

THE SEAWEED REBELLION: FLORIDA'S EXPERIENCE WITH OFFSHORE ENERGY DEVELOPMENT

EDWARD A. FITZGERALD*

Table of Contents

I.	INTRODUCTION	2
II.	THE ROOSEVELT THROUGH FORD ADMINISTRATIONS: <i>Tidelands Controversy</i>	4
III.	THE NIXON THROUGH CARTER ADMINISTRATIONS: <i>Energy v. Environment</i>	12
IV.	THE REAGAN ADMINISTRATION: <i>The Epic Struggles</i>	14
	A. <i>The Five-Year OCS Leasing Programs</i>	15
	B. <i>OCS Moratoria</i>	18
	C. <i>State Consistency Review of OCS Lease Sales</i>	21
	D. <i>OCS Revenue Sharing</i>	24
	E. <i>The Five-Year OCS Program 1987-1992</i>	27
	F. <i>Activities on Existing Leases</i>	30
V.	THE BUSH ADMINISTRATION: <i>The Peace Proposal</i>	30
	A. <i>President Bush's Peace Proposal</i>	31
	B. <i>Cancellation and Buyback</i>	33
	C. <i>OCS Revenue Sharing</i>	35
	D. <i>The Five-Year OCS Leasing Program</i>	37
	E. <i>OCS Moratoria</i>	39
	F. <i>Consistency Review</i>	40
VI.	THE CLINTON ADMINISTRATION: <i>Reconciliation Continues</i>	43
	A. <i>The Five-Year OCS Program 1997-2002</i>	45
	B. <i>Mobil v. United States</i>	49
	C. <i>OCS Revenue Sharing</i>	59
VII.	THE GEORGE W. BUSH ADMINISTRATION: <i>Brother Helps Brother</i>	62
	A. <i>Lease Sale 181</i>	62
	B. <i>Chevron Appeal</i>	65
	C. <i>Energy Supply</i>	67
VIII.	CONCLUSION	69

* Professor, Wright State University. Ph.D. 1983, Boston University; M.A. 1976, Northeastern University; J.D. 1974, Boston College Law School; B.A. 1971, Holy Cross College.

I. INTRODUCTION

There has been a great deal of conflict between the federal and coastal state governments regarding offshore energy development, which is known as the Seaweed Rebellion.¹ The principal source of the conflict is that the benefits of offshore energy development, which include increasing the domestic supply of energy,² preserving jobs,³ generating federal revenues,⁴ and reducing the trade deficit,⁵ are national in scope. While the costs of offshore energy development, such as adverse socioeconomic and environmental impacts are borne by the coastal states.⁶

The statutory framework regulating OCS energy development is based on cooperative federalism.⁷ When the coastal states' concerns were not addressed, they brought suits challenging federal offshore actions. The federal courts were called upon to interpret statutes and determine if the federal agencies were complying with the statutory mandates. The coastal states were generally unsuccessful in the litigation because the courts adopted interpretations that were not consistent with text, intent, and purposes of the statutes and deferred to executive decisions, which did not comply with the statutes. The judicial decisions discounted the important role of the coastal states, decreased environmental protection, and elevated executive policy above congressional mandates. The judicial decisions set the stage for subsequent political actions. Congress responded by enacting and amending statutes and establishing moratoria on offshore leasing and development through budgetary restrictions.⁸

1. EDWARD A. FITZGERALD, *THE SEAWEED REBELLION: FEDERAL-STATE CONFLICTS OVER OFFSHORE ENERGY DEVELOPMENT* (2001).

2. Outer Continental Shelf (OCS) production constituted 25% of total U.S. domestic production of crude oil and natural gas in 1999. Energy Information Administration, *Monthly Update*, ELEC. POWER MONTHLY, Feb. 2000, at 11, 15, 43, 117, available at <http://tonto.eia.doe.gov/FTP/ROOT/electricity/epm/02260002.pdf>.

3. OCS oil and gas production provides thousands of direct jobs and an additional 2.5 jobs for every person employed in the industry. MINERALS MGMT. SERV., U.S. DEP'T OF THE INTERIOR, *MOVING BEYOND CONFLICT TO CONSENSUS: REPORT OF THE OCS POLICY COMMITTEE'S SUBCOMMITTEE ON OUTER CONTINENTAL SHELF LEGISLATION 37-38* (1993) [hereinafter *MMS, MOVING BEYOND*].

4. Total disbursements of OCS revenues from 1955 through 1995 amounted to \$109 billion. MINERALS MGMT. SERV., U.S. DEP'T OF THE INTERIOR, *FEDERAL OFFSHORE STATISTICS 85* (1995).

5. In 1999, U.S. energy imports cost \$60 billion and comprised 18% of the \$330 billion trade deficit. Energy Information Administration, *supra* note 2.

6. H.R. REP. NO. 98-206, at 26-30 (1983).

7. FITZGERALD, *supra* note 1, at 1; Daniel S. Miller, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil and Gas Development*, 11 *ECOLOGY L. Q.* 401, 402-05 (1984).

8. FITZGERALD, *supra* note 1, at 5-20.

This article examines the Seaweed Rebellion, focusing on the state of Florida. The territorial sea of Florida, which extends three miles in the Atlantic and three marine leagues in the Gulf of Mexico (Gulf), includes 6.7 million acres, which makes Florida the second largest owner of ocean land in the contiguous United States.⁹ Florida has 11,000 miles of coastline, which is second only to Alaska.¹⁰ Over 75% of the state's population is concentrated in the coastal areas.¹¹ Florida's coast is important for tourism,¹² sport and commercial fishing, commercial development, and port activities. Florida is actively engaged in coastal and ocean management.¹³

The first battle of the Seaweed Rebellion, which occurred from the Roosevelt through Ford administrations, addressed whether the federal or coastal state governments had jurisdiction over offshore submerged lands. During the Nixon, Ford, and Carter administrations, the federal-state offshore conflict revolved around energy development and environmental protection. During the Reagan administration, there were federal-state battles over the first three five-year offshore leasing programs, the establishment of offshore leasing moratoria, state consistency review of offshore lease sales, the termination of cooperative federal-state offshore programs, and offshore revenue sharing. President Bush achieved a degree of peace in the Seaweed Rebellion by restricting offshore development and addressing persistent problems, such as the cancellation and buyback of offshore leases and offshore revenue sharing. The federal-state reconciliation continued during the Clinton administration but there were conflicts, which focused on contract rights and offshore revenue sharing. President George W. Bush hopes to expand offshore energy development to lessen United States' dependence on imported petroleum, but has decided not to pursue this goal by federal leasing or development off the coast of Florida. The Bush administration restructured Lease Sale 181,

9. See Donna R. Christie & Paul Johnson, *State Ocean Policy Initiatives in Florida*, 18 COASTAL MGMT. 283 (1990).

10. *See id.*

11. *See id.*

12. By conservative estimates, tourism generates more than \$50 billion per year, which constitutes more than 10% of the state's \$450 billion economy. More than 874,000 of the state's non-farm jobs are directly related to tourism. Another 400,000 jobs are indirectly related. Mike Schneider, *Florida Suffers More than Most*, DAYTON DAILY NEWS, Oct. 3, 2001, at 6E.

13. Donna R. Christie & Paul Johnson, *supra* note 9, at 283; Donna R. Christie, *Florida's Ocean Future: Toward a State Ocean Policy*, 5 J. LAND USE & ENVTL. L. 446 (1990)[hereinafter Christie, *Florida's Ocean Future*]; Donna R. Christie, *Growth Management in Florida: Focus on the Coast*, 3 J. LAND USE & ENVTL. L. 33 (1987); Daniel W. O'Connell, *Florida's Struggle for Approval Under the Coastal Zone Management Act*, 25 NAT. RESOURCES J. 61 (1985).

bought back leases off southwest Florida, and did not schedule any future lease sales close to the Florida coast because of political opposition. Florida has been involved in the battles of the Seaweed Rebellion and has evolved from a supporter to an opponent of federal offshore energy development.

II. THE ROOSEVELT THROUGH FORD ADMINISTRATIONS:

TIDELANDS CONTROVERSY

The first battle of the Seaweed Rebellion was the tidelands controversy,¹⁴ which dealt with jurisdiction over offshore submerged lands.¹⁵ Initially, the federal government recognized state ownership of offshore lands. Congress admitted states into the Union with offshore boundaries of three miles or three marine leagues.¹⁶ In over thirty decisions from 1842 through 1935, the Supreme Court held that coastal states owned submerged lands under their navigable waters. The Department of the Interior recognized coastal state ownership when it refused to issue leases for offshore oil and gas development in the 1930's.

As World War II approached, the federal government realized the importance of offshore petroleum. Beginning in 1937, the Roosevelt administration promoted bills in Congress, which declared federal jurisdiction over submerged lands below the low water mark. These efforts, though unsuccessful, continued through 1940. The jurisdictional conflict remained dormant through World War II. The tidelands controversy was revived in 1945, but the nature of the bills changed. Congress began to consider bills that surrendered federal claims and granted the coastal states title to offshore lands within their historic boundaries.

Recognizing congressional hostility to the federal jurisdictional claim, the Truman administration resorted to the courts. The federal government brought suit, challenging California's assertion of title to offshore lands three miles from its coastline. The Court in *United States v. California* (California I), focusing on the international aspects of the conflict, declared that the federal government's sovereign interests in navigation, national defense,

14. The tidelands controversy was mislabeled. The coastal states' ownership of the tidelands, which is the area between the low and high tide mark, was not in dispute, but rather the area seaward of the low water mark. *Borax Consol. v. Los Angeles*, 296 U.S. 10, 15 (1935); *Weber v. Bd. of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57 (1873).

15. ERNEST R. BARTLEY, *THE TIDELANDS CONTROVERSY: A LEGAL AND HISTORICAL ANALYSIS* (1953); HERBERT MARSHALL & BETTY ZISK, *THE FEDERAL-STATE STRUGGLE FOR OFFSHORE OIL* (1969); William K. Metcalf, *The Tidelands Controversy: A Study in the Development of Political-Legal Problem*, 4 SYRACUSE L. REV. 39 (1953).

16. *See id.*

international relations, and commerce established paramount rights over offshore lands below the low water mark.¹⁷ An aspect of these paramount rights was dominion over the resources.¹⁸ The Court rejected California's assertion that the equal footing clause¹⁹ granted it the same rights as the colonial Atlantic states because the colonial states never held title to their offshore submerged lands.²⁰ In 1950, the Court reiterated the paramount rights rationale in *United States v. Louisiana* (Louisiana I)²¹ and *United States v. Texas*.²²

The tidelands controversy became an issue in the 1952 elections. The Republicans favored restoring the coastal states historic title, while the Democrats were split on the issue. President Eisenhower's victory, coupled with the election of a Republican Congress, resulted in the enactment of the Submerged Lands Act (SLA) in 1953.²³ The coastal states were granted title to offshore lands within their historic boundaries and the rights to the natural resources contained therein. The federal government relinquished all claims to such lands. The coastal states were awarded an unconditional grant to offshore lands three miles from their coastlines. States bordering the Gulf could assert an even greater claim of three marine leagues.²⁴

Soon after the SLA became law, the Outer Continental Shelf Lands Act (OCSLA)²⁵ was enacted, granting the federal government jurisdiction over submerged lands seaward of the boundaries established in the SLA. The Department of the Interior was given broad discretionary authority to develop and regulate outer continental shelf (OCS)²⁶ energy development. The revenues derived from OCS development were not shared with the coastal

17. *United States v. California*, 332 U.S. 19 (1947)[hereinafter *California I*].

18. *Id.* at 29-41.

19. The equal footing clause appears in the Northwest Ordinance, which dealt with the admission of new states into the Union after independence. Article 5 states, "whenever any of the said states shall have sixty thousand free inhabitants, therein, such state shall be admitted by its delegates into the Congress of the United States, *on an equal footing with the original states, in all respects whatever*...." The equal footing clause appears in every enabling statute admitting states into the Union, except Texas. Comment, *The Tidelands Oil Controversy*, 10 DEPAUL L. REV. 116, 119 (1960).

20. *California I*, 332 U.S. at 36.

21. 339 U.S. 699 (1950)[hereinafter *Louisiana I*].

22. 339 U.S. 707 (1950).

23. MARSHALL & ZISK, *supra* note 15, at 33-46; Metcalf, *supra* note 15, at 81-88.

24. 43 U.S.C. § 1301 (1953).

25. 43 U.S.C. § 1331 (1953).

26. The outer continental shelf is defined as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control...." 43 U.S.C. § 1331(a)(1953).

states but, instead, were deposited into the United States Treasury.²⁷

The Court upheld the constitutionality of the SLA in *Alabama v. Texas*²⁸ and repudiated the paramount rights rationale of the earlier decisions.²⁹ The rapid development of technology in the 1950s allowed for offshore energy development in deeper waters, so it became essential to establish explicit federal-state boundaries.

In 1960, the Court in *United States v. Louisiana* (Louisiana II)³⁰ determined that the Gulf states could claim three-marine-league boundaries from their coastlines if they met both parts of a two-part test: (1) state boundaries had to exceed three miles upon admission into the Union, and (2) Congress had to approve these boundaries. The Court held that only Texas³¹ and Florida³² could claim three-marine-league boundaries in the Gulf. Congress had accepted Florida's Constitution, which defined such a boundary, upon Florida's readmission into the Union in 1868.³³

The Court recognized that the Gulf states' claims to three-marine-league boundaries exceeded the United States' territorial claims, but it found this insignificant. During the congressional hearings, a State Department representative stated that limited state jurisdiction over offshore natural resources would not affect the United States' international position because the federal government had already claimed such authority pursuant to the Truman Proclamation.³⁴ The Court characterized this controversy

27. Warren Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23 (1953).

28. 347 U.S. 272 (1954).

29. Comment, *Inability of Complainant States to Test the Validity of an Act Ceding Proprietary Rights in Submerged Lands to Coastal States: Alabama v. State of Texas*, 34 B.U. L. REV. 504, 507 (1954).

30. 363 U.S. 1 (1960)[hereinafter Louisiana II].

31. *Id.* at 36-66.

32. *United States v. Florida*, 363 U.S. 121, 121-29 (1960).

33. Article I of the Florida Constitution of 1868 fixes the state boundaries as: FLA. CONST. of 1868, art. I.

The Act of Congress admitting Florida into the union in 1845 described the state as embracing:

the Territories of East and West Florida, which by the Treaty of East and West Florida, which by the Treaty of Amity, Settlement and Limits, between the U.S. and Spain ... were ceded to the U.S. The Florida Constitution of 1838, which was in force when Florida was admitted into the Union contained a similar description. Spain claimed a seaward boundary in excess of three miles in the Gulf.

Id.

34. In September 1945, President Truman issued a proclamation that declared U.S. jurisdiction over "the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas." Executive Order No. 9033 stated that the proclamation did not affect the federal-state controversy as it related "to the ownership or control of the subsoil and seabed of the continental shelf within or outside of the 3-mile limit." Presidential

as a "wholly domestic concern within the power of Congress to resolve."³⁵

Federal-state offshore boundary disputes off California³⁶ (in California II), Texas³⁷ (in Louisiana III and IV), and Louisiana³⁸ occurred in the 1960's. The Court utilized international law to constrain the coastal states offshore claims. The last major battle in the tidelands controversy involved the claims of the colonial states to continental shelf lands in the Atlantic Ocean. In 1975, the Court in *United States v. Maine*³⁹ revived the paramount rights rationale and denied the Atlantic states claim to offshore title beyond the limits established in the SLA. The Court held that the Atlantic states never held title to offshore submerged lands below the low-water mark. The first claim to such lands was made by the federal government through the establishment of a three-mile territorial sea following the adoption of the Constitution.⁴⁰ The federal government's sovereign interests created paramount rights over offshore submerged lands. The SLA merely relinquished federal claims over offshore lands three miles from the Atlantic states' coastlines. The Court refused to reconsider the rationale of its earlier decisions.⁴¹

The Court severed Florida's Atlantic boundary claim because it rested on different grounds.⁴² Florida asserted that its offshore boundary was established by its 1868 Constitution. The Court held that the SLA established Florida's only claim to offshore submerged lands. Prior to the SLA, the federal government possessed paramount rights over submerged offshore lands.⁴³

Florida argued that strait baselines should be used to measure its southern coastline from the mainland to Dry Tortugas, which is comprised of islands and reefs. The Supreme Court refused to allow the use of strait baselines because the federal government did not approve of their use.⁴⁴ Florida, relying on marine geography,⁴⁵ also

Proclamation No. 2667 (September 28, 1945); Exec. Order No. 9033, 10 Fed. Reg. 12303-05; Ann Hollick, *U.S. Oceans Policy: The Truman Proclamations*, 17 VA. J. INT'L L. 23 (1976).

35. *Louisiana II*, 363 U.S. at 31.

36. *United States v. California*, 381 U.S. 139 (1965) [hereinafter California II].

37. *United States v. Louisiana*, 394 U.S. 1 (1969) [hereinafter Louisiana IV]; *United States v. Louisiana*, 389 U.S. 155 (1967) [hereinafter Louisiana III].

38. *United States v. Louisiana*, 394 U.S. 11 (1969).

39. 420 U.S. 515 (1975).

40. *Id.* at 523-26.

41. *Id.*

42. *United States v. Maine*, 420 U.S. at 517 n.3.

43. *United States v. Florida*, 425 U.S. 791, 792 (1975); *See also*, Andrew W. Anderson, Note, *Florida's Slice of the Offshore Pie*, 30 U. MIAMI L. REV. 215, 216-17 (1975).

44. *United States v. Florida*, 425 U.S. at 792-93.

45. Florida contended that the configuration of the sea bottom is crucial and pointed out that if the Straits of Florida were all parts of a dry upland basin, it would drain into the basin

claimed that the Straits of Florida, the Florida Keys, Marquesas Islands, and Dry Tortugas were in the Gulf of Mexico, not the Atlantic. The Supreme Court, rejecting this claim, determined that the International Hydrographic Bureau had established Florida's southern boundary. Since the areas claimed were in the Atlantic, not the Gulf, Florida's claim was limited to three miles, not three marine leagues.⁴⁶

Florida asserted that Florida Bay was a historic bay, thus inland waters, for the purpose of measuring its three-marine-league grant in the Gulf. The Court found that Florida did not meet the criteria for establishing a historic bay. The federal government's disclaimer of historic title was dispositive in the absence of clear and convincing historical evidence.⁴⁷ In addition, the Court held that if accretion had occurred, Florida's Gulf coastline must be measured from its 1868 coastline or, if erosion had occurred, from its present coastline.⁴⁸

The Court committed the same analytical errors in this case as in earlier tidelands decisions.⁴⁹ First, the Court continued to rely on the paramount rights rationale to deny Florida's historic claims to its offshore lands. Florida's 1868 Constitution should have established its offshore borders. The paramount rights rationale in *California I* confused dominion and imperium.⁵⁰ The federal government's predominant sovereign rights over offshore lands do not constitute a claim of ownership. Prior to *California I*, the Court never held that the power to regulate constitutes a grant of title⁵¹ or that rights under international law serve as the basis for property rights between the federal and state governments.⁵² The Court also determined that the federal government could not deprive a state of its property.⁵³ The Court confused property rights, which are determined by domestic law, with sovereignty, which is governed by international law.

of the Gulf rather into the Atlantic Ocean. Report of the Special Master at 19, *United States v. Florida*, 425 U.S. 791 (1975).

46. *United States v. Florida*, 425 U.S. at 792-93.

47. *Id.* at 792.

48. *Id.*

49. Edward A. Fitzgerald, *The Tidelands Controversy Revisited*, 19 ENVTL. L. 209 (1988) [hereinafter Fitzgerald, *Tidelands*].

50. *California I*, 332 U.S. at 43-46 (Frankfurter, J., dissenting).

51. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (E.D. Penn. 1823) (No. 3230); *United States v. Bevens*, 16 U.S. (1 Wheat) 336, 388 (1818).

52. *Skiriotes v. Florida*, 313 U.S. 69, 72-73 (1941); *United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. (1 Wheat) 543, 575 (1823).

53. *Coyle v. Smith*, 221 U.S. 559, 580 (1910); *Louisiana v. Mississippi*, 202 U.S. 1, 39-41(1905); *Geofroy v. Riggs*, 133 U.S. 258, 267(1889).

The SLA was designed to overturn *California I* and restore the coastal states to the position that they occupied prior to the California decision.⁵⁴ Coastal states had to establish historic claims over their inland waters from which their three-mile or three-marine-league boundaries would be measured. Congress did not intend that a strictly legal test be employed; instead, it intended that state boundaries be determined on equitable grounds. The Court should have examined the claims, understandings, expectations, and uses by the States throughout their history.⁵⁵

Second, the Court refused to recognize Florida's historic claims to Florida Bay and allow Florida to utilize straight baselines to establish its offshore borders. The Court relied on its decision in *California II*.⁵⁶ California claimed that its coastline began at the end of its inland waters, which included historic bays and waters between islands fifty miles offshore. The Court invoked the 1958 Convention on the Territorial Sea and Contiguous Zone (CTSCZ),⁵⁷ which the United States ratified in 1961, to interpret the SLA. The CTSCZ established the same boundaries for international and domestic purposes and recognized juridical and historic bays as inland waters.⁵⁸ The Court's utilization of international law was contrary to the SLA and constrained the coastal states offshore claims.

The Court held that the state must show a "continuous and exclusive assertion of dominion" to establish historic inland waters.⁵⁹ The Court determined that only Monterey Bay qualified as a juridical bay. California's other claims to historic bays were rejected on the grounds of "questionable evidence" and a federal disclaimer of historic title.⁶⁰ The Court noted that a federal disclaimer would not be decisive when "the historic evidence was clear beyond doubt."⁶¹ This rigorous standard of proof employed by the Court was not required by international law.⁶²

54. Justice Black points out that in the legislative history, "the term 'historic State boundaries' was used 813 times, 'original boundaries' 121 times, and 'traditional' boundaries 114 times." *California II*, 381 U.S. at 188.

55. Fitzgerald, *Tidelands*, *supra* note 49, at 223-28; *see also California II*, 381 U.S. at 178-212 (Black, J., dissenting).

56. *California II*, 381 U.S. 139.

57. 15 U.S.T. 1607, T.I.A.S. No. 5639 (April 29, 1958).

58. Article 7 of the CTSCZ defines a juridical bay as having two criteria: (1) well-marked indentation along the coast which contains landlocked waters; and (2) the closing lines of the bay must not exceed 24 miles. *California II*, 381 U.S. at 169 n.36. Historical bays are "bays over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." *Id.* at 172.

59. *Id.* at 172-75.

60. *Id.*

61. *Id.*

62. A United Nations study recommended by the International Law Commission

The CTSCZ allows for the use of straight baselines drawn from the mainland around offshore islands to establish inland waters.⁶³ The Court refused to allow California to use straight baselines because only the federal government could authorize their use.⁶⁴ Even though the use of international law, the CTSCZ, to define the SLA was dubious, the Court should have allowed the use of straight baselines as authorized by the CTSCZ.

Third, the Court failed to perceive the inequity and inconsistency concerning the use of the present or past coastline depending on whether erosion or accretion had occurred. The Court determined that Texas and Florida were entitled to a three-marine-league boundary in the Gulf, but the coastline from which such a boundary would be measured was not established. Texas invoked the CTSCZ and claimed that its three-marine-league boundary should be measured from the offshore jetties that were constructed after its admission into the Union in 1845. The Court in *Louisiana III* held that Texas' three marine-league boundary should be measured from the coastline "as it existed" in 1845.⁶⁵ If Texas was claiming a three-mile boundary, the jetties would establish its coastline. If the CTSCZ was utilized to establish the historic Texas coastline, Texas would be granted title to offshore lands that Congress never intended. Furthermore, international law should not be invoked to grant Texas more land than it ever claimed historically.⁶⁶

The Court misinterpreted the SLA language and legislative history and its earlier decision. The SLA provides an operational definition of boundaries that establishes their width, not their location. The SLA declares state boundaries to be three miles or three marine leagues from the state coastlines, but it does not distinguish between the coastlines from which the three-mile or three-marine-league grants are to be measured. Furthermore, the SLA does not assume that the location of the state's original boundaries are the basis for determining the present boundaries.⁶⁷

determined that there are three factors which have to be considered in "determining whether a State has acquired historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; and (3) the attitude of foreign States." *United States v. Louisiana*, 394 U.S. 11, 23-24 n. 24 (1969), citing *Juridical Regime of Historic Waters, Including Historic Bays*, reprinted in [1962] 2 Y.B. Int'l L. Comm. 1, 13, U.N. Doc. A/Cn.4/143.

63. *California II*, 381 U.S. 139, 167-68 n.34 (1965).

64. *Id.* at 167-69.

65. *Louisiana III*, 389 U.S. 155, 159-61 (1967).

66. *Id.*

67. *Id.* at 169-71 (Harlan, J., dissenting).

Texas and the United States filed a cartographic stipulation that showed the agreed 1845-49 coastline and the resulting three-marine-league boundary. Because erosion had claimed between 17,000-35,000 acres along the Texas coast, much of the present Texas coastline is inland from its 1845 coastline.

In *Louisiana IV*, the Court, adhering to the CTSCZ principle of an ambulatory coastline, determined that Texas' present coastline should be the basis for measuring its three-marine-league boundary.⁶⁸ This was directly contrary to its finding in *Louisiana III* that the 1845 coastline had to be employed.⁶⁹ If there was any accretion to the Texas coast since 1845, Texas was required to use its 1845 coastline to measure its three-marine-league boundary. If there was any erosion, Texas had to use its present coastline as defined by the CTSCZ. The Court acknowledged this inequity, but attributed it to the SLA.⁷⁰

The Court's decisions in both cases were incongruent. In *Louisiana III*, the Court stressed that the three-mile and three-marine-league boundaries had to be measured from different points.⁷¹ In *Louisiana IV*, the Court required that the same boundary be used for both measurements.⁷² In *Louisiana III* the Court refused to employ the CTSCZ,⁷³ but mandated its use in *Louisiana IV*.⁷⁴ The Court's decisions were consistent in one respect, both deprived Texas of its offshore lands. The Court's logic was "heads I win, tails you lose."⁷⁵ The obvious inequity did not result from the SLA but from the Court's statutory misinterpretation.

The Court deprived Florida of offshore submerged lands within its historic boundaries as defined by its 1868 Constitution. The Court determined that Florida's Atlantic boundary is three miles from its coastline. This includes three miles off the southern coasts of the Florida Keys, Marquesas Islands, and Dry Tortugas, which are in the Atlantic, not the Gulf.⁷⁶ Florida's Gulf boundary is three

68. *Louisiana IV*, 394 U.S. 1, 4-5 (1969).

69. *Louisiana III*, 389 U.S. at 161.

70. *Louisiana IV*, 394 U.S. at 5-6.

71. *Louisiana III*, 389 U.S. 155, 159-61 (1967).

72. *Louisiana IV*, 394 U.S. at 5-6.

73. *Louisiana III*, 389 U.S. at 161.

74. *Louisiana IV*, 394 U.S. at 4-5.

75. *Id.* at 9-10 (Black, J., dissenting).

76. The Court held that:

[T]he Gulf of Mexico lies to the north and west, and the Atlantic Ocean to the south and east, of a line that begins at a point on the northern coast of the island of Cuba in 83° West longitude, and extends thence to the northward along that meridian of longitude to 24° 35' North latitude, thence eastward along that parallel of latitude through Rebecca Shoal

marine leagues from its historic coastline around northern Dry Tortugas, Marquesas Islands, and the Florida Keys to the mainland, continuing three marine leagues from its historic border to the Alabama border. There are no inland waters enclosing the Dry Tortugas, Marquesas Islands, and the Florida Keys. There are no historic or juridical bays off the Florida coast in the Gulf.⁷⁷

III. THE NIXON THROUGH CARTER ADMINISTRATIONS:

ENERGY V. ENVIRONMENT

From 1954 through 1968, OCS energy development occurred primarily in the Gulf of Mexico off the coasts of Texas and Louisiana. During this period, OCS decisions were made in closed administrative process involving the Secretary of the Interior and the petroleum industry. The federal government's need for revenue and industry interest determined when and where leasing would occur.⁷⁸

In the 1960's and 1970's, new concerns, such as environmental protection and coastal zone management, began to emerge.⁷⁹ The Santa Barbara oil spill in 1969 legitimized the concerns of environmental groups and focused national attention on the dangers of offshore energy development.⁸⁰ This prompted the enactment of new statutes, such as the National Environmental Policy Act (NEPA),⁸¹ Marine Sanctuaries Act (MSA),⁸² Endangered Species Act (ESA),⁸³ and Coastal Zone Management Act (CZMA),⁸⁴ which affected the Secretary of the Interior's "carte blanche" authority over OCS development.⁸⁵

At the same time Congress was instructing federal agencies to consider environmental factors, there was a growing recognition of

and the Quicksands Shoal to the Marquesas Keys, and thence through the Florida Keys to the Mainland at the eastern end of Florida Bay...
United States v. Florida, 425 U.S. 791, 792 (1976).

77. *See id.* at 791 (1976). An amendment to the SLA in 1986 declared that once a state's boundary is fixed by the Court, the boundary is immobile. OCSLA Amendments of 1985, Pub L. No. 99-272, 8005, 100 Stat. 82, 151 (1986); *see* Christie, *Florida's Ocean Future*, *supra* note 13, at 467-78.

78. GEN. ACCOUNTING OFFICE, U.S. CONG., ISSUES IN LEASING OFFSHORE LANDS FOR OIL AND GAS DEVELOPMENT, REP. NO. EMD-81-59, 13-15 (1981).

79. Robert W. Knecht et al., *National Ocean Policy: A Window of Opportunity*, 10 OCEAN DEV. & INT. L. 113 (1988).

80. James S. Bowman, *The Environmental Movement: An Assessment of Ecology Politics*, 5 ENVTL. AFF. 649, 650-52 (1976).

81. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (2000).

82. National Marine Sanctuaries Act, 16 U.S.C. §§ 1431-1445(c) (2000).

83. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000).

84. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (2000).

85. H.R. 590, 95th Cong. 54 (1977).

a domestic energy shortage. President Nixon decided to pursue an extensive OCS leasing program in 1971 that scheduled sales in undeveloped frontier areas. The goals of the program were expanded in 1973 and 1974 following the OPEC oil boycott.

The expanded OCS leasing program was opposed by many coastal states, coastal communities, and environmental and fishing groups, who resorted to the courts to halt OCS lease sales. The courts were called upon to interpret the new statutory mandates.⁸⁶ Meanwhile, Congress sought to reduce opposition and expedite OCS energy development by enacting amendments to the CZMA and OCSLA.

The 1976 CZMA Amendments dealt with the impacts of OCS energy development.⁸⁷ The Coastal Energy Impact Program (CEIP) was established to provide funds to the coastal states and communities affected by OCS development.⁸⁸ A new section was added to the consistency provisions, which granted coastal states the right to determine if federal lessees' exploration, development, and production plans are consistent with the state's coastal zone management program.⁸⁹

After a difficult four year struggle,⁹⁰ the OCSLA Amendments were enacted in 1978.⁹¹ The amendments are designed to expedite OCS energy development, protect the environment, and increase state and local participation in the process.⁹² OCS development is divided into four distinct phases: (1) the development of the five-year OCS leasing program;⁹³ (2) the lease sale;⁹⁴ (3) exploration;⁹⁵ and (4) development and production.⁹⁶ The coastal states can participate in all phases of the process and challenge the Secretary of the Interior's statutory compliance in the courts.

The statutory framework governing OCS development is based on cooperative federalism.⁹⁷ The federal government has jurisdiction over the OCS pursuant to the OCSLA. The Secretary of the Interior develops a five-year OCS leasing program and leases

86. See *Sierra Club v. Morton*, 510 F.2d 813 (5th Cir. 1975); *NRDC v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *California v. Morton*, 404 F.Supp. 26 (C.D. Cal. 1975).

87. 16 U.S.C. §§ 1451-64 (1976).

88. 16 U.S.C. § 1456(a) (1976).

89. 16 U.S.C. § 1456(c)(3)(B) (1976).

90. John Murphy & Martin H. Belsky, *OCS Development: A New Law and a New Beginning*, 7 COASTAL ZONE MGMT. J. 297 (1980).

91. 43 U.S.C. §§ 1331-56, 1801-66 (1978).

92. H.R. 590, 95th Cong. 54 (1977).

93. 43 U.S.C. § 1344 (1978).

94. 43 U.S.C. § 1345 (1978).

95. 43 U.S.C. § 1340 (1978).

96. 43 U.S.C. § 1351 (1978).

97. Miller, *supra* note 7, at 402-05.

OCS tracts to private companies, who pay upfront bonuses, rentals on tracts, and royalties on future production.⁹⁸ The Secretary of the Interior also regulates OCS exploration, development, and production. The coastal states have jurisdiction over the submerged lands extending from their coastlines three miles or three marine leagues in the Gulf pursuant to the SLA.⁹⁹ The coastal states can participate in the OCS program pursuant to the OCSLA, CZMA, NEPA, ESA, and MSA but do not share in most of the revenues derived from OCS development.¹⁰⁰

During the 1970's, Florida supported OCS energy development,¹⁰¹ however, it was very concerned that OCS development did not pose any threat to its vital tourism and recreation industries.¹⁰² Florida did not object to any of the five OCS lease sales off its coast,¹⁰³ but it insisted upon protective stipulations.¹⁰⁴ Governors Askew and Graham consistently opposed any leasing off southwest Florida south of 26° North latitude until additional studies were performed.¹⁰⁵

IV. THE REAGAN ADMINISTRATION: *THE EPIC STRUGGLES*

The most heated battles of the Seaweed Rebellion occurred during the Reagan administration. President Reagan came to office seeking to expand OCS energy development to curb the deficit,

98. FITZGERALD, *supra* note 1, at 1.

99. *Id.*

100. Most of the revenues are deposited into the U.S. Treasury. OCS revenues fund the Land and Water Conservation Fund (16 U.S.C. § 4601 (1990)) and the National Historic Preservation Act (16 U.S.C. § 470 (1980)). The coastal states share only the revenues derived from OCS energy development in the 8(g) zone, which extends three to six miles offshore. 43 U.S.C. § 1337 (1978); *see also*, Edward A. Fitzgerald, *The Seaweed Rebellion: The Battle Over Section 8(g) Revenues*, 8 J. ENERGY L. & POL'Y 253 (1988) [hereinafter Fitzgerald: *The Seaweed Rebellion*].

101. Between 1947 and 1968, Florida leased its entire Gulf territorial waters. Eight wells were drilled and there was some production (50-100 barrels/day). The wells were not put into production because of economic reasons. All the state leases have been returned to the state. *OCS Lease Sales and Dep't of Interior's Five-Year Leasing Plan: Hearings Before the House Comm. on Interior and Insular Affairs*, part II, 97th Cong. 94-97, 333 (1982) [hereinafter *Hearings: OCS Lease Sales*] (statement of Maurice Rinkel, Florida OCS advisor).

102. For an overview of the development of Florida's OCS policy, see ELIZABETH A. HODECKER, EXECUTIVE OFFICE OF THE GOVERNOR, THE DEVELOPMENT OF THE STATE OF FLORIDA'S OUTER CONTINENTAL SHELF POLICY (1980) as cited in the *Final Five-Year Plan for Oil and Gas Development in the OCS: Hearings Before Subcomm. on Energy Conservation and Supply of the Senate Comm. on Energy and Natural Resources*, 97th Cong. 58-79 (1982) [hereinafter *Hearings: Final Plan*].

103. There was one sale in the Florida Straits (Lease Sale 5), three sales in the Gulf (Lease Sales 32, 41, and 65), and one sale in the south Atlantic (Lease Sale 43).

104. *OCS Amendments of 1978-Oversight: Hearings Before the House Ad Hoc Comm. on the OCS*, 95th Cong. 524-40 (1978)(statement of Maurice Rinkel); *see Hearings: OCS Lease Sales*, *supra* note 101, at 94-97, 331-45 (statement of Maurice Rinkel).

105. *Hearings: Final Plan*, *supra* note 102.

increase federal revenues, and expand the domestic supply of energy. At the same time, President Reagan sought to eliminate the funding for many vital ocean and coastal programs. Secretaries of the Interior, James Watt and Donald Hodel, proceeded in a confrontational manner and aggravated federal-state relations. The numerous battles during the Reagan administration revolved around the five-year OCS leasing programs, state consistency review of OCS lease sales, the termination of CZMA, and the establishment of an OCS revenue sharing program. Florida Governors Graham and Martinez and the entire Florida congressional delegation were skeptical of OCS development off Florida.¹⁰⁶

A. *The Five-Year OCS Leasing Programs*

The first federal-state battle in the Reagan administration involved the establishment of the five-year OCS development program. Section 18 of the OCSLA requires the Secretary to develop a five-year OCS program, which establishes the size, timing, and location of leasing activities to meet the nation's energy needs.¹⁰⁷ In 1980, Secretary of the Interior Cecil Andrus approved the five-year OCS leasing program that called for thirty-one lease sales and five re-offering sales, eleven of which were in the Gulf.¹⁰⁸ Alaska and California, off whose coasts 50% of the leasing was scheduled to occur, the North Slope Borough of Alaska, and the Natural Resources Defense Council(NRDC) brought suits alleging that the Secretary had failed to comply with section 18.¹⁰⁹

The D.C. Circuit utilized a hybrid standard to review the Secretary's decisions.¹¹⁰ The Secretary's factual decisions, those which required the evaluation of data and drawing conclusions, would be upheld if supported by substantial evidence.¹¹¹ The Secretary's policy decisions, those for which the statute established standards but allowed the Secretary discretion on how to meet the

106. Florida's official position was "that the state does not oppose OCS oil and gas development as long as assurances can be made that [the state's] uniquely sensitive and economically important marine and coastal resources will not be adversely affected." Christie, *Florida's Ocean Future*, *supra* note 13, at 574 (quoting Johnson & Tucker, *The Federal Outer Continental Shelf Oil and Gas Leasing Program: A Florida Perspective* 4-5,6 (Office of the Governor Feb. 1987)).

107. 43 U.S.C. § 1344 (1978).

108. Edward A. Fitzgerald, *California v. Watt: Congressional Intent Bows to Judicial Restraint*, 11 HARV. ENVTL. L. REV. 147 (1987) [hereinafter Fitzgerald, *Watt*].

109. *Id.*

110. *Id.* at 154. The D.C. Circuit has jurisdiction over challenges to the five-year program. 43 U.S.C. § 1349(c)(1) (1978).

111. Fitzgerald, *Watt*, *supra* note 108, at 154.

standards, would be sustained if not arbitrary and capricious.¹¹² The Secretary's statutory interpretations, while entitled to judicial deference, would be scrutinized by the court.¹¹³ The crucial element in *Watt I* was the court's characterization of several issues as questions of statutory interpretation.

The court held that the Secretary had not adequately considered several factors set forth in section 18.¹¹⁴ First, the Secretary had not defined lease sales in the program "as precisely as possible."¹¹⁵ Second, the Secretary had not considered the equitable sharing of development benefits and environmental risks as required by section 18(a)(2)(B).¹¹⁶ Third, the Secretary had not considered the relative environmental sensitivity and marine productivity as required by section 18(a)(2)(G).¹¹⁷ Finally, since the Secretary had not adequately considered several of the section 18(a)(2) factors, he could not properly balance the potential for energy discovery, environmental damage, and coastal zone impacts in selecting the timing and location of lease sales as required by section 18(a)(3).¹¹⁸

The court did not recognize any meaningful role for the coastal states in the OCS development process.¹¹⁹ Section 18 requires the Secretary to solicit comments from the governors of affected coastal states and allows state and local governments to submit comments on the proposed program.¹²⁰ The Secretary is required to accept reasonable state comments or provide valid reasons for rejecting them.¹²¹ The D.C. Circuit ruled that section 18 was purely procedural.¹²² The Secretary was only required to address state concerns and explain why they were rejected.¹²³ The Secretary of the Interior's responses adequately addressed the state governors' concerns.¹²⁴ Section 18 did not provide an independent basis to review the Secretary's decisions.¹²⁵ Any substantial objection to the Secretary's decisions had to be reviewed in the context of the particular section.¹²⁶

112. *Id.*

113. *Id.* at 155; see *California v. Watt*, 668 F.2d 1290, 1300-03 (D.C. Cir. 1981).

114. See *Watt*, 668 F.2d 1290.

115. *Id.* at 1303-04; see 43 U.S.C. § 1344(a) (1978).

116. *Watt*, 668 F.2d at 1308; see 43 U.S.C. § 1344(a)(2)(B) (1978).

117. *Watt*, 668 F.2d at 1311-13; see 43 U.S.C. § 1344(a)(2)(G) (1978).

118. *Watt*, 668 F.2d at 1317-1319; see 43 U.S.C. § 1344(a)(3) (1978).

119. See *Watt*, 668 F.2d at 1317-1319.

120. 43 U.S.C. § 1344(c) (1978).

121. *Id.*

122. *Watt*, 668 F.2d at 1321-22.

123. See *id.*

124. See *id.*

125. See *id.*

126. See *id.*

While the litigation over Secretary Andrus' five-year program was underway, President Reagan came to office. The new Secretary of Interior, James G. Watt, immediately began to revise the Andrus program.¹²⁷ Secretary Watt's program "increased the pace, acreage, and quality of offerings and achieved early leasing [in the] high potential areas."¹²⁸ New streamlined OCS procedures were proposed, which included "area-wide environmental and hydrocarbon assessments, tiering of NEPA documents, area-wide lease offerings, and more efficient methods for assuring receipt of fair market value."¹²⁹ Secretary Watt stressed that OCS development "is not a partnership" between the federal and state governments.¹³⁰ Secretary Watt submitted the five-year program to Congress in July 1981.¹³¹ In October 1981, the D.C. Circuit remanded the Andrus program back to the Secretary with instructions and a compliance schedule.¹³² OCS leasing was allowed to continue while the program was being revised.¹³³

In July 1982, Secretary Watt approved a revised program, which called for forty-one lease sales, comprising approximately one billion acres, to occur from August 1982 through June 1987.¹³⁴ The new program was twenty times greater than the Andrus program and the area to be leased was twenty-five times greater than the area previously leased throughout the entire OCS program.¹³⁵

Governor Graham of Florida objected to the program and accused Secretary Watt of ignoring the state's concerns.¹³⁶ The

127. The Secretary is authorized to revise and reapprove the program at any time. 43 U.S.C. § 1344(e) (1978).

128. *Administration to Speed Exploration of Offshore Reserves Revise Lease Plan*, 11 ENV'T REP. (BNA) 2219 (Apr. 17, 1981).

129. Proposed Changes in Offshore Leasing Program, Request for Comment, 46 Fed. Reg. 22,468 (Apr. 17, 1981).

130. *Watt Says National Interest Overrides State Recommendations On OCS Activities*, 12 ENV'T REP. (BNA) 5 (May 1, 1981).

131. Proposed Changes in Offshore Leasing Program, 46 Fed. Reg. 39,226 (July 31, 1981).

132. SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 98TH CONG., REPORT ON SECRETARY OF INTERIOR JAMES G. WATT'S FIVE-YEAR OIL AND GAS LEASING PLAN FOR THE OUTER CONTINENTAL SHELF 6 (1983).

133. *Id.*

134. *Id.*

135. *See id.*

136. Governor Graham raised the following concerns. First, there was an inappropriate use of constant cost assumption that was based on the Western and Central Gulf and Southern California, which were not applicable for the Eastern Gulf (EGOM). *Hearings: Final Plan*, *supra* note 102, at 24-42 (1982). Second, the long term cumulative impact on renewable resources, such as fisheries, was not considered. *Id.* Third, marine productivity was inaccurately assessed. *Id.* Fourth, there was an inaccurate assumption that the damage to the fisheries would not exceed natural variability. *Id.* Fifth, the total net economic value was inappropriate. Since only 10% of tracts would have oil, smaller regions should be utilized to assess the petroleum potential. *Id.* Sixth, the increase in acreage offered would not automatically increase exploratory drilling, which is contingent on economic factors, such as

governor warned the Secretary that Florida would litigate unless the Secretary delayed Lease Sale 79 off southwest Florida and Lease Sale 78 in the South Atlantic.¹³⁷ When these concerns were not met, Florida, along with Alaska, California, Oregon, and Washington, brought suit challenging the five-year OCS program.¹³⁸ The NRDC, along with six other environmental groups, brought a companion suit.¹³⁹ The petitioners alleged that Secretary Watt failed to comply with section 18 and the earlier court decision.¹⁴⁰

The D.C. Circuit utilized the same standard of review as employed in *Watt I*, but characterized Secretary Watt's decisions differently.¹⁴¹ In the challenge to the Andrus program, the court held that several of issues revolved around the Secretary of the Interior's statutory interpretations, which were reviewed to insure that they "effectuated the intent of Congress."¹⁴² In the challenge to the Watt program, the court held that the issues focused on the adequacy of the Secretary's analysis, so the Secretary's decisions would be set aside only if they were arbitrary and capricious.¹⁴³ The D.C. Circuit found that Secretary Watt complied with Section 18.¹⁴⁴

B. OCS Moratoria

After losing the battle in the D.C. Circuit, Florida and other coastal states worked for the establishment of moratoria on OCS leasing in certain environmentally sensitive areas through appropriation restrictions.¹⁴⁵ Congress utilizes the appropriations process to oversee agency action and influence policy. This practice has been criticized on several grounds. First, the appropriations process does not provide for thoughtful deliberations.¹⁴⁶ Second,

the availability of drilling rigs. *Id.* Seventh, the receipt of fair market value was questionable. There was no support for the assumption tracts in the EGOM would receive multiple bids, so individual tracts were likely to be underbid. *Id.* Eighth, the cost/benefit analysis was invalid because it was based on the entire OCS region, rather than the planning areas, which should be the basic unit of analysis. *Id.* Ninth, there was a lack of adequate environmental studies in certain areas. *Id.*

137. *Id.*

138. Fitzgerald, *Watt*, *supra* note 108, at 176.

139. *Id.*

140. *Id.*

141. *Id.*; see *California v. Watt*, 712 F.2d 584 (D.C. Cir. 1983).

142. Fitzgerald, *Watt*, *supra* note 108, at 176; *Watt*, 712 F.2d 584 (D.C. Cir. 1983).

143. Fitzgerald, *Watt*, *supra* note 108 at 176; *Watt*, 712 F.2d 584.

144. See *Watt*, 712 F.2d 584.

145. The first appropriations restrictions for tracts off the coast of California occurred in 1981. Pub. L. No. 97-100 (Dec. 23, 1981). For an overview of OCS moratoria, see Jack H. Archer & Joan M. Bondareff, *The Role of Congress in Establishing U.S. Sovereignty Over the Expanded Territorial Sea*, 1 TERR. SEA J. 117, 140 n.21 (1990).

146. Neil E. Devins, *Regulation of Government Agencies Through Limitation Riders*, DUKE L. J. 456, 464 (1987).

appropriations restrictions cause friction with the houses and between the House and Senate.¹⁴⁷ Third, the appropriations process bypasses the committees with substantive expertise.¹⁴⁸ Fourth, the appropriations process interferes with executive policy implementation.¹⁴⁹ Fifth, limiting agency action through appropriations detracts from fiscal policy.¹⁵⁰ Appropriations restrictions have also been applauded for being "so direct, unambiguous, and virtually self-enforcing ... the dollar figures in appropriations bills represent commands, which cannot be bent or ignored except at extreme peril to agency officials."¹⁵¹ Appropriations restrictions are "the only realistic way to stop the Executive from launching administrative initiatives that Congress disfavors."¹⁵²

Congress established moratoria for fiscal 1984 on 52.2 million OCS acres, including 7.4 million acres in the Eastern Gulf of Mexico (EGOM).¹⁵³ The EGOM restrictions included designated tracts in the sea grass beds, the Florida Middle Ground, and a twenty-meter isobath south of 26° North latitude.¹⁵⁴ All submerged lands within thirty-nautical miles of the baseline from which the territorial sea is measured were excluded.¹⁵⁵ For tracts in Lease Sale 79 that were located south of 26° North latitude, lease stipulations were established. First, no exploration activities could occur until the Department of the Interior accumulated three years of physical oceanographic and biological resource data.¹⁵⁶ Second, lessees were required to perform biological surveys prior to approval and initiation of exploration or drilling operations and to work with the Department of the Interior on monitoring of any subsequent drilling activities.¹⁵⁷

The Secretary of the Interior criticized the OCS moratoria for several reasons. First, the moratoria precluded OCS energy development in many promising areas.¹⁵⁸ This increased

147. *Id.*

148. *Id.* at 464-465.

149. *Id.*

150. *Id.*; see FITZGERALD, *supra* note 1, at 100.

151. SENATE COMM. ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION: CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES 31 (1977).

152. Devins, *supra* note 146, at 464.

153. FITZGERALD, *supra* note 1, at 100-01.

154. *Department of Interior and Related Agencies Appropriations for 1988: Hearings Before the Subcomm. on Interior Appropriations of the House Comm. on Appropriations*, part 9, 100th Cong. 48, 789 (1987)[hereinafter *Hearings: 1988 Appropriations*] (statement of William Bettenberg, Director, Minerals Mgmt. Serv.).

155. *See id.*

156. *See id.*

157. *See id.*; see also Pub. L. No. 98-146, 28-30 (Nov. 4, 1983).

158. G. Kevin Jones, *Understanding the Debate Over Congressionally Imposed Moratoria on*

importation of petroleum, which jeopardized United States balance of payments and foreign policy.¹⁵⁹ The increase in tanker traffic was more dangerous than OCS development.¹⁶⁰ Second, the moratoria reduced the revenues received by the federal government from OCS energy activities.¹⁶¹ Third, the moratoria reduced employment opportunities and adversely affected local economies.¹⁶² Fourth, the moratoria hurt commercial and sport fishing because fish are attracted to offshore installations.¹⁶³ Fifth, OCS development is very safe.¹⁶⁴ Sixth, the moratoria frustrated goals of the OCSLA, which is designed to expedite OCS energy development among various OCS regions.¹⁶⁵ Finally, many of the coastal states opposed to OCS development were actively pursuing offshore energy development in their own coastal zones.¹⁶⁶

Despite the moratoria, there were three sales off the Florida coast pursuant to Secretary Watt's five-year program Lease Sales 79 and 94 in the EGOM and Lease Sale 78 in the South Atlantic.¹⁶⁷ There were sixty leases issued in Lease Sale 79 and thirteen leases in Lease Sale 94 in the area off southwest Florida south of 26° North latitude.¹⁶⁸ Leases were also issued off the Florida Panhandle.

Florida officials criticized each sale, asserting that there was insufficient information to proceed with leasing off southwest Florida. Further study was necessary. Spills posed a danger to sensitive Florida habitats, particularly Florida Middle Ground, which has a coral reef that depends on unpolluted water and adequate light, and Big Bend sea grass beds, which support sea life, stone crabs, shrimp, scallops, and mullet.¹⁶⁹ Furthermore, the Secretary of the Interior was not sensitive to Florida's concerns regarding Lease Sale 78, but only responded to Defense Department and NASA demands.¹⁷⁰ Florida congresspersons introduced legislation that would ban leasing in the thirty-mile buffer zone

the OCS Oil and Gas Leasing, 9 TEMP. ENVTL. L. & TECH. J. 117, 147-48(1990). FITZGERALD, *supra* note 1, at 101.

159. FITZGERALD, *supra* note 1, at 101.

160. *Id.*, see generally Christie, *Florida's Ocean Future*, *supra* note 13, at 567-68.

161. *Id.* at 149-50.

162. *Id.* at 150-51.

163. *Id.* at 152-53.

164. *Id.* at 151-52.

165. *Id.* at 153-54.

166. *Id.* at 154-55.

167. *Outer Continental Shelf Leasing Activities: Hearings Before the Subcomm. on Energy Conservation and Supply of the Senate Comm. on Energy & Natural Resources*, 98th Cong. 12-17(statement of Sen. Chiles), 32-45 (statement of Senator Hawkins, Paula) (1984).

168. *See id.*

169. *See id.*

170. *Outer Continental Shelf Leasing Activities*, *supra* note 167.

around the Middle Grounds, off southwest Florida, and within a thirty-mile buffer zone around the Florida coast.¹⁷¹

C. State Consistency Review of OCS Lease Sales

While the battle over the five-year OCS program was underway, there was another Seaweed conflict, which focused on whether OCS lease sales were subject to state consistency review. Section 307(c)(1) of the Coastal Zone Management Act (CZMA) provided that federal activity "directly affecting" the state's coastal zone must be conducted "in a manner which is to the maximum extent practicable, consistent with the approved state's management programs."¹⁷² The conflict between California and the Secretary of the Interior regarding Lease Sale 53 brought this issue before the courts.¹⁷³

In July 1980, the California Coastal Commission requested that the Secretary submit a consistency determination with the proposed Notice of Sale of Lease Sale 53.¹⁷⁴ The Secretary refused, asserting that Lease Sale 53 would not directly affect the coastal zone.¹⁷⁵ The Secretary nullified many of the Commission's objections by deleting sales in four of the five basins originally scheduled for leasing.¹⁷⁶ Nevertheless, the Commission insisted that thirty-one of the tracts remaining in the Santa Maria Basin be deleted because development could jeopardize the sea otter.¹⁷⁷ When negotiations failed, California brought suit.¹⁷⁸

In 1981, the federal district court issued a preliminary injunction preventing the Secretary from accepting or rejecting any bids on the disputed tracts.¹⁷⁹ The district court determined that the Final Notice of Sale directly affected California's coastal zone, so a consistency determination was warranted.¹⁸⁰

171. *House Passes Bill to Share OCS Revenues with States: Administration May Veto It*, 14 *Env't Rep. (BNA)* 909 (Sept. 23, 1983); *Hawkins Offers bill To Ban OCS Leasing in Areas Covered By December Gulf Sale*, 16 *ENV'T REP. (BNA)* 1603 (Dec. 13, 1985).

172. 16 U.S.C. § 1456 (1976).

173. Edward A. Fitzgerald, *Secretary of Interior v. California: Should OCS Lease Sales Be Subject to State Consistency Review?*, 12 *B.C. ENVTL. AFF. L. REV.* 425 (1985) [hereinafter Fitzgerald, *Consistency Review*].

174. *Id.* at 431.

175. *Id.* at 432.

176. *Id.*

177. *Id.*

178. *Id.* at 432; see also *California v. Watt*, 11 *ENV'TL. REP. (Env'tl. L. Inst.)* 20,565 (1981).

179. Fitzgerald, *Consistency Review*, *supra* note 173, at 434; see also *State v. Watt*, 520 *F.Supp.* 1359 (C.D.Cal. 1981).

180. Fitzgerald, *Consistency Review*, *supra* note 173, at 435.

The case proceeded to the Ninth Circuit where Florida, whose coastal zone management program had been approved in 1981,¹⁸¹ filed an amicus brief.¹⁸² After the Ninth Circuit upheld the district court,¹⁸³ the Secretary of the Interior appealed to the Supreme Court. In January 1984, the Court, in a five to four decision, held that only federal activities occurring within the geographical boundaries of the coastal zone can directly affect the coastal zone.¹⁸⁴ Reviewing the legislative history, the Court pointed out that in 1972, Congress rejected four proposals that would have extended state authority beyond the three-mile coastal zone.¹⁸⁵ In 1976, Congress rejected a proposal to make OCS leasing subject to consistency review.¹⁸⁶ The Court interpreted these actions as demonstrating an explicit intent by Congress to exclude OCS lease sales from consistency review.¹⁸⁷

The Court decided that the enactment of the OCSLA Amendments in 1978 reinforced its conclusion.¹⁸⁸ The OCSLA Amendments delineated the specific stages in the OCS development process and specifically separated OCS lease sales from subsequent development.¹⁸⁹ Since OCS lease sales only entitled the lessees to priority in the submission of subsequent plans, OCS lease sales did not directly affect the coastal zone.¹⁹⁰ OCS lease sales were not subject to consistency review, which was limited to the later two stages of OCS development process pursuant to section 307(c)(3)(B).¹⁹¹

The Court's decision was incorrect. The Court misread the legislative history¹⁹² to arrive at a conclusion that was contrary to a 1979 Justice Department interpretation,¹⁹³ the National Oceanic

181. See Christie, *Florida's Ocean Future*, *supra* note 13, at 488-97; O'Connell, *supra* note 13, at 61.

182. Florida argued that the consistency provisions of the CZMA were designed to insure harmony between the CZMA and other federal programs. Congress intended to subject OCS lease sales to state consistency review. National Oceanic and Atmospheric Administration (NOAA) regulations assumed that OCS lease sales were subject to consistency review. OCS lease sales produced direct effects on the coastal zone. The existence of other statutory provisions did not relieve the Secretary of his duty to ensure consistency under the CZMA. Brief of Amici Curiae Alaska, et al. *California v. Watt*, 520 F. Supp. 1359 (C.D. Cal. 1981).

183. See *California v. Watt*, 683 F.2d 1253 (9th Cir. 1982).

184. *Sec'y of Interior v. California*, 464 U.S. 312, 104 S. Ct. 656, 666 (1984).

185. See *id.* at 663-66.

186. *Id.*

187. See *id.*

188. Fitzgerald, *Consistency Review*, *supra* note 173, at 445.

189. *Id.*

190. *Id.*

191. *Id.*; see also *Sec'y of Interior v. California*, 104 S.Ct. at 668-71; 16 U.S.C. § 1456 (1976).

192. See Fitzgerald, *Consistency Review*, *supra* note 173, at 451-59.

193. *Id.* at 462; see also *Dep't. of Justice Advisory Opinion rendered for the Dep't. of Commerce and Dep't. of Interior* (April 20, 1979).

and Atmospheric Administration (NOAA) regulations,¹⁹⁴ and the district and appellate court decisions. The decision diminished state input at the crucial early stages of the process. This relegated the states to a minor advisory role during the pre-lease and lease sale stages, which are the only time that the lease sale can be evaluated in its entirety to determine if it interferes with state coastal management programs. Later state review was restricted to particular tracts under section 307(c)(3)(B). Limiting state involvement at the lease sale stage frustrated the purpose of the CZMA, which is to establish a cooperative management scheme between the federal and state governments to protect the natural systems of the coastal zone.¹⁹⁵

Congress responded quickly to the Court's narrow interpretation of "directly affecting."¹⁹⁶ Bills were introduced to reverse the decision and guarantee the states a major role in future consistency determinations.¹⁹⁷ Florida officials were critical of the Court's decision and supported the amendment of section 307(c)(1). Governor Graham stressed the need for federal-state cooperation regarding OCS development. Early state review was essential to preclude costly litigation.¹⁹⁸ Senator Hawkins pointed out that Florida's tourist and recreation industry, which generated over \$23 billion in 1983, needed to be protected. State participation in the later stages of the process was too limited.¹⁹⁹ The Senate Commerce Committee issued a favorable report on a bill in 1984, but no further action was taken before the close of the 98th Congress.²⁰⁰ Subsequent efforts to amend section 307(c)(1) during the Reagan administration were regularly defeated.²⁰¹

194. Fitzgerald, *Consistency Review*, *supra* note 173, at 459-64.

195. *Id.* at 466-69.

196. *See id.* at 469-71.

197. *Id.*

198. *Id.*; see S. REP. NO. 98-512, at 122-23 (1984).

199. *Coastal Zone Management: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong. 103 (1984) (statement of Sen. Hawkins, Paula).

200. S. REP. NO. 98-512.

201. H.R. 3202, 100th Cong. (1987); *Coastal Zone Management Act: Hearings Before the House Comm. on Merchant Marine and Fisheries*, part 2, 100th Cong. (1987).

D. OCS Revenue Sharing

Another federal-state battle during the Reagan administration concerned OCS revenue sharing.²⁰² The Reagan administration decided to accelerate and expand OCS leasing, while attempting to terminate the funding for many ocean and coastal programs.²⁰³ The Reagan administration targeted the programs established under the CZMA for elimination on the grounds that the programs had accomplished their goals.²⁰⁴ The administration asserted that the states were aware of the benefits and sound coastal zone management and would continue to fund the programs.²⁰⁵ Furthermore, the Coastal Energy Impact Program (CEIP), which provided loans and grants to the coastal states to mitigate the adverse impacts of OCS development, was slated for termination because the projected OCS boom/bust cycle never occurred.²⁰⁶

Initially, Congress was receptive to the administration's request and signaled that the program should be phased out by fiscal year 1984.²⁰⁷ In 1983, Congress reassessed the importance of maintaining state coastal zone programs.²⁰⁸ Despite Reagan administration opposition, Congress decided to increase the funding for the CZMA for fiscal year 1984 through fiscal year 1986.²⁰⁹

The Reagan administration also proposed to eliminate the funding for the National Sea Grant,²¹⁰ Commercial Fisheries and Research and Development Act,²¹¹ and Anadromous Fish Conservation Act.²¹² The administration argued that the goals of these programs had been achieved and it was time for the states and private industry, who were the direct beneficiaries, to take

202. See Edward A. Fitzgerald, *Outer Continental Shelf Revenue Sharing: A Proposal to End the Seaweed Rebellion*, 5 UCLA J. ENVTL. L. & POL'Y 1 (1985) [hereinafter Fitzgerald, *Revenue Sharing*].

203. *Id.*

204. *Id.*

205. *Id.* at 18 n.127.

206. *Id.* at 19; see also Dan Derheimer & Jack D. Salmon, *Coastal Energy Impact Mitigation in the Gulf: The Past Reviewed and Alternatives for the Future*, 10 COASTAL ZONE MGMT. J. 161, 163-64 (1982).

207. Fitzgerald, *Revenue Sharing*, *supra* note 202, at 19; H.R. REP. NO. 97-124, at 22 (1981).

208. Fitzgerald, *Revenue Sharing*, *supra* note 202, at 19; H.R. REP. NO. 98-478 (1983).

209. Fitzgerald, *Revenue Sharing*, *supra* note 202, at 19; H.R. REP. NO. 98-952, at 14 (1984); H.R. REP. NO. 99-414, at 15 (1985).

210. Fitzgerald, *Revenue Sharing*, *supra* note 202, at 20. The National Sea Grant was established in 1966 to develop a network of universities dedicated to marine education and research. 33 U.S.C. §§ 1121-1131 (1966).

211. The Commercial Fisheries Research and Development Act was enacted in 1964 to provide grants for research and development of commercial fisheries. 16 U.S.C. § 779 (1964).

212. Fitzgerald, *Revenue Sharing*, *supra* note 202, at 20. The Anadromous Fisheries Conservation Act was enacted in 1965 "[f]or the purpose of conserving, developing, and enhancing ... the anadromous fishery resources of the Nation." 16 U.S.C. § 757 (1965).

responsibility for the programs. Congress, however, continued to fund the programs.²¹³

The Reagan administration engendered a great deal of hostility by pursuing an aggressive OCS leasing program, while attempting to terminate the funding for vital ocean and coastal programs.²¹⁴ To sustain the funding for ocean and coastal programs and minimize coastal state opposition to OCS leasing, various bills were introduced to provide for OCS revenue sharing.²¹⁵ Governor Graham supported OCS revenue sharing as a means to maintain the funding for the CZMA.²¹⁶ The governor asserted that Florida's coastal management plan helped the state prepare for OCS development.²¹⁷ Secretary Watt's new streamlined procedures placed additional burdens on state governments to protect the state's environmental resources.²¹⁸ Federal funds were needed to participate in federal consistency decisions.²¹⁹

After a difficult four-year struggle in Congress, a block grant bill was reported out of the Conference Committee in 1984.²²⁰ The bill established an Ocean and Coastal Resources Management and Development Fund consisting of 4% of the average OCS oil and gas revenues received during the previous three fiscal years.²²¹ Despite Reagan administration opposition,²²² the House passed the bill in

213. *Id.*

214. *Id.* at 21.

215. *Id.*

216. The governor supported the continuation of CEIP funding, which had been used to develop six regional OCS facility siting studies; to develop an oil spill vulnerability atlas for the entire Florida coastline; to plan for future port growth resulting from OCS exploration and production in the EGOM and South Atlantic; to investigate ocean thermal energy conversion; and to provide funds for oceanographic data. *Oceanography Miscellaneous: Hearings Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, part 1, 98th Cong., 1st Sess. 43-48 (1983) (statement of Robert Graham, Governor of Fla.).

217. *Id.*

218. *Id.*

219. *Id.*

220. See Fitzgerald, *Revenue Sharing*, *supra* note 202 at 27-29.

221. *Id.* There was a ceiling of \$300 million on the initial deposit into the fund, which could only grow 105% from the prior year's deposit. Money would be awarded to the fund through the normal appropriations process. Block grants would be given to the coastal states from the fund by the Secretary of Commerce according to a formula which considered the following factors: (1) one half of the actual OCS leasing and volume of gas first landed in the coastal state; (2) proposed OCS leasing off the state's coast; (3) coastal-related energy facilities; (4) shoreline mileage; and (5) coastal population. Items (4) and (5) would only apply if the state had, or was working towards, an approved coastal zone management program. The block grants could be used for CZMA and CEIP activities, and the enhancement, management and development of living marine and natural resources. One third of the grant had to be passed through to affected local governments. No funds would be allocated to the National Sea Grant, which would continue to be treated as a separate budget item. S.2463, 98th Cong., 2d Sess. (1984); 130 Cong. Rec. H9233-H9239 (daily ed. Sept. 10, 1984).

222. See 130 Cong. Rec. S13847 (daily ed. Oct. 9, 1984).

1984.²²³ The Senate, however, defeated the bill.²²⁴ Senator Durenberger stated that the OCS revenue sharing program "may be entitlement spelled with a small 'E', but it is pork barrel politics spelled with a capital 'P'."²²⁵ The same block grant bill was included in the initial version of the Omnibus Budget Reconciliation Act of 1985,²²⁶ but was dropped from the final version because of budgetary concerns.²²⁷

Congress missed an opportunity to quell the Seaweed Rebellion. OCS revenue sharing would have many benefits. First, OCS revenue sharing would help mitigate the impacts of the Court's erroneous tidelands decisions and allow the coastal states to share in the benefits derived from offshore energy development on offshore lands previously within their historic boundaries.

Second, OCS revenue sharing would provide funds to coastal state and local governments to plan for and deal with the impacts of OCS energy development.²²⁸ This would diminish coastal state opposition and provide greater predictability to the OCS leasing schedule, which the industry considers to be very important.²²⁹ Greater certainty would result in larger bonus bids for oil and gas leases and increase the revenues received by the federal government. Furthermore, the expensive delays resulting from litigation would be eliminated.²³⁰

Finally, OCS revenue sharing would rectify the inequity between inland and coastal states regarding the disposition of revenues derived from federal leasing. OCS leasing is the only federal leasing program that does not provide for a form of revenue sharing to compensate the states for the federal retention of land and help the states deal with the impacts of such development.²³¹

223. Fitzgerald, *Revenue Sharing*, *supra* note 202, at 28.

224. *Id.*

225. *Id.*; 130 Cong. Rec. S13846 (daily ed. Oct. 9, 1984).

226. H.R. REP. NO. 99-453, 1st Sess. at 45-51 (1985).

227. Fitzgerald, *Revenue Sharing*, *supra* note 202, at 46-47.

228. *Id.* at 30-31.

229. GEN. ACCOUNTING OFFICE, U.S. CONG., OUTLOOK FOR ACHIEVING FISCAL YEAR 1983 OFFSHORE REVENUE ESTIMATE-POSSIBLE BUT NOT LIKELY, REP. NO. EMD-82-83 (1982), 32-33. H.R. REP. NO. 98-206, at 55-56 (1983).

230. The Department of the Interior estimated that the delays caused by litigation cost the federal government \$280 million annually, and that it would increase to one billion annually. H.R. REP. NO. 98-206, at 54-56 (1983).

231. The National Forest Revenue Act allocates 25% of the proceeds from timber harvesting in the national forests to state and local governments. 16 U.S.C. § 500 (1976). The Taylor Grazing Act provides the states 12 1/2% of all grazing and stock raising receipts from federal leases. 43 U.S.C. § 315 (1954). The Mineral Leasing Act grants to the affected states 50% of the federal mineral leasing receipts. 30 U.S.C. § 181 (1981).

E. The Five-Year OCS Program 1987-1992

In 1984, Secretary Clark began to develop the third five-year OCS program for 1987-1992. His successor, Donald Hodel, was committed "to pursue the objective of energy independence insofar as the policies and programs of the Department of Interior can contribute to its achievement ... [OCS energy resources] can contribute to that objective."²³² Secretary Hodel declared that, "the OCS leasing program must minimize conflicts with state and other interests."²³³ He promised to "ensure that the Interior Department's OCS pre-lease negotiation process is adequate to ensure that all resource values ... are considered and protected in specific areas."²³⁴ Negotiations would continue "with the appropriate Congressional, state, and local officials so we will be in position to agree that blanket OCS moratoria no longer are necessary."²³⁵

In July 1987, Secretary Hodel approved the five-year program for 1987-1992, which scheduled thirty-eight sales in twenty-one of the twenty-six planning areas.²³⁶ Two sales were scheduled in the EGOM: Lease Sale 116 in 1988 and Lease Sale 137 in 1991.²³⁷

Secretary Hodel instituted a subarea deferral program that was designed to focus on promising areas and accommodate environmental concerns.²³⁸ The Secretary requested and received over one hundred nominations for subarea exclusions.²³⁹ In July 1987, the Secretary announced that fifteen areas would be excluded, while thirteen other areas were "highlighted for further review."²⁴⁰ The subarea deferrals included 75% of the OCS off Florida, including a sixteen-mile coastal buffer off Cape San Blas; a thirty-mile coastal buffer from the Gulf/Franklin county line west of Apalachicola to Naples; the sea grass beds and middle grounds in the EGOM; Key Largo and Looe Key national marine sanctuaries in the Straits; the nearshore area; and all NASA flight clearance areas

232. *Donald Paul Hodel Nomination: Hearings Before the Senate Comm. on Energy and Natural Resources*, 99th Cong. 22-23 (1985).

233. *Id.* at 24.

234. *Id.* at 23.

235. *Id.*

236. This included twenty-four standard lease sales, eleven frontier sales, and three supplemental sales. Annual sales were scheduled in the Central Gulf and Western Gulf. Fourteen triennial sales were scheduled in the other nine areas.

237. *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988).

238. *Id.* at 292. Section 18(f) of the OCSLA allows the Secretary to establish procedures for "receipt and consideration of nominations for any area to be offered for lease or to be excluded from leasing." 43 U.S.C. § 1344(f) (1978).

239. Edward A. Fitzgerald, *National Resources Defense Council v. Hodel: The Evolution of Interior's Five-Year Outer Continental Shelf Oil and Gas Leasing Program*, 12 TEMP. ENVTL. L. & TECH. J. 1, 29-30 (1993)[Fitzgerald, *Evolution*].

240. *Id.*

in the South Atlantic except 122 blocks of industry interest.²⁴¹ Florida officials wanted more areas excluded.²⁴²

California, Florida, Massachusetts, Oregon, and Washington brought suit challenging the program. The National Resource Defense Council (NRDC), representing a coalition of environmental groups, brought a companion suit. Florida asserted that the EIS did not adequately consider the impacts of a large oil spill on its sensitive environmental offshore. Furthermore, the inclusion of the Florida Straits and certain subareas around Apalachicola Bay did not comply with section 18 of the OCSLA.²⁴³

Florida subsequently withdrew from the suit after Governor Martinez negotiated a deal with Secretary Hodel. The March 1988 deal excluded the remaining portion of the Straits, the areas adjacent to Dry Tortugas and Keys that had been deleted from Lease Sale 116,²⁴⁴ and designated areas off Dry Tortugas and Miami. Areas of high environmental concern and high natural gas potential seaward of Cape San Blas were protected.²⁴⁵ A stipulation for oil spill containment and cleanup, modeled after the stipulation in the Panhandle, would be in place prior to Lease Sales 116 and 137.²⁴⁶ Only two sales would occur in the EGOM: Lease Sales 116 and 137.²⁴⁷ Most of the area under moratoria would be deferred from leasing, including twenty-three blocks in the Florida Middle Ground; the thirty-mile buffer from Apalachicola to 26° North latitude; and the fifteen-mile buffer between Apalachicola Bay and Panama City.²⁴⁸ Several of the remaining areas, including sixty-

241. *Id.*; *Department of Interior and Related Agencies Appropriations for 1988: Hearings Before the Subcomm. on Interior Appropriations of the House Comm. on Appropriations*, part 9, 100th Cong. 48, 789 (1987)[hereinafter *Hearings: 1988 Appropriations*] (statement of William Bettenberg, Director, Minerals Mgmt. Serv.).

242. This included a thirty-mile buffer zone from the Alabama/Florida border to Dry Tortugas. No leasing below 26° North latitude should occur because of insufficient data. Fitzgerald, *Evolution*, *supra* note 239.

243. Revised Final Brief for Petitioners on Petition for Review of a Decision of the Secretary of Interior to the U.S. Court of Appeals for the District of Columbia at 30, *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988).

244. The Secretary deleted several areas of concern from Lease Sale 116, including the Department of Defense warning area, sixteen-mile buffer from Panama City to Cape San Blas, the area shoreward of the twenty-meter isobath between 25° and 26° North latitude, and all acreage south of 25° North latitude. *Hearings: 1988 Appropriations*, *supra* note 241, at 46-49 (statement of William Bettenburg, Director, Minerals Mgmt. Serv.). Some of these areas, however, were kept in the program to assess their hydrocarbon potential. *Id.* The Secretary also agreed to establish a joint federal/state task force for Florida, whose findings will be used for Lease Sale 137 in the EGOM and Lease Sale 140 in the Straits. *Id.*

245. *Id.* at 47.

246. *Id.* at 48-49.

247. *See id.* at 46-49.

248. *Id.*

four blocks near Apalachicola Bay, would be subject to a special oil containment and cleanup stipulation.²⁴⁹

Several months later a second agreement was negotiated regarding Lease Sale 116, which established two sales.²⁵⁰ The first sale, which would occur in November 1988, would not include any tracts in the area below 26° North latitude.²⁵¹ The second sale would not occur until studies were completed and evaluated.²⁵² Part I of Lease Sale 116 occurred in 1988 and resulted in the leasing of tracts off northwest Florida.²⁵³

The suit against the five-year program continued without Florida. The D.C. Circuit utilized the same standard of review that had been established in the earlier challenges.²⁵⁴ However, the court stressed that *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*,²⁵⁵ which had been decided after the prior cases, would require the affirmation of “an implementing agency's construction of a statute when Congress has not expressed its clear intent on the precise question at issue and the agency advances a permissible construction.”²⁵⁶

The D.C. Circuit viewed the Secretary's OCSLA compliance as a policy question and upheld the Secretary's implementation of section 18 of the OCSLA.²⁵⁷ The court did not scrutinize the Secretary of the Interior's statutory compliance,²⁵⁸ but continued to follow the erroneous conclusion in the first challenge, that the Secretary had broad discretion to balance the section 18(a)(3) factors to expedite OCS oil and gas development. This was contrary to legislative history, which indicated that the Secretary should balance environmental protection, energy potential, and adverse impacts on the coastal zone when developing the five-year OCS leasing program.²⁵⁹

The D.C. Circuit reviewed the Secretary of the Interior's NEPA compliance as a policy question and determined that the Secretary's EIS sufficiently discussed conservation measures as an option to leasing in environmentally sensitive OCS areas. The D.C. Circuit

249. *Id.*

250. *Id.*

251. *Id.*; see also *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 293 n.3 (D.C. Cir. 1988).

252. *Hearings: 1988 Appropriations*, *supra* note 241.

253. *Id.*

254. *Hodel*, 865 F.2d at 300 (citing *Watt I*, 668 F.2d at 1300-03, and *Watt II*, 712 F.2d, at 590-91).

255. 467 U.S. 837, 842-45 (1984).

256. *Hodel*, 865 F.2d at 300.

257. See *id.* at 305-06.

258. See Fitzgerald, *Evolution*, *supra* note 239, at 13-15.

259. See Fitzgerald, *Consistency Review*, *supra* note 173, at 464-69.

should not have upheld the Secretary's determination because the Secretary did not take a hard look at conservation measures as an option for leasing environmentally sensitive OCS areas.²⁶⁰ An examination of the conservation option was particularly important because of congressionally-imposed moratoria.

F. Activities on Existing Leases

After three years of physical oceanographic and biological resource study, the Minerals Management Service (MMS) concluded that development off Florida would not pose any problems. Florida disagreed and asserted that the data regarding the impacts of oil and gas activities on certain habitats off southwest Florida was deficient.²⁶¹ Governor Martinez declared that before any exploration activity would take place, there needed to be a detailed understanding of the currents in the EGOM and Straits of Florida to ensure the protection of the Florida Keys.²⁶² The Secretary of the Interior agreed to address the deficiencies and extend the length of the leases.²⁶³

Nevertheless, several lessees, Unocal and Mobil, submitted two exploration plans in 1988 regarding three of the seventy-three leases in the Pulley Ridge area south of 26° North latitude.²⁶⁴ After Florida objected to the exploration plans, the lessees appealed to the Secretary of Commerce.²⁶⁵ Congress entered the conflict and established a moratoria for the conduct of any leasing or the approval or permitting of any drilling or other exploration activity on lands within the EGOM planning area, which lie south of 26° North latitude, in the Department of the Interior's fiscal 1989 appropriation bill.²⁶⁶ This prohibited any activity on the seventy-three leases off southwest Florida.

V. THE BUSH ADMINISTRATION: *THE PEACE PROPOSAL*

President Bush achieved some peace in the Seaweed Rebellion. Secretary of Interior, Manuel Lujan, supported OCS development but was less confrontational than his predecessors. Secretary Lujan declared that, "the OCS leasing program is an important element in our effort to reduce America's dependence on insecure foreign

260. See Fitzgerald, *Evolution*, *supra* note 239, at 37-42.

261. H.R. REP. NO. 100-713, 2d Sess., at 34-36 (1988).

262. *Id.*

263. *Id.*

264. See *Hearings: 1988 Appropriations*, *supra* note 241, at 49 (statement of William Bettenberg).

265. See 16 U.S.C. § 1456(c)(3)(B) (1976).

266. Pub. L. No. 100-446 (Sept. 27, 1988), 102 Stat. 1801.

sources of energy," but he would "oppose development in those environmentally sensitive areas where the risk of damage is great."²⁶⁷ In addition, he promised to work "with the States and Congress to identify any measures which may be taken to enhance the contribution which this important program can make to the Nation in the coming years."²⁶⁸ The Bush administration canceled planned lease sales off Florida, considered the cancellation and buyback of the existing leases off southwest Florida, supported an OCS revenue sharing program, developed the first five year OCS leasing program that was not challenged, and upheld several of Florida's consistency objections. Congress continued the OCS moratoria and amended the consistency provisions of the CZMA to overturn the Court's decision in *Secretary of Interior v. California*.²⁶⁹ Florida Governors Martinez and Chiles and the entire Florida congressional delegation continued to oppose OCS development.

A. President Bush's Peace Proposal

President Bush, fulfilling his campaign promise, called for the "indefinite postponement of three [OCS] lease sales,"²⁷⁰ including Lease Sale 116-part 2 in the Gulf of Mexico,²⁷¹ while a special task force reviewed their environmental impacts.²⁷² In March 1989, the OCS Leasing and Development Task Force was established.²⁷³

The National Academy of Science (NAS) provided the task force with a report dealing with the adequacy of the environmental information for OCS oil and gas decisions regarding the sales.²⁷⁴ The NAS report found the physical oceanographic information marginal, the ecological information inadequate, and the socioeconomic information inadequate or doubtful for southwest Florida.²⁷⁵ The NAS recommended that the Department of the

267. *Manuel Lujan, Jr. Nomination: Hearing Before the Senate Comm. on Energy and Natural Resources*, 101st Cong. 205 (1989).

268. *Id.*

269. 464 U.S. 312 (1984).

270. MINERALS MGMT. SERV., U.S. DEPT OF THE INTERIOR, OCS NATIONAL COMPENDIUM, MMS 91-0032, at 62 (1991). Lease Sale 91 off northern California and Lease Sale 95 off southern California were the other sales.

271. The areas included in Lease Sales 91 and 116 were already subject to congressional moratoria through September 1989. Pub. L. No. 100-446, 102 Stat. 1774 (1988).

272. *Id.*

273. *Id.* The Task Force consisted of Secretary Lujan [chair]; Secretary of Energy, James Watkins; EPA Administrator, William Reilly; NOAA Administrator, John Knauss; and OMB Director, Richard Darman.

274. *Outer Continental Shelf: MMS Should Change Environmental Studies, Assess Long-Term Drilling Effects, NAS Says*, 20 ENV'T. REP. (BNA) 1269 (Nov. 10, 1989).

275. *Id.*

Interior answer the questions about the environmental impacts before proceeding with any of the lease sales.²⁷⁶

Governor Martinez testified at task force hearings that, "[w]e in Florida cannot afford to run the risk of losing the natural resources that have been our state's lifeblood for so many years."²⁷⁷ The OCS Task Force concluded that the cumulative impacts of each sale would produce unacceptable changes in the local environments unless mitigation measures were instituted.²⁷⁸ The task force recommended that the Secretary undertake specific studies prior to making leasing decisions regarding these three OCS areas and revise the NEPA-EIS process to improve the assessment of available environmental information.²⁷⁹

After studying the recommendations, President Bush announced his decision regarding OCS oil and gas development on June 20, 1990.²⁸⁰ First, all lease sales pending off California and southwest Florida would be canceled, and no further leasing would occur before 2000 and the completion of the studies recommended by the NAS.²⁸¹ Second, the Department of the Interior would investigate the cancellation and buyback of the existing OCS leases off southwest Florida, and discussions would be initiated with Florida regarding the state's participation in the buyback.²⁸² Third, air quality concerns and better oil spill responses would be addressed.²⁸³ Fourth, the establishment of an OCS revenue sharing program and the expansion of coastal states' authority in the OCS decision-making process would be investigated.²⁸⁴ Fifth, the OCS program would be restructured to ensure the availability of adequate information regarding resource potential and environmental effects; preclude OCS development in areas where the risks outweighed the benefits; and prioritize development in areas with the greatest resource potential and smallest environmental risks.²⁸⁵ President Bush stated that, "[a]lthough I have today taken these strong steps

276. *Id.*

277. Tim Nickens, *Martinez Asks For Ban on Drilling*, ST. PETERSBURG TIMES, June 13, 1989, at 8B.

278. *Outer Continental Shelf: OCS Task Force Recommends Delay In Drilling Off California, Florida, More Studies, Mitigation*, 21 ENV'T. REP. (BNA) 289 (June 1, 1990).

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* President Bush also declared that the Monterey Bay Marine Sanctuary off the coast of California would be approved and oil and gas activities within the sanctuary would be prohibited. Lease Sale 96 on Georges Bank off the New England coast and Lease Sale 132 in the Washington/Oregon planning area would be canceled. Environmental studies in the areas would continue, but no lease sales would be conducted until after the year 2000.

to protect our environment, I continue to believe that there are significant offshore areas where we can and must go forward with resource development."²⁸⁶ Secretary Lujan characterized the decision as a "balanced approach" and hoped that the administration could "move beyond temporary stop-gap measures, like moratoria, and instead develop a more positive productive and cooperative approach on this very difficult issue."²⁸⁷

B. Cancellation and Buyback

President Bush asked Florida to participate in the buyback of the seventy-three leases off southwest Florida. Section 5 of the OCSLA, which had never been utilized, allows the Secretary of the Interior to cancel an OCS lease if he has determined after a hearing that continued activity on the lease "would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment;" this threat will not diminish to an acceptable extent over time; and "the advantages of cancellation outweigh the advantages of continuing such lease or permit [in] force."²⁸⁸ The lease must be under continuous suspension for a period of five years prior to cancellation. The lessee is entitled to compensation for the canceled leases equal to the lesser of the fair value of the mineral rights, or the bonuses, rentals, and lease expenditures made after the issuance of the lease, plus interest, less any revenues received.²⁸⁹

Governor Martinez and Florida congresspersons were adamantly opposed to this suggestion. They asserted that the federal government, in the face of state objections, went ahead with leasing off southwest Florida and received \$107.8 billion in bonus bids and \$4.8 billion in rents. Since Florida received nothing, the state

286. *Review of Offshore Oil and Gas Programs: Hearings Before the Subcomm. on Water, Power, and Offshore Energy Resources of the House Comm. on Interior and Insular Affairs*, 102d Cong. 310-21 (1991) (statement of the President, White House, Office of Press Sec'y, June 26, 1990).

287. *Superfund: EPA Will Do All Risk Assessments, Says Private Cleanups Are Protective*, 21 ENV'T REP. (BNA) 414 (June 29, 1990); *Outer Continental Shelf: Decision on Outer Continental Shelf Plan Pleases Environmentalists, Angers Industry*, 21 ENV'T REP. (BNA) 443 (July 6, 1990). Reactions to the President's decision were mixed. A bipartisan group of California and Florida congresspersons praised the decision. The American Petroleum Institute (API) disagreed, stating that "locking up these energy-rich lands at a time when our dependency on foreign energy is escalating is a serious mistake," which will "lead to decreased domestic production, more imports, more dependency on OPEC, more tanker traffic, and the export of jobs and investment overseas."

288. 43 U.S.C. § 1334(a)(2)(c) (1990).

289. *Id.*

should not be obligated to buy back the leases. Furthermore, there was no guarantee that the Secretary of the Interior would not lease the tracts again in the future.²⁹⁰

The projected cost of the buyback of the seventy-three Florida leases was very high. The Government Accounting Office (GAO) estimated that cost of the buyback, as of December 31, 1990, to be between \$181 million and \$196 million.²⁹¹ The MMS estimated the potential cost of the repurchase, as of September 30, 1995, to be between \$270 million and \$497 million.²⁹²

Various bills were introduced, which prohibited leasing and development off southwest Florida. The Secretary of the Interior would be instructed to develop guidelines for the buyback of the Florida leases, which was solely a federal responsibility. Section 5 would be amended to provide for a suspension period of one year before cancellation to: allow Congress to cancel leases; permit compensation in the form of credits against bonuses, rents, royalties, and permit fees; and delete the requirement that the Department of the Interior weigh benefits of cancellation against the advantages of lease continuation. Sections 18 and 19 of the OCSLA would be amended to require the Secretary of Interior to accept state governors' comments on the five-year leasing program and individual lease sales, unless they were based on a material error of fact or were arbitrary and capricious.²⁹³ The Secretary of the Interior and the petroleum industry opposed the legislation.²⁹⁴

290. *OCS Lease Cancellation and Compensation Process: Hearing Before the House Comm. on Merchant Marine and Fisheries*, 101st Cong. 11, 44-45 (1990) (statement of Rep. Dante Fascell and Rep. Andy Ireland); *Dep't of Interior and Related Agencies Appropriation for 1991: Hearing Before the Subcomm. on Interior Appropriation of the House Comm. on Appropriation*, 101st Cong. 398-99 (1990) (statement of Barry A. Williamson, Director, Minerals Mgmt. Serv.); David Dahl, *The High Price of Off-Shore Drilling*, ST. PETERSBURG TIMES, Feb. 5, 1990, at 1A.

291. GEN. ACCOUNTING OFFICE, U.S. CONG., MINERAL REVENUES: POTENTIAL COST TO REPURCHASE OFFSHORE OIL AND GAS LEASES, REP. NO. RCED-91-93 (1991).

292. *Department of Interior Appropriations for 1993: Justifications for Budget Estimates: Hearing Before Subcomm. on Interior Appropriations of the House Comm. on Appropriations*, 102d Cong. 473 (1992). The different dates reflected when the five-year suspension period began. The GAO also did not consider the expenses incurred by the lessees and utilized a different interest rate.

293. H.R. 2945, 101st Cong. (1989); see *Review of Offshore Oil and Gas Programs: Hearings Before the Subcomm. on Water, Power, and Offshore Energy Resources of the House Comm. on Interior and Insular Affairs*, 102d Cong. 734, 736 (1991); *Legislation Relating to Oil and Gas Leasing on the OCS: Hearing Before Senate Comm. on Energy and Natural Resources*, 102d Cong. (1991).

294. *Legislation Relating to Oil and Gas Leasing on the OCS: Hearing Before Senate Comm. on Energy and Natural Resources*, 102d Cong. 50-54 (1991) (statement of David C. O'Neal, Interior), 117-19 (statement of Edward R. Prince, NOIA). The Secretary of the Interior and the petroleum industry did not support the changes in section 5 for the following reasons: first, dropping the criterion of weighing cancellation against continuation would jeopardize a national balancing scheme in the statute. Second, Congress should not have the ability to

The buyback of OCS leases and other OCS issues became part of the National Energy Bill, which was prompted by Iraq's invasion of Kuwait in 1990. The House version of the bill authorized the Secretary of the Interior to cancel and buy back existing leases off southwest Florida. Compensation could be made either in currency or forgiveness of lessee's obligation to pay other rents or royalties. A moratorium on leasing and preleasing activities in EGOM and Atlantic regions would be established until 2002. Section 5 would be changed to allow Congress to cancel a lease; decrease the suspension period from five to two years; and allow compensation in the form of currency, forgiveness of lessees obligation for rents and royalties, or any combination thereof.²⁹⁵ The Senate version was more limited.²⁹⁶

C. OCS Revenue Sharing

OCS revenue sharing, which was supported by the Bush administration, was also considered as part of the comprehensive national energy policy.²⁹⁷ OCS revenue sharing efforts began in the Senate Energy and Natural Resources Committee. In June 1991, the committee issued a report on the National Energy Policy Act, which included the Coastal States and Community OCS Impact Assistance Act.²⁹⁸ The National Ocean Policy Study (NOPS) of the Senate Commerce Committee also began to consider an OCS block grant bill, the Ocean and Coastal Resources Enhancement Act.²⁹⁹

cancel a lease because it would inject too much uncertainty into the process. Third, the time period for cancellation should not be shortened because the five-year period provided time for mitigation measure to be implemented. Fourth, compensation in the form of credits could not be used by all companies and would affect the bidding strategies of certain companies. Fifth, any change in section 5 would apply to all leases. The Secretary of the Interior also opposed the proposed in sections 18 and 19 of the OCSLA, asserting that shifting the burden of proof regarding sections 18 and 19 of OCSLA would grant the coastal states too much power.

295. CONGRESSIONAL RESEARCH SERVICE, U.S. CONGRESS, ENERGY EFFICIENCY AND RENEWABLE ENERGY PROVISIONS OF S. 2116 AND H.R. 776: A SIDE-BY-SIDE COMPARISON 31 (1992).

296. *Id.* The Senate version of National Energy Bill authorized the Secretary of the Interior to cancel and buyback existing leases off southwest Florida, and prepare a report to be completed within one year of enactment, analyzing alternative means of compensation for canceled leases. A moratoria on leasing and pre-leasing off southwest Florida would be established until 2000.

297. XLVII CONG. Q. ALMANAC 195-208 (1991). In February 1991, the Secretary of Energy released the "National Energy Strategy," which recommended an increase in domestic production, an end to OCS moratoria, and the enactment of OCS revenue sharing.

298. S. REP. NO. 72 (1991); *Improving the OCSLA: Hearing Before the Subcomm. on Panama Canal/OCS of the House Comm. on Merchant Marine and Fisheries*, 101st Cong. 45-56 (1989) (statement of James M. Hughes, Deputy Assistant Sec'y, Dep't of the Interior, Land and Minerals Mgmt.).

299. *Section 49, The Ocean and Coastal Resources Enhancement Act: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 102d Cong. (1991).

The final Senate version of the National Energy Security Act of 1992 incorporated both committee bills. Two separate funds would be established, the first administered by the Secretary of the Interior and the second by the Secretary of Commerce. Monies deposited into the two funds would be comprised of OCS royalty revenues on tracts beyond the 8(g) zone³⁰⁰ coming into production after enactment.³⁰¹ The Senate bill also included designated moratoria on OCS activities until 2000 and authorized the cancellation and buyback of the leases off southwest Florida.³⁰²

Several OCS revenue sharing bills moved forward in the House. The House Interior and Insular Affairs Committee reported a bill which would establish a Coastal Protection Fund.³⁰³ The House Merchant Marine and Fisheries Committee reported the Ocean and Coastal Resources Management and Development Block Grant Act.³⁰⁴ The final House version of the Comprehensive National Energy Policy Act provided for the establishment of a single fund, which would be managed by the Secretary of Commerce.³⁰⁵ The House bill also established moratoria until 2002 and authorized the Secretary to cancel and buyback existing leases off North Carolina, southwest Florida, and in the North Aleutian Basin. Compensation could be made either in currency or the forgiveness of the lessee's

300. FITZGERALD, *supra* note 1, at 243-47; Christie, *Florida's Ocean Future*, *supra* note 13, at 575-76; 43 U.S.C. § 1337 (1999). Section 1337g of the OCSLA provides for the sharing of revenues derived from leasing and development in the area three miles from coastal states seaward boundaries. See Fitzgerald, *The Seaweed Rebellion*, *supra* note 100.

301. CONGRESSIONAL RESEARCH SERVICE, *supra* note 295, at 31. The Coastal Communities Impact Assistance Fund, which reflected the Senate Energy bill, provided eligible states and localities on a sliding scale from 12.5% of previous fiscal year's royalty revenue for tracts adjacent to the states offshore jurisdiction to nothing for tracts more than 200 miles from the coast. The fund was capped at \$300 million per year. One half of the state's share would be passed through to the counties.

The Coastal Resources Enhancement Fund, which reflected the NOPS bill, would be comprised of 4% of the prior year's new revenues with the maximum amount of \$100 million. Block grants would be awarded to the states according to the following formula: 1/2 based on the number, location and impact of energy facilities in the coastal zone; 1/4 based on shoreline mileage; and 1/4 based on coastal population. Each state would receive between 1.62% to 8% of the fund. One third of the grant would be passed through to local governments. The revenues from both funds could be utilized for the amelioration of adverse environmental impacts, administrative costs, and activities consistent with the CZMA, the Federal Water Pollution Control Act, and the Oil Pollution Act. S. 2166, 102d Cong. (1992).

302. *Id.*

303. H.R. REP. NO. 474 p. 8, at 81-82 (1992).

304. H.R. REP. NO. 474 p. 9, at 3-9, 39-44 (1992).

305. CONGRESSIONAL RESEARCH SERVICE, *supra* note 295, at 31. Monies going into the fund were comprised of 4% of the average annual OCS revenues from the previous three fiscal years, which could be increased to 5% annually. Different states would be entitled to different allocations through block grants from the fund. Eligible states would receive 2/3 and localities would receive 1/3 of the fund.

obligation to pay other rents or royalties.³⁰⁶ The Bush administration offered a third proposal, which called for the establishment of the Coastal Communities Impact Assistance Fund.³⁰⁷

The Conference Committee considered the three proposals, each of which recognized the risks to and impact on the coastal states from OCS energy development. OCS revenue sharing became entangled with the lease buyback effort and budget reconciliation.³⁰⁸ There was a marked difference in the priorities between the House and Senate conferees. The representatives were more interested in OCS lease cancellations and buybacks, while the senators were more concerned with the establishment of an OCS revenue sharing program. The Office of Management and Budget declared that the lease cancellations and buybacks would violate the Congressional Budget Act, triggering a sequestration and an across-the-board cut in mandatory spending programs.³⁰⁹ Since this would derail the conference report, the OCS provisions were deleted from the Energy Policy Act of 1992.³¹⁰

D. The Five-Year OCS Leasing Program

President Bush hoped to end the OCS moratoria and avoid litigation over the next five-year OCS program by limiting the acreage offered, focusing on promising areas, and improving consultation with the coastal states.³¹¹ In 1991, Secretary Lujan

306. *Id.*

307. *Department of the Interior and Related Agencies Appropriations for 1993, Part 13: Hearing Before the Subcomm. on Interior of the House Comm. on Appropriations*, 102d Cong. 523-25 (1992) (response of S. Scott Sewell, Director, Minerals Mgmt. Serv.); *National Energy Security Act of 1991, Titles VII and VIII: Hearing Before the Senate Comm. on Energy and Natural Resources*, 102d Cong. 83-88 (1991) (testimony of Barry A. Williamson, Director, Minerals Mgmt. Serv.). The fund would consist of 12.5% of the royalties on new production. Funds would be distributed to all coastal states within 200 miles of a leased tract based on the distance of the state from the tract. Each state had spending discretion, but one half of the state's share had to be passed through to local governments. The administration asserted that its proposal, which was similar to the Senate bill, had several advantages over the House version: First, the impact assistance was directly tied to the level of OCS activity near the coastal state. Second, one half of the states grants would be passed through to local governments. Third, the failure to earmark funds would increase flexibility and decrease administrative costs. Finally, funding through a permanent appropriation would give the states twice the amount of money over the next decade.

308. *Offshore Drilling Mandate*, XLVIII CONG. QUARTERLY ALMANAC 248 (1992). Act effective 1992, Pub. L. No. 486, 106 Stat. 2776. H.R. REP. NO. 102-1018 (1992). Joan Bondareff, *Congress, Reform, and Oceans Policy*, 22 COASTAL MGMT. 147, 156 (1994).

309. Bondareff, *supra* note 308.

310. *Id.*

311. *President's Five Year Outer Continental Shelf Oil and Gas Leasing Program: Hearing Before the Subcomm. On Oceanography, Great Lakes, and the Outer Cont'l Shelf of the House Comm. on Merchant Marine and Fisheries*, 102d Cong. 92-100 (1991) (statement of Barry A.

submitted the draft-proposed five-year leasing program, which incorporated the restrictions outlined by President Bush. The new program provided for better coordination among federal agencies, more responsiveness to state concerns, and a scientific basis for decision-making.³¹² Two hundred fifty million acres (one sixth of the OCS acreage) would be offered, which was one third of the amount in the 1987 program.³¹³ Leasing would occur in fifteen planning areas, twenty-three sales would take place in twelve planning areas.³¹⁴ Geographical basins would be identified for leasing. The number of blocks offered would be limited to 250 in the South Atlantic, 200 in the EGOM, and eighty-seven off southern California.³¹⁵ Two sales were proposed for the EGOM west of 84° longitude and North of 26° latitude in 1994 and 1997.³¹⁶ A new Area Evaluation and Decision Process (AEDP) was proposed to accomplish the following: improve the acquisition and integration of environmental, mineral, and socioeconomic information; define lease proposals more specifically; and enhance opportunities for participation.³¹⁷

Florida officials criticized the proposed program for not excluding more of the EGOM. They felt that the proposed areas were too close to the Florida coastline and requested a buffer zone of 100 miles off Florida.³¹⁸ The 6% chance of a spill was too high in light of the small estimates of petroleum reserves (ninety million barrels of oil and twenty million cubic feet of natural gas).³¹⁹ A spill would endanger barrier islands, estuaries, salt marshes, wetlands, mangroves and fisheries.³²⁰ They pointed out that west coast fishing generated \$132 million per year, fish processing raised \$350 million per year, and tourism, retirement, and recreation generated billions annually.³²¹

Florida officials sought a federal legislative solution. Bills were introduced to permanently ban OCS development off Florida below

Williamson, Director, Minerals Mgmt. Serv.).

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 7 (statement of Rep. Porter J. Goss), 9-10, 62-70 (statement of Governor Lawton S. Chiles), 10-13 (statement of Rep. Lawrence J. Smith), 13-17 (statement of Senator Bob Graham), 17-19 (statement of Rep. Andy Ireland), 19-20 (statement of Rep. Pete Peterson), 20-22 (statement of Rep. Jim Bacchus), 22-24 (statement of Rep. Dante Fascell), 24-26 (statement of Rep. Bill Livingston).

319. *Id.*

320. *Id.*

321. *Id.*

26° North latitude, cancel and buyback the seventy-three existing leases, create a buffer zone of 100 miles around the state, and ban any leasing until 2002 and the completion of environmental studies.³²² The bills expanded state authority over OCS development and required the Secretary of the Interior to accept state governors' comments regarding the five-year OCS program and lease sales, unless the governors' comments were based on material error or were arbitrary and capricious.³²³ The federal government and petroleum industry opposed the legislation.³²⁴

The final five-year program was approved in 1992, providing for eighteen lease sales in eleven planning areas, comprising 208 million acres.³²⁵ Changes from the 1991 proposed program included: fewer areas for leasing consideration, less acreage in each sale, and fewer sales.³²⁶ In the EGOM, 898 blocks off Florida were excluded and the number of sales reduced from two to one, which would occur in 1995.³²⁷ The scope of the program, the deletion of controversial areas, and doubtful success in the D.C. Circuit convinced the coastal states and environmental groups not to litigate.

E. OCS Moratoria

Despite President Bush's efforts, Congress continued to impose OCS moratoria. After the Exxon Valdez oil spill in 1989, the OCS moratoria were expanded. The Department of Interior was prohibited from spending funds for leasing in the EGOM or exploratory activities on the seventy-three leases south of 26° North latitude in 1990.³²⁸

President Bush hoped that his peace proposal would preclude future moratoria. Iraq's invasion of Kuwait highlighted U.S. vulnerability to imported oil. Despite Republican efforts to characterize OCS moratoria as aid for Saddam Hussein, the Democratic Congress continued moratoria for 1991 that were similar to the prior year.³²⁹ In addition, no funds were allowed for any preleasing, leasing, or exploration regarding Lease Sale 137 in the EGOM.³³⁰ The OCS moratoria were continued through 1992 and

322. H.R. 2945, 102d Cong. (1991); S. 734, 102d Cong. (1991); S. 736, 102d Cong. (1991).

323. H.R. 2945, 102d Cong. (1991); S. 734, 102d Cong. (1991); S. 736, 102d Cong. (1991).

324. H.R. 2945, 102d Cong. (1991); S. 734, 102d Cong. (1991); S. 736, 102d Cong. (1991).

325. MINERALS MGMT. SERV., U.S. DEP'T OF THE INTERIOR, OUTER CONTINENTAL SHELF NATURAL GAS AND OIL RESOURCE MANAGEMENT COMPREHENSIVE PROGRAM 1992-97: SUMMARY AND DECISION (1992).

326. *See id.*

327. *Id.*

328. Act of Oct. 23, 1989, Pub. L. No. 101-121, 103 Stat. 720 (1989).

329. Act of Nov. 5, 1990, Pub. L. No. 101-512, 104 Stat. 1936 (1990).

330. *Id.*

similar restrictions were imposed, including a ban on expenditures for activities concerning Lease Sale 151 in the EGOM.³³¹

F. Consistency Review

There were several developments concerning the consistency provisions of the CZMA during the Bush administration.

1. Section 307(c)(1)

In 1990, Congress amended the CZMA³³² to overturn the Court's erroneous decision in *Secretary of Interior v. California*.³³³ Section 307(c)(1) now requires that each federal agency activity within or outside of the coastal zone that affects any land, water, natural resources of the coastal zone must be conducted in a manner consistent with the state's coastal zone management program.³³⁴ The Conference Committee stressed that the principal objective of the amendment was "to overturn the Supreme Court's 1984 decision in *Secretary of Interior v. California*" and to clarify that OCS oil and gas lease sales are "subject to the consistency requirements of section 307(c)(1)."³³⁵

2. Section 307(c)(3)(B)

Development on some of the existing leases off the Panhandle and southwest Florida went forward. Section 307(c)(3)(B) of the CZMA requires an applicant for an OCS exploration, development, and production plan to certify that the plan is consistent with the coastal zone management program of any affected coastal state.³³⁶ The certification is submitted to the coastal state for approval.³³⁷ If certification is denied, the applicant may appeal to the Secretary of Commerce, who can override the state's objection on the grounds that the activity is consistent with the CZMA.³³⁸ The Secretary considers four factors to determine if the activity is consistent with objectives of the CZMA. First, is the activity consistent with the

331. Act of Nov. 13, 1991, Pub. L. No. 102-514, 105 Stat. 1012 (1991).

332. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388; see generally Jack Archer, *Evolution of Major 1990 CZMA Amendments: Restoring Federal Consistency and Protecting Coastal Water Quality*, 1 TERRITORIAL SEA J. 191 (1991); Timothy Eichenberg, *State Jurisdiction Under the Coastal Zone Management Act Extension of the Territorial Sea*, 2 TERRITORIAL SEA J. 115 (1992).

333. 464 U.S. 312 (1984).

334. 16 U.S.C. § 1456(c)(1) (2000).

335. H.R. REP. NO. 101-964, at 968 (1990).

336. 16 U.S.C. § 1456(c)(3)(B).

337. *Id.*

338. *Id.* at § 1456(c)(3)(A).

objectives of the CZMA?³³⁹ Second, is the activity's impact on the natural resources of the coastal zone less than the activity's contribution to the national interest?³⁴⁰ Third, is the activity consistent with the Clear Air Act and Clear Water Act?³⁴¹ Finally, are there any reasonable alternatives available?³⁴² The Secretary can also override the state's objection in the interest of national security.³⁴³

Union Oil and Mobil Oil, federal lessees of OCS tracts off southwest Florida acquired in Lease Sale 79, submitted proposed exploration plans and consistency determinations to Florida pursuant to section 307(c)(3)(B). The Florida Department of Environmental Regulation (FDER) objected to Union's consistency certification and determined that the biological, oceanographic, and socioeconomic information was insufficient to assess the environmental and socioeconomic effects of exploration and demonstrate consistency with Florida's coastal zone management program.³⁴⁴ The FDER made a similar finding regarding Mobil's consistency determination.³⁴⁵ Both companies appealed to the Secretary of Commerce, who rejected their appeals.³⁴⁶ The Secretary, citing the NRC report regarding the inadequacy of data in the region, determined that the impact of exploration on the state's natural resources outweighed its contribution to the national interest.³⁴⁷

Chevron submitted an exploration plan for a Destin Dome block³⁴⁸ off the Florida Panhandle that had been acquired in Lease Sale 94.³⁴⁹ The FDNR objected to the plan, finding it inconsistent

339. 15 C.F.R. § 930.121(a) (2002); *id.* at § 1456(c)(3)(B)(iii).

340. 15 C.F.R. § 930.121(b).

341. 16 U.S.C. § 1456(f).

342. 15 C.F.R. § 930.121(c); *see generally* Edward A. Fitzgerald, *Exxon v. Fischer: Thresher Sharks Protect the Coastal Zone*, 14 B.C. ENVTL. AFF. L.J. 561, 569-71 (1987).

343. 15 C.F.R. § 930.122 (2002).

344. Consistency Appeal of Union Exploration Partners, LTD with Texaco Inc. from an Objection by the State of Florida, 1993 NOAA LEXIS 3, at *9-10 (U.S. Dep't of Commerce Jan. 7, 1993).

345. Consistency Appeal of Mobil Exploration & Producing U.S. Inc. from an Objection by the State of Florida, 1993 NOAA LEXIS 4, at *10 (U.S. Dep't of Commerce Jan. 7, 1993).

346. Union Exploration Partners, 1993 NOAA LEXIS 3, at *95; Mobil Exploration & Producing U.S., 1993 NOAA LEXIS 4, at *100.

347. Union Exploration Partners, 1993 NOAA LEXIS 3, at *53-55; Mobil Exploration & Producing U.S., 1993 NOAA LEXIS 4, at *56-59.

348. In January 1989, the MMS approved the unitization of nine leases held by Chevron, Conoco, and Murphy Exploration in the Destin Dome 56 Unit. Chevron is the designated operator of the unit. Complaint, *Chevron v. United States* (Fed. Cl., dated July 24, 2000) (on file with court).

349. In 1986, Conoco submitted an exploration plan for three wells. Florida determined that the wells were consistent with its coastal zone management program. One well was drilling in 1987. Two more were completed in 1989.

with state policies protecting marine and coastal resources.³⁵⁰ The Secretary of Commerce overruled the objection, finding exploration consistent with the goals of the CZMA.³⁵¹

The two decisions upholding Florida's objections to the Union and Mobil exploration plans off southwest Florida were unprecedented. In the prior eight coastal state objections pursuant to section 307(c)(3)(B), state objections had been upheld three times; however, these objections had been upheld only because the Secretary determined that reasonable alternatives were available.³⁵² The Secretary never found that the state interests outweighed national concerns. In the *Union* and *Mobil* cases the Secretary also found no reasonable alternatives were available.³⁵³

There has been an ongoing debate regarding state consistency authority.³⁵⁴ Critics raise several arguments. First, they assert that the coastal states interpret federal consistency authority to impose substantive conditions and data requirements on federal licenses and permits that are not required by federal regulatory statutes.³⁵⁵ Coastal states block licenses and permits, which do not meet state conditions and interfere with federal programs.³⁵⁶ This violates the rights of the applicants and the federal government. Second, the critics claim that the Secretary of Commerce is institutionally incompetent to adequately monitor state consistency challenges; therefore, coastal state bureaucracies are granted excessive power.³⁵⁷ Third, they allege that broad interpretations of state consistency authority violate the Constitution.³⁵⁸ Finally, the critics argue that state consistency authority is not necessary for the coordination of federal-state programs.³⁵⁹

What the critics fail to recognize is that the CZMA is designed to balance economic development and environmental protection. Congress established a cooperative federal-state program. The

350. Consistency Appeal of Chevron U.S.A., Inc. from an Objection by the State of Florida, 1993 NOAA LEXIS 2, at *8 (U.S. Dep't of Commerce Jan. 8, 1993).

351. *Id.* at *64, 69.

352. Memorandum from the Office of the Assistant General Counsel for Ocean Services, Nat'l Oceanic and Atmospheric Admin., on the Coastal Zone Management Act Secretarial Appeal Decisions (April 11, 2001) [hereinafter CZMA Appeal Decisions].

353. *Id.*

354. See generally Bruce Kuhse, *The Federal Consistency Requirements of the Coastal Zone Management Act of 1972: It's Time to Repeal This Fundamentally Flawed Legislation*, 6 OCEAN & COASTAL L.J. 77 (2001).

355. Scott C. Whitney et al., *State Implementation of the Coastal Zone Management Consistency Provisions—Ultra Vires or Unconstitutional?*, 12 HARV. ENVTL. L. REV. 67, 84 (1988).

356. *Id.* at 86.

357. *Id.* at 95. See Kuhse, *supra* note 354, at 78.

358. Whitney, *supra* note 355, at 99. See Kuhse, *supra* note 354, at 106.

359. Whitney, *supra* note 355, at 109.

federal government provided the funding for the program and coastal states were granted consistency authority, which was consistently expanded by Congress. Coastal states develop their programs within federal guidelines and possess the expertise regarding their programs. Coastal states can place additional requirements on federal licenses and federal agencies to insure conformity with state coastal zone programs. This has not caused great problems. A 1983 NOAA study showed that the coastal states generally concurred with applicants' certifications.³⁶⁰ For example, 99% of the 435 exploration, development, and production plans were approved by the states, and most controversies were resolved by mediation.³⁶¹

The Secretary of Commerce appeal process has been balanced. There have been fourteen OCS appeals, seven decided in favor of the states and seven in favor of the federal lessees.³⁶² There have been some problems with delay, but Congress addressed this issue.³⁶³ No other statutes grant the coastal states such authority or provide for such federal-state coordination. If the consistency provisions are repealed, it will break the federal promise to the coastal states and engender great hostility, which will lead to delays and litigation.³⁶⁴

VI. THE CLINTON ADMINISTRATION: *RECONCILIATION CONTINUES*

President Clinton came to office promising to "stop the crusade for new offshore drilling"³⁶⁵ and pursue a cooperative federal-state OCS policy.³⁶⁶ Secretary of the Interior, Bruce Babbitt, declared

360. See NAT'L OCEANIC AND ATMOSPHERIC ADMIN., U.S. DEP'T OF COMMERCE, FEDERAL CONSISTENCY STUDY-DRAFT I (1985).

361. *Id.* at I-i.

362. CZMA Appeal Decisions, *supra* note 352.

363. See *generally* Coastal Zone Protection Act of 1996, Pub. L. No. 104-150, 110 Stat. 1380; H.R. REP. NO. 104-521 (1996).

364. See Jack Archer & Joan Bondareff, *Implementation of the Federal Consistency Doctrine-Lawful and Constitutional: A Response to Whitney, Johnson & Perles*, 12 HARV. ENVTL. L. REV. 115, 156 (1988); John A. Duff, *The Coastal Zone Management Act: Reverse Pre-Emption or Contractual Federalism?*, 6 OCEAN & COASTAL L.J. 109, 113 (2001).

365. GOVERNOR BILL CLINTON & SENATOR AL GORE, PUTTING PEOPLE FIRST 97 (1992).

366. A 1993 report by the OCS Policy Committee of the MMS influenced President Clinton's OCS policy. The report made several recommendations. First, the federal government should abandon its hierarchical approach to OCS decision-making and focus on consensus building so that OCS moratoria are unnecessary. Regional task forces should be established to build a consensus on OCS leasing. Second, the cancellation and buyback of the leases identified in 1992 should be investigated pursuant to section 5 of the OCSLA which should not be amended. Third, an OCS revenue sharing or coastal state impact assistance program should be established. Fourth, the Secretary should be empowered to lower royalty rates to stimulate greater production. Incentives should be provided to encourage deepwater development. Finally, scientific environmental review panels should not be established because they would just add another layer of bureaucracy. MMS, MOVING BEYOND, *supra* note 3, at v-vi.

that support for OCS energy development would be contingent on the:

relative need for, and availability of, the resource, possible environmental impacts of the drilling project, possible environmental impacts of any required coastal facilities, possible impacts on fisheries and other ocean or coastal-dependent industries or resources, local economic and social impacts of the project, possible impacts on tourism or other uses of the coastal area, consistency with state coastal management plans, etc.³⁶⁷

The Clinton administration developed the five-year OCS leasing program for 1997-2002.³⁶⁸ One sale, Lease Sale 181, was scheduled for the EGOM region more than one hundred miles off the coast of Florida.³⁶⁹ The OCS moratoria were reconfigured to be consistent with the five-year schedule for the first time. Industry efforts towards exploration off the Florida Panhandle proceeded despite state consistency objections. The seventy-three leases off southwest Florida were canceled and bought back as a result of litigation.³⁷⁰ After fifty-eight years a coastal impact assistance program was finally established. Florida governors, Lawton Chiles and Jeb Bush, and the entire Florida congressional delegation continued to oppose any leasing and development within one hundred miles of the coast.³⁷¹

A. *The Five-Year OCS Program 1997-2002*

The Clinton administration's five-year OCS leasing program for 1997-2002 was based on consensus building, scientific decision-making, and a preference for natural gas. The Clinton administration proceeded in a consultative manner and supported the existing OCS moratoria. This provided the opportunity to resolve several of the ongoing OCS conflicts. Lease Sale 137 and

367. *Proposed Nomination of Bruce Babbitt to be Secretary of the Interior: Hearing before the Senate Comm. on Energy and Natural Resources*, 103d Cong. 196 (1993) (statement of Gov. Bruce Babbitt).

368. MINERALS MGMT. SERV., U.S. DEPT OF THE INTERIOR, PROPOSED FINAL OFFSHORE OCS OIL AND GAS PROGRAM 1997-2002, DECISION DOCUMENT (1996) [hereinafter PROPOSED FINAL PROGRAM].

369. *Id.*

370. *See id.*

371. *Oversight Hearing on Outer Continental Shelf Oil and Gas Leasing: Hearings Before the Subcomm. on Energy and Mineral Resources of the House Comm. on Resources*, 105th Cong. 20-22 (1998) [hereinafter *Oversight Hearing on OCS Leasing*] (statement of Rep. Joe Scarborough from Florida).

Lease Sale 151 in the EGOM and Lease Sale 164 in the Atlantic, which had been precluded by OCS moratoria, were canceled; OCS lease sales were only scheduled in the Alaska and Gulf regions.³⁷²

Leasing in the EGOM remained controversial. There had been ten sales in the area, the last in 1988, and forty-five exploratory wells had been drilled.³⁷³ Most of the EGOM had been placed under moratoria since 1991. The area located south of 26° North latitude and east of 86° West longitude were withdrawn from consideration by President Bush's executive decree until 2001.³⁷⁴ The 1992-1997 OCS leasing program called for one sale in the area not exempted, but this sale was precluded by congressional moratoria.³⁷⁵ President Bush promised to implement studies before any further leasing in the prescribed area, but no funds had been appropriated.³⁷⁶

There were 159 existing leases in the area not withdrawn by President Bush.³⁷⁷ Twenty-nine exploration wells were drilled in the Pensacola and Destin Dome areas, which resulted in six natural gas discoveries.³⁷⁸ There was further interest in Destin Dome and Pensacola blocks. Industry estimates stated that seven trillion cubic feet of natural gas were present in the area and there was good oil and gas potential in the deeper OCS waters near the Central Gulf.³⁷⁹ Florida continued to oppose leasing within one hundred miles of its coast.³⁸⁰

One sale, Lease Sale 181, was scheduled for 2001 in the EGOM area off Alabama, one hundred miles from Florida, in the final five-year program.³⁸¹ Both the Florida and Alabama governors approved the sale.³⁸² The industry is particularly interested in the area because of the potential oil and gas findings in the deepwater

372. *Id.* at 46-48 (statement of Cynthia Quartermain, Director, Minerals Mgmt. Serv., Dep't of the Interior); PROPOSED FINAL PROGRAM, *supra* note 368, at 2-3.

373. See MINERALS MGMT. SERV., U.S. DEPT' OF THE INTERIOR, OCS DRAFT PROPOSED OIL AND GAS LEASING PROGRAM 1997 TO 2002 (1995) [hereinafter OCS DRAFT PROGRAM].

374. See *id.*; see generally EDWARD A. FITZGERALD, THE SEAWEED REBELLION: FEDERAL-STATE CONFLICTS OVER OFFSHORE ENERGY DEVELOPMENT 213-37 (2001).

375. See OCS DRAFT PROGRAM, *supra* note 373.

376. See *id.*

377. See *id.*

378. *Id.*

379. *Id.*

380. In 1993, Governor Chiles and his cabinet submitted a resolution to President Clinton recommending the imposition of a permanent ban on leasing and a three year delay on any further activity on existing leases, which was endorsed by the entire Florida congressional delegation. Governor Chiles felt the risk to Florida's valuable resources was not worth the benefits of the small amount of projected resources. The governor also suggested that a regional task force be established to examine existing data, recommend studies, and develop stipulations. *Id.*

381. PROPOSED FINAL PROGRAM, *supra* note 368, at 51-52.

382. See *id.*

areas.³⁸³ The Deep Water Royalty Relief Act (DWRRA),³⁸⁴ enacted in 1995,³⁸⁵ provides a further stimulus for the sale. The DWRRA grants the Secretary of the Interior discretion to waive OCS royalty payments on new production from tracts at a depth of 200 meters or greater in the Gulf regions that will not be economically viable without such an incentive.³⁸⁶ The reductions can only occur if the volume of production exceeds 17.5 million barrels or the equivalent from 200-400 meters, 52.5 million barrels or the equivalent from 400-800 meters, 87.5 million barrels or the equivalent below 800 meters.³⁸⁷ These reductions cannot occur if the price of crude oil exceeds \$28 per barrel or the price of natural gas exceeds \$3.5 per million BTUs.³⁸⁸

The DWRRA has stimulated OCS activities in the Gulf. In 1990, there were only nine rigs in depths over 1000 feet, now there are forty rigs.³⁸⁹ The number of deepwater wells increased to 505 in the year 2000.³⁹⁰ Ultra-deepwater wells have increased 95%.³⁹¹ Development plans for deepwater tracts have increased 46%.³⁹² Production from deepwater leases has increased 500 times since 1994.³⁹³ Deepwater production constitutes 50% of the Gulf production and 15% of domestic production.³⁹⁴

After the five-year plan was approved, the OCS moratoria in the EGOM were reconfigured so there would be no conflict with Lease Sale 181.³⁹⁵ Drilling restrictions in the area south of 26° North latitude were deleted because they were no longer necessary.³⁹⁶ For the first time, the five-year OCS leasing program and the OCS moratoria were consistent.³⁹⁷

383. *See id.*

384. Act of Nov. 28, 1995, Pub. L. No. 104-58, 109 Stat. 557 (1995).

385. *Alaska Oil Export Ban Lifted*, LI CONG. Q. ALMANAC 5-25, 26 (1995).

386. 43 U.S.C. § 1337(a)(3)(c)(ii) (2000).

387. *Id.*

388. *Id.* at § 1337(a)(3)(c)(v).

389. *Department of the Interior and Related Agencies Appropriations for Fiscal 2002: Hearing Before the Subcomm. on Interior Appropriations of the House Comm. on Appropriations*, 107th Cong. 277-86 (2001) (statement of Thomas Kitsos, Acting Director, Minerals Mgmt. Serv.).

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.* There was a 24% increase in deepwater production from 2000 to 2001.

394. *Id.*

395. *See Oversight Hearing on OCS Leasing*, *supra* note 371; Department of the Interior and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-291, 114 Stat. 922; Act of Nov. 29, 1999, Pub. L. No. 106-113, 113 Stat. 1501 (1999); Act of Oct. 21, 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998); Act of Nov. 14, 1997, Pub. L. No. 105-83, 111 Stat. 1543 (1997).

396. *See Id.*

397. *See Id.*

Through an executive order, President Clinton went even further and expanded the Bush moratoria until 2012.³⁹⁸ Florida officials were critical of the president's decision.³⁹⁹ Even though President Clinton promised no new leasing off southwest Florida or in the Florida Keys, the remainder of the Florida coast was unprotected and action on existing leases off Florida could go forward.⁴⁰⁰ In May 2000, President Clinton announced further plans to protect the U.S. coastal areas.⁴⁰¹

Florida officials, particularly concerned with OCS development off the Florida Panhandle, continued to pursue congressional action. In 1993, the Secretary of Commerce overruled Florida's consistency objection to the Chevron exploration plan in the Destin Dome area.⁴⁰² In 1995, the Secretary of Commerce overruled Florida's consistency objection to the Mobil plan of exploration (POE) for blocks located ten to twenty miles off the city of Pensacola.⁴⁰³ In 1997, Senators Mack and Graham introduced the Florida Coast Protection Act that would: (1) prohibit any further leasing or exploration off Florida until there was adequate environmental analysis that was independently peer reviewed; (2) establish a permanent moratorium one hundred miles from shore; and (3) cancel six leases seventeen miles offshore from the Florida

398. *H.R. 33: Imposing Certain Restrictions and Requirements on the Leasing Under the Outer Continental Shelf Lands Act of Lands Offshore Florida, and for Other Purposes: Hearing on H.R. 33 Before the Subcomm. on Energy and Mineral Res. of the House Committee on Resources*, 106th Cong. 31 (1999) (statement of Mike Joyner, Director, Legislative and Governmental Affairs, Florida Dep't of Env'tl. Protection); BILIANA CICIN-SAIN & ROBERT W. KNECHT, *THE FUTURE OF U.S. OCEAN POLICY* 228-29 (1999); NAT'L OCEANIC AND ATMOSPHERIC ADMIN., U.S. DEP'T OF COMMERCE., *NATIONAL OCEAN CONFERENCE* 188 (1998); *President Clinton Extends for 10 Years, Until 2012, Moratoria on Oil and Gas Drilling*, N.Y. TIMES, June 13, 1998, at A1.

399. See David Cox, *State Prepares for Offshore War*, TAMPA TRIB., June 20, 1998, at Metro 1.

400. Carl Hulse, *Oil-Drilling Ban Leaves Panhandle Unprotected*, LEDGER (Lakeland, Fla.), June 21, 1998, at A17.

401. The Departments of Interior and Commerce, EPA were instructed to strengthen ocean protection by establishing a system of protected marine areas and providing greater coordination between federal agencies. No specific proposals were presented, but the agencies were requested to make suggestions regarding coastal areas that required limitations on fishing, offshore drilling, mining, and dumping. President Clinton stated that our oceans are far more than a playground. Ocean-related economic activities support one out of every six jobs in the U.S. *Clinton Unveils Plan to Save Coastlines*, N.Y. TIMES, May 27, 2000, at A1.

402. Consistency Appeal of Chevron U.S.A., Inc. from an objection by the State of Florida, 1993 NOAA LEXIS 2 (U.S. Dep't of Commerce Jan. 8, 1993).

403. The Secretary determined that exploration furthers the national interest by increasing domestic petroleum development and enhancing U.S. energy security. The national interests outweighed any adverse effects on state resources. There was no violation of the CAA or CWA. There were no reasonable alternatives. Consistency Appeal of Mobil Exploration & Producing U.S. Inc. from an Objection by the State of Florida, 1995 NOAA LEXIS 37 (U.S. Dep't of Commerce Jun. 20, 1995).

Panhandle and compensate the lessees.⁴⁰⁴ Senator Mack stated that, "[t]he reason for our ongoing crusade to end drilling off Florida's coast is simple: In [sic] Florida, a healthy environment means a healthy economy."⁴⁰⁵ Five days later Mobil withdrew its plans.⁴⁰⁶

Chevron moved ahead towards development. In 1996, Chevron submitted a development and production plan and a consistency determination for nine tracts in the Destin Dome, 25 miles south of Pensacola.⁴⁰⁷ The FDER found the project was not consistent with Florida's Coastal Management Program.⁴⁰⁸ Chevron appealed Florida's decision to the Secretary of Commerce. The EPA agreed with Florida that the current information was insufficient to determine the environmental impacts of the project⁴⁰⁹ and refused to consider Chevron's development permits until the appeal was completed. The Clinton administration was expected to make a decision, but Secretary of Commerce Daley resigned in 2000 to become campaign manager for Al Gore.⁴¹⁰

Governor Bush,⁴¹¹ along with Senators Graham and Mack,⁴¹² opposed Chevron's appeal. Florida officials feared that offshore energy development would harm the environment and threaten the

404. See Phil Willon, *Offshore Oil Drilling Ban Sought*, TAMPA TRIB., June 20, 1997, at Metro 1.

405. *Id.*

406. *Mobil's Welcome Retreat*, SARASOTA HERALD-TRIB., June 27, 1997, at 12A.

407. The Destin Dome unit consists of eleven blocks, of which two have been drilled. Preliminary activities indicate a resource potential of between four hundred twenty-five billion and three trillion cubic feet of natural gas. Royalty estimates are between \$12.5 million and \$1 billion. *Department of Interior and Related Appropriations for Fiscal Year 2000: Hearing Before the Senate Comm. on Appropriations*, 106th Cong. 376 (1999) (statement of Secretary Bruce Babbitt).

408. Florida's finding of inconsistency was based on: (1) lack of sufficient information, (2) insufficient time to review response to earlier requests for information, (3) failure to provide requested information, and (4) inconsistencies with Florida statutes. Florida cited statutes which prevent oil and gas activities in state waters (1989/90) and Florida's policy of precluding oil and gas development within 100 miles of its coast due to impacts on marine, coastal, land and economic resources. *Id.*

409. Bill Kaczor, *EPA Sides with Florida in Offshore Drilling Dispute*, ASSOCIATED PRESS NEWSWIREs, Oct. 5, 1999, at 19:03:00, WESTLAW, AllNewsPlus. Senator Graham noted that the EPA's finding "reinforces our long-held belief that offshore gas exploration poses an unacceptable risk to Florida's environmental and economic future." Carl Hulse & Sean Loughlin, *EPA Helps Florida Fight Gulf Gas Drilling*, LEDGER (Lakeland, Fla.), Oct. 11, 1999, at A12.

410. Craig Pittman, *Decision Being Delayed on Offshore Gas Drilling*, ST. PETERSBURG TIMES, June 25, 2000, at B3.

411. *Bush Promises No Offshore Oil Drilling*, PALM BEACH POST, Jan. 1, 1999, at A25.

412. Senators Graham and Mack wrote to the Secretary that, "[y]our administration's opposition to offshore drilling in Florida has been clear from the beginning.... We hope that you remain our ally in our effort to protect Florida's coastlines." *Florida Senators Take Anti-Drilling Appeal to Clinton*, ASSOCIATED PRESS NEWSWIREs, Oct. 26, 1999, at 19:08:00, WESTLAW, AllNewsPlus.

vital tourist industry.⁴¹³ Onshore support facilities would change the character of the coast, pollute the environment, and decrease real estate values. The northwest Florida economy was tied to the beach, weather, and the environment. The five western counties in Florida generated \$8 billion in tourist revenues in 1996. Three cities: Pensacola, Panama City, and Fort Walton Beach alone brought in \$1.5 billion.⁴¹⁴ Officials also feared that offshore development would threaten Florida's fishing industry. Florida has rich estuaries, mangroves, and sea grass areas, which are important to the fishing industry.⁴¹⁵ Florida congresspersons continued to introduce legislation opposing offshore energy development.⁴¹⁶

B. Mobil v. United States

The cancellation and buyback of the seventy-three leases off southwest Florida became intertwined in the litigation regarding OCS leases off North Carolina.⁴¹⁷ From 1981 through 1983, the Department of the Interior sold fifty-three OCS leases off the coast of North Carolina.⁴¹⁸ Mobil moved forward with its plans for exploration on the Manteo Unit.⁴¹⁹ The Outer Banks Protection Act (OBPA) was enacted,⁴²⁰ which prevented the Secretary from approving any POE until October 1, 1991.⁴²¹ The Secretary then had to certify to Congress that adequate information was available to proceed safely and wait forty-five days during a continuous congressional session.⁴²² The required certification could not be made until after the newly created Environmental Sciences Review

413. *Oversight Hearing on OCS Leasing*, *supra* note 371, at 20-23 (statement of Rep. Joe Scarborough from Florida), 31-33 (statement of Rep. Porter J. Goss from Florida).

414. *Id.* at 29-30 (statement of Estus Whitfield, Env'tl. Advisor to Gov. Lawton Chiles of Florida).

415. According to Senator Graham, 90% of the Gulf marine fish are caught off western Florida. Fish landings off western Florida generated \$130 million and fish processing in western Florida generated \$350 million. Recreational fishing along the Panhandle for out-of-state visitors generated \$92 million dollars. *Impacts of Coastal Areas and Communities Caused by Offshore Oil and Gas Exploration and Development: Hearing Before the Senate Comm. on Energy and Natural Resources*, 106th Cong. 10-11 (1999) (statement of Senator Bob Graham from Florida).

416. H.R. 33, 106th Cong. (1999).

417. See Edward A. Fitzgerald, *Conoco Inc. v. United States: Sovereign Authority Undermined by Contractual Obligations on the OCS*, 27 PUB. L. CONTRACT L.J. 755, 763-64 (1998) [hereinafter Fitzgerald, *Conoco*].

418. *Id.* at 757.

419. See *id.* at 759-60.

420. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 555 (codified at 33 U.S.C. § 2753 (1994)), *repealed by* Act of April 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996); see generally Fitzgerald, *Conoco*, *supra* note 417, at 760-63.

421. 33 U.S.C. § 2753(c)(1) (1994) (repealed 1996).

422. *Id.*

Panel (ESRP) submitted its findings and recommendations regarding the adequacy of available oceanographic, ecological, and sociological information.⁴²³ If the Secretary's findings differed from the ESRP, the Secretary was required to explain the differences in the certification.⁴²⁴ The OBPA applied to all subsequent OCS activities in the region.

Following the enactment of the OBPA, the Department of the Interior suspended the North Carolina leases, including the payment of rents; extended the terms of the leases; and rejected the POE submitted by Mobil for the Manteo Unit.⁴²⁵ If the OBPA had not been enacted, exploration still could not have gone forward because North Carolina had determined that Mobil's draft National Pollution Discharge Elimination System permit (NPDES)⁴²⁶ and POE were not consistent with its coastal management program.

The ESRP submitted its report on the Mobil POE, recommending five socioeconomic studies and a better survey of the ocean bottom, and the Secretary of the Interior agreed to perform these studies.⁴²⁷ In April 1992, Secretary Lujan certified to Congress that sufficient information was available to approve the POE for one well on the Manteo Unit, but no action would occur until the studies recommended by the ESRP were completed.⁴²⁸ The lessees were informed that the suspension required by OBPA no longer applied to their leases in the Manteo Unit and were asked if the suspensions should be continued.⁴²⁹ Mobil requested that the suspensions be maintained because North Carolina's rejection of its consistency certification was being appealed, and the Secretary continued the suspensions.⁴³⁰ In September 1994, the Secretary of Commerce sustained North Carolina's objections to Mobil's NPDES permit and POE.⁴³¹

423. *Id.* at § 2753(e)(1).

424. *Id.* at § 2753(c)(3)(A).

425. Fitzgerald, *Conoco*, *supra* note 417 at 762.

426. A NPDES permit is issued by the EPA for all discharges from a drilling unit or production platform. No discharges are allowed without a permit. *See* 33 U.S.C. § 1342 (2000); MINERALS MGMT. SERV., U.S. DEP'T OF THE INTERIOR, 1991 ANNUAL REPORT TO CONGRESS 13 (1992).

427. *DOI Appropriations 1993: Justifications for Budget Estimates: Hearing Before House Subcomm. on Interior of the House Comm. on Appropriations*, 102d Cong. 510, 590 (1992) (statement of Scott Sewell, Director, Mineral Mgmt. Serv.).

428. *DOI Appropriations for 1994, Part 13: Hearing Before the Subcomm. on Interior of the House Comm. on Appropriations*, 103d Cong. 391-94, 477-81 (1993) (statement of Carolita Kalluhar, Director, Mineral Mgmt. Serv.).

429. *See id.*

430. *See id.*

431. *Mobil Oil Exploration v. Brown*, 920 F. Supp. 1, 2 (D.D.C. 1996); *Drilling Discharge Consistency Appeal of Mobil Oil Exploration & Producing Southeast, Inc. from an Objection by the State of North Carolina*, 1994 NOAA LEXIS 34, at *108 (U.S. Dep't of Commerce Sept.

In 1992, Conoco and several other petroleum companies, which held leases offshore Alaska, North Carolina, and southwest Florida brought suit alleging that the OBPA, President Bush's directive, and congressional appropriation bans on exploration "breached the contracts at issue, frustrated performance thereof, rendered such performance impracticable, or constituted a taking in violation of the Fifth Amendment of the U.S. Constitution."⁴³²

The federal government then settled the claims regarding the southwest Florida, Bristol Bay, and North Carolina leases, paying \$198 million to nine major oil companies.⁴³³ Conoco received \$23 million, while the eight other companies shared the remaining \$175 million.⁴³⁴ Governor Chiles hailed the settlement as "a tremendous victory for the people of Florida."⁴³⁵ Marathon and Mobil reserved their rights and claims regarding five leases off North Carolina, which had been acquired in 1981.⁴³⁶

In April 1996, the U.S. Court of Federal Claims in *Conoco v. United States* determined that the OBPA constituted a breach of contract.⁴³⁷ The OCS lessees had not contemplated the enactment of the OBPA, which indefinitely precluded the Secretary from considering any POE for the North Carolina leases.⁴³⁸ The court ordered the federal government to pay Mobil and Marathon \$156 million in restitution for their bonus bids, but denied any recovery for the annual rentals.⁴³⁹ Several weeks later the OBPA was repealed.⁴⁴⁰

The Federal Circuit Court of Appeals reversed, holding that even though the language in the leases did not contemplate future legislation and regulations like the OBPA, the OBPA did not constitute a material breach of contract.⁴⁴¹ The lease required the lessees to "comply with all regulations and orders relating to exploration, development, and production."⁴⁴² The OCSLA mandated that lessees "obtain federal and state approvals and

2, 1994); Plan of Exploration Consistency Appeal of Mobil Oil Exploration & Producing Southeast, Inc. from an Objection by the State of North Carolina, 1994 NOAA LEXIS 33, at *90 (U.S. Dep't of Commerce Sept. 2, 1994).

432. See *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 314 (1996).

433. Booth Gunter, *Nine Firms Surrender Oil Leases*, TAMPA TRIB., Aug. 1, 1995, at Metro 1.

434. *Id.*

435. *Id.*

436. See *id.*; *Marathon Oil Co. v. United States*, 158 F.3d 1253 (Fed. Cir. 1998).

437. 35 Fed. Cl. 309 (1996).

438. *Id.*

439. *Marathon Oil Co.*, 158 F.3d at 1256-58.

440. Act of April 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321(1996).

441. *Marathon Oil Co.*, 158 F.3d at 1256-58.

442. *Id.* at 1258.

certifications before they may explore or develop the leased areas."⁴⁴³ The lessees were required to attain a consistency determination before the POE's could be approved by the Secretary of the Interior. North Carolina's objection to the consistency certification had been upheld by the Secretary of Commerce. The lessees failure to obtain the consistency certification, not the OBPA, precluded the approval of the POE. The federal government was not liable for this delay. Nevertheless, the court noted that:

[h]ad North Carolina concurred in the CZMA certification of the POE, and the Secretary refused to grant a permit or license due to the OBPA, then appellees' contentions might have merit because they could invoke the contract law principle that a party hindering the other's performance is considered in breach.⁴⁴⁴

The Supreme Court, reversing the Federal Circuit, held that the OBPA did constitute a material breach of the contract.⁴⁴⁵ The OCSLA did not authorize any suspensions like the OBPA.⁴⁴⁶ Mobil and Marathon did not waive their restitution claims by demanding contract compliance because the federal government never fulfilled any part of the bargain.⁴⁴⁷ The consistency objections by North Carolina did not affect Mobil and Marathons claims for restitution.⁴⁴⁸

The Court's decision was incorrect. The decision was inconsistent with lease terms. The

OBPA did not constitute a material breach of the contract. The Secretary could have accomplished the same ends pursuant to his suspension authority. Restitution was unwarranted.⁴⁴⁹

1. Lease Terms

The key issue in the litigation was the meaning of the lease terms, particularly that leases are subject to "all other applicable statutes and regulations."⁴⁵⁰ The Court held that the phrase did not encompass future legislation like the OBPA, but only existing

443. *Id.*

444. *Id.* at 1260.

445. Mobil Oil Exploration & Producing S.E., Inc. v. United States, 530 U.S. 604, 605 (2000).

446. *Id.*

447. *Id.*

448. *Id.* at 623.

449. Fitzgerald, *Conoco*, *supra* note 417.

450. *Mobil Oil*, 530 U.S. 604.

statutes and regulations and future OCSLA regulations.⁴⁵¹ The Court failed to recognize the plain meaning of the contract language, the limited nature of rights acquired by the OCS lessees, and the purposes of the OCSLA.

The contract states that OCS leases are subject to "all other applicable statutes and regulations."⁴⁵² The Restatement notes that "where language has a generally prevailing meaning, it is interpreted in accordance with that meaning."⁴⁵³ Thus, the contract language encompassed the OBPA, which dealt with the administration of OCS leases. Furthermore, nothing limits the language to statutes and regulations existing at the time of the lease's execution.

OCS lease terms must be defined in light of the authorizing statutes. Congress intended to exercise both the proprietary powers of a landowner and the police powers of a sovereign in the OCSLA.⁴⁵⁴ An OCS lessee only acquires limited property rights, which are subject to the federal government's continued regulatory authority.⁴⁵⁵ The courts have recognized the dual nature of OCS leases. In several cases arising from the Santa Barbara oil spill in 1969, the courts noted that OCS leases remained subject to Secretary of the Interior's continued regulatory authority.⁴⁵⁶ In *Secretary of the Interior v. California*, which held that OCS lease sales were not subject to state consistency authority, the Court stated that "[t]he purchase of an OCS lease, standing alone, entails no right to explore, develop, or produce oil and gas resources on the OCS ... [t]hose activities may not begin until separate federal approval has been obtained."⁴⁵⁷ OCS lessees only receive "priority over other interested parties in submitting for federal approval a plan for exploration, production, or development."⁴⁵⁸

Contract terms must be interpreted in light of the purposes of the authorizing statute.⁴⁵⁹ The OCSLA is designed to: promote the discovery of new hydrocarbon resources, but in a manner that balances orderly energy resource development with the protection

451. *Id.* at 615.

452. *Id.*

453. RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(a) (1981).

454. See Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23, 44 (1953).

455. See 43 U.S.C. § 1344(a) (2000).

456. See *Union Oil Co. v. Morton*, 512 F.2d 743, 747-49 (9th Cir. 1975); *Pauley Petroleum Inc. v. United States*, 591 F.2d 1308, 1325 (Ct. Cl. 1979); *Sun Oil Co. v. United States*, 572 F.2d 786, 814 (Ct. Cl. 1978).

457. 464 U.S. 312, 340-41 (1984).

458. *Id.* at 337.

459. See *Union Oil Co.*, 512 F.2d at 748-49; RESTATEMENT (SECOND) OF CONTRACTS § 207 (1981).

of the human, marine, and coastal environments; minimize federal-state conflicts; and eliminate conflicts between energy development and the recovery of other resources.⁴⁶⁰ The OBPA implemented these goals.

2. Breach of Contract

The Supreme Court determined that the enactment of the OBPA established new conditions and constituted a material breach of contract by interfering with the Secretary's obligation to approve the POE within thirty days of its submission.⁴⁶¹ A material breach of contract undermines the central purposes of the contract. The standard of materiality is "necessarily imprecise and flexible" and contingent upon "the nature and effect of the violation in light of how the particular contract was viewed, bargained for, entered into, and performed by the parties."⁴⁶²

The delay caused by the OBPA did not constitute a material breach of the contract. The Court misconstrued the requirements of the OCSLA, which include environmental protection. Section 1340(c) of the OCSLA requires the lessee to submit the POE. The Secretary must approve the plan within thirty days of its submission, if it is consistent with the OCSLA, the regulations issued under the OCSLA, and the provisions of the lease.⁴⁶³ If these criteria are not met, the Secretary "shall require such modifications ... as are necessary to achieve such consistency."⁴⁶⁴ The Secretary shall not approve a plan if it poses a serious risk and "cannot be modified to avoid such condition."⁴⁶⁵ In such a case, the Secretary may proceed to cancel the lease.⁴⁶⁶ The thirty-day time period is not mandatory. There are no consequences in the event it is not met.⁴⁶⁷ Further, nothing in the OCSLA precludes the suspension of the time period. The legislative history acknowledges that "the Secretary has 30 days to approve or modify such a plan, but may delay approval if he believes a suspension of activities on the leases is warranted."⁴⁶⁸ The OBPA, an appropriate statute, recognized the

460. See 43 U.S.C. 1332(3)-(6) (2000); H.R. REP. NO. 95-590, at 51-52 (1978); S. REP. NO. 95-1474, at 79-80 (1978).

461. *Mobil Oil Exploration & Producing S.E., Inc. v. United States*, 530 U.S. 604, 620-21(2000).

462. *Stone Forest Indus., Inc. v. United States*, 973 F.2d 1548, 1551 (Fed. Cir. 1992); see RESTATEMENT (SECOND) OF CONTRACTS § 241 cmts. a, b (1981).

463. 43 U.S.C. § 1340(c) (2000).

464. *Id.* at § 1340(c)(1).

465. *Id.*

466. *Id.*

467. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 64 (1993).

468. H.R. REP. NO. 95-590, at 49 (1978).

environmental sensitivity of the area, declared the prior studies to be inadequate, and mandated new studies. Congress instructed the Secretary of the Interior to comply with the environmental protection goals of OCSLA. Congress felt that the minimum delay caused by the OBPA would not pose any problems.⁴⁶⁹

The North Carolina lessees did not suffer any injury as result of the OBPA. Secretary Lujan suspended activities on the Manteo leases for approximately twenty months. After the Secretary certified that sufficient information was available and was about to lift the OBPA suspensions, the lessees requested the continuation of the suspensions to appeal North Carolina's negative consistency determinations. The lessees failure to obtain North Carolina's approval alone delayed any exploration activities on the Manteo Unit before, during, and after the suspension mandated by the OBPA. This independently precluded federal liability for a breach of contract.

The Restatement declares that if the duty owed by the breaching party "would have been discharged by impracticability or frustration before any breach by non-performance," the breaching party's "duty to pay damages for total breach by repudiation is discharged."⁴⁷⁰ Frustration of purpose "deals with the problem that arises when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract."⁴⁷¹ The "non-occurrence of the frustrating event must have been a basic assumption on which the contract was made."⁴⁷² Case law also holds that the federal government is not liable for a breach, if an independent activity frustrates contract performance.⁴⁷³

3. Suspension Authority

The Supreme Court held that the Secretary's authority to suspend OCS leases does not support his actions pursuant to the OBPA.⁴⁷⁴ The Court refused to acknowledge that the Secretary could have accomplished the same end pursuant to the OCSLA, which allows the Secretary to suspend an OCS lease "if there is a threat of serious, irreplaceable, or immediate harm or damage to life

469. See 33 U.S.C. § 2753(b), (d) (repealed 1996).

470. RESTATEMENT (SECOND) OF CONTRACTS § 254(1) (1981), as cited in Robin Kundis Craig, *Mobil Oil Exploration, Environmental Protection, and Contract Repudiation: It's Time to Recognize the Public Trust in the Outer Continental Shelf*, 30 ELR 11104, 11115 (Dec. 2000).

471. RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981).

472. *Id.* at § 265 cmt. a.

473. *William F. Klingensmith, Inc. v. United States*, 731 F.2d 805, 809 (Fed. Cir. 1984); *See Merritt-Chapman & Scott Corp. v. United States*, 528 F.2d 1392, 1397 (Ct. Cl. 1976).

474. *Mobil Oil Exploration & Producing S.E., Inc. v. United States*, 530 U.S. 604, 618 (2000).

(including fish and other aquatic life), to property, to any mineral deposit (in areas leased or not leased), or to marine, coastal, or human environment."⁴⁷⁵ The lease terms are extended for the suspension period.⁴⁷⁶

The regulations permit the Secretary to suspend OCS leases when it is "necessary for the implementation of the requirements of the National Environmental Policy Act or to conduct an environmental analysis."⁴⁷⁷ The NEPA and OCSLA are complementary statutes which protect the environment.⁴⁷⁸ The OBPA declared that there was insufficient information regarding petroleum development in the region. Past studies were inadequate.⁴⁷⁹ The additional studies mandated by OBPA were consistent with OCSLA and necessary to comply with NEPA, which was another applicable and appropriate statute. The regulation allowed the Secretary to suspend the leases until the studies were completed.⁴⁸⁰

The regulations allow the Secretary to suspend the lease if the lessee experiences an inordinate delay in obtaining the necessary permits, including administrative and judicial challenges.⁴⁸¹ This regulation can be triggered by either the lessee or the Secretary of the Interior. The Secretary's suspension of the leases to allow the lessees to appeal North Carolina's negative consistency determination was supported by the regulation.

4. Restitution

The Court held that the Secretary of the Interior's failure to comply with the thirty-day approval period was "substantial," depriving the companies of the benefit of their bargain ... and the Government's communication of its intent to commit that breach amounted to a repudiation of the contracts."⁴⁸² Furthermore, Mobil and Marathon's attempts to comply with the contract did not constitute a waiver of their restitution claims because the federal government never attempted to meet the contract conditions.⁴⁸³

Restitution is only available when "a breach by non-performance gives rise to a claim for damages for total breach" or on a

475. 43 U.S.C. § 1334(a)(1)(B) (2000).

476. *Id.* at § 1334(a)(1), (2).

477. 30 C.F.R. § 250.10(b)(4) (1997).

478. *Village of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984).

479. 33 U.S.C. § 2753(b), (d) (2000).

480. *Union Oil Co. v. Morton*, 512 F.2d 743, 751-52 (9th Cir. 1975); *Gulf Oil Corp. v. Morton*, 493 F.2d 141, 146 (9th Cir. 1973).

481. 30 C.F.R. § 250.10(b)(6) (2000).

482. *Mobil Oil Exploration & Producing S.E., Inc. v. United States*, 530 U.S. 604, 621 (2000).

483. *Id.*

repudiation.⁴⁸⁴ The injured party can only receive restitution if the action "so substantially impairs the value of the contract to the injured party ... that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance."⁴⁸⁵ Corbin states that:

[r]estitution is an available remedy only when the breach is of vital importance.... In the case of a breach by non-performance ... the injured party, however, cannot maintain an action for restitution of what he has given the defendant unless the defendant's non-performance is so material that it is held to go to the 'essence;' it must be such a breach as would discharge the injured party from any further contractual duty on his own part.⁴⁸⁶

Repudiation only occurs "if there is an action that would amount to a total breach, and there is only such a breach if the suspect action destroys the essential object of the contract."⁴⁸⁷

There was no total breach of contract and no repudiation. Justice Stevens found that the federal government's failure to comply with the thirty-day requirement was not the basis of total breach.⁴⁸⁸ Time is not of the essence in the contracts. Mobil and Marathon waited seven years of the ten-year lease to begin the Outer Banks proposal, then waited another two years after the OBPA to file suit. Justice Stevens noted that the OCS process is fraught with "inordinate delays."⁴⁸⁹ Approval of the POE was "a gateway to the company's enjoyment of all other rights," but "was only one gateway of many that the petitioners knew they had to get through in order to reap the benefit of the OCSLA leases, and even that gate was not closed completely, but only narrowed."⁴⁹⁰

Mobil and Marathon's actions were inconsistent with their restitution claims.⁴⁹¹ An aggrieved party can seek restitution after a material breach of the contract. However, if the party continued to act as if the contract is valid, the party waives the restitution

484. RESTATEMENT (SECOND) OF CONTRACTS § 243(1) (1981).

485. *Id.* at § 243(4).

486. *Mobile Oil*, 530 U.S. at 630 (Stevens, J., dissenting)(citing 5 CORBIN ON CONTRACTS § 1104).

487. *Id.*

488. *Id.* at 638-39.

489. *Id.*

490. *Id.* at 638.

491. RESTATEMENT (SECOND) OF CONTRACTS § 373 cmt. a (1981).

claim.⁴⁹² Mobil and Marathon continued to treat the contracts as valid.⁴⁹³ Two days after the enactment of the OBPA, the companies submitted the POE. After North Carolina's negative consistency determination, the companies requested suspensions to appeal to the Secretary of Commerce. When the Secretary refused to reverse the state's determination, the companies asked for additional suspensions to challenge the Secretary's decision in the courts. The federal government granted the suspensions and complied with the conditions of the contract.⁴⁹⁴

This case demonstrates the Court's effort to turn the clock back to pre-New Deal jurisprudence when common law rights limited governmental action.⁴⁹⁵ Contract and property law principles have been resurrected to undermine administrative-political regulation.⁴⁹⁶ This has been manifested in the resurgence of the takings clause⁴⁹⁷ and the curtailment of the sovereign acts and unmistakability doctrines in contract law.⁴⁹⁸ The Court fails to recognize that governmental regulation through the political process is a means for realizing the public interest in the modern administrative state.

C. OCS Revenue Sharing

Efforts to establish an OCS revenue sharing program continued in the Clinton Administration. In 1993⁴⁹⁹ and 1997,⁵⁰⁰ the Department of the Interior's OCS Policy Committee recommended OCS revenue sharing as a means to maintain the existing state coastal and marine resource programs, offset the impacts of OCS energy development, strengthen the federal-state partnership, provide a reasoned approach for the transfer of federal funds to the states, and help the states participate in the OCS process. One of the major problems was the identification of budget offsets for the

492. *Id.*

493. *Mobil Oil.*, 530 U.S. at 631-32.

494. *Id.*

495. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 425-426 (1987); see also CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION, RECONCEIVING THE REGULATORY STATE* (1990); MICHAEL S. GREVE, *THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW* (1996).

496. *Id.*

497. *Dolan v. Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina*, 505 U.S. 1003 (1992); *First Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n.*, 483 U.S. 825 (1987).

498. See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 116 S. Ct. 2432 (1996).

499. MMS, *MOVING BEYOND*, *supra* note 3, at 57-62.

500. MINERALS MGMT. SERV., U.S. DEP'T OF THE INTERIOR, *COASTAL IMPACT ASSISTANCE: A REPORT FROM THE COASTAL IMPACT ASSISTANCE WORKING GROUP TO THE OCS POLICY COMMITTEE* (1997).

expenditures, which was required by the Congressional Budget Enforcement Act to prevent any net loss to the Treasury. New programs had to be offset by a corresponding increase in revenues or decrease in expenditures within a five to seven year window. Furthermore, budget caps were established on domestic spending that included ceilings on Department of the Interior expenditures. OCS revenue sharing would have to compete with other Department of the Interior programs.⁵⁰¹

From 1998 through 2000, the federal government experienced budget surpluses. OCS revenue sharing bills were introduced, following two basic approaches. The Conservation and Reinvestment Act (CARA) set aside 60% of the OCS revenues to be utilized for: OCS impact assistance; state, local, and urban conservation and recreation; and wildlife conservation and recreation.⁵⁰² The Resources 2000 Act was designed "to expand upon the promises of the Land and Water Conservation Act of 1965 ... and the National Historic Preservation Act ... by providing permanent funding for the protection and enhancement of the Nations natural, historic, and cultural resources."⁵⁰³

In October 1999, the Congressional Budget Office announced that OCS revenue sharing would not affect appropriation budget caps "because creating new direct spending authority does not constitute a change in budgetary concepts or definitions."⁵⁰⁴ In November 1999, a bipartisan compromise was then negotiated between the supporters of CARA and Resources 2000 in the House Resources Committee and sent to the floor.⁵⁰⁵ In May 2000, the House overwhelmingly passed CARA,⁵⁰⁶ which would establish a fund of \$3 billion from qualified OCS revenues for coastal state impact assistance and coastal conservation.⁵⁰⁷

CARA moved over to the Senate. A bipartisan compromise developed in the Senate Natural Resources Committee, which distributed \$3 billion in qualified OCS revenues as an entitlement program to deal with OCS impacts and fund: the Land and Water Conservation Fund, state wildlife programs, urban park and

501. *Id.* at 8; Pub. L. No. 101-508, 104 Stat. 1388 (1990).

502. H.R. 701, 106th Cong. (1999) (introduced by Sen. Young).

503. H.R. 798, 106th Cong. § 3(b) (1999).

504. Press Release, United States House committee on Resources, Landmark Conservation Bill Would Not Affect Appropriations Budget Caps (Oct. 14, 1999).

505. The committee vote was thirty-seven to twelve. Press Release, United States House Committee on Resources, Landmark Conservation, Wildlife & Recreation Legislation Approved by United States House Committee on Resources (Nov. 10, 1999).

506. The vote was 315 (118 Republican, 196 Democrat, 1 Independent) to 102 (93 Republican, 8 Democrat, 1 Independent).

507. Edward A. Fitzgerald, *The Conservation and Reinvestment Act of 1999: Outer Continental Shelf Revenue Sharing*, 30 ENVTL. L. REP. 10165 (2000).

recreation recovery, urban and community forestry, historic preservation, farm and ranch land protection, forestry protection, rural development assistance, youth conservation corps, and payment in lieu of taxes.⁵⁰⁸ Two funds were established to deal with impacts of OCS development and coastal conservation.⁵⁰⁹

However, CARA got stalled in the Senate. There was strong opposition from western senators, who were against federal land acquisition, and appropriators, who feared losing control over funds.⁵¹⁰ After Senate Majority Leader Lott conceded there was no chance of the bill coming to floor as free-standing legislation,⁵¹¹ CARA became intertwined with the Department of the Interior's appropriation bill. Conferees worked out compromise, which created a fund devoted to land acquisition, conservation and maintenance,⁵¹² but killed CARA.⁵¹³ When CARA supporters threatened to derail the compromise, Senator Lott promised to push for more money in another appropriation bill.⁵¹⁴

Coastal state impact aid amounting to \$150 million for fiscal 2001 was provided in the Commerce-Justice-State Departments' appropriation bill.⁵¹⁵ The newly enacted section 31 of the OCSLA dealing with OCS impact assistance instructs the Secretary of Commerce to make payments to a producing state with an approved coastal impact assistance plan and to coastal political subdivisions. Each producing coastal state will receive 60% of the amount appropriated, which will be divided equally among all producing states, and 40% of the amount appropriated will be divided according to OCS production, except that no state can receive more than 25% of the fund in any year.⁵¹⁶ The amount each state shall receive is based upon the qualified revenues generated off the

508. *See id.*

509. *See id.* Senate Energy and Natural Resources Committee reported out a bill by a vote of thirteen to seven.

510. *Conservation Bill Stalls in the Senate as Opponents Fan Fears of 'Land Grabs'*, LVI CONG. Q. ALMANAC 10-6 (2000).

511. *House Adopts Conference Report, Senate Clears Bill*, LVI CONG. Q. ALMANAC 2-93, 2-95 (2000).

512. *Id.*

513. Senator Murkowski angrily stated that:

the Interior Appropriation Committee has substituted end-of-the-year smoke and mirrors for the C.A.R.A. It is possible that none of the accounts might ever be appropriated at all. Nothing says the accounts have to be funded. And, because this program does not have formulas for state and local money, it can all be absorbed in Washington, D.C.

Press Release, Senate Committee on Energy and Natural Resources, Murkowski: Appropriators Put Smoke and Mirrors in Place of CARA (Sept. 29, 2000).

514. *Deal Reached on Land Funds, Policy Rider*, LVI CONG. Q. ALMANAC 2-93, 2-95(2000).

515. *Id.* at 2-93.

516. 43 U.S.C. § 1356(a) (2000).

producing state as a percentage of the amount of revenues generated off all of the coastal states from January 1, 1995 through December 31, 2000.⁵¹⁷

Each coastal state must develop a coastal impact assistance plan by July 1, 2001, which identifies an agency, a program of implementation, a contract with political subdivision, a certification of public participation, and a consideration of other federal resources.⁵¹⁸ Funds can only be utilized in accordance with the plan.⁵¹⁹ The Secretary reviews the expenditure of the funds.⁵²⁰

VII. THE GEORGE W. BUSH ADMINISTRATION: *BROTHER HELPS BROTHER*

President George W. Bush came to office seeking to expand our domestic supply of energy⁵²¹ but promising to maintain the OCS moratoria off Florida. Secretary of Interior Gale Norton supports the existing moratoria off Florida and wants "a cooperative working relationship with the States."⁵²² Secretary Norton declared that, "I am firmly committed to a process that I call Four C's: they are consultation, cooperation, and communication—all in the service of conservation."⁵²³ Jeb Bush, the Governor of Florida and brother of the President, along with entire Florida congressional delegation,

517. If more than one state is within two hundred miles of the center of a tract, each state shall share proportionality. No revenues generated from areas where OCS moratoria were in effect on January 1, 2000 are eligible unless the lease was issued before January 1, 2000 and production has begun. Thirty-five percent of each state's share must be passed through to coastal political subdivisions according to a formula, which is based upon (a) 25% of the political subdivision's population/state coastal population; (b) 25% of the shoreline mileage of the political subdivision/state mileage; (c) 50% on the proximity to the leased tract. Except in California, where a political subdivision having an oil refinery (but not within two hundred miles of an OCS tract) is treated as if it is fifty miles away. If the state does not have an approved state plan, the other states receive that share. *Id.*

518. *Id.*

519. Authorized uses include: (1) those identified in the Senate Committee version of CARA; (2) projects and activities for the conservation, protection or restoration of wetlands; (3) mitigation of damages to wildlife or natural resources, including activities under the Oil Pollution Control Act; (4) planning and assistance and administrative costs to comply with OCS activities; (5) implementation of federal approved marine, coastal, or comprehensive conservation management plan; and (6) mitigation of OCS activities, including onshore infrastructure projects and other public service needs (only 23% of the funds can be utilized under this section). *Id.*

520. *Id.*

521. Frank Bruni, *The 2000 Campaign; The Texas Governor Bush, in Energy Plan, Endorses New U.S. Drilling to Curb Prices*, N.Y. TIMES, Sept. 30, 2000, at A1.

522. *Proposed Fiscal Year 2002 Budget for the Department of the Interior and the National Park Service: Hearing Before the Senate Comm. on Energy and Natural Resources*, 107th Cong. 28-31 (2001) (statement of Secretary Norton).

523. Press Release, United States Dept. of Interior, Secretary Norton Announces Eastern Gulf of Mexico Base Sale 181, Scheduled for Dec. (Oct. 26, 2001) [hereinafter Press Release, EGOM Base Sale].

oppose OCS activities off the coast of Florida.⁵²⁴ The Bush administration faced conflict with Florida over Lease Sale 181 in the EGOM, the appeal of Chevron's consistency certification for development off Pensacola, and the expansion of OCS development, but was willing to accommodate the state's concerns. This facilitated the reelection of Governor Jeb Bush in 2002 and enhances the President's electoral possibilities in Florida for 2004.⁵²⁵

A. Lease Sale 181

During his presidential campaign, George W. Bush agreed to maintain the moratoria on new leasing off the coast of Florida but felt development on the existing one hundred fifty leases should go forward. The candidate promised to listen "very carefully to Governor Jeb Bush," and "work with state leaders to determine on a case-by-case basis whether drilling ought to go forward on the leases in place."⁵²⁶

Lease Sale 181 in EGOM is the first sale in the EGOM since 1988 and the only sale in the 1997-2002 program in the EGOM region. Initially, the proposed area for the sale included 5.9 million acres along the border of the Central Gulf region one hundred miles from the Florida coast.⁵²⁷ There was also a stovepipe shaped section that extended thirty miles from the Florida coast, which was very contentious. Potential resources in the area were estimated to be four hundred million barrels of oil and three to seven trillion cubic feet of natural gas.⁵²⁸ Governor Bush and the entire Florida

524. Katharine Q. Seelye, *Local Issues Prodded Republicans in House Votes Against Drilling*, N.Y. TIMES, June 23, 2001, at 1.

525. There have been accusations that the Bush administration is playing favoritism by agreeing to buy back the Florida leases, but not the 36 leases off the coast of California. Richard A. Opiel, *President's Help for his Governor Brother Includes More Than Campaign Stops*, N.Y. TIMES, October 18, 2002, at A18; see also, *Bush Asked to Follow Florida Precedent By Buying Oil Leases Along California Coast*, 33 Env't Rep. (BNA) 1275 (June 7, 2002); *Interior Rejects Request by California On Purchase of 36 Offshore Oil-Gas Leases*, 33 Env't Rep. (BNA) 1331 (June 14, 2002); *Norton Says Dispute Over California Leases Could Have Wider Impact on Development*, 33 Env't Rep. (BNA) 1404 (June 21, 2002). California is litigating whether the federal extension of the lease periods on the California leases is a federal action subject to state consistency review pursuant to the CZMA. *California v. Norton*, 150 F.Supp.2d 1046 (N.D. Cal. 2001); see also, *California Governor Rejects Bush Overture To Settle Suit Over Offshore Oil, Gas Leases*, 33 Env't Rep. (BNA) 129 (Jan.18, 2002); *GOP Gubernatorial Candidate in California Gets Norton's Response on Offshore Leases*, 33 Env't Rep. (BNA) 1404 (June 21, 2002).

526. Carl Hulse, *Narrow Divide over Deep Wells; The Presidential Candidates Agree on Everglades, Subtly Differ on Offshore Drilling*, SARASOTA HERALD-TRIB., Oct. 29, 2000, at A1.

527. See David Ivanovich, *Bush Bows to Florida on Drilling; Oil Industry Disappointed*, HOUSTON CHRON., July 3, 2001, at 1; see also Thomas B. Pfankuch, *Bushes Make Deal on Gulf Oil Leases*, FLA. TIMES-UNION (Jacksonville, Fla.), July 3, 2001, at A1.

528. See *id.*

congressional delegation objected to any leasing within one hundred miles of the Florida coast.⁵²⁹

Florida congresspersons worked to halt the lease sale. An bipartisan amendment sponsored by Representatives Davis and Scarborough was added to the Department of the Interior's appropriation bill, which delayed Lease Sale 181 sale for six months.⁵³⁰ The House passed the amendment by a 247 to 164 vote, with seventy Republicans ignoring an appeal from the White House.⁵³¹

Opponents of the amendment, including House Whip, Tom DeLay, declared that the sale was an issue of national security and Florida's action was "the height of arrogance."⁵³² Representative Callahan introduced an amendment to the energy and water appropriation bill, which terminated the funds for a natural gas pipeline from Alabama to Florida.⁵³³ Representative Callahan stated that it is "the height of hypocrisy" for Florida to stop the lease sale and request funds for pipeline.⁵³⁴ Representative DeLay kept the provision in the bill, stating that Florida should "share in the shortages that they are forcing on the rest of America."⁵³⁵ The bill passed, but Representative C.W. Young from Florida, the chair of the House Appropriations Committee, removed the provision in conference.⁵³⁶

The House action generated a compromise. The Bush administration reduced the size of the sale from 5.9 million to 1.47 million acres and eliminated the stovepipe section from the sale so that none of the 256 blocks offered would be less than one hundred miles from the Florida coast.⁵³⁷ President Bush's press secretary,

529. Governor Bush declared that the protection of Florida's beaches, fisheries, and pristine waters "is of paramount importance to the state." David E. Sanger, *Oil Drilling Issue Could Set Bush Against Bush*, N.Y. TIMES, Jan. 26, 2001, at A17. Senator Graham stated that, "the integrity of Florida's coastline is currently under threat, both from a potential new lease sale off the Panhandle shoreline and the possibility that drilling will be permitted on existing leases." Megan K. Doyle, *Florida Lawmakers Urge Extension of Drilling Ban*, PALM BEACH POST, Feb. 3, 2001, at A23.

530. Christopher Marquis, *House Vote Stalls Gulf Drilling Plan*, N.Y. TIMES, June 22, 2001, at A1.

531. *Id.*

532. *Bashing Florida for Standing Firm Against Unnecessary Gulf Drilling*, TAMPA TRIB., July 8, 2001, at Commentary 2.

533. Jennifer Sergent, *Lawmakers Face off over Drilling*, PRESS JOURNAL (Vero Beach, Fla.), June 29, 2001, at A13.

534. *Id.*

535. Hervey Penn, *GOP Whip Seeks to Punish State for Drilling Vote*, PALM BEACH POST, June 30, 2001, at A3.

536. H.R. Rep. No. 107-258 (2001); Steve Hollister, *Lawmakers Battle Over Offshore Drilling Ban*, BRADENTON HERALD, June 29, 2001; Cherie Jacobs, *Florida's 753-Mile Gas Pipeline Project Should be Completed in June*, TAMPA TRIB., Nov. 18, 2001.

537. David Ivanovich, *Bush Bows to Florida on Drilling; Oil Industry Disappointed*,

Ari Fleisher, declared that "President Bush is 'concerned about the environment' and 'concerned about people in Florida and their reaction to development of resources off their shore.'"⁵³⁸ Governor Bush hailed the decision for demonstrating "significant progress in Florida's fight to protect our coastline."⁵³⁹

Action to delay the sale moved over to the Senate. Senators Graham and Nelson opposed Lease Sale 181. Senator Nelson put a hold on the nomination of J. Steven Griles to Deputy Interior Secretary to ensure a vote on his amendment to delay Lease Sale 181.⁵⁴⁰ Senator Nelson's amendment was defeated sixty-seven (forty-nine Republicans, eighteen Democrats) to thirty-three (thirty-two Democrats, one Independent). The reduction in the size of the sale took the steam out of the amendment. Senator Nelson released his hold on J. Steven Griles, who was then confirmed.⁵⁴¹ Senator Nelson warned that the leases were "the proverbial camel's nose under the tent."⁵⁴² Senator Graham stated that, "despite this disappointing vote, those of us who treasure our coastline will continue to battle to protect it."⁵⁴³ Secretary Norton declared the Senate vote to be "a victory for all Americans who want to see environmentally responsible energy production."⁵⁴⁴

After the Conference Committee eliminated the House amendment,⁵⁴⁵ Lease Sale 181 moved forward.⁵⁴⁶ On December 5, 2001, seventeen companies bid \$340.5 million for ninety-five tracts in the EGOM.⁵⁴⁷ Three tracts received bids over \$20 million and six others received bids over \$10 million.⁵⁴⁸ Half of the tracts in the

HOUSTON CHRON., July 3, 2001, at 1.

538. *Id.*

539. *Id.*

540. Douglas Jehl, *Florida Senator Takes Hostage on Oil Plan*, N.Y. TIMES, June 30, 2001, at A16.

541. *Interior Bill Heads to Conference After Passing Senate with Surprising Ease*, CONG. Q. WEEKLY, July 14, 2001, at 1696-97.

542. Thomas B. Pfanckuch, *Bushes Make Deal on Gulf Oil Leases*, FLA. TIMES-UNION (Jacksonville, Fla.), July 3, 2001, at A1.

543. *Senate: No Delay for Gulf Drilling*, FLA. TIMES-UNION (Jacksonville, Fla.), July 13, 2001, at A1.

544. *Id.*

545. *Normally Contentious Interior Bill Moves Cleanly Through Conference*, CONG. Q. WEEKLY, Oct. 13, 2001, at 2413.

546. Secretary Norton stated, "[d]uring the course of the entire sale process, we focused heavily on cooperation, consultation and communication with state government interests and together reached a decision and a sale that will create jobs, protect the environment and reduce our dependence on foreign oil." Press Release, EGOM Base Sale, *supra* note 523.

547. Press Release, United States Dept. of Interior, Sale 181 Attracts \$340 Million in High Bids (Dec. 5, 2001).

548. Alan Sayre, *Environmentalists Promise to Push to Block Development*, ASSOCIATED PRESS NEWSWIRES, Dec. 5, 2001, at 11:50:00, WESTLAW, AllNewsPlus.

sale received no bids.⁵⁴⁹ The MMS declared the sale "a smashing success."⁵⁵⁰

B. Chevron Appeal

The Bush administration resolved the controversy regarding the appeal of Florida's rejection of Chevron's development and production plan on nine tracts in the Destin Dome area, twenty-five miles off Pensacola. In the 1980's, companies paid \$13 million for nine leases in Lease Sales 79, 94 and 116,⁵⁵¹ which are projected to produce 2.6 trillion cubic feet of natural gas.⁵⁵² Florida objected to Chevron's exploration plan, but the Secretary overturned the objection in 1993.⁵⁵³ Chevron submitted its development and production plan and Florida objected in 1998.⁵⁵⁴ Chevron appealed to the Secretary of Commerce, but the Clinton administration took no action.⁵⁵⁵ In 1998 and 1999, Chevron submitted requests for NPDES and Clean Air permits, which the EPA refused to address until the appeal process was completed.⁵⁵⁶ During the 2000 presidential campaign, Governor Bush accused the Clinton administration of playing politics by refusing to make a decision that could hurt Vice-President Gore.⁵⁵⁷

Chevron, relying on the Mobil case, filed suit against federal government for the delay, alleging breach of contract and taking of property.⁵⁵⁸ Chevron alleged that the federal government did not give "timely and fair" consideration to its consistency appeal or permit applications.⁵⁵⁹ Congress addressed the issue of delays

549. *Id.*

550. David Ballingrud, *Oil Companies Pony up for Right to Drill Nearer Florida*, ST. PETERSBURG TIMES, Dec. 6, 2001, at A1. The five largest lessees are Shell Offshore, which was awarded twenty-eight bids worth \$109.6 million; Anadarko Petroleum Corp., which was awarded twenty-six bids worth \$136 million; Kerr-McGee Oil & Gas, which was awarded sixteen bids worth \$34.7 million; Marathon Oil, which was awarded fourteen bids worth \$28.3 million; and Amerada Hess, which was awarded eight bids worth \$6.8 million. Robert Trigaux, *Offshore Oil Drilling Moves into Florida Neighborhood*, ST. PETERSBURG TIMES, Mar. 3, 2002, at H1; *see also*, *Bids for Leases in Eastern Gulf Accepted; Groups Wary of Additional Development*, 33 Env't Rep. (BNA) 314 (Feb. 8, 2002).

551. The companies paid \$10.4 million in bonus bids and \$2.2 million in rents. Cory Reiss, *Gulf Drilling Opponents Reunite to Block Chevron*, SARASOTA HERALD-TRIB., Aug. 6, 2001, at BS1.

552. *Id.*

553. Consistency Appeal of Chevron U.S.A. from an Objection by the State of Florida, 1993 NOAA LEXIS 2 (United States Dep't of Commerce Jan. 8, 1993).

554. Reiss, *supra* note 551.

555. *Id.*

556. *Id.*

557. *Id.*

558. Complaint, *Chevron v. United States* (Fed. Cl. 2000) (No. 00-431C) (on file with court); Mary Ellen Klass, *New Frontier War*, PALM BEACH POST, Sept. 9, 2001, at A1.

559. Plaintiff's Motion for Partial Summary Judgment on Liability, *Chevron v. United States* (Fed. Cl. 2000) (No. 00-431C) (on file with court). The oil companies made the following

regarding consistency appeals in the Coastal Zone Protection Act of 1996.⁵⁶⁰ The Secretary of Commerce was instructed to issue decisions no later than ninety days after the record is closed.⁵⁶¹

Governor Bush and the Florida congressional delegation opposed energy development off the Panhandle.⁵⁶² They feared that if Chevron obtained permit approval, other leaseholders would move towards development. This would make the compromise regarding Lease Sale 181 meaningless because production rigs would be close to the Florida coast.⁵⁶³ They were also concerned that the events of September 11 would influence the Secretary of Commerce's decision.⁵⁶⁴ Senator Graham stated that terrorism should not preclude an "adequate and full debate on the real factors that govern issues such as energy policy."⁵⁶⁵ The EPA supported Florida's rejection.⁵⁶⁶

Senator Graham and Representative Scarborough introduced legislation to address Florida's concerns with Lease Sale 181 and the approval of the Chevron permit.⁵⁶⁷ The legislation would end the moratoria and establish a permanent ban on OCS activities off Florida; require that the EIS be released prior to the state's consistency determination; and authorize the buy back of the existing leases off Florida for \$90 million.⁵⁶⁸

In May 2002, President Bush proposed to buy back the leases off the Florida Panhandle for \$115 million.⁵⁶⁹ Environmental groups

contentions: first, the EPA stopped considering the NPDES and clean air permits while awaiting the consistency decision by the Secretary of Commerce. The Secretaries of the Interior and Commerce both recommended that the EPA proceed with the process. *Id.* Second, the Secretary of the Interior submitted abbreviated comments and did not recommend a secretarial override of Florida's objections. *Id.* These decisions were motivated by Vice-President Gore's objection to energy development off the coast of Florida during the 2000 Presidential Election. *Id.* Third, the Department of Commerce failed to close the record, even though it was aware that the EPA ceased action on the permits. *Id.*

560. Coastal Zone Protection Act of 1996, Pub. L. No. 104-150, 110 Stat. 1380 (1996); H.R. REP. NO. 104-521, at 4 (1996).

561. 16 U.S.C. § 1465 (2000).

562. David Wasson, *Bipartisan Team Unites to Fight Chevron*, TAMPA TRIB., Aug. 18, 2001, at Metro 1.

563. Reiss, *supra* note 551.

564. Corey Reiss, *Security Issues Revive Drilling Debate*, SARASOTA HERALD-TRIB., Sept. 30, 2001, at BS1.

565. *Id.*

566. Carl Hulse & Sean Loughlin, *EPA Helps Florida Fight Gulf Gas and Drilling*, LEDGER (Lakeland, Fla.), Oct. 11, 1999, at A12; see Mary Ellen Klass, *Debate Flares over Risks of Gulf Drilling*, PALM BEACH POST, Sept. 10, 2001, at A1; Craig Pittman, *Is This in Florida's Future*, ST. PETERSBURG TIMES, Aug. 12, 2001, at A1.

567. See Graham, *Bush Discusses Permanent Drilling Ban*, ST. PETERSBURG TIMES, Aug. 8, 2001, at B5; Wasson, *supra* note 562.

568. S. REP. NO. 107-771 (2001); H.R. REP. NO. 107-1631 (2001).

569. President Bush also proposed to buy back the leases in the Florida Everglades for \$110 million. Elisabeth Bumiller & Carl Hulse, *U.S. May Buy Back Florida Oil Rights*, N.Y.

praised the decision but alleged that it was designed to help Governor Jeb Bush's and President Bush's re-election efforts.⁵⁷⁰ Governor Bush responded that "when there is a convergence of good politics and good public policy, I don't think we should be ashamed about it."⁵⁷¹ In July 2002, the litigation was settled.⁵⁷²

C. Energy Supply

President Bush criticized the Clinton administration for lacking an energy policy.⁵⁷³ Early in the Bush administration there was an energy crisis in California. Vice-President Cheney was instructed to conduct a study of national energy policy. The National Energy Policy Report noted that much of the OCS was precluded from development and regulatory delays stalled OCS development.⁵⁷⁴ The report suggested greater incentives for deep water drilling.⁵⁷⁵ The Secretaries of the Interior and Commerce were urged to re-examine the existing OCS policy framework to determine what changes are needed.⁵⁷⁶

In May 2001, the Department of the Interior's OCS Policy Committee recommended that the MMS identify the five most promising areas for natural gas development that are now under moratoria.⁵⁷⁷ The committee urged the MMS to obtain seismic data to narrow prospective areas, study the environmental and social impacts needed for leasing, and open up discussions with the coastal states for lifting the moratoria.⁵⁷⁸ This generated speculation that the Secretary of the Interior would move forward with energy development in moratoria areas, including the EGOM.⁵⁷⁹ Congress

TIMES, May 30, 2002, at A1; *see also*, Press Release, Department of Interior, Interior Reaches Agreement to Acquire Mineral Rights in the Everglades, Settles Litigation on Offshore Oil and Gas Leases in Destin Dome (May 29, 2002).

570. *Id.*

571. *Id.*

572. In the settlement, Chevron received \$46 million, Conoco \$46 million, and Murphy Exploration & Production \$23 million. *Id.* at 1-2. Stipulation for Compromise Settlement and Entry of Final Judgment, *Chevron v. United States* (Fed. Cl. 2000) (No. 00-431C) (on file with court).

573. Bruni, *supra* note 521.

574. NAT'L ENERGY POLICY DEV. GROUP, REPORT OF THE NAT'L ENERGY POLICY DEV. GROUP 5-7, 5-8 (2001).

575. *Id.*

576. *Id.*

577. *Interior Department Advisory Panel Proposes Study of Offshore Drilling*, 32 Env't. Rep. (BNA) 1138 (June 8, 2001); H. Josef Hebert, *Panel Set to Make Recommendation on New Offshore Drilling*, ASSOCIATED PRESS NEWSWIRE, May 23, 2001, at 05:09:00, WESTLAW, AllNewsPlus.

578. Hebert, *supra* note 577.

579. John M. Biers, *Oil Industry Wins Tentative Victory*, TIMES-PICAYUNE (New Orleans, La.), May 31, 2001, at 1.

responded to the recommendation. Resolutions were introduced in the House and Senate to prohibit new OCS energy development in areas currently under moratoria.⁵⁸⁰ Senator Kerry (Democrat, Mass.) added an amendment to the Department of the Interior's appropriation bill that prohibited any pre-leasing activities, including seismic testing, geophysical testing, pilot program, and drilling in OCS protected areas.⁵⁸¹ Senator Kerry stated, "[t]his amendment makes sure that drilling in protected areas-rejected by the states and further rejected by the Congress -cannot be achieved by backdoor, stealth actions at the Department of the Interior."⁵⁸²

The Kerry amendment was incorporated into the Department of the Interior's fiscal 2002 appropriation bill.⁵⁸³ No pre-leasing, leasing, or development activities can occur in the areas identified by President Clinton in 1998, regarding: North, Central, and Southern California; the North Atlantic; Washington-Oregon; and the Eastern Gulf south of 26° North latitude.⁵⁸⁴ There is also a ban on leasing in North Aleutian Basin Alaska, outside of the Lease Sale 181 area in the EGOM, and in the Mid and South Atlantic.⁵⁸⁵

The MMS developed the five-year leasing program for 2002-07.⁵⁸⁶ The plan calls for twenty sales in the Gulf and off Alaska.⁵⁸⁷ No areas under moratoria or withdrawn by the executive action are included.⁵⁸⁸ Two lease sales are scheduled for the EGOM.⁵⁸⁹

VIII. CONCLUSION

The development of energy resources on the OCS has generated a great deal of controversy between the federal and coastal state governments. Florida has evolved from a supporter to an opponent of offshore energy development.

580. H.R. Con. RES., 107th Cong. § 136 (2001); S. Res., 107th Cong. § 39 (2001); *Oil Exploration: California, Florida Lawmakers Promise Fight if Bush Pushes Exploration in Offshore Areas*, 32 Env't. Rep. (BNA) 956, 957 (May 18, 2001).

581. Robert Schlesinger, *Senate Fortifies Ban on Offshore Drilling, Measure Prohibits Planning to Drill*, BOSTON GLOBE, July 13, 2001, at A3.

582. *Id.*

583. *See* Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107-63, 115 Stat. 414 (2002).

584. *Id.*

585. *Id.*

586. *See* Press Release, Minerals Mgmt. Serv., MMS Issues Proposed OCS Oil and Gas Leasing Program 2002-2007 and Draft Environmental Impact Statement (Oct. 26, 2001); *see also*, *Five-Year Plan for Oil and Gas Development In Federal Offshore Waters Signed by Norton*, 33 Env't Rep. (BNA) 1564 (July 12, 2002).

587. *See id.*

588. *See id.*

589. *See id.* The two sales are Lease Sale 189 (December 2003) and Lease Sale 197 (March 2005).

Florida had little success in the tidelands controversy. The Court narrowly interpreted the SLA and utilized international law to minimize the coastal states historic offshore claims. Florida was granted a border of three miles in the Atlantic, which included the Straits of Florida, and three marine leagues in the Gulf. Florida could not utilize straight baselines around its offshore islands. No historic or juridical bays off Florida were recognized.

In the 1970's, OCS policy vacillated between the needs of environmental protection and energy development. The courts consistently rejected claims by the coastal states, local governments, and environmental groups that OCS lease sales violated environmental statutes. During this period, Florida supported OCS development but negotiated with the Secretary of the Interior to have stipulations imposed that protected its environment.

The most intense battles in the Seaweed Rebellion occurred during the Reagan administration. President Reagan came to office seeking to expand OCS energy development. There was litigation regarding the first five-year OCS leasing program, which was remanded to the Secretary of the Interior. Secretary Watt developed the second five-year OCS leasing program, which greatly accelerated and expanded OCS energy development. Florida brought suit, but the D.C. Circuit upheld the program, deferring to Interior's statutory interpretations. Congress responded by establishing OCS moratoria in environmentally sensitive areas, including areas off the coast Florida. Nevertheless, Lease Sales 79 and 94 resulted in the leasing of tracts off southwest and northwest Florida that are still controversial.

There was another federal-state controversy regarding state consistency review of OCS lease sales. Florida filed an amicus brief in California's challenge to the Secretary of the Interior's refusal to permit state consistency review of OCS leases sales pursuant to the CZMA. The Supreme Court adopted an erroneous view of the legislative history of the CZMA, the NOAA regulations, a Justice Department opinion, and the OCSLA to preclude state consistency review of OCS lease sales. The Court undermined the cooperative federal-state framework envisioned by the statutes regarding OCS development.⁵⁹⁰

590. The decision reflected Richard Lazarus' astute observation that the justices "perceive environmental law as merely an incidental factual context, in which environmental protection concerns are at stake, but there is nothing uniquely environmental about the legal issues being raised." Richard J. Lazarus, *Restoring What's Environmental*, 47 UCLAL. REV. J. 703, 706 (2000). Accordingly, the justices "fail to appreciate how the nature of the environmental concerns being addressed can sometimes be relevant to their resolution of those legal issues." *Id.*

While these battles were underway, the Reagan administration attempted to terminate the funding for vital ocean and coastal programs, particularly the CZMA. Congress began considering the establishment of an OCS revenue sharing program to continue the funding, which Florida supported. The OCS revenue sharing program was not enacted, but the funding for the programs was continued. Secretary Hodel developed the third five-year OCS leasing program. Florida again brought suit challenging the program but withdrew after a deal was negotiated by Governor Martinez. Nevertheless, Lease Sale 116, off the coast of Florida, under the Hodel plan has resulted in the leasing of tracts off the Florida Panhandle, which have been the source of ongoing conflict.

President George Bush, reversing the hostile policies of his predecessor, offered a peace proposal in the Seaweed Rebellion. He canceled all lease sales off Florida, and he agreed to consider the cancellation and buy back of existing leases off southwest Florida and establish an OCS revenue sharing program. The buy backs and revenue sharing proposals canceled each other out in Congress. The Bush administration developed the five-year OCS program for 1992-1997, which was the first not to be litigated. Congress maintained and expanded the OCS moratoria off the coast of Florida. The Secretary of Commerce upheld Florida's objection to exploration plans off southwest Florida but overturned the state's objections to exploration plans off the Florida Panhandle on tracts obtained in Lease Sales 79 and 94. Section 307(c)(1) of the CZMA was amended to authorize state consistency review of OCS lease sales, reversing the Court's decision in *Sec'y of Interior v. California*.

The Clinton administration continued to foster federal-coastal state reconciliation. One lease sale in the EGOM was included in the five-year OCS program for 1997-2001. For the first time, the OCS moratoria were reconfigured to be consistent with the five-year leasing program. Development on leases off the Florida Panhandle proceeded. Mobil submitted a development plan for tracts obtained in Lease Sale 116, which was withdrawn after legislation cancelling the leases was proposed by both Florida senators. Chevron went forward, submitting a development plan. Florida determined the plan was not consistent with its coastal zone management plan. Chevron appealed to the Secretary of Commerce. Governor Bush and the Florida congressional delegation opposed the plan.

The Clinton administration bought back leases off southwest Florida, which had become the subject of litigation. In the litigation dealing with OCS leases off North Carolina, the Court determined that contract rights supersede the Secretary of the Interior's regulatory authority on the OCS. This presents a very serious threat for future OCS regulation. The Clinton administration

unsuccessfully attempted to get the CARA enacted. Nevertheless, after fifty-eight years, an OCS revenue sharing program was finally established to help the coastal states deal with the impacts of OCS development.

In the current Bush administration, Florida's OCS disputes have been resolved because brother helped brother. Initially, there was conflict over Lease Sale 181 because tracts were located thirty miles from the Florida coastline. After the House moved to delay the sale, a deal was negotiated that eliminated the areas within one hundred miles of the Florida coast. Lease Sale 181, the first sale in the EGOM region since 1988, occurred in December 2001. Another issue of contention concerned the delay of the Secretary of Commerce's decision regarding the appeal of Florida's rejection of Chevron's development and production plan in the Destin Dome area. Chevron instituted suit against the federal government, alleging that the delay constituted a breach of contract. In July 2002, the litigation was settled after the federal government agreed to buy back the leases for \$115 million. Finally, President George W. Bush wants to increase the domestic supply of energy. Proposals have been put forth regarding OCS energy development, but Congress continues to maintain OCS moratoria in environmentally sensitive areas, including the EGOM. Secretary Norton promised not to include any areas near the Florida coast in the next five-year OCS program. The Bush administration's willingness to meet the state's objections helped the reelection of Governor Jeb Bush in 2002 and improves the President's own chance of electoral success in Florida in 2004.

Florida, like the other coastal states in the Seaweed Rebellion, was not successful in its litigation. The courts narrowly interpreted the statutes and deferred to the Secretary of the Interior's decisions, which were contrary to the coastal states' concerns. Florida, like the other coastal states, was more successful in Congress preventing energy development off its coast through the establishment of OCS moratoria. Much of Florida's success can be attributed to consistent bipartisan opposition by governors and the entire congressional delegation. Florida's continued importance in presidential politics also guarantees that the state's OCS concerns will be seriously considered.

Congress should take steps to strengthen the role of coastal states in the OCS process. Florida's proposal to strengthen the role of state governors in the development of the five-year OCS leasing program pursuant to section 18 of the OCSLA and regarding OCS lease sales pursuant to section 19 of the OCSLA should be

enacted.⁵⁹¹ Coastal state decisions regarding consistency determinations under the CZMA should be given greater weight. Many of these changes can be accomplished by shifting the burden of proof regarding state determinations.⁵⁹² After a state makes a decision, the burden should shift to the Secretary of the Interior or Secretary of Commerce to demonstrate why the state's position is incorrect. In addition, the OCS revenue sharing program should be institutionalized.⁵⁹³

Congress should establish a national ocean management regime,⁵⁹⁴ which encourages state offshore management. This is particularly important in light of the establishment of the 200-mile Exclusive Economic Zone⁵⁹⁵ and extension of the United States territorial sea to twelve miles.⁵⁹⁶ Florida has been actively engaged in managing its coastal and ocean resources,⁵⁹⁷ which are important components of its economy. Florida believes that OCS energy development poses too great a risk.⁵⁹⁸ The establishment of an ocean management program and enactment of the suggested statutory changes will help Florida protect its coast.

591. FITZGERALD, *supra* note 1, at 274-77; *see also* Devins, *supra* note 146.

592. *See* Mark J. LaLonde, *Allocating the Burden of Proof to Effectuate the Preservation and Federalism Goals of the CZMA*, 92 MICH. L. REV. 483 (1992).

593. FITZGERALD, *supra* note 1, at 274-77; *see also* Devins, *supra* note 146.

594. *See* CICIN-SAIN & KNECHT, *supra* note 398; ROBERT JAY WILDER, LISTENING TO THE SEA (Bert A. Rockman ed., 1998); Lawrence Juda, *Ocean Policy, Multi-Use Management, and the Cumulative Impact of Piecemeal Change: The case of the United States Outer Continental Shelf*, 24 OCEAN DEV. & INT'L. L. 355 (1993).

595. In 1983, President Reagan issued Presidential Proclamation 5030 establishing a 200-mile EEZ, which is approximately four billion acres and 1.7 times the land area of the U.S. 48 Fed. Reg. § 10601 (1983); *see generally* Bondareff, *supra* note 308, at 153-54.

596. In December 1988, President Reagan issued Presidential Proclamation 5928, extending the United States territorial sea to twelve miles. 54 Fed. Reg. § 777 (1988); FITZGERALD, *supra* note 1, at 278-81.

597. Christie, *supra* note 13; Christie & Johnson, *supra* note 13; O'Connell, *supra* note 13.

598. Senator Nelson observed that, "Florida's coastline is one of our most treasured environmental and economic assets, and demands continued protection. We should never have to see waves of oil hitting our beaches, so allowing oil rigs off our coastline is a risk we can't afford to take." Megan K. Doyle, *supra* note 529.

TRANSGENIC SALMON AND THE DEFINITION OF “SPECIES” UNDER THE ENDANGERED SPECIES ACT

BLAKE HOOD*

Table of Contents

I.	INTRODUCTION	75
II.	SCIENTIFIC DEFINITIONS OF “SPECIES”	78
	<i>A. Taxonomy Generally</i>	78
	<i>B. Differing Views of “Species”</i>	79
	<i>C. Other Categories</i>	83
III.	LEGAL DEFINITIONS OF “SPECIES”	84
	<i>A. Statutory Analysis of the ESA</i>	85
	<i>B. Administrative Interpretation</i>	89
	<i>C. Judicial Interpretation</i>	95
IV.	TRANSGENIC SALMON	99
	<i>A. Biology Behind Transgenic Salmon</i>	99
	<i>B. Regulation of Transgenic Salmon</i>	100
	<i>C. Aquaculture Generally</i>	101
	<i>D. Aquaculture of Transgenic Salmon: The “Trojan Gene Effect”</i>	104
	<i>E. Consideration of Transgenic Salmon as a “Species”</i>	105
V.	CONCLUSION	111

I. INTRODUCTION

Advances in biotechnology during the late Twentieth Century have enabled scientists to manipulate their environment in an unprecedented manner for purposes including development of new drugs and new types of food.¹ Specifically, scientists can use biotechnology to engineer or genetically modify living organisms to incorporate DNA representing some desirable trait from one organism into another that will exhibit the desirable trait. One contemporary and particularly controversial product of biotechnology is the genetically modified or transgenic salmon. As one company engineers them, transgenic salmon are composed of Atlantic salmon that have incorporated both a gene that produces

* J.D. The Florida State University College of Law, 2002; B.A. Emory University, 1999. The Author wishes to thank Professor J. B. Ruhl for helpful comments on drafts of this paper.

1. See David F. Betsch, *Principles of Biotechnology*, North Central Regional Extension Publications, Biotechnology Information Series, at http://www.nal.usda.gov/bic/Education_res/iastate.info/bio1.html (March 1994).

growth hormones and a promoter gene that activates the first gene.² Proponents of these unique fish tout them as a potentially efficient and economical source of food. Opponents raise concerns not only about how safe these fish are for human consumption but also about the environmental risks in raising them. One study in particular cautioned that if transgenic salmon were raised in an aquaculture environment and somehow escaped into the wild, they could force natural populations into extinction due to the combined effect of their increased mating advantage and decreased survivability.³

The Endangered Species Act of 1973 ("ESA")⁴ may provide some solutions as well as problems relating to the issue of transgenic salmon. The ESA's protections extend only to "species" as administrative agencies and courts have interpreted that term. Section 1532 of the ESA defines "species" to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature."⁵ On the one hand, then, the ESA should protect already endangered or threatened wild species from any dangers that transgenic salmon pose. On the other hand, though, the ESA can only protect wild populations of salmon from transgenic ones if its legal framework provides the agencies with a basis for distinguishing between them. At the heart of any basis for distinguishing between organisms under the ESA is the definition of "species."

This comment examines the many scientific definitions of "species" to determine the status of transgenic salmon within modern taxonomy. Additionally, the comment examines the many and equally complex legal definitions of "species" under the ESA. Applying both the scientific and legal standards, the comment explores whether transgenic salmon are, or, if not, should be a separate species under the ESA. Consequently, the comment also answers the questions of whether non-transgenic salmon could be protected against transgenic escapees and whether the ESA could somehow extend its protections to transgenic salmon themselves.

2. See Anne Kapuscinski, *Biosafety Assessment of Transgenic Aquatic Organisms: The Case of Transgenic Salmon*, in *AQUACULTURE AND THE PROTECTION OF WILD SALMON* 56, 57 (Patricia Gallagher & Craig Orr eds., 2000), available at <http://www.sfu.ca/cstudies/science/aquaculture/Aquacultureproceedings.pdf> (last visited Nov. 6, 2002); Aqua Bounty Farms, *The Research*, at <http://www.aquabounty.com/research.html> (last visited Nov. 6, 2002).

3. See William M. Muir & Richard D. Howard, *Possible ecological risks of transgenic organism release when transgenes affect mating success: Sexual selection and the Trojan gene hypothesis*, 96 *PROC. NAT'L ACAD. SCI. U.S. AM.* 13853, 13853-56 (1999).

4. 16 U.S.C. §§ 1531-1544 (2000).

5. *Id.* § 1532(16).

Part II traces the biological definitions of “species” throughout history from the morphology-based essentialist views to Ernst Mayr’s generally accepted Biological Species Concept (“BSC”). Given these various views, I conclude that even within the scientific community the definition of “species” is quite fluid.

In exploring the legal definitions of “species,” Part III begins with an analysis of the ESA’s language itself. After reviewing both precursor statutes and the language currently in effect, I contend that a tension exists in the ESA between a mandate that decisions to list species be based only on scientific data and the Act’s thoroughly unscientific definition of “species.” Ultimately, the statutory analysis reveals a desire to preserve genetic diversity and heritage. Part II then examines the administrative explications of the ESA. The listing agencies’⁶ definitions of “distinct population segment” (“DPS”) demonstrate ambivalence about the type and quality of difference between organisms of the same species required for protecting separate populations. Yet the FWS and NMFS suggest in their proposed policy on hybridization that they would not protect transgenic fish unless they were a part of an approved recovery plan.⁷ Finally, Part II examines the sparse judicial interpretations of “species.” While stating little directly on point, the courts have recognized that the ESA definition of “species” is broader than the usual scientific definition. Additionally, though courts generally defer to agencies on issues of science, a recent case has reined in an agency that attempted to split hairs too finely in a listing decision based on distinctions below the level of subspecies or DPS.⁸

Part IV closely analyzes the status of transgenic salmon. It starts with an explanation of the biology behind genetically engineered fish. Next, Part IV reviews federal policy on the types of aquaculture environments in which transgenic salmon may be raised. I also include a summary of one scientific prediction about the dangers that aquaculture-raised transgenic salmon pose to the environment. Finally, Part V concludes this comment with a consideration of transgenic salmon as a species under the ESA by

6. See *id.* § 1532(15) (defining “Secretary” to mean the Secretaries of Interior and Commerce). The National Marine Fisheries Service (“NMFS”) carries out the ESA duties for the Secretary of Commerce while the Fish and Wildlife Service (“FWS”) carries out the Secretary of Interior’s duties. See J.B. Ruhl, *The Endangered Species Act*, in ENVIRONMENTAL ASPECTS OF REAL ESTATE TRANSACTIONS 640, 643 (James B. Witkin ed., 1st ed. 1995).

7. See Endangered and Threatened Wildlife and Plants; Proposed Policy and Proposed Rule on the Treatment of Intercrosses and Intercross Progeny (the Issue of “Hybridization”), 61 Fed. Reg. 4,710, 4,710 (Feb. 7, 1996) (to be codified at 50 C.F.R. pt. 424) [hereinafter Proposed Hybrid Policy].

8. See *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1162 (D. Or. 2001).

applying the biological and legal standards to transgenic salmon in hypothetical but realistic situations.

Ultimately, there may be a simple answer to the question of whether transgenic salmon are “species” under the ESA. The proposed hybrid policy clearly and wisely would deny protection. In the absence of this policy, the answer depends on many variables, including the degree of genetic and morphological difference between transgenic and natural organisms, as well as the actual situation of actual transgenic populations and their relationship to natural populations. Yet given the indication of the agencies’ mindset on transgenic organisms, transgenic salmon probably will not and should not warrant “species” status under the ESA.

II. SCIENTIFIC DEFINITIONS OF “SPECIES”

Since the ESA uses many scientific terms, and since the ESA often explicitly requires agencies to consider scientific data,⁹ understanding the scientific use of certain terms may help determine how the designation “species” applies to transgenic organisms. Unfortunately, while young biology students may memorize the apparently fixed taxonomic categories and recite erudite-sounding Latin nomenclature, biologists still disagree on the substantive definition of “species.”¹⁰ The scientific consensus on “species,” then, is that no complete consensus exists and that different definitions suit different purposes.

A. Taxonomy Generally

Taxonomy refers to the discipline of recognizing and delimiting groups of organisms and arranging them into a classification scheme.¹¹ More precisely, categories are the abstract class names into which organisms are placed.¹² An eighteenth century Swedish biologist named Carl Linnaeus, the “father of taxonomy,”¹³ developed the familiar system of hierarchical categories consisting of Kingdom, Class, Order, Genus, and Species.¹⁴ According to

9. See, e.g., 16 U.S.C. § 1533(b)(1)(A) (2000) (requiring the secretary to make determinations regarding the listing of endangered or threatened species “solely on the basis of the best scientific and commercial data”).

10. See John Charles Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501, 505 (1994) (stating that the very validity of the concept of species is debatable).

11. ERNST MAYR, *THE GROWTH OF BIOLOGICAL THOUGHT: DIVERSITY, EVOLUTION, AND INHERITANCE* 146 (1982).

12. ERNST MAYR, *POPULATIONS, SPECIES, AND EVOLUTION: AN ABRIDGMENT OF ANIMAL SPECIES AND EVOLUTION* 13 (1970).

13. MAYR, *supra* note 11, at 171.

14. Kevin P. Hill, *The Endangered Species Act: What Do We Mean by Species?*, 20 B.C.

Linnaeus's Latin multinomial system, organisms are identified by their genus and species names. Genus refers to organisms with a certain affinity such as dogs (*Canis*); species refers to a distinguishing character between groups in the genus such as that distinguishing domestic dogs (*Canis familiaris*) from wolves (*Canis lupus*).¹⁵

Taxonomists do not classify organisms as individuals but rather as groups, which, if they are sufficiently distinct, form taxa.¹⁶ Taxa are thus groups of actual organisms that are assigned to specific categories.¹⁷ Historically, the process of classifying organisms into the species category by determining whether given groups are sufficiently distinct has turned on two basic criteria: (1) morphology, or observable differences in appearance and form, and (2) sexual compatibility, or the actual and potential ability of groups to interbreed and produce viable offspring.¹⁸ Though the history of biology has included many definitions of species, they all seem to oscillate between these two factors.

At a very basic level, then, the traditional framework for categorizing groups of organisms as distinct species underlies any agency decision to list a species. General taxonomy provides some of the nomenclature for listing decisions and likely serves as the agencies' background cognitive conception of the animal kingdom. As the ESA's title suggests, however, listing decisions are concerned only with the species category.

B. Differing Views on "Species"

Though scientists debate the definition of "species," today they generally accept one model, Ernst Mayr's biological species concept ("BSC"),¹⁹ as the default standard.²⁰ The BSC makes sense, however, only in light of prior theories. The BSC represents a product of historical dialectic by synthesizing previously divergent ideas into one definition. In past definitions one finds the elements composing the current standard.

ENVTL. AFF. L. REV. 239, 247-48 (1993).

15. *Id.* at 248.

16. MAYR, *supra* note 12, at 14.

17. *Id.*

18. Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L.Q. 1029, 1089 (1997).

19. See Stephen J. O'Brien & Ernst Mayr, *Bureaucratic Mischief: Recognizing Endangered Species and Subspecies*, 251 SCI. 1187, 1187-88 (1991) (providing a general overview of the BSC).

20. See Hill, *supra* note 14, at 250.

1. The Essentialist Views

The earliest species concepts, including that of Linneaus,²¹ up to the time of Darwin can generally be referred to as essentialist concepts.²² Also called typological concepts,²³ these views categorize organisms solely using morphology as the determinative criterion. The essentialist views have four basic characteristics: “(1) species consist of similar individuals sharing in the same essence; (2) each species is separated from all others by a sharp discontinuity; (3) each species is constant through time; and (4) there are severe limitations to the possible variation of any one species.”²⁴ The guiding precept of essentialism is that groups of organisms sharing some observable trait correspond to a platonic ideal;²⁵ the members of each group share or participate in the same fixed essence, and each member represents a particular spacio-temporal expression of that species-essence.

The practical effect of an essentialist model is to view the animal kingdom as organized into a system of neat pigeonholes.²⁶ Taxonomy therefore consists of the obviously simple task of observing animal populations, noting groups that look alike, and metaphorically placing the groups into different species-essence pigeonholes. Of course, essentialists encountered a little problem when they observed the vast amount of variation between basically similar organisms.²⁷ Yet according to platonic metaphysics, nothing in the realm of space and time perfectly expresses perfect ideals; variation must, then, simply represent imperfect manifestations of a platonic ideal.

The predominance of essentialist views in western biology makes sense given its convenient compatibility with creationist dogma involving finite kinds of creatures created at one time.²⁸ Also, using morphology as the criterion is simple and requires no real technical skill. Essentialism was popular probably because it appealed to a sense of truth in simplicity. Indeed, even today, listing agencies rely a great deal on morphological differences in distinguishing between organisms.²⁹

21. See MAYR, *supra* note 11, at 258.

22. See Doremus, *supra* note 18, at 1089.

23. See MAYR, *supra* note 12, at 11.

24. MAYR, *supra* note 11, at 260.

25. See *id.*

26. Hill, *supra* note 14, at 248.

27. See *id.* at 249; MAYR, *supra* note 12, at 11.

28. See MAYR, *supra* note 11, at 257.

29. Doremus, *supra* note 18, at 1112.

2. The Effect of Darwin's Theory of Evolution

With the publication in 1859 of his *Origin of Species*, Charles Darwin rejected the static worldview of the essentialists.³⁰ Instead, Darwin's theory of evolution maintained that species continuously mutate into new forms. Morphology, far from indicating universal essences, indicated adaptations to the environment, which are not fixed by definition. Under this rubric, species were "units of evolution," and the goal of taxonomists became identifying ancestors common to different organisms.³¹ No longer could one identify species with absolute categories; one must measure the distinctness of different species according to the extent of relatedness between them.³²

In Darwin's own opinion, evolution effectively rendered taxonomy an arbitrary task.³³ He at least rejected any rigorous system of classification and appealed instead to common sense and experience: "In determining whether a form should be ranked as a species or a variety, the opinion of naturalists having sound judgment and wide experience seems the only guide to follow."³⁴ Darwin seemed unconcerned about the irrelevance of taxonomy when he wrote, "[i]t is really laughable to see what different ideas are prominent in various naturalists' minds, when they speak of 'species'.... It all comes, I believe, from trying to define the undefinable."³⁵ Whether or not undefinable, species constantly change, though at a very slow rate. Taxonomy, then, amounts to little more than an attempt to frame moving pictures.

3. Mayr's Biological Species Concept (BSC)

Despite the moving picture of evolution, morphological differences between organisms do exist, and in the wake of Darwin, scientists sought a unified theory of taxonomy.³⁶ In 1940, Ernst Mayr offered his biological species concept ("BSC") as a solution.³⁷

30. MAYR, *supra* note 11, at 269.

31. Hill, *supra* note 14, at 249.

32. *Id.*

33. Doremus, *supra* note 18, at 1090.

34. MAYR, *supra* note 11, at 267.

35. *Id.* Darwin was not the only one to view "species" as dubious. Philosophers such as Leibniz and Locke contended that while nature may be organized into some cognizable order, to a great extent "species" is a human construct that lacks a one-to-one correspondence with the empirical world. *See id.* at 263-64. Similarly, according to this nominalist approach, Lamarck at one time believed that species do not exist, that only individuals do. *Id.* at 269. While Darwin was not a nominalist, he does represent a move away from a rigid definition of "species."

36. *See* Doremus, *supra* note 18, at 1090.

37. *See* O'Brien & Mayr, *supra* note 19, at 1187.

The defining characteristic of the BSC is neither morphology nor evolution, but sexual compatibility.

After clarification by Mayr, the definition states, “[a] species is a reproductive community of populations (reproductively isolated from others) that occupies a specific niche in nature.”³⁸ Reproductive isolation refers to the tendency of distinct groups to avoid interbreeding even when they are in contact in nature.³⁹ A niche refers to an organism’s particular ecological role in competing for natural resources.⁴⁰ Stated otherwise, then, species are groups of organisms that actually live in nature, compete for resources, and interbreed while not breeding with other groups.

Species maintain their reproductive isolation through various isolation mechanisms.⁴¹ Mayr distinguishes between premating and postmating mechanisms.⁴² Premating mechanisms prevent mating from occurring, while postmating mechanisms prevent the successful creation of offspring despite copulation.⁴³ Premating mechanisms usually involve some external barrier to copulation, such as seasonal or habitat differences between different groups that prevent them from even meeting.⁴⁴ Postmating mechanisms involve either mortality of the sexual gametes or zygotes or the reduced viability or sterility of offspring.⁴⁵ Mayr recognizes with others, however, that organisms that would otherwise differ from each other in taxonomy and genetics do sometimes interbreed and produce viable offspring.⁴⁶ This breakdown of isolation mechanisms produces organisms called hybrids.⁴⁷

The BSC synthesizes past species concepts first by focusing on reproductive isolation since it is fundamental to the process of speciation, or the evolution of new species.⁴⁸ When an interbreeding group is isolated from other groups, it maintains an internal genetic cohesion by exchanging adaptive traits.⁴⁹ Secondly, morphology

38. MAYR, *supra* note 11, at 273.

39. O'Brien & Mayr, *supra* note 19, at 1187.

40. See ACADEMIC PRESS DICTIONARY OF SCIENCE AND TECHNOLOGY (1996), at <http://www.academicpress.com/insight/07301997/niche1.htm> (last visited November 6, 2002) (defining niche as “the unique position occupied by a particular species, conceived both in terms of the actual physical area that it inhabits and the function that it performs within the community”).

41. MAYR, *supra* note 12, at 55.

42. *Id.* at 57.

43. *Id.* at 57-65.

44. *Id.* at 57-64.

45. *Id.* at 57, 64-5.

46. *See id.* at 69.

47. *Id.*

48. Doremus, *supra* note 18, at 1090.

49. *See id.* at 1091.

plays a role since, though not determinative of species, it serves as a rough marker for the genetic traits of a species.⁵⁰

One must note some crucial idiosyncrasies of the BSC. Because it rejects the notion of abstract essences defining species and instead focuses on populations,⁵¹ the BSC deals with real groups of organisms; it is thoroughly descriptive rather than prescriptive. Thus, it cannot tell one how to delimit species, though it does allow one to determine the categorical rank of taxa.⁵² By focusing on populations, further, the BSC cannot answer whether a particular individual organism out of context belongs to a certain species. Additionally, species exist only in relation to other species.⁵³ As Mayr explains, to be a “species” is analogous to being a “brother.”⁵⁴ The designation “species,” he concludes, does not refer to an intrinsic property or essence of a group; rather, it indicates isolation from other groups.⁵⁵

C. Other Categories

The ESA and administrative regulations use scientific terms in addition to “species” that are relevant in deciding whether an organism can receive ESA protection. One such term that garners even less consensus than “species” is “subspecies.”⁵⁶ Mayr has defined “subspecies” as “an aggregate of phenotypically similar populations of a species inhabiting a geographic subdivision of the range of the species and differing taxonomically from other populations of the species.”⁵⁷ Attempting to clarify this definition, Mayr later wrote that a subspecies must share a unique geographic range, phenotypic characters, and unique natural history.⁵⁸ Thus, subspecies represent some smaller set below species that shares a unique characteristics that warrant its own category. Yet scientists generally agree that a “subspecies” is not a unit of evolution⁵⁹ but is instead merely a unit of convenience.⁶⁰

Unlike the scientifically dismissed term “subspecies,” the term “population” is essential to taxonomy. A level of organization lying between the individual and species, a population is a group of

50. *Id.*

51. MAYR, *supra* note 11, at 272.

52. *Id.* at 273.

53. MAYR, *supra* note 12, at 14.

54. *Id.*

55. MAYR, *supra* note 11, at 286.

56. See Doremus, *supra* note 18, at 1101.

57. MAYR, *supra* note 12, at 210.

58. O'Brien & Mayr, *supra* note 19, at 1188.

59. MAYR, *supra* note 12, at 210.

60. Doremus, *supra* note 18, at 1101.

individuals sharing a single gene pool such that any two individuals of opposite sex have an equal probability of mating with each other.⁶¹ Individual organisms serve as simply “temporary vessels” that compose only a small portion of the gene pool.⁶² Moreover, individuals do not change in response to environmental conditions while populations do.⁶³ Only at the level of populations do genes interact in combinations numerous enough so that gene pools can visibly manifest themselves.⁶⁴ Thus, scientists recognize populations as the basic units of evolution.⁶⁵

Finally, another term that figures prominently in the debate over ESA species determinations is “hybrid.” Even though the definition of “species” turns on reproductive isolation, the isolating mechanisms can fail, and two organisms that differ substantially may breed.⁶⁶ Scientists refer to the resulting organism as a hybrid rather than a member of either of its parents’ species.⁶⁷ Hybridization is thus defined as “the crossing of individuals belonging to two unlike natural populations that have secondarily come into contact.”⁶⁸ Like subspecies, hybridization serves as another convenient classification tool to explain how apparently distinct organisms can produce offspring.

The flexibility one finds in the scientific definitions of “species” and other terms is perhaps a practical necessity. The natural world is fluid and does not neatly fit into any one classification scheme. The flexibility is therefore necessary since, after all, scientific categories should conform to the natural world and not the other way around.

III. LEGAL DEFINITIONS OF “SPECIES”

Whether a group of organisms constitutes a separate species under the ESA does not simply depend on whether a biologist makes such a determination in a peer-reviewed journal. “Species” under the ESA is a uniquely legal term that constrains the listing process. Congress has repeatedly decided to leave the statutory definition of

61. MAYR, *supra* note 12, at 82.

62. *Id.* at 83.

63. See Michael Goodman, *Preserving the Genetic Diversity of Salmonid Stocks: A Call for Federal Regulation of Hatchery Programs*, 20 ENVTL. L. 111, 119 (1990).

64. See MAYR, *supra* note 12, at 83.

65. Goodman, *supra* note 63, at 113.

66. See MAYR, *supra* note 12, at 69.

67. See *id.*

68. *Id.* “Hybridization,” far from clarifying the definition of species, seems to conflict with it and begs the question of species definition. If the inability of two organisms to create viable offspring draws a bright line between two species but the ability to create fertile hybrids does not, how can reproductive isolation define a species?

“species” vague. Moreover, Congress defers to the listing agencies by allowing them to define “species” based on the best available scientific and commercial data.⁶⁹ The agencies, in turn, have created an often nuanced definition, though their listing decisions are not always based on purely scientific criteria.⁷⁰ The courts, finally, have not provided comprehensive commentary on the term “species,” though they have made important decisions on certain points. The end result is that, despite emphasis on scientific data, the legal framework provides listing agencies with substantial deference in declaring a group of organisms a species.

A. *Statutory Analysis of the ESA*

After analyzing both the current language of the ESA and that of precursor legislation along with the accompanying legislative history, two themes emerge regarding the definition of “species.” First, the progression from early legislation to the current ESA is marked by inclusion of additional terms in the definition and consequently an expansion of coverage. Second, as endangered species legislation developed, Congress placed more emphasis on scientific opinions. These two themes, though independently justifiable, conflict when placed in the same statutory scheme.

1. Background

Major endangered species legislation arose with the Endangered Species Preservation Act of 1966.⁷¹ The act did not define “species,” and the scope of its coverage extended to native fish and wildlife whose “existence is endangered.”⁷² This simple scheme makes no distinction between species and subspecies and thus covers only so-called pure species when the entire population is threatened with extinction. In making listing decisions, the Secretary of Interior must sometimes refer to scientific opinion.⁷³ With the Endangered Species Conservation Act of 1969,⁷⁴ Congress added protection for subspecies of fish or wildlife. Yet Congress retained the requirement that coverage extends to only those species or subspecies that are threatened with “worldwide extinction”⁷⁵ to the exclusion of coverage for smaller populations that may be in danger

69. See 16 U.S.C. § 1533(b)(1)(A) (2000).

70. See Doremus, *supra* note 18, at 1112.

71. Pub. L. No. 89-669, 80 Stat. 926 (1966).

72. *Id.* § 1(c).

73. *Id.*

74. Pub. L. No. 91-135, 83 Stat. 275 (1969).

75. *Id.* § 3(a).

of extinction in their areas. Additionally, Congress mandated that listing decisions be based on “the best scientific and commercial data available.”⁷⁶ Thus, precursor legislation to the ESA already revealed the theme of splitting larger groups into smaller ones to be protected and the importance of science.

Congress continued the trends when it enacted the Endangered Species Act of 1973.⁷⁷ This act explicitly defined “species” as “any subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed with mature.”⁷⁸ Most notably, this definition expanded coverage beyond subspecies to the population level and perhaps further, depending on the meaning of “smaller taxa.” Moreover, Congress lowered the bar on the requisite danger facing species that warrants listing by first allowing species to be listed even if they are only “threatened” with becoming endangered.⁷⁹ Congress also shrunk the geographic area throughout which species must be threatened or endangered from “worldwide” to “a significant portion of its range.”⁸⁰ In the remarkably eco-centric House Report,⁸¹ the legislators explained that the underlying goal of the ESA is to protect genetic heritage. Ruminating on mankind’s role in nature, the Committee states that “we are our brothers’ keepers.”⁸² Nonetheless, the Committee acknowledged that preserving genetic heritage has utilitarian justifications too, since genetic variations are “potential resources.”⁸³

The current understanding of “species” took form only after a few amendments. In 1978, Congress amended ESA’s definition of species to its current form by discarding the “smaller taxa” language of the original act and replacing it with “any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.”⁸⁴ Though the 1979 amendments did not alter the definition of species, the Senate Report acknowledged that the DPS category could possibly lead to overlisting, but

76. *Id.*

77. 16 U.S.C. §§ 1531-1543 (Supp. 1973).

78. *Id.* § 1532(11).

79. *Id.* §§ 1533(a)(1), 1532(15).

80. *Id.* §§ 1532(4), (15).

81. H.R. REP. NO. 93-412 (1973).

82. *Id.* at 5.

83. *Id.*

84. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 3(16), 92 Stat. 3751 (1978). Attempting to explain the amendment, the Conference Report confusingly states that the new definition excludes “taxonomic categories below subspecies....” H.R. CONF. REP. NO. 95-1804, at 17 (1978). Of course, a distinct population segment is nothing if not a taxonomic category below subspecies. See Karl Gleaves et al., *The Meaning of “Species” Under the Endangered Species Act*, 13 PUB. LAND L. REV. 25, 30 n.26 (1992).

predicted that the implementing agencies would “use the ability to list populations sparingly.”⁸⁵ Finally, in 1982, Congress added the requirement that listing turn “solely on the basis of the best scientific and commercial data available”⁸⁶ to the exclusion of economic considerations.⁸⁷ The statutory language currently in effect was completed after 1982.

2. Current Language

Today, despite the nuances added through the amendments, and a few idiosyncrasies, the language relevant to the definition of species is basically simple. “Species” is defined to include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.”⁸⁸ Under section 1533, species are listed when they are either “endangered” or “threatened.”⁸⁹ Section 1532 defines “endangered species” to mean “any species which is in danger of extinction throughout all or a significant portion of its range” other than certain insects.⁹⁰ Finally, a “threatened species” is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”⁹¹

The first obvious idiosyncrasy of the definition of “species” is the disparate treatment of fish and wildlife, on the one hand, and plants on the other. While the ESA protects whole species and subspecies of both groups, only fish and wildlife get protection at the DPS level. Another quirk is the disparate treatment of vertebrate and invertebrate fish or wildlife. The ESA protects vertebrate fish or wildlife subspecies and DPSs, yet invertebrate fish or wildlife are protected at the subspecies level only.

Finally, the definitions of the terms “species,” “endangered species,” and “threatened species” coalesce only when read in a certain order. Reading the definitions of endangered and threatened species before that of species seems to authorize protection only when a species as a whole, “throughout all or a significant portion of its range,” is endangered or threatened. Reading the definition of species first, however, limits the “all or significant portion of its range” language by effectively defining “it”

85. S. REP. NO. 96-151, at 7 (1979).

86. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1420 (1982).

87. H.R. REP. NO. 97-835, at 20 (1982).

88. 16 U.S.C. § 1532(16) (2000).

89. *Id.* § 1533(a)(1).

90. *Id.* § 1532(6).

91. *Id.* § 1532(20).

as not only the species as a whole but additionally subspecies and DPSs. Thus, protected species include species in danger of becoming extinct, or in danger of becoming endangered, throughout all or a significant portion of (1) the range of the species as a whole, (2) the range of a subspecies, or (3) the range of a DPS. This broad definition culminates the expansion of statutory coverage.

3. Strictly Science Mandate

Though the definitions section, section 1532, plays a crucial role in listing decisions, the process for listing a species under the ESA is outlined in section 1533. Not only does section 1533 enumerate the factors that the Secretary can consider in making the determination, but it also insists on the primary role of science. What Holly Doremus calls the “strictly science mandate”⁹² is the section 1533 requirement that the Secretary make listing decisions “solely on the basis of the best scientific and commercial data available to him.”⁹³ Though this mandate was probably inspired by a desire to insulate the listing process from political pressures and provide an objective and certain basis for decisionmaking,⁹⁴ the listing process is still characterized by uncertainty.⁹⁵

The strictly science mandate might not be problematic but for the fact that the ESA definition of “species” is itself an unscientific one. Neither does the definition mention reproductive isolation, nor is “distinct population segment” used in scientific literature.⁹⁶ Indeed, scientists may argue that the ESA definition, in addition to

92. Doremus, *supra* note 18, at 1051.

93. 16 U.S.C. § 1533(b)(1)(A) (2000).

94. Doremus, *supra* note 18, at 1038.

95. As a matter of statutory construction, applicability of the strictly science mandate to the definition of species is not obvious. Doremus divides the listing process into two elements: the “taxonomy problem” and the “viability problem.” *Id.* at 1087-88. According to Doremus, the “taxonomy problem” requires agencies to decide whether a group of organisms is a species under the ESA; if so, the “viability problem” requires agencies to decide whether that species is endangered or threatened. *Id.* at 1088; *see also* Endangered and Threatened Species; Puget Sound Populations of Pacific Hake, Pacific Cod, and Walleye Pollock, 65 Fed. Reg. 70514, 70517 (November 24, 2000) (to be codified at 50 C.F.R. pts. 223 and 224) [hereinafter Hake, Cod, Pollock Determination]. One might assume that the strictly science mandate would apply to both the taxonomy and viability problems. Yet 16 U.S.C. § 1533(b)(1)(A) explicitly states that the science mandate applies to “determinations required by (a)(1) of this section,” which is the section authorizing the Secretary to determine whether a species is endangered or threatened, and not the determination of whether a group of organisms is a “species.” The 1982 amendments, however indicated a legislative intent that economics can play no role in “any phase of the listing process,” Pub. L. No. 97-304, 21, 96 Stat. 1411, 1411-16 (1982) (emphasis added), which should be guided instead by scientific and commercial data. The amendments thus imply that science should guide the species identification phase of the listing process.

96. *See* Southwest Ctr. for Biological Diversity v. Babbit, 980 F. Supp. 1080, 1085 (D. Ariz. 1997).

not accounting for all biological factors in species identification, actually conflicts with the biological definition.⁹⁷ Some would rectify this discrepancy by amending the definitions section to comport with Mayr's BSC definition,⁹⁸ while others would prefer a definition based on comparison of genetic information.⁹⁹ Some would just as soon not have legislators deal with scientific questions at all.¹⁰⁰ Whatever the remedy, all seem to agree that a basic tension inheres in the ESA between the role of science, the statute's text itself, and the underlying policy goals.

B. Administrative Interpretation

Given the relatively simple but certainly vague statutory framework, the agencies responsible for implementing the ESA¹⁰¹ have offered no further clarification regarding a comprehensive definition of "species." With a few minor adjustments, the Code of Federal Regulations' definitions of "species," "endangered species," and "threatened species" track the statutory language.¹⁰² Two aspects of the definition of "species" that FWS and NMFS have attempted to explicate are the distinct population segment and hybridization. Despite deceptively technical definitions, the regulatory framework for species identification still remains flexible to the chagrin of those who criticize the ESA for not being rigorously scientific enough¹⁰³ and those who criticize the agencies of promulgating incoherent policies and drifting with political currents.¹⁰⁴ When it comes to transgenic organisms, however, the agencies have proposed a policy that would provide no such flexibility and most often preclude protection.

97. See M. Lynne Corn, *The Listing of Species: Legal Definition and Biological Realities*, Congressional Research Service (December 15, 1992) at <http://www.cnie.org/NLE/CRSreports/biodiversity/biodv-10.cfm> (last visited Nov. 6, 2002).

98. See Hill, *supra* note 14, at 264.

99. See Kevin W. Grierson, Note, *The Concept of Species and the Endangered Species Act*, 11 VA. ENVTL. L.J. 463, 487 (1992).

100. See William W. Steele, Jr., *Major Issues in Reauthorization of the Endangered Species Act*, 24 ENVTL. L. 321, 326 (1994) (Steele, the Associate Director for Natural Resources of the White House Office of Environmental Policy in 1994, remarked, "[o]ne of my worst nightmares envisions a congressional floor debate regarding the definition of 'subspecies' or 'distinct population.' This is an inherently scientific issue with no real place in the legislative process, and it should be resolved by scientists.").

101. See *supra* note 6 and accompanying text.

102. 50 C.F.R. §§ 424.02(e), (k), (m) (2000).

103. See Hill, *supra* note 14, at 264.

104. See Doremus, *supra* note 18, at 1112.

1. Species Identification Generally

In the absence of more specific definitions or policy statements, the listing agencies are free to determine whether a group of organisms is a species in whatever manner they want, short of being arbitrary and capricious. In practice, agencies have favored an all-factors approach, relying on different lines of evidence as they suit the situation.

In the recent listing of the Alabama sturgeon,¹⁰⁵ FWS responded directly to the question of how it identifies species. In replying to a public comment entitled “Genetics is the best science for making taxonomic determinations and trumps morphological analyses,”¹⁰⁶ FWS stated that the “most scientifically credible approach to making taxonomic determinations is to consider all available data involving as many different classes of characters as possible... [including] morphological, karyological (chromosomal), biochemical (including DNA analysis and other molecular genetic techniques), physiological, behavioral, ecological, and biogeographic characters.”¹⁰⁷ Moreover, the weight that FWS gives any of these sources of data depends on factors including the availability, quality, appropriateness, and utility of each to the particular organism.¹⁰⁸

As the sturgeon listing demonstrates, however, genetics currently plays one of the more important roles in species identification. Though not determinative, genetics often serves as the language in which taxonomic debates take place. The taxonomic status of the sturgeon was debated within the scientific community. Some scientists concluded that the fish was a species separate from another similar fish by using techniques such as nuclear DNA and mitochondrial DNA d-loop analysis, while other scientists reached the opposite conclusion using mitochondrial cytochrome b locus analysis.¹⁰⁹ Acknowledging some disagreement over the sturgeon’s taxonomic status, FWS nonetheless considered it a separate species by seeming to weigh the preponderance of scientific opinions.¹¹⁰ Thus, listing agencies may not delve into the substance of genetic data; these data merely form the language of scientific conversation. The agency’s job is listening for a consensus opinion.

105. Endangered and Threatened Wildlife and Plants; Final Rule to List the Alabama Sturgeon as Endangered, 65 Fed. Reg. 26,438 (May 5, 2000) (to be codified at 50 C.F.R. pt. 17).

106. *Id.* at 26,452.

107. *Id.*

108. *Id.*

109. *See id.* at 26,438.

110. *See id.* at 26,439.

2. Distinct Population Segment (DPS)

The section 1532(16) definition of “species” allows agencies to consider populations of organisms as independent species even though the species as a whole does not face extinction. The legislative history, however, indicates an expectation that the agencies will use this DPS category only “sparingly.”¹¹¹ In Senate Committee Report 96-151, the Committee responded to the General Accounting Office’s concern that the DPS standard could lead to absurd results like the listing of squirrels in one city park where their population is declining despite an abundance of squirrels in other parks nearby.¹¹² The Committee justifies the DPS, irrespective of any clarification by the agencies, by announcing that despite potential problems on a small scale the DPS provides protection to United States populations of organisms that might be abundant elsewhere,¹¹³ which is apparently politically, if not scientifically, justifiable. Nonetheless, the agencies seem not to have heeded the “sparingly” language and use the DPS often.

In 1996, the FWS and NMFS issued a joint policy statement explaining how they would implement the DPS in listing, delisting, and reclassifying.¹¹⁴ Under this policy, a DPS consists of three elements: discreteness, significance, and status. To be discrete, a population must have some characteristic that differentiates it from other populations. Specifically, a population must either be “markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors,” which can be shown through genetic evidence, or it must be “delimited by international governmental boundaries.”¹¹⁵ To be significant, a population must be important to the taxon to which it belongs. The agencies can consider, but are not limited to, the following factors:

- (1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon,
- (2) Evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon,
- (3) Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more

111. S. REP. NO. 96-151, at 7 (1979).

112. *See id.*

113. *Id.*

114. Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4,722 (Feb. 7, 1996) [hereinafter DPS Policy].

115. *Id.* at 4,725.

abundant elsewhere as an introduced population outside its historic range, or (4) Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.¹¹⁶

Finally, the agency must determine the status of the population, meaning the agency will decide whether it is endangered or threatened according to the factors in section 1533(a).¹¹⁷

Though the policy statement is filled with factors, its flexibility in implementation is obvious. Indeed, the fact that the policy is written in terms of factors implicitly indicates a case-by-case application. Regarding the significance element, the agencies explicitly state that flexibility is essential since “it is not possible to describe prospectively all the classes of information that might bear on the biological and ecological importance of a discrete population segment.”¹¹⁸ Moreover, the agencies will not require genetic evidence to support a finding of distinctness,¹¹⁹ nor will they require absolute reproductive isolation of the population from other populations.¹²⁰ Thus, the agencies at most indicate their general mindset: populations can be “species” if they somehow represent a unique and reproductively separated subset of the whole species, extinction of which would effect important losses on the whole species in terms of geography or genetics.

In 1991, NMFS issued its own policy regarding the application of the DPS standard exclusively to Pacific salmon.¹²¹ For these fish, a population is a DPS only if it represents an “evolutionary significant unit” (ESU).¹²² The language of this policy suggests that populations must satisfy more rigorous tests than those of the general DPS policy statement to qualify for DPS status. Instead of “discrete,” Pacific salmon populations are DPSs only if they are “substantially reproductively isolated;”¹²³ instead of being “significant,” they must “represent an important component in the evolutionary legacy of the species.”¹²⁴ Yet even this policy gives

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 4,723.

120. *Id.* at 4,724.

121. Policy on Applying the Definition of Species Under the Endangered Species Act to Pacific Salmon, 56 Fed. Reg. 58,612 (Nov. 20, 1991).

122. *Id.* at 58,618.

123. *Id.*

124. *Id.* The agency explains that the reproductive isolation of populations must be substantial enough to allow “important differences” to develop that distinguish them from other populations. *Id.* The evolutionary legacy element seems to increase the requisite

NMFS significant leeway. As in the general DPS policy, NMFS adds qualifying language that largely takes the bite out of the rule. Reproductive isolation, after all, need not be absolute, and a lack of “direct genetic or any other type of information” will not prevent DPS/ESU status.¹²⁵ Not wanting to restrict its future listing decisions, the agency announces that for these fish it will require a little more than for other fish. Consequently, though, the agency’s determination that a population is an ESU is discretionary and made on a case-by-case basis.

In practice, as with general species determinations, the agencies consider many factors in making DPS determinations. Recent NMFS status review decisions use language apparently typed into and automatically spit out of agency computers. In the section usually called “Consideration as a ‘Species’ Under the ESA,” NMFS states that it considers several kinds of information in the attempt “to delineate DPSs,” including habitat characteristics, geographic variability in phenotypic and life history traits, use of mark-recapture studies, and traits that are inherited in a predictable way.¹²⁶ Moreover, in the sections called “*DPS Determination*,” NMFS sometimes states that genetic evidence may indicate significant reproductive isolation and thereby identify discrete and significant segments of the species.¹²⁷

Though not explicitly stated, the agencies use basically the same analysis when (1) determining if a population is distinct from the species as a whole (i.e., whether a DPS exists) and (2) assuming one exists, determining if two populations compose the same DPS. This second type of analysis usually occurs when it is clear that a petitioned group of organisms is distinct from the species as a whole, but it is not clear if the group as petitioned really comprises multiple DPSs. For example, NMFS received a petition to list the various types of Rockfish each as DPSs.¹²⁸ The NMFS determined that because of habitat characteristics, population structure, and genetic evidence that populations within each type of Rockfish did

significance for a population in that a population must contribute “substantially to the ecological/genetic diversity of the species as a whole” such that extinction would “represent a significant loss to the ecological/genetic diversity of the species...” *Id.* Presumably, with these heightened standards, fewer populations can qualify as DPSs and therefore NMFS can list fewer “species.”

125. *Id.*

126. *See, e.g.,* Hake, Cod, Pollock Determination, *supra* note 95, at 70,516; *see also* Endangered and Threatened Species; Puget Sound Populations of Copper Rockfish, Quillback Rockfish, Brown Rockfish, and Pacific Herring, 66 Fed. Reg., 17,659, 17,662 (Apr. 3, 2001) (to be codified at 50 C.F.R. pts. 223 and 224) [hereinafter Rockfish, Herring Determination].

127. *See, e.g.,* Rockfish, Herring Determination, *supra* note 126, at 17,663.

128. *Id.* at 17,659.

not belong to one DPS, but rather composed their own DPS.¹²⁹ Additionally, with particular relevance to transgenic salmon, a recent notice of determination cited differences in growth rates and ultimate sizes as reasons for concluding that two Pacific hake populations did not belong to the same DPS.¹³⁰

In sum, the DPS standard gives agencies a tool for protecting small groups of organisms relative to the species as a whole. To be protected, these groups must exhibit some unique inherent trait, occupy a unique ecological and geographical role, and represent a significant part of the species as a whole. The particular grounds that determine the agency's decision, however, are largely for the agency to choose.

3. Hybrid Policy

Currently, NMFS and FWS do not have a final hybrid policy, though a proposed rule awaits promulgation.¹³¹ The prior agency position on hybrids emanated from a series of legal opinions of the Interior Department's Solicitor, which discouraged protection for hybrids.¹³² One such opinion prevented the use of hybridization as a tool for rescuing the Dusky Seaside Sparrow from extinction.¹³³ In the late 1970s, the Dusky's numbers plummeted so severely, that by 1981 only 5 specimens remained, all of which were male.¹³⁴ FWS rejected a plan under which these males would have been bred with females from another subspecies of the Seaside Sparrow and then the female hybrids would have been bred with the male Dusky's in a process called back-crossing.¹³⁵ Even though later generations would share 98.4% of the same genetic material, FWS refused to protect the hybrids and withdrew funding for the program.¹³⁶ Consequently, the Dusky became extinct.¹³⁷ The basis for this and other of the Solicitor's opinions was a desire to preserve genetic purity,¹³⁸ which was supposedly corrupted by hybridization. Today, the agencies continue to deny listed status to hybrids.¹³⁹

129. *Id.* at 17,663.

130. *See* Hake, Cod, Pollock Determination, *supra* note 95, at 70,517.

131. *See* Proposed Hybrid Policy, *supra* note 7.

132. *Id.* at 4,710.

133. *See* Hill, *supra* note 14, at 245.

134. *Id.* at 258.

135. *Id.* at 259.

136. *Id.*

137. *Id.*

138. *See* Doremus, *supra* note 18, at 1110.

139. *See* Endangered and Threatened Wildlife and Plants; Final Rule to Remove the Plant "Echinocereus lloydii" (Lloyd's Hedgehog Cactus) from the Federal List of Endangered and Threatened Plants, 64 Fed. Reg. 33,796 (June 24, 1999) (to be codified at 50 C.F.R. pt. 17) (withdrawing protection from hedgehog cactus, which was determined to be a hybrid and not

Under the proposed policy, certain hybrids will be covered. The policy employs the term “intercross” instead of hybridization to refer to “all crosses between individuals of different species.”¹⁴⁰ Coverage under the policy extends to intercross progeny resulting from the intercross of a listed with a non-listed species if the progeny share traits of the listed parent’s taxon and more closely resemble the listed parents than some intermediate form between the listed and non-listed parents.¹⁴¹ This policy, then, would probably provide coverage for organisms like the sparrow intercross progeny and will thus prevent needless extinctions.

This new policy is extremely significant to the issue of transgenic organisms. Speaking directly on point, the agencies state that as a general rule the policy would not protect any organism resulting from the “intentional intercrossing of species under confinement and the artificial transfer of genetic material from one taxonomic species into another (i.e., transgenics).”¹⁴² The progeny may be covered, however, if they are part of an approved recovery plan.¹⁴³ The significance of this policy is two-fold. First, it unambiguously states the regulatory position that transgenic organisms occupy the status of hybrids or intercross progeny. Second, it establishes a presumption against coverage of transgenic organisms as endangered species. Thus, if the agencies adopt the new policy, transgenic organisms will only rarely receive protection.

C. *Judicial Interpretation*

Cases directly addressing the definition of “species” -- legal, biological, or otherwise -- are few in number. These cases do not offer a comprehensive account, but they give guidance in a few particular areas.

At least one federal court recognizes that the ESA definition of species is not a strictly scientific definition. A District Court in Arizona stated that the ESA definition is more expansive.¹⁴⁴ Pointing to legislative history, the court reasoned that a broader definition is justified because it allows the government to protect populations in the United States from going extinct, even if the worldwide population is healthy.¹⁴⁵ Similarly, the same court in a subsequent decision in the same case stated that a DPS is not

a distinct species as initially thought).

140. Proposed Hybrid Policy, *supra* note 7, at 4,710-11.

141. *Id.*

142. *Id.* at 4,712.

143. *Id.*

144. *Southwest Ctr. for Biological Diversity v. Babbitt*, 926 F. Supp. 920, 924 (D. Ariz. 1996).

145. *Id.*

simply broader than any scientific category but rather “appears nowhere in taxonomic science or literature” and “appears to be some sort of hybrid language that Congress carved out which is not based upon taxonomy.”¹⁴⁶ Thus, despite the mandate that listing decisions be based on the best available scientific or commercial data, the courts acknowledge that the ESA permits listings based on its own somewhat non-scientific definition.

Another District Court stressed the importance of interbreeding in the ESA definition of “species.” In the *Fund for Animals*¹⁴⁷ case, the plaintiffs sued the Florida Game and Fresh Water Fish Commission to enjoin it from allowing a four-day deer hunt designed to eliminate an apparent overcrowding problem.¹⁴⁸ The plaintiffs wanted to protect the Florida white-tail deer, a non-listed animal that resembles the Key Deer, a listed species.¹⁴⁹ To protect the white-tail, the plaintiffs argued that the two types of deer were the same species. Based upon expert testimony that the two deer types do not actually interbreed, the court held that the two are automatically different species, and therefore the white-tail should not receive the protection of the Key Deer.¹⁵⁰ Even though the two could interbreed, the “definition of ‘species’ in the Endangered Species Act contemplates *the act of interbreeding* to occur, in fact, during maturity, not the *possibility* that white-tail deer might someday biblically *know* the Key Deer.”¹⁵¹ Thus, this court makes a bright-line rule, however obvious, that requires a species under the ESA to at least be a group of interbreeding individuals.

Courts usually defer to the agencies when their decisions rest upon scientific evaluations. The Eleventh Circuit in *United States v. Guthrie*¹⁵² upheld the agency decision that a group of organisms constituted a species despite some uncertainty within the scientific community.¹⁵³ The defendant in *Guthrie*, charged with the criminal possession and selling of Alabama red-bellied turtles, argued that these listed turtles should not have been considered as a separate species under the ESA.¹⁵⁴ The court cited the different scientific publications that the agency relied upon to make its determination

146. *Southwest Ctr. for Biological Diversity v. Babbit*, 980 F. Supp. 1080, 1085 (D. Ariz. 1997).

147. *Fund for Animals, Inc. v. Florida Game & Fresh Water Fish Comm'n*, 550 F. Supp. 1206 (S.D. Fla. 1982).

148. *Id.* at 1207.

149. *Id.* at 1208.

150. *Id.* at 1209.

151. *Id.*

152. 50 F.3d 936 (11th Cir. 1995).

153. *Id.* at 946.

154. *Id.* at 939.

and held that the agency did not abuse its discretion by considering the turtle a separate species despite the scientific uncertainty.¹⁵⁵ Though the case primarily demonstrates the deference courts will give to agencies when their decisions rest upon scientific information, it at least demonstrates that absolute scientific consensus is not a requisite for species determinations under the ESA.

Courts have, however, restrained the listing agencies when their policy statements or listing decisions contravene the text of the ESA definition. In the second *Southwest* case,¹⁵⁶ the court struck down a FWS policy that required petitions to list a DPS to include only one subspecies per DPS.¹⁵⁷ Thus, if an applicant seeks to list a DPS that consists of multiple subspecies, the applicant must make separate DPS petitions for each subspecies. Reading the statute strictly, the court noted that the “ESA *does not* refer to the listing of DPSs of *subspecies* ... if Congress had intended that a DPS contain only one subspecies, it would have allowed only the listing of ‘DPSs’ of *subspecies*.”¹⁵⁸

More recently, an Oregon district court prevented NMFS from making a listing decision at a level below the DPS/ESU.¹⁵⁹ In 1998, NMFS listed the Oregon Coast Coho Salmon as a threatened species, but in making the determination the agency included only “naturally spawned” salmon.¹⁶⁰ According to a policy statement that this case effectively strikes down, fish that are “hatchery spawned,” or raised in an artificial propagation environment, will not be counted along with “naturally spawned” fish unless they are essential to the recovery of the species, even if the agency considers both the hatchery and naturally spawned fish to constitute one DPS/ESU.¹⁶¹ The decision not to count the hatchery-spawned fish was arbitrary and capricious because NMFS had concluded that the hatchery and naturally spawned populations of salmon belonged to

155. *Id.* at 945-46.

156. *Southwest Ctr. for Biological Diversity v. Babbitt*, 980 F. Supp. 1080 (D. Ariz. 1997).

157. *See id.* at 1085.

158. *Id.* The decision is curious because, as the FWS argued, how can a DPS consist of more than one subspecies if subspecies are subsets of species and DPSs are even smaller subsets? If a group consists of multiple subspecies, each of which necessarily exhibits unique characteristics, then surely under the FWS policy statement on DPS listing, the group as a whole would not be discrete. Yet because DPS is not a scientific term, the court dismisses it and basically deprives it of any meaning at all. *See id.*

159. *See Alsea Valley Alliance v. Evans*, 161 F. Supp 2d 1154 (D. Or. 2001).

160. *Id.* at 1159.

161. *See id.* at 1158.

the same DPS/ESU¹⁶² and that the ESA does not allow agencies to make distinctions within a DPS/ESU.¹⁶³

The significance of *Alsea* should not be overstated. The case does not deal with the questions of whether a DPS exists or, assuming a DPS exists, whether it really comprises multiple populations. Instead, the case concerns the narrow question of whether, assuming a DPS exists and assuming that the two populations in question belong to the same DPS, the agency can nonetheless choose not to count the hatchery-spawned fish in determining whether the DPS is endangered or threatened. The court does not hold that hatchery-spawned fish cannot constitute a DPS of their own. In fact the court states quite the opposite: “[t]he NMFS listing decision could arguably be proper under the ESA if the NMFS defined ‘hatchery spawned’ coho as a separate DPS.”¹⁶⁴ To do this would require the population to satisfy the DPS/ESU standard.¹⁶⁵ Neither does the court hold that hatchery spawned fish must always be counted along with naturally spawned fish in determining whether a DPS/ESU is endangered or threatened. Rather, the court takes as given the agency’s decision that the two types of fish constitute one DPS/ESU. At least then the case stands for the proposition that fish from artificial propagation environments *can* be included in the same DPS with naturally spawned fish of an otherwise identical species. Once the DPS is delineated, however, the agency cannot make distinctions between members within the DPS because the ESA’s text does not mention any such distinctions.¹⁶⁶

As the judicial, administrative, and statutory authorities reveal, the legal definition of “species” is no clearer than the scientific definitions. The statutory framework essentially punts to the agencies, which have substantial deference to construe and apply the term. The agencies have exercised their discretion, for example, by deciding that hybrids are not species. More importantly for this comment is their indication that transgenic organisms are hybrids. The courts, finally, will restrain agencies’ species determinations only when they clearly violate the ESA’s language.

162. *Id.* at 1161.

163. *Id.* at 1162.

164. *Id.*

165. *Id.* The court notes, however, that in the case in question, the two populations interbred and so could not be discrete from each other.

166. *See id.*

IV. TRANSGENIC SALMON

Determining how certain organisms fit into the ESA scheme of species identification is an empirical endeavor that cannot be answered in the abstract. The place of transgenic salmon in the ESA depends on how they are made, where they live, and how they interact with other salmon. Understanding the place of transgenic salmon in the ESA enables one to predict what a policy statement on transgenic organisms under the ESA might look like and consequently to predict whether they could be listed or whether they are distinguishable from populations of basically similar fish minus the genetic modifications.

A. *Biology Behind Transgenic Salmon*

Transgenic salmon have their genesis in the biotechnological¹⁶⁷ techniques of genetic engineering. Genetic engineering allows scientists to incorporate desirable traits of one organism into another.¹⁶⁸ Traditional breeding has long exploited the fact that, though breeders could not have fully understood the mechanics until the twentieth century, DNA, which determines an organism's characteristics, will function even if it is transferred from one organism to another.¹⁶⁹ Breeders accomplish this genetic transfer by simply mating animals with different observable traits.¹⁷⁰

Modern genetic engineering is infinitely more precise than traditional breeding. First, scientists can isolate individual genes along lines of DNA that represent given traits.¹⁷¹ This isolated gene is then inserted into a fertilized egg through a variety of mechanisms. The insertion may involve *Agrobacterium*, electroporation, or particle gun transfer.¹⁷² Often scientists attach the gene to some kind of molecular vehicle and directly inject the entire construct into the fertilized egg through a glass needle.¹⁷³ Eggs that survive and begin to divide are placed into a surrogate mother.¹⁷⁴ The resulting offspring are genetically modified organisms.¹⁷⁵ Genetic engineering has the added advantage over

167. See Betsch, *supra* note 1, at 1.

168. *Id.*

169. *Id.*

170. Carol Lewis, *A New Kind of Fish Story: The Coming of Biotech Animals*, FDA CONSUMER, Jan.-Feb. 2001, at 1, available at http://www.fda.gov/fdac/features/2001/101_fish.html (last visited Nov. 6, 2002).

171. *Id.*

172. Betsch, *supra* note 1, at 1.

173. Lewis, *supra* note 170.

174. *Id.*

175. See Kapuscinski, *supra* note 2, at 57.

breeding of not being limited by post-mating isolation mechanisms,¹⁷⁶ meaning scientists can combine desirable traits from organisms that are otherwise incapable of breeding.

Salmon have long been the subject of genetic engineering experiments. Since around 1980, scientists have attempted to create faster-growing salmon. Dr. Choy Hew, a Canadian researcher, discovered that certain flounder could survive in a tank that was accidentally frozen and then thawed.¹⁷⁷ Hew determined that the flounder has a gene, a so-called antifreeze gene, that allows it to survive in polar regions. Hew isolated the gene that acts like an on-off switch for the antifreeze gene, and he also isolated a gene from Chinook salmon that produces a growth stimulating hormone. He inserted these two genes into a fertilized salmon egg. Because the on-off switch gene seems to stay turned on, it continuously activates the growth hormone gene. The resulting fish therefore grow larger more quickly.

The only producer of transgenic salmon that is close to commercialization is Aqua Bounty Farms, a subsidiary of A/F Protein.¹⁷⁸ Using techniques similar to those of Dr. Hew, Aqua Bounty scientists incorporate the Chinook growth hormone and the promoter sequence (on-off switch) from the ocean pout fish into fertilized eggs from Atlantic salmon.¹⁷⁹ Their transgenic salmon grow anywhere from 2.5 to 6 times faster than normal salmon.¹⁸⁰

B. Regulation of Transgenic Salmon

Companies like Aqua Bounty hope to capitalize on their salmon's potential for increased production by selling the fish to net pen salmon farms that will raise them as future food sources.¹⁸¹ Though no transgenic fish have been approved as food sources¹⁸² Aqua

176. See *supra* notes 41-47 and accompanying text.

177. Lewis, *supra* note 170, at 1.

178. See Kapuscinski, *supra* note 2, at 57; Aqua Bounty Farms, *supra* note 2.

179. See Kapuscinski, *supra* note 2, at 57. A DPS of Atlantic salmon was listed in 2000 as an endangered species. See Endangered and Threatened Species; Final Endangered Status for a Distinct Population Segment of Anadromous Atlantic Salmon (*Salmo salar*) in the Gulf of Maine, 65 Fed. Reg. 69,459, 69,479 (Nov. 17, 2000) (to be codified at 50 C.F.R. pts. 17 and 224) [hereinafter Anadromous Atlantic Salmon].

180. See Kapuscinski, *supra* note 2, at 57. Aqua Bounty has named its particular type of salmon "AquAdvantage Bred salmon." Aqua Bounty Farms, *supra* note 2.

181. See Kapuscinski, *supra* note 2, at 57. Dr. Choy L. Hew argues that only aquaculture can meet the increased demand for seafood products due to population growth. See Choy L. Hew & Garth Fletcher, *Transgenic Fish for Aquaculture*, CHEMISTRY & INDUSTRY, Apr. 21, 1997.

182. John Matheson, *Questions and Answers About Transgenic Fish*, United States Food & Drug Admin., Center for Veterinary Medicine, at <http://www.fda.gov/cvm/index/consumer/transgen.htm> (last visited Nov. 6, 2002).

Bounty itself claims already to have orders for 15 million genetically engineered eggs.¹⁸³

Aqua Bounty has submitted an application to the Food and Drug Administration for commercial approval of their salmon,¹⁸⁴ even though the FDA website has not posted the application or even mentioned that an application has been received.¹⁸⁵ The FDA does indicate, though, that it would regulate the fish as drugs rather than food¹⁸⁶ because the growth hormone used in their production is already considered a drug.¹⁸⁷

C. Aquaculture Generally

The problem with commercially harvesting fish, transgenic or otherwise, is finding a place to put them all. Just as cattle farmers may use wide expanses of fenced in farmland to provide containment in a somewhat natural environment, so commercial fish harvesters may grow fish in natural bodies of water sectioned off by netting or floating cages.¹⁸⁸ The hatchery owners may raise the fish exclusively in the pens, or they may release the fish into the wild to increase the size of natural populations.¹⁸⁹ This manner of raising fish has many names including aquaculture, artificial propagation, and controlled propagation.

1. Potential Dangers

Michael Goodman argues that poorly designed hatchery programs pose serious threats to the adaptive gene pools, and thus the existence, of natural fish populations.¹⁹⁰ Hatcheries pose direct threats to gene pools through a destruction of genetic diversity even without reducing population size.¹⁹¹ For example, nature has its

183. See Rick Moore, *The Spawning of a New Era: GM Super Salmon and the Wisdom of Tinkering with Fish*, at <http://www1.umn.edu/urelate/kiosk/12.00text/salmon.html> (last visited Nov. 6, 2002); Union of Concerned Scientists, *Genetically Engineered Salmon*, at http://www.ucsusa.org/food_and_environment/biotechnology/page.cfm?pageID=327 (last revised Oct. 29, 2002) [hereinafter UCS Update].

184. Kapuscinski, *supra* note 2, at 57; E-mail from Elliot Entis, President of A/F Protein, Inc. (September 17, 2001).

185. UCS Update, *supra* note 183.

186. See Matheson, *supra* note 182.

187. See UCS Update, *supra* note 183. Though the agency does not explain why it will regulate the fish this way, the Union of Concerned Scientists postulates that the drug framework has an advantage over the food framework in that drugs, unlike foods, must pass pre-market review of health and environmental risks. However, the drug regulations do not allow much public participation. *Id.*

188. See Moore, *supra* note 183.

189. See Goodman, *supra* note 63, at 123-24.

190. See *id.* at 125-26.

191. *Id.*

own process, natural selection, for choosing which traits or alleles will work in the wild.¹⁹² Hatchery managers, however, often engage in so-called artificial selection by tossing out fish with commercially undesirable traits, like slow growth rates, and keep fish that grow quickly and large.¹⁹³ The result is an artificial population sharing a homogeneous gene pool of traits that are not always beneficial in the wild (i.e. contribute to low fitness).¹⁹⁴ The hatchery manager's artificial selection process keeps the population size steady, even though in nature fish with these traits would die off.¹⁹⁵ If generation after generation of these naturally unfit fish are released into the wild, the artificially selected traits find their way into natural gene pools through the process of introgression and threaten the continued existence of wild populations.¹⁹⁶

Artificially propagated fish also indirectly threaten natural gene pools by reducing the size of natural populations. Hatchery fish can be released in such numerous amounts that they crowd out and compete with natural fish for resources.¹⁹⁷ Additionally, hatcheries are often breeding grounds for diseases, which are then transmitted to natural populations upon release or by seeping through the underwater netting.¹⁹⁸

As the agencies have recognized, aquaculture is a significant source of species endangerment.¹⁹⁹ Additionally, the Environmental Defense Fund concluded that "[a]quaculture facilities constructed or operated without environmental protection in mind can cause serious environmental degradation...."²⁰⁰ Whether or not one disputes the full effect of aquaculture on the environment, even those in favor of aquaculture agree that new technologies can obviate some of the possible problems.²⁰¹

2. Aquaculture of Endangered Species

Not only commercial fish harvesters benefit from aquaculture. Listing agencies and conservation groups may view aquaculture as

192. *See id.* at 126.

193. *Id.* at 128.

194. *Id.* at 129.

195. *Id.*

196. *Id.*

197. *See id.* at 135.

198. *See id.* at 137.

199. *See* Anadromous Atlantic Salmon, *supra* note 179, at 69,478 (considering escapes from aquaculture to be a manmade factor affecting the continued existence of the salmon).

200. REBECCA GOLDBURG & TRACY TRIPLETT, ENV'T'L DEFENSE FUND, MURKY WATERS: ENVIRONMENTAL EFFECTS OF AQUACULTURE IN THE US 16 (1997).

201. Hew & Fletcher, *supra* note 181.. Hew and Fletcher offer indoor, self-contained facilities as alternatives to floating cage aquaculture. *Id.*

a mechanism for preserving fish species. Listing agencies have promulgated two relevant policies. Both are arguably guided by the ESA definition of “conservation,” which includes “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary... [and may include] propagation....”²⁰²

The NMFS and FWS have a joint policy providing that artificial or controlled propagation can be used to prevent the extinction of listed species provided they consider the risks, including risks of genetic introgression and adverse impacts to wild populations of listed species, determine that other measures have failed, and base the programs on specific recommendations in an approved recovery plan.²⁰³ The NMFS also promulgated policy exclusively applicable to Pacific salmon.²⁰⁴ Under this policy, specimens of listed Pacific salmon DPSs can be bred in hatcheries, but they will not be counted in with naturally spawned fish in the same DPS unless they are “essential for recovery.”²⁰⁵ Two circumstances where this might apply are where there is a “high, short-term risk of extinction, or if the hatchery population is believed to contain a substantial proportion of the genetic diversity remaining in the species.”²⁰⁶ The Pacific salmon policy, then, requires a more serious threat of injury to the natural populations in the absence of artificial propagation in order to permit artificial propagation.

As is the proposed hybrid policy,²⁰⁷ the joint policy on artificial propagation is particularly significant for transgenic salmon. Like the proposed hybrid policy, this policy defines “intercross” to mean the “genetic exchange between individuals of different species [or] subspecies....”²⁰⁸ This policy explicitly states that “[i]ntercrossing will not be considered for use in controlled propagation programs unless recommended in an approved recovery plan; supported in an approved genetic management plan ... implemented in a scientifically controlled and approved manner; and undertaken to compensate for a loss of genetic viability....”²⁰⁹ Thus, generally the

202. 16 U.S.C. § 1532(3) (2002).

203. See Policy Regarding Controlled Propagation of Species Listed Under the Endangered Species Act, 65 Fed. Reg. 56,916, 56,920 (Sept. 20, 2000) [hereinafter Controlled Propagation Policy].

204. Interim Policy on Artificial Propagation of Pacific Salmon Under the Endangered Species Act, 58 Fed. Reg. 17,573 (Apr. 5, 1993) [hereinafter Pacific Salmon Artificial Propagation Policy].

205. *Id.* at 17,575.

206. *Id.*

207. Proposed Hybrid Policy, *supra* note 7 at 4,710.

208. Controlled Propagation Policy, *supra* note 200, at 56,919.

209. *Id.* at 56,920.

policy does not regulate artificial propagation of transgenic fish. Rather, it limits the artificial propagation of transgenic fish that are at least partially composed of listed species.

D. Aquaculture of Transgenic Salmon: The "Trojan Gene Effect"

As if the risks of aquaculture in general were not serious enough, using transgenic fish raises additional issues.²¹⁰ To prevent injury to natural populations if hatchery spawned transgenic fish escaped into the wild, companies like Aqua Bounty argue that they can simply produce sterile salmon and so prevent them from reproducing in the wild.²¹¹ The problem with this biological barrier to reproduction is, first, sterilization procedures are not always effective and, second, for large outputs of fish, screening of each individual fish is cumbersome.²¹² Thus, some accidentally fertile transgenic fish could still escape into the wild.

A provocative recent study by William Muir and Richard Howard from Purdue University projected serious dangers to natural fish populations if transgenic fish do escape.²¹³ To state their conclusion bluntly, they predict that "a transgene introduced into a natural population by a small number of transgenic fish will spread as a result of enhanced mating advantage, but the reduced viability of offspring will cause evaluated extinction of both populations."²¹⁴ Muir and Howard conducted experiments using transgenic fish that have the same characteristics as those made by Aqua Bounty. The researchers' fish were Japanese medaka inserted with a human growth hormone gene and salmon promoter gene. Their tests revealed that survival of transgenic young was 70% of that of wild young, or a 30% disadvantage. They also conducted mating experiments and found that in general, transgenic or not, larger males have a mating advantage of 400% over smaller ones. Though the medaka had an increased juvenile growth rate, their ultimate adult body size was not larger than wild medaka; Muir and

210. Atlantic Salmon Federation, *Aquaculture: Its Challenges for the Wild Atlantic Salmon*, Brief to the Senate Committee on Fisheries, at <http://www.asf.ca/Aquaculture/senate.pdf> (Feb. 29, 2000) (arguing that transgenic salmon only add to the existing threats of aquaculture). For general coverage of the issue, see a summary of CBS Evening News, *Genetic Tinkering for Bigger Catch* (Feb. 14, 2000) at <http://www.cbsnews.com/stories/2000/02/14/eveningnews/main160S40.shtml> (on file with the Journal of Land Use & Environmental Law).

211. See Hew & Fletcher, *supra* note 181; Moore, *supra* note 183.

212. See Kapuscinski, *supra* note 2, at 61.

213. See Muir & Howard, *supra* note 3, at 13856. *But see* Hew & Fletcher, *supra* note 181. Hew and Fletcher claim that "[i]n terms of ecology, there is no evidence that transgenics disrupt the ecological balance...". *Id.*

214. Muir & Howard, *supra* note 3, at 13,853.

Howard therefore concluded that the transgenic male medaka probably would not have an increased mating advantage. They nonetheless modeled the possible effects of a transgene release assuming that the growth rate would continue throughout adulthood because other fish species, including salmon, continue to grow through adulthood when altered with growth hormone genes.

Muir and Howard applied these data to a simulation model with staggering results. They assumed that sixty transgenic fish were introduced into a wild population of 60,000. If the 400% mating advantage is not factored in, but the 30% viability disadvantage is, the wild populations should recover without a problem and the transgene should be eliminated in twenty generations.²¹⁵ Yet, when Muir and Howard combined the effects of the mating advantage and reduced viability, the transgene spread quickly throughout the wild populations and the population was completely eliminated in forty generations.²¹⁶ The researchers referred to the extinction phenomenon as the “Trojan gene effect” because, in summary, “the mating advantage provides a mechanism for the transgene to enter and spread in a population, and the viability reduction eventually results in population extinction.”²¹⁷

Results such as the “Trojan gene effect” should factor prominently in the debate over the scope the ESA’s definition of “species.” Given such troubling possibilities, policy makers should consider the incentives to distinguish the transgenic from natural fish and thereby protect the natural ones, as well as the disincentive to waste resources to protect fish that are bred to die.²¹⁸

E. Consideration of Transgenic Salmon as a “Species”

Whether transgenic salmon are a “species” under the ESA is too broad an inquiry. Species identification requires groups of actual organisms living in actual environments. An academic inquiry, then, requires certain assumptions about the groups under scrutiny. For transgenic salmon, the hypothetical circumstances with the most pressing relevance involve facts similar to those in the *Aalsea* case, in which the court prohibited agencies from distinguishing

215. *See id.* at 13,854-55.

216. *See id.* at 13,855.

217. *Id.*

218. Some fish farmers are quick to point out that they do not use transgenic fish. In responding to the CBS news broadcast, Atlantic Salmon of Maine announced on its website that it “would not endorse or even experiment with a ‘GMO’ (genetically modified organism) salmon unless exhaustive study were done, in advance, to satisfy us that there were no harmful affects to consumers or the environment.” Majestic Farms, Response to the CBS news broadcast on “GENETIC TINKERING FOR BIGGER CATCH,” at <http://www.majesticsalmon.com/gmopolic.html> (last visited Nov. 6, 2002).

between naturally spawned and hatchery spawned fish within the same DPS.²¹⁹ Part IV. E asks slightly different questions. First, Part IV. E considers whether agencies can distinguish between hatchery spawned transgenic salmon and naturally spawned salmon for the purpose of determining whether the two populations compose the same DPS. In answering this first question, Part IV. E also considers whether, assuming the two populations do compose the same DPS, the agencies may nonetheless refuse to count the transgenic fish by virtue of their being transgenic. Second, Part IV. E considers whether hatchery spawned transgenic fish could constitute their own DPS.

The transgenic salmon in this inquiry are modeled after those modified by Aqua Bounty and are composed of Atlantic salmon with the Chinook salmon growth hormone gene and the ocean pout promoter gene. The Atlantic salmon used must be from a non-listed DPS,²²⁰ but let the salmon be a DPS that is petitioned for listing. Further assume that the genes have the effect of increasing both the growth rate and ultimate size of the salmon. Finally, assume that the transgenic fish are raised in hatcheries for commercial purposes and that they somehow escape into the wild. This comment will consider the ramifications if (1) the escapees are considered hybrids, (2) regardless of hybrid status, the escapees interbreed with wild populations of the Atlantic salmon petitioned for listing, or (3) regardless of hybrid status, the escapees do not interbreed with wild populations but form their own isolated population segment.

1. Transgenic Salmon as Hybrids

The quick and easy answer is that under the proposed agency position on hybridization, transgenic salmon are intercross progeny, and the agencies would thus have to distinguish between the populations; the escapees would receive no protection. Under the proposed policy, the processes through which the escapees were created meet the broad definition of intercross that includes the “artificial transfer of genetic material”²²¹ between species given the combination of Chinook and pout fish genes with Atlantic salmon. Moreover, since the escapees were created for commercial production, they cannot satisfy the exclusion for organisms that are produced for purposes of recovery of a listed species under a recovery plan.²²² Were the proposed hybrid policy effectuated, the

219. See *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001).

220. See *supra* notes 188-201 and accompanying text.

221. Proposed Hybrid Policy, *supra* note 7, at 4,712.

222. *Id.*

escapees would not be protected regardless of whether or not they interbred with wild Atlantic salmon. As a *proposed* policy, however, the agency may change its position before rendering its final policy, however unlikely.

The proposed hybrid policy's exclusion of transgenic organisms makes good sense. First, it makes the regulatory position on hybrids more compliant with the statutory strictly science mandate.²²³ By providing protection to some hybrids, the policy recognized what scientists had long contended; hybridization between subspecies is a common and natural process.²²⁴ This realization also permits agencies to use hybridization as a technique for preserving species at a high level of genetic purity as was prohibited for the Dusky seaside sparrow.²²⁵ Secondly, and most important, by generally excluding transgenic organisms from the newly created hybrid protection, the agencies ensure that only those hybrids that preserve natural genetic heritage receive protection. From the Act's inception, Congress expressed its concern for preserving the genetic heritage developed by nature over evolutionary time scales.²²⁶ Thus, the exclusion better fulfils the policy that the ESA should not protect just any genetic heritage but only that heritage that develops through natural processes.

2. Distinguishing Transgenic from Non-Transgenic Salmon

Were one to set aside the issue of transgenic salmon as hybrids, traditional DPS analysis would make distinguishing between interbreeding populations of escapees and wild salmon difficult. The significance of being able to distinguish between the transgenic escapees and petitioned wild salmon is that, in distinguishing them, the listing agency will not count the transgenic salmon with the wild salmon and will thus reduce the total number for purposes of listing. This reduced number in the abstract makes listing more likely. Conversely, if the two populations must be counted together, as in *Alsea*,²²⁷ the total number increases and makes listing less likely.

The first way the agencies could refuse to count the transgenic fish is by determining that they do not belong to the same DPS as the petitioned fish. Some will argue that the agency should distinguish between the populations, primarily because the transgenic fish meet the DPS discreteness test for determining that

223. See *supra* Part III. A. 3.

224. Proposed Hybrid Policy, *supra* note 7, at 4,711.

225. See *supra* notes 137-38 and accompanying text.

226. See H.R. REP. NO. 93-412, at 5 (1973).

227. See *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001).

two groups belong to different populations.²²⁸ The transgenic fish are markedly distinct in terms of physiology (morphology) because of their growth rate and ultimate size, both of which have been used to distinguish populations.²²⁹ Moreover, they are discrete because of their unique genetic makeup. Genetic evidence, though not always required, is almost always used in DPS determinations. In the *Alesea* case itself, the court did not distinguish between the fish populations in part because it would create the “unusual circumstance of two *genetically identical* Coho Salmon swimming side-by-side in the same stream, but only one receives ESA protection while the other does not.”²³⁰ By contrast, in this section’s hypothetical, the genetic difference between the two populations is not disputed; *transgenic* salmon are necessarily genetically distinct.

On the other hand, some will argue that calling the populations distinct from each other makes no sense if, as assumed here, they interbreed. Indeed the joint policy definition of discreteness centers on reproductive isolation. The definition states that populations are distinct if they are “markedly separated,” in the sense of being isolated reproductively, as a consequence of what Mayr called isolation mechanisms: “physical, physiological, ecological, or behavioral factors.”²³¹ The policy also states that the genetic and morphological data is used to “provide *evidence* of this separation.”²³² Thus genetic and morphological differences are not ends in themselves; they are merely tools for establishing reproductive isolation.

The result is a strange situation and a legal stalemate. As the DPS policy assumes, usually populations that are reproductively isolated eventually manifest genetic or morphological differences. Here, however, the transgenic and wild populations interbreed *and* show genetic and morphological differences. Thus the transgenic salmon meet the individual factors supporting discreteness, but they fail the basic test of being markedly separated.

As a matter of policy, the stalemate should be resolved in favor of distinguishing the two groups. In light of the “Trojan gene effect,”²³³ it would be silly to mandate inclusion in wild populations of a group that is lethal to the whole group; it would be legally perverse to say that the listing process itself could result in a take. In reality, though, this reasonable policy may not prevail. Even the

228. See *supra* notes 114-15 and accompanying text.

229. See *supra* note 130 and accompanying text.

230. *Alesea Valley Alliance*, 161 F. Supp. 2d at 1163. (Emphasis added.)

231. DPS Policy, *supra* note 114, at 4,725.

232. *Id.* (Emphasis added.)

233. See *supra* Part IV. D.

Alsea case runs the risk of being perverse because the policy it rejected was based on protecting wild populations from the dangers of hatchery breeding to which hatchery fish are exposed.²³⁴ Thus, the hatchery and naturally spawned fish had to be counted together despite the potential genetic and ecological dangers. Additionally, though the listing agencies are required to consider the best available scientific and commercial data, they are not required to follow any particular study. With the added safeguard of arbitrary and capricious judicial review, the agency would likely prevail if it chose not to follow the Muir and Howard study²³⁵ in light of other evidence reaching different conclusions.

A second way the agencies could refuse to count the transgenic fish is by arguing that, while their being hatchery spawned is insufficient, their being transgenic provides a sufficient basis for ignoring them even assuming they and the wild fish compose the same DPS. To make this argument, however, requires the agencies to make distinctions at levels below the DPS, to distinguish between members within the DPS. The court in *Alsea* rejected just such an attempt.²³⁶ Again, sound policy and common sense support distinguishing the populations. However, if other courts adopt the strict *Alsea* approach by reading the categories of possible species under the ESA literally, they will not allow agencies to make the distinctions.

3. Transgenic Salmon as a Separate DPS

Disregarding the “transgenic salmon as hybrids” issue would not, however, allow protection for isolated populations of escapees under traditional DPS analysis. If the escapees do not interbreed with wild populations, but form their own isolated population group, and thus satisfy the discreteness prong of the DPS test, the only issue is the significance of the population to the species as a whole. This second element of the DPS test centers largely on the importance of a given population to the geographic dispersal of a species insofar as the factors include persistence in an unusual setting, a significant gap in the species’ range if the population dies off, and whether the population is the last natural occurrence of the species.²³⁷ These factors are case specific, but for the sake of argument, assume that the transgenic population does live in a

234. See Pacific Salmon Artificial Propagation Policy, *supra* note 204, at 17,574.

235. Muir & Howard, *supra* note 3.

236. See *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1162 (D. Or 2001). (“The central problem with the NMFS listing decision ... is that it makes improper distinctions, below that of a DPS...”).

237. See DPS Policy, *supra* note 114, at 4,725.

unique area that effectively extends the overall range of the Atlantic salmon. The significance test also allows agencies to consider marked differences in the population's genetic characteristics as supporting separate DPS identification.²³⁸ Again, transgenic salmon are by nature genetically unique.

Again, however, while transgenic salmon seem to satisfy the letter of the test, they contravene its purpose. The significance test measures the significance of the population "to the taxon to which it belongs."²³⁹ Consequently, a population's significance is not measured in terms of an inherent right to exist; significance here is relative to the importance of a part to a whole. It is nonsense to argue that it is significant to the species as a whole to protect a creature created in a lab that dies in a few generations when put into the wild. To protect these populations from extinction wastes valuable time and money; the effort would amount to keeping alive organisms that are engineered to die. Then again, the ESA makes no such priority list and requires agencies to consider each petitioned species as if in a vacuum. Thus, species that are not adaptive and are "engineered to die" by evolution through natural selection could receive just as much protection under the ESA. The difference between the naturally and artificially selected organisms, though, is temporal. Scientists can create these non-adaptive organisms as quickly as they want whereas nature takes a long time. Extending protection to the manmade non-adaptive organisms opens the door to the absurd result of protecting any small group of transgenic organisms getting into the wild which is in danger of extinction, as quickly as scientists can make and release them. As the DPS policy was probably fashioned to prevent the absurd results mentioned by the GAO of protecting small groups of squirrels in city parks,²⁴⁰ so it should prevent this absurd result.

In summary, the transgenic salmon escapees should not, and likely would not, be considered a "species" under the ESA. First, the proposed hybrid policy explicitly denies coverage to transgenic organisms in most circumstances, regardless of the existence or lack of reproductive isolation. Second, even ignoring the proposed policy, traditional DPS analysis would preclude coverage when the escapees form reproductively isolated communities because they are not significant to the species as a whole. Oddly, though, traditional DPS analysis may not provide a basis for distinguishing transgenic and non-transgenic salmon if other courts adopt the strict *Alsea*-type stance toward DPS identification. Yet since the agencies have

238. *Id.*

239. *Id.*

240. *See supra* note 112 and accompanying text.

already indicated their position on transgenic organisms as hybrids, and since the agencies are not prohibited from implementing their position before they issue their final policy, the perverse results under traditional DPS analysis will probably never arise.

V. CONCLUSION

As the hypothetical demonstrates, species determination under the ESA can involve many twists and turns. The legal framework is far from the conceptually simple pigeonhole system of the essentialists. The legal definitions have come a long way in incorporating scientific ideas, such as reproductive isolation. Undoubtedly, however, the legal and scientific definitions do not directly correspond with each other. While Congress has indicated a desire for ESA listings to be scientific, it also imbued the ESA with policy goals. Species determination thus involves a balancing of technical definitions with guiding principles.

Regarding transgenic organisms, however, the legal framework will probably be much less complicated. The proposed hybrid policy gives the simple answer that transgenic organisms are considered hybrids and presumptively not protected. As a general rule, the policy is prudent. For organisms as hypothesized in this comment, agencies should certainly deny protection. The transgenic salmon pose serious ecological threats to wild populations, and are not engineered for natural environments. Protecting them would be perverse and simply waste resources that could be better channeled toward saving other species.

Whether the hybrid policy is wise in all circumstances, though, is not so clear. One can postulate a transgenic organism that has incorporated only a very slight genetic variation, is well suited to living in natural environments, and actually does establish its own reproductively isolated niche. If these organisms adapt seamlessly without the ecological detriment that the hypothetical transgenic salmon pose, why should they not receive protection if their habitat is threatened? To resort to the policy of protecting natural genetic heritage under the ESA simply begs the question. What “natural” means is no clearer than what “species” means.

Given the advances in biotechnology, the definition of “species” will probably become more muddled. But if the hybrid policy is any indication, the agencies seem to be working towards keeping the law current with the science and consistent with the policy goals of the ESA.

FLORIDA WATER RESOURCE DEVELOPMENT: A CALL FOR STATEWIDE LEADERSHIP

CHARLES R. FLETCHER*

Table of Contents

I.	FLORIDA WATER DEVELOPMENT NEEDS	113
II.	FLORIDA WATER RESOURCE MANAGEMENT	117
III.	THE BASICS OF AMERICAN WATER LAW	124
	<i>A. The Riparian System</i>	124
	<i>B. Prior Appropriation</i>	126
IV.	WATER RESOURCE DEVELOPMENT IN OTHER STATES	127
	<i>A. Selected Eastern States</i>	127
	<i>B. Selected Western States</i>	130
V.	ALTERNATIVES FOR FLORIDA	140
	<i>A. Improve State Leadership</i>	141
	<i>B. Coordinate Statewide Funding</i>	142
	<i>C. Facilitate Creation of Local Revenue Sources</i>	143
	<i>D. Authorize Cooperative Water Transfer Agreements</i>	144

I. FLORIDA WATER DEVELOPMENT¹ NEEDS

Florida has experienced a severe drought over the past few years.² In 2000 and 2001, the drought and increased demands on public drinking water systems put many communities' drinking water supplies at risk.³ In South Florida, water restrictions were so severe that public water utilities were ordered to reduce water

* Attorney, de la Parte & Gilbert, P.A.. J.D. 1996, Florida State University College of Law; B.S. Environmental Engineering 1991, Florida Institute of Technology.

1. "Water resource development" and "water supply development" are defined terms in Section 373.019, Florida Statutes. FLA. STAT. §§ 373.019(19), (21) (2001). However, use of these terms in this paper is not intended to imply these specific statutory definitions. Generally, "water resource development" is intended to refer to projects that develop a water source for human use, such as a reservoir. "Water supply development" is intended to imply those types of projects necessary to treat and distribute water to end consumers. Section IV of this paper discusses water resource development efforts in other states, and in that section these terms are defined as they are used in the statutes and planning documents of those states.

2. See *Florida Responds to the Drought*, PIPELINE, Mar. 12, 2001, at 1 (de la Parte & Gilbert, P.A., Tampa, Fla.).

3. See Alisa Ulferts, *Water Summit Prepares for Drought's Worst*, ST. PETERSBURG TIMES, Mar. 24, 2001, at 1B (discussing state and federal officials' search for solutions to the water shortage).

pressure to dangerously low levels.⁴ In Tampa, the city's reservoir ran dry.⁵ One distraught regional water management district official said about Florida's water supply shortfall, "*I'm ready to go slit my wrists. This is a gloomy, gloomy situation we've got here.*"⁶ These extreme conditions were due in part to the drought, but they were also the result of a systematic failure throughout urban Florida to keep pace with growing water supply needs as Florida grows and develops. Fingers can be pointed in many directions, but, as demonstrated below, the primary reason for this failure is a lack of statewide leadership in water resource planning and development.⁷

The need to develop new water sources for growing urban areas is not a new phenomenon in American history, nor is it unique to Florida. In New York City, the need for a public water system was recognized before the Revolutionary War. However, it was not until the late 1790's, when faced with deteriorating water quality, population pressures and progress in other competing eastern cities, that New York business leaders demanded that the city government take action. For instance, the *New York Daily Advertiser* warned its readers in 1798: "Citizens of New York, what are you doing[?] If you procrastinate, you are ruined; while you are immersed in business or sunk in pleasure, careless of the future, other towns, your rivals in trade, have vigorously begun the effectual measures of precautions."⁸

In 1799, Alexander Hamilton convinced the New York City Council that it could not raise sufficient capital through loans and taxes to complete the water system and, instead, that New York State should charter a private corporation to acquire and distribute water for New York City.⁹ Aaron Burr, then a member of the New York State Assembly, rushed the bill chartering the corporation through the New York Legislature in three days.¹⁰ Unfortunately,

4. Brad Bennett, *S. Florida District Says Existing Limits Failing*, MIAMI HERALD, Mar. 16, 2001 at 1A. For a discussion about the drastic restrictions on water use imposed in South Florida, see Robert P. King, *Drastic Steps for Drought Toughened Water Limits to Affect Lawns, Businesses, Fountains*, PALM BEACH POST, Mar. 16, 2001, at A1.

5. Steve Huettel, *Tampa's Water Crisis Getting Worse*, ST. PETERSBURG TIMES, May 12, 2000 at 3B; *Report Underscores Tampa's Drought Woes*, ST. PETERSBURG TIMES, Feb. 20, 2001, at 3B.

6. Ulferts, *supra* note 3 (quoting Sonny Vergara, the executive director of the Southwest Florida Water Management District). (Emphasis added.)

7. See, e.g., CHARLES J. MEYERS ET AL., WATER RESOURCE MANAGEMENT 2 (1998) (arguing that Florida's decentralized allocation system has hindered water resource development).

8. Michael C. Finnegan, *New York City's Watershed Agreement: A Lesson in Sharing Responsibility*, 14 PACE ENVTL. L. REV. 577, 588 (1997).

9. *Id.*

10. *Id.*

creating a private company to supply water to growing New York City was a dismal failure.¹¹ By 1832, only twenty-three miles of pipe had been laid, and the city did not have a reliable water supply. Two years later, the city started one of the first of many large public works projects to construct a reservoir and aqueducts to supply the city with safe, reliable drinking water.¹²

While Florida is not facing the same public health threats from inadequate water supply that our nation's founding fathers faced in New York City, the economic effects of inadequate and unreliable water supplies are being felt in present-day Florida.¹³ When local economic development officials were bidding to bring semiconductor manufacturers to the Tampa Bay Area,¹⁴ one of the most significant problems cited by the manufacturers was an inadequate and unreliable water supply.¹⁵ In addition to the availability and reliability of water supplies, the increasing cost of water may affect economic development in the Tampa Bay Area. In June 2001, Tampa Bay Water announced that its wholesale cost of water will reach \$2.50 per thousand gallons by the year 2010 and may reach as high as \$3.12.¹⁶ These escalating water rates are certain to discourage siting of water-dependent industries such as semiconductor plants, and they have the potential to impact real estate markets as well. This projected surge in the cost of water for Tampa Bay Area businesses and residents is the result of Tampa Bay Water's aggressive development of alternative water supplies, such as desalinization.¹⁷ This increase in water cost is projected to occur even though the Southwest Florida Water Management District (SWFWMD) has pledged to invest \$183 million towards

11. *See id.* at 589 n.75.

12. *Id.* at 589.

13. *See* Robert Trigaux, *Wanted: Aggressive Strategy to Solve Florida Water Woes*, ST. PETERSBURG TIMES, Mar. 18, 2001, at 1H.

14. James Thorner, *Computer Chip Plant Considers Area Sites*, ST. PETERSBURG TIMES, Aug. 26, 1999, at 2E.

15. *Agency Pushes for Chip Plants*, ST. PETERSBURG TIMES, June 13, 1997, at 1E.

16. James Thorner, *Water Prices to Surge*, ST. PETERSBURG TIMES, June 9, 2001, at 1E. *See generally* Tampa Bay Water, Board Agenda (June 11, 2001) (outlining the agenda for its regular Board of Directors meeting and scheduling a discussion of the 2001/02 Budget under item G1 on that agenda) (on file with author); Memorandum from Koni M. Cassini, Director of Finance and Administration, Tampa Bay Water, to Jerry L. Maxwell, General Manager, Tampa Bay Water (May 29, 2001) (outlining the changes to Tampa Bay Water's Proposed Budget 2001-2002 scheduled to be reviewed before the Board of Directors as Agenda Item G1) (on file with author).

17. *See* Thorner, *supra* note 16.

development of water sources¹⁸ and federal grants have been used to underwrite some of the cost of other new water supply projects.

Florida is not an arid, water-scarce state. Florida receives an annual average rainfall of 53 inches.¹⁹ In total, Florida receives an annual average of 150 billion gallons per day of rainfall and 25 billion gallons per day of inflow from Georgia and Alabama.²⁰ However, difficulties have arisen in meeting Florida's growing water needs. The problem has two characteristics. The first is distribution, both temporal and geographic. Most of the water in Florida is in the wrong place at the wrong time. Seasonal fluctuations result in large quantities of water when demand is low and less water in winter months when demand is high.²¹ In addition to this temporal distribution problem, the available water is frequently not in the part of the state where the demand is greatest. While most Florida residents live near the coast, most of the available fresh water supply sources are inland.²² Although there are large reservoirs of brackish water on Florida's coasts in the form of bays, estuaries, and coastal brackish aquifers, desalinating this water is still relatively expensive and permitting desalination facilities in Florida's fragile coastal ecosystems is challenging. Consequently, there is a geographic distribution problem as well as a temporal distribution problem.

The second characteristic limiting water resource development is Florida's water-dependent environment, which needs large quantities of fresh water for its sustained health.²³ To the casual observer, it would appear that Florida is a water-rich state with plenty of water available to meet the demands of Florida's growing population and economic development. However, according to some ecologists and water regulators, the demands of Florida's environment are so great that only a very limited quantity of water is available for human use.²⁴ For this reason, in many parts of

18. Northern Tampa Bay New Water Supply and Ground Water Withdrawal Reduction Agreement, between West Coast Regional Water Supply Authority, Hillsborough County, Pasco County, Pinellas County, City of Tampa, City of St. Petersburg, City of New Port Richey, and Southwest Florida Water Management District 13-14 (Apr. 28, 1998) [hereinafter Partnership Agreement] (on file with author); S.W. FLA. WATER MGMT. DIST., REGIONAL WATER SUPPLY PLAN 112 (2001) [hereinafter REGIONAL WATER SUPPLY PLAN].

19. EDWARD A. FERNALD & ELIZIBETH D. PURDUM, WATER RESOURCES ATLAS OF FLORIDA 10 (1998).

20. Ronald A. Christaldi, *Sharing the Cup: A Proposal for the Allocation of Florida's Water Resources*, 23 FLA. ST. U. L. REV. 1063, 1064 n.5 (1996).

21. *Id.*

22. *Id.* at 1064-65.

23. FERNALD & PURDUM, *supra* note 19, at 11-12.

24. See, e.g., Partnership Agreement, *supra* note 18, at 3-4, 17-18 in which SWFWMD required reductions in groundwater withdrawals from the 11 public supply wellfields in the Northern Tampa Bay Area far below historic withdrawals due to environmental impacts

Florida water is not naturally scarce but has been made scarce through environmental regulation.

II. FLORIDA WATER RESOURCE MANAGEMENT

Modern Florida water law evolved from the common law to a statutory permitting system. Florida common law water rights were originally governed by the "riparian" and "reasonable use" theories.²⁵ In a landmark water law decision, the Florida Supreme Court described the common law system as follows:

Prior to the adoption of the Water Resources Act [i.e., Chapter 373, Florida Statutes], Florida followed the reasonable use rule; that is, a landowner, who, in the course of using his own land, removes percolating water to the injury of his neighbor, must be making a reasonable exercise of his proprietary rights, *i.e.*, such an exercise as may be reasonably necessary for some useful or beneficial purpose, generally relating to the land in which the waters are found.²⁶

Many riparian jurisdictions did not allow diversion of surplus waters beyond the boundaries of the riparian land. However, such water transport was allowed under Florida common law.²⁷

In 1955, the Florida Legislature created the Water Resources Study Commission to conduct a comprehensive study pertaining to the possible enactment of water legislation.²⁸ In December 1956, the Commission submitted a report to the Governor and the Legislature, which it entitled, *Florida's Water Resources, A Study of the Physical, Administrative, and Legal Aspects of Water Problems and Water Management (the Commission Report)*. The *Commission Report* presented a thorough examination of Florida water law as it then existed and made specific recommendations for new legislation.

SWFWMD believed were caused by the withdrawals. The 11 wellfields were initially authorized under the Partnership Agreement for sustained production of water up to 158 million gallons per day ("mgd"), but to protect the environment, SWFWMD has mandated a schedule of reductions to 90 mgd. Partnership Agreement, *supra* note 18, at 17-18. The wellfields regulated by the Partnership Agreement, some of which date back to the 1920s, had been historically permitted to produce, cumulatively, about 192 mgd on an annual average. Interview with Richard McLean, SWFWMD Deputy Executive Director for Regulation when the Partnership Agreement was negotiated.

25. Christaldi, *supra* note 20, at 1066-68.

26. *Vill. of Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663, 672 (Fla. 1979).

27. *See City of St. Petersburg v. S.W. Fla. Water Mgmt. Dist.*, 355 So. 2d 796, 798 (Fla. 2d DCA 1977).

28. Act effective May 30, 1955, ch. 29748, 1955 Fla. Laws.

The *Commission Report* resulted in the Florida Water Resources Act of 1957, which was codified in Chapter 373, Florida Statutes (the 1957 Act).²⁹ Under the 1957 Act, the existing water management districts, then involved primarily in flood control, could be authorized to regulate water use but only in a manner which would not interfere with reasonable existing uses of water.³⁰

In 1972, Professor Frank Maloney published *A Model Water Code, with Commentary*.³¹ That same year, the Legislature significantly revised Chapter 373 by enacting the Florida Water Resources Act of 1972 (the 1972 Act).³² The 1972 Act is largely based on Professor Maloney's *Model Water Code*, but some significant alternations were made. One of the more significant alterations to the *Model Water Code* was the decentralization of water resource management and development. The *Model Water Code* called for a statewide board, in addition to the creation of water management districts.³³ When the Legislature enacted the 1972 Act, the statewide board was omitted; consequently, many of the statewide governmental functions in the *Model Water Code* were omitted from the 1972 Act. Instead of a statewide board, the 1972 Act provided for the Department of Environmental Regulation (now, the Department of Environmental Protection) and the state's five regional water management districts to be principally responsible for assessing and regulating water resource needs. Under the 1972 Act, the Department of Environmental Protection (DEP) delegated to the water management districts not only day-to-day administration of water resource management functions but considerable policymaking authority.³⁴ The resulting two-tiered structure created inefficient, decentralized water resource planning and development agencies with little statewide coordination.³⁵

Also omitted from the 1972 Act were statutory provisions implementing water resource development programs. One of the functions of the statewide board that was not assigned to either the water management districts or DEP was holding "annually a

29. See Ch. 57-380, 1957 Fla. Laws.

30. *Id.* §§ 5, 8(1)(a).

31. FRANK MALONEY, ET AL., *A MODEL WATER CODE, WITH COMMENTARY* (Univ. of Fla. Press 1972).

32. See Ch. 72-299, 1972 Fla. Laws (codified at FLA. STAT. ch. 373).

33. MALONEY, *supra* note 31, § 1.05.

34. See FLA. H.R. COMM. ON NATURAL RES., *ANALYSIS AND MODELING OF WATER SUPPLY ISSUES FOR THE REGION BOUNDED BY HILLSBOROUGH, MANATEE, PASCO AND PINELLAS COUNTIES 13-15* (1994) (on file with committee) [hereinafter HOUSE NATURAL RES. COMM. REPORT].

35. See *id.* at 12-15.

conference on water resource development programs.”³⁶ At this statewide conference, under the *Model Water Code*, the state board would select the projects that met certain criteria and request funding for these projects.³⁷ Each entity in the state that was responsible for state, regional, or local water resource development activities was to present water resource development programs that needed financial assistance from the federal government.

The *Model Water Code* also called for the creation of a Water Resources Development Account.³⁸ According to the *Model Water Code* commentary, the purpose of the account was to “provide continuity in long-term programs of planning, research and construction”; this account was not to fund normal administrative expenses.³⁹ The Water Resources Development Account, as described in the *Model Water Code*, was not carried over into the 1972 Act. Other financial mechanisms have been used to fund the water management districts; however, little of these funds have been used for water resource development as envisioned by the *Model Water Code*. One funding mechanism is a constitutional one mill property tax for water management purposes.⁴⁰ The Florida Legislature has authorized the state’s five water management districts to levy these property taxes, subject to statutory caps.⁴¹

The 1972 Act did adopt one statewide water resource planning function included in the *Model Water Code*, the Florida Water Plan.⁴² However, because a statewide water agency was not created, the statewide plan became merely a compilation of the regional plans by Florida’s five regional water management districts, without any statewide planning or analysis completed.

One important planning tool recommended in the *Model Water Code* and included in the 1972 Act was the establishment of minimum flows and levels.⁴³ Originally, minimum flows and levels

36. MALONEY, *supra* note 31, § 1.06(12)(a).

37. *Id.* § 1.06(12)(b).

38. *Id.* § 1.14.

39. *Id.* § 1.14 cmt.

40. FLA. CONST. art. VII, § 9(b). In the northwestern portion of the state, the ad valorem tax is limited to 0.05 mill.

41. FLA. STAT. § 373.503(3)(a) (2001). The Legislature vested in Florida's five water management districts the authority to levy the ad valorem tax for water management purposes. The Legislature set the maximum millage rates for the water management district at:

1. Northwest Florida Water Management District: 0.05 mill.
2. Suwannee River Water Management District: 0.75 mill.
3. St. Johns River Water Management District: 0.6 mill.
4. Southwest Florida Water Management District: 1.0 mill.
5. South Florida Water Management District: 0.80 mill.

42. MALONEY, *supra* note 31, § 1.07; FLA. STAT. § 373.036 (2001).

43. MALONEY, *supra* note 31, § 1.07; FLA. STAT. § 373.042(1) (2001).

were to be part of the statewide board's planning efforts as part of the State Water Use Plan.⁴⁴ The purpose of the minimum flows and levels was to ensure instream water would be available for public purposes, such as boating, fishing, swimming, and environmental protection.⁴⁵ In addition, the minimum flows and levels were to serve as guidelines for protecting non-consumptive water uses when issuing water use permits.⁴⁶ In other words, establishing minimum flows and levels enabled the water managers and the water users to determine how much water was available from a waterbody for consumptive use. This type of information is critical to proper planning for future water resource development needs. Unfortunately, the five regional water management districts generally failed to establish minimum flows and levels for over twenty years after the passage of the 1972 Act.⁴⁷ Water users and environmental advocates became so frustrated with the regional water management districts' inability to fulfill this critical planning element of the *Model Water Code* and the 1972 Act that they filed suit to force the establishment of minimum flows and levels.⁴⁸ In 1996 and 1997, the Florida Legislature passed laws emphasizing the importance of minimum flows and levels and requiring that priority schedules for establishing minimum flows and levels be adopted by Florida's five regional water management districts.⁴⁹

In 1997, the Florida Legislature amended the Florida Water Resources Act (the 1997 Amendments) to establish additional water resource development planning initiatives to be conducted by Florida's five regional water management districts.⁵⁰ The primary goal of the 1997 Amendments was to increase the water supply "pie," meaning that the enhanced planning functions of the regional water management districts were intended to provide the information necessary to identify supply shortfalls and develop the additional water supplies necessary to avoid competition for water supplies as Florida's population and economy continued to grow.

In addition, a regional water supply planning element was added that required the regional water management districts to

44. MALONEY, *supra* note 31, § 1.07(4), (5).

45. *Id.* § 1.07(4) cmt.

46. *Id.* § 1.07(5) cmt.

47. HOUSE NATURAL RES. COMM. REPORT, *supra* note 34, at 14 - 15 (In 1994, only two minimum flows had been established by rule.)

48. *See, e.g.*, Pinellas County v. S.W. Fla. Water Mgmt. Dist., FLWAC Case No. RFR 95-001 (Final Order, Feb. 14, 1996); Concerned Citizens of Putnam County for Responsive Gov't, Inc. v. St. Johns River Water Mgmt. Dist., 622 So. 2d 520 (Fla. 5th DCA 1993).

49. Act effective May 31, 1996, ch. 96-339, 1996 Fla. Laws 1952, at 1953; Act effective May 29, 1997, ch. 97-160, 1997 Fla. Laws 3002.

50. Ch. 97-160, §§ 3, & 4, 1997 Fla. Laws 3007-12 (amending FLA. STAT. §§ 373.036 & 373.0361 (1996)).

identify both water supply needs for the region and available water supply sources.⁵¹

As a result of the 1997 legislation Florida's five water management districts each embarked on ambitious regional water supply planning efforts. The water management districts' regional water supply plans have identified looming water supply shortfalls,⁵² but they have not proven to be useful tools to develop water sources necessary to meet Florida's growing water needs. The regional water supply plans, and other related plans, have typically only produced lists of possible sources without proposing specific sources to meet identified water supply deficits.⁵³ Additionally, the water management districts have not realistically evaluated ratepayer acceptance of the costs of the proposed projects or identified alternative funding sources.⁵⁴ As part of the 1997

51. See FLA. STAT. § 373.0361(2) (2001), which provides, in pertinent part:

Each regional water supply plan shall be based on at least a 20-year planning period and shall include, but not be limited to:

(a) A water supply development component that includes:

1. A quantification of the water supply needs for all existing and reasonably projected future uses within the planning horizon. The level-of-certainty planning goal associated with identifying the water supply needs of existing and future reasonable-beneficial uses shall be based upon meeting those needs for a 1-in-10-year drought event.

2. A list of water source options for water supply development, including traditional and alternative sources, from which local government, government-owned and privately owned utilities, self-suppliers, and others may choose, which will exceed the needs identified in subparagraph 1.

3. For each option listed in subparagraph 2., the estimated amount of water available for use and the estimated costs of and potential sources of funding for water supply development.

4. A list of water supply development projects that meet the criteria in s. 373.0831(4).

(b) A water resource development component that includes:

1. A listing of those water resource development projects that support water supply development.

2. For each water resource development project listed:

a. An estimate of the amount of water to become available through the project.

b. The timetable for implementing or constructing the project and the estimated costs for implementing, operating, and maintaining the project.

c. Sources of funding and funding needs.

d. Who will implement the project and how it will be implemented.

(c) The Recovery and Prevention Strategy described in s. 373.0421(2).

(d) A funding strategy for water resource development projects, which shall be reasonable and sufficient to pay the cost of constructing or implementing all of the listed projects.

52. See, e.g., REGIONAL WATER SUPPLY PLAN, *supra* note 18, at 69-73; ST. JOHNS RIVER WATER MGMT. DIST., DISTRICT WATER SUPPLY PLAN 77-84 (2000).

53. See, e.g., REGIONAL WATER SUPPLY PLAN, *supra* note 18, at 76-109, 231-42.

54. For an economic analysis of the impacts of increases in water supply costs, see U.K. DEP'T FOR ENV'T, FOOD AND RURAL AFFAIRS, ECONOMIC INSTRUMENTS IN RELATION TO WATER

amendments, the Legislature provided that the water management districts must fund and implement water resource development⁵⁵ and charged them with securing the necessary funding for regionally significant water resource development projects.⁵⁶ However, the water management districts have generally been unwilling to fulfill this leadership role. Instead, the water management districts have emphasized efforts to reduce demand, citing the need to "reinforce a conservation ethic aimed at changing the water-use habits of the populace."⁵⁷ While water conservation is a worthwhile goal, Florida cannot hope that its residents, tourists, businesses, and farmers will reduce water use and then rely on such hope as a dependable source of water to meet future needs. Water resource plans that rely on reduction in water demand through rationing measures such as increased water charges and moratoriums on groundwater withdrawals, as some Florida regional water supply plans suggest,⁵⁸ are ineffective and unreliable.⁵⁹

The water management districts' failure to effectively lead state or regional water resource development efforts is largely a symptom of a failure of Florida's water management structure. Under the *Model Water Code* and the 1972 Act, the water management districts are charged with serving two masters. They are charged with preserving Florida's water resources,⁶⁰ as well as maximizing the reasonable-beneficial use of water to meet Florida's economic needs.⁶¹ At best, these functions are inconsistent; at worst, they are contradictory. In Hawaii, another state that adopted the *Model Water Code* proposed by Professor Maloney, questions regarding the inconsistent roles of water management agencies have also surfaced. A member of Hawaii's Review Commission of its State Water Code wrote:

ABSTRACTION (2000). Through surveys and economic analysis, the likely impacts of planning and regulatory approaches were evaluated as part of a regulatory and water resource planning process.

55. FLA. STAT. § 373.0831(2)(b) (2001).

56. FLA. STAT. § 373.0831(4)(a) (2001).

57. REGIONAL WATER SUPPLY PLAN, *supra* note 18, at 119; Regional water supply plans have emphasized "demand management" for residential and agricultural water users by identifying these "demand management" activities as "new" water sources available to meet future growth. *Id.* at 36, 113; S. FLA. WATER MGMT. DIST., LOWER EAST COAST REGIONAL WATER SUPPLY 241-248 (2000).

58. SWFWMD did not evaluate or identify any new fresh groundwater sources in its regional water supply plan. REGIONAL WATER SUPPLY PLAN, *supra* note 18, at 61.

59. U.N. ECON. COMM'N FOR LATIN AM. AND THE CARIBBEAN, THE WATER RESOURCES OF LATIN AMERICA AND THE CARIBBEAN—PLANNING, HAZARDS AND POLLUTION 88 (1990).

60. *See, e.g.*, FLA. STAT. § 373.016(3)(g) (2001).

61. *See, e.g.*, FLA. STAT. §§ 373.036(2)(d)1, 373.0831(2)(b) (2001).

If in a particular context the [water management agency] views its mission fundamentally as conservator of the resource for the benefit of the public interest, its commitment to maximize private water use will become secondary. If on the other hand the [water management agency] sees itself as primarily in business to allocate water for maximum beneficial uses, determined more or less by land uses and water needs of individual users, it will in some degree compromise its role as conservator.⁶²

As Florida's water management districts entered into the regional supply planning process, it appears that they viewed their role primarily as conservators of water resources, rather than as agents for promotion of the maximum reasonable-beneficial use of the water resources of the state.⁶³ Consequently, the planning process has not produced any strong coordination or leadership in the development of new water supplies on a statewide basis. The present piecemeal process through which utilities separately develop individual water supplies will continue to become less and less effective as water is made increasingly scarce in Florida. In other states, statewide leadership in water resource development has been provided in a number of different ways; the following sections of this paper will outline some of these initiatives.

It is unfair to infer that Florida's water management districts have not taken any steps to facilitate water resource development. Indeed, the SWFWMD has made a laudable effort to assist in water resource development through its New Water Sources Initiative (NWSI) and through its assistance to Tampa Bay Water in the Partnership Agreement. As noted earlier, the SWFWMD has pledged \$186 million in water resource development assistance to Tampa Bay Water.⁶⁴ However, the SWFWMD is the only water

62. Douglas W. MacDougal, *Private Hopes and Public Values in the "Reasonable Beneficial Use" of Hawaii's Water: Is Balance Possible?*, 18 U. HAW. L. REV. 1, 3 (1996).

63. REGIONAL WATER SUPPLY PLAN, *supra* note 18, at 259. The plan recommendations for water resource development funding consist of environmental protection functions such as "adequate funding to maintain expertise relative to conducting hydrologic and biologic assessments," funding the establishment of minimum flows and levels, and "adequate funding for implementation of the water use permitting program as one of the essential District tools in managing water supply issues." *Id.* at 260.

64. Tampa Bay Water, formerly known as the West Coast Regional Water Supply Authority, is a regional interlocal agency created by three cities and three counties. Pinellas County, Pasco County, Hillsborough County, the City of Tampa, the City of St. Petersburg, and the City of New Port Richey reorganized and renamed the authority "Tampa Bay Water" in 1998 through an interlocal agreement executed pursuant to sections 163.01 and 373.1963 of the Florida Statutes. TAMPA BAY WATER, AMENDED AND RESTATED INTERLOCAL

management district in Florida that has made a substantial financial commitment to the development of new water supplies.

Unfortunately, even the efforts of the SWFWMD were not part of a deliberative regional or statewide planning effort. The SWFWMD's commitment to Tampa Bay Water was made as an incentive in the Partnership Agreement for Tampa Bay Water and its member governments to agree to settle related litigation and reduce groundwater withdrawals.⁶⁵ Ultimately, the SWFWMD's financial assistance was incorporated into Tampa Bay Water's regional water resource planning effort, the Master Water Plan. However, it should be noted that SWFWMD's Regional Water Supply Plan and Tampa Bay Water's Master Water Plan are not entirely consistent, and some of the regional water sources identified in Tampa Bay Water's Master Water Plan are not recognized in the Regional Water Supply Plan.

III. THE BASICS OF AMERICAN WATER LAW

An understanding of water allocation systems is necessary to evaluate water resource development options. Generally, water rights in the United States are usufructory, which means that one may have a right to use a natural resource without actually owning the property.⁶⁶ Historically, two schools of water rights developed within the United States. In the water-rich eastern United States, the riparian system developed from the English Common Law.⁶⁷ In the arid western United States, the "prior appropriation" doctrine developed from the local customary practices of western settlers.⁶⁸

A. *The Riparian System*

The essence of the riparian doctrine is that only the landowner adjacent to a watercourse has a right to use its water.⁶⁹ Most eastern states initially adopted the English "natural flow" doctrine of riparian rights, which eventually evolved into the "reasonable

AGREEMENT REORGANIZING THE WEST COAST REGIONAL WATER SUPPLY AUTHORITY (June 10, 1998). The SWFWMD provided financial assistance through an agreement colloquially known as the Partnership Agreement, *supra* note 18.

65. See Partnership Agreement, *supra* note 18 at 26-7.

66. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3:10 (June 2002) (citing *Tyler v. Wilkinson*, 24 Fed. Cas. 472 (C.C.D.R.I. 1827)).

67. JOSEPH L. SAX & ROBERT H. ABRAMS, LEGAL CONTROL OF WATER RESOURCES 154, 158-62 (1986).

68. *Id.* at 154.

69. *Id.* at 154-55.

use" doctrine followed today in most American riparian jurisdictions.⁷⁰

Before underground hydrology was understood and the frequent interconnection between ground water and surface water was recognized, courts in eastern states generally made legal distinctions between: (1) ground waters containing percolating waters, (2) groundwaters containing underground streams, and (3) surface water courses.⁷¹ Water from underground streams was treated the same as surface water courses.⁷² However, water use from ground water containing percolating waters was treated differently. Percolating waters were considered waters "without any permanent, distinct, or definite channel, [that] percolate in veins or filter from the lands of one owner to those of another."⁷³ Under common law, a landowner could use as much percolating ground water as needed, regardless of the adverse effect it might have on other landowners, as long as the use was reasonably related to the natural use of the overlying land.⁷⁴ This rule, known as the "English Rule", was first articulated in 1843, before the interconnecting nature of groundwaters and surfacewaters was recognized.⁷⁵ For instance, a landowner could use water for agricultural, domestic, or industrial purposes on his overlying land but could not sell or transfer the water to other property if it would impair the ground water supply of another landowner.

In contrast, the rights of riparian landowners to use waters from a surface watercourse were more limited. A lower riparian owner was generally entitled to protection when diversion by an upper riparian owner interfered with his use of water. Under the reasonable use doctrine, each riparian owner could use the water, so long as that use did not unreasonably interfere with its reasonable use by other riparians.⁷⁶ The determination of whether a use is reasonable is generally made on a case-by-case basis under the common law.⁷⁷

70. TARLOCK, *supra* note 66, §§ 3:55, & 3:56, & 3:60.

71. Christaldi, *supra* note 20, at 1067.

72. *Nourse v. Andrews*, 255 S.W. 84, 86 (1923).

73. *Tampa Waterworks Co. v. Cline*, 20 So. 780, 782 (Fla. 1896).

74. TARLOCK, *supra* note 66, § 4:6.

75. *Acton v. Blundell*, 152 Eng. Rep. 1223, 1235 (1843). The court's declaration of the English Rule has been said to come from the maxim: "To whomsoever the soil belongs, he owns also to the sky and to the depths." *Vill. of Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663, 666 (Fla. 1979) (citing *F. MALONEY ET AL., WATER LAW AND ADMINISTRATION* 155 (1968)).

76. TARLOCK, *supra* note 66, § 3:60.

77. See RESTATEMENT (SECOND) OF TORTS § 850A (1979). The Restatement lists the following considerations for determining if a use is reasonable: (1) The purpose of the use; (2) suitability of the use to the watershed or lake; (3) the economic value of the use; (4) the social value of the use; (5) the extent and amount of harm the use causes; (6) the practicality of

Although the riparian system ensured that downstream landowners had a right to a certain quantity and quality of water, the system had a number of deficiencies. First and foremost, the reasonable use doctrine created uncertainty because water users could not reliably know the amount of water that could be used at any given time; the reasonableness of their use was largely contingent on the use of other riparian users. A second deficiency emanated from the limitation on transferring water over land to non-riparian property, which precluded potential uses that were otherwise economically viable and, thereby, limited economic growth.

B. Prior Appropriation

Water law in much of the western United States developed in a different social and economic environment than in the eastern United States. The western prior appropriation doctrine grew from the customary law that developed among miners and ranchers in arid areas where large quantities of water were necessary for the predominant economic enterprises.⁷⁸ The basic tenet of the prior appropriation doctrine was termed "first in time, first in right."⁷⁹ Any landowner could divert as much water as he could successfully use, so long as it was beneficially employed.⁸⁰ Unlike the riparian system, water could be used on lands unconnected with the water body from which it was withdrawn. The concept of "beneficial use" developed as part of the prior appropriation doctrine in an attempt to prevent waste of water resources.⁸¹ Without this limitation, those users with prior claims could have diverted all the water from a watercourse and eliminated any other economic uses of the water. Under the beneficial use standard, water users whose rights were junior, or newer, frequently had legal recourse to ensure that water was not wasted and that it satisfied the beneficial use standard.⁸²

While the prior appropriation doctrine was useful, if not essential, in the development of the western United States, in more recent times it has been criticized for a number of reasons. First, since water rights are often held in perpetuity, the prior

avoiding the harm by adjusting the use or method of use of one proprietor or the other; (7) the practicality of adjusting the quantity of water uses by each proprietor; (8) the protection of values of water uses, land, investments and enterprises; and (9) the justice of requiring the use causing harm to bear the loss. *Id.* § 850.

78. TARLOCK, *supra* note 66, § 5:3.

79. SAX & ABRAMS, *supra* note 67, at 279.

80. TARLOCK, *supra* note 66, § 5:66.

81. *Id.* §§ 5:66, & 5:68.

82. *Id.* §§ 5:66, & 5:67.

appropriation doctrine has had a tendency to freeze initial patterns of water use and allocation.⁸³ In some instances, it has been difficult to reallocate water to respond to western population growth and economic development.⁸⁴ Second, under the prior appropriation doctrine a water user will lose its water rights if the water is not beneficially used.⁸⁵ Consequently, water users have an incentive to withdraw and use as much water as possible, regardless of the potential conservation.

IV. WATER RESOURCE DEVELOPMENT IN OTHER STATES

A. Selected Eastern States

1. North Carolina

In January 2001, the North Carolina Department of Environment and Natural Resources completed a State Water Supply Plan that identified present water supplies and projected water supply shortfalls in the state's thirty-eight defined river basins.⁸⁶ This State Water Supply Plan provides information similar to Florida's regional water supply plans, such as identifying water supply shortfalls and generic options for new water sources such as on-stream reservoirs, groundwater supplies, and water conservation. The North Carolina State Water Supply Plan is built upon local water supply plans developed by local and regional water suppliers under North Carolina General Assembly House Bill 157

83. Christaldi, *supra* note 20, at 1070. For an excellent article discussing how the prior appropriation doctrine has evolved to provide more flexibility in water use and allocation see A. Dan Tarlock *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N.D. L. REV. 881 (2000).

84. For example, at the beginning of the twentieth century, in a bitter battle that lasted over 20 years, the City of Los Angeles acquired through various means lands in the Owens Valley for the purpose of transferring agricultural water uses to municipal use. *See generally*, William L. Kahrl, *Part II Politics of California Water: Owens Valley and the Los Angeles Aqueduct, 1900-1927*, 6 HASTINGS W.-N.W.J. ENVTL. L. & POL'Y 255 (2000). This controversial expropriation of land and water rights in rural California has colored water reallocation efforts ever since and led to distrust between rural and urban communities.

The absence of trading in California also has cultural explanations, in particular the memories of the land-grab that Los Angeles made for Owens Valley. In folk memory giving up rural water to city folk means desolating a thriving farming community-as happened in Owens Valley.

This Little Water Went To Market (Water Trading), THE ECONOMIST, Aug. 4, 1990, at 19.

85. *See, e.g.*, Danielson v. Milne, 765 P.2d 372, 375 (Colo. 1988); State Dept. of Ecology v. Theodoratus, P.2d 1941 (Wash. 1998); State Dept. of Parks v. Idaho Dept. of Water Resources, 530 P.2d 924 (Idaho 1974); CAL. WATER CODE ANN. § 275, 1241 (2001). For a thorough discussion of the beneficial use doctrine see Janet C. Newman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919 (1998).

86. DEP'T OF ENV'T & NATURAL RES., NORTH CAROLINA STATE WATER SUPPLY PLAN ES-1 (Jan. 2001).

passed in 1989.⁸⁷ This process has created a "bottom-up" approach to water supply planning through which the local water supply plans developed by the local governments have become the essential data sources for local and regional water supply planning in North Carolina. Notably, this "bottom-up" approach created a state plan fairly consistent with local water resource development goals.

Unlike Florida, North Carolina has used its planning process to focus leadership of water resources development at a statewide level. The North Carolina Legislature requires the Department of Environment and Natural Resources to prepare a statewide plan before July 1 each year covering water resource development projects for a period of six years.⁸⁸ This plan is required to include: projects approved by the United States Congress; projects for which Congress has appropriated funds; projects for which grant applications have been submitted under two North Carolina water supply grant programs; and planned federal reservoir projects for which no federal funds are scheduled.⁸⁹ The North Carolina Department of Environment and Natural Resources is required to rank each project within these categories to either prioritize funding or recommend no funding. To accomplish this task, the Department must base its review on the following four criteria: "[1] local interest in the project, [(2)] the cost of the project to the State, [(3)] the benefit of the project to the State, and [(4)] the environmental impact of the project."⁹⁰

The resulting priority list for state water resource development is submitted to the North Carolina Director of the Budget and distributed to the Budget Advisory Commission and the North Carolina General Assembly as part of the recommended budget.⁹¹ The Director of the Budget has discretion to decide which of the water resource development projects prioritized by the Department of Environment and Natural Resources will be recommended for funding.⁹² Through this process, North Carolina has provided two important leadership functions. First, it has identified those projects that are of statewide importance and will be supported by the Department of Environment and Natural Resources. Second, it allows the Department to emphasize its support for the most important projects, which would not otherwise be cost-effective, to ensure that important projects are completed when the water

87. N.C. GEN. STAT. § 143-355(1), (m) (2000).

88. *Id.* § 143-215.73A(a).

89. *Id.* § 143-215.73A(b)(1)-(5).

90. *Id.* § 143-215.73A(c).

91. *Id.* § 143-215.73A(e).

92. *Id.* § 143-215.73A(f).

supplies are needed and not postponed until a water supply crisis develops.

2. New York

As noted earlier, New York State has been searching for new water supplies for New York City's ever-growing population since the Revolutionary War. In the nineteenth century, New York City completed two regional reservoir and aqueduct projects that stretched through three upstate New York counties.⁹³ The second of these public works programs, completed at the end of the nineteenth century, was constructed for New York City by the New York State Board of Aqueduct Commissioners⁹⁴, which was created by the New York State Legislature in 1883 for the sole purpose of building large public works projects to supply New York City with reliable sources of drinking water.⁹⁵

After the success of the state-sponsored reservoir and aqueduct projects, New York City looked again to private water developers to provide water for New York City's projected additional population growth. In 1895, the New York State Legislature chartered a second private water supply company with the authority to acquire land and water rights in upstate New York.⁹⁶ Unfortunately, this second attempt to leverage private capital to supply New York City with water failed and, in 1901, the charter was repealed.⁹⁷

In 1905, the New York State Water Supply Commission was created and vested with the authority to develop the state's water resources.⁹⁸ Under the leadership of the State Water Supply Commission, New York City was able to develop water supplies in the Catskill region; although, it was required to provide water at cost to other growing communities along the route of the aqueduct from the Catskills to New York City.⁹⁹

In the twentieth century, New York City continued to develop water supplies in upstate New York but with frequent conflicts between the residents of the rural areas where the water supplies were developed and the New York City government.¹⁰⁰ Frequently,

93. Finnegan, *supra* note 8, at 590-97.

94. *Id.* at 597.

95. Act of June 1, 1883, ch. 490, sections 1-2, 1883 N.Y. Laws 666.

96. Finnegan, *supra* note 8, at 597.

97. *Id.* at 597-98.

98. *Id.* at 598.

99. *Id.* at 599.

100. *Id.* at 598-601.

the city condemned land in rural areas for water supply development and was very heavy-handed with the local residents.¹⁰¹

In recent years, New York City has developed a more cooperative approach. As part of an effort to maintain water quality around the city's upstate watersheds, a new watershed agreement was reached between the city and the upstate local governments.¹⁰² Innovative provisions within the agreement provide a level of benefit to the residents in the locality of the source-water bodies through the formation of the Watershed Corporation, an independent and locally administered not-for-profit corporation paid for primarily by New York City.¹⁰³ Activities that the Watershed Corporation will undertake in the upstate region surrounding the city's reservoirs include sewage treatment, sewer system expansions, storm water control, replacement of septic systems, and other water quality improvement projects.¹⁰⁴ New York City's commitment under the agreement for funding these projects exceeds \$300 million.¹⁰⁵ In addition, the Watershed Agreement requires the city to provide \$75 million dollars for the "Catskill Fund for the Future," which is used to provide grants and loans for economic development projects that encourage environmentally sound development and job growth.¹⁰⁶ Finally, payments in excess of \$9.6 million have been made directly to the upstate local governments in the vicinity of the city's reservoirs.¹⁰⁷

B. Selected Western States

1. Texas

Since 1957, the Texas Water Development Board has been charged with preparing a comprehensive long-term plan for the development and management of water resources.¹⁰⁸ The most recent statewide plan was completed in 1997; it outlines current and future needs for water and wastewater treatment projects in Texas for the next fifty years and then assigns state priorities to these projects based on the needs identified in the plan.¹⁰⁹ The State

101. *Id.* at 602-05.

102. *Id.* at 625.

103. *Id.* at 631.

104. *Id.* at 635-36.

105. *Id.* at 636.

106. *Id.* at 641.

107. *Id.* at 642-43.

108. TEX. H.R., HOUSE RESEARCH ORG., TEXAS AT A WATERSHED: PLANNING NOW FOR FUTURE NEEDS 2 (1997) [hereinafter TEXAS AT A WATERSHED].

109. See TEX. WATER DEV. BD., WATER FOR TEXAS TODAY AND TOMORROW: A CONSENSUS-BASED UPDATE TO THE STATE WATER PLAN, 1-2 – 1-3 (1997).

Water Plan generally identifies key water-management tools to be used statewide in managing demand and developing new water supplies. These key water-management tools include: water conservation, expanded use of existing supplies, reallocation of reservoir storage, water marketing, water yield enhancement, inter-basin transfers, and new water supply development.¹¹⁰ The State Water Plan emphasizes that implementation of the solutions identified in the plan will be challenging and will require leadership and financial commitment from the state, as well as from regional and local governments. Thus, the executive summary of the 1997 State Water Plan concludes:

Implementing the State Water Plan will not be easy. The state still requires considerable efforts to improve water planning and management, and to provide additional financial assistance. Improved public participation and education, as well as intra- and inter-regional cooperation, are absolutely essential to the future well-being of Texas. The magnitude of these efforts is significant and will require an ongoing commitment of its citizens and governments to ensure its implementation.¹¹¹

Texas voters first authorized public development of water resources in 1904; since then, six plans have been officially adopted.¹¹² Prior to the 1980's, Texas state water plans had primarily identified new water supply development projects to meet growing water supply demands. In 1984, the Texas Water Development Board adopted a state water plan that, in addition to traditional water supply projects such as reservoirs and wellfield development, also included demand management, water conservation, and development of alternative water supplies.¹¹³

Yet, the Texas Water Development Board has recognized that demand management, conservation, and alternative water supplies are not sufficient to meet the growing state need for cost effective water supplies. For instance, inter-basin transfers and new reservoirs will be necessary.¹¹⁴ While the State Water Use Plan does express a preference for developing water supplies within river basins, the plan also recognizes that inter-basin transfers are at

110. *Id.*

111. *Id.* at XI.

112. *Id.*

113. *Id.*

114. *Id.*

times necessary to provide cost-effective water supplies.¹¹⁵ In 1997, approximately twenty to twenty-five percent of Texas' total surface water use was supplied from inter-basin transfers, including a significant percentage of water supplies for major metropolitan areas.¹¹⁶ The Texas State Water Plan also identified that approximately one million acre-feet per year, or 4.6% of the projected new water supply needs by the year 2050 will be met through inter-basin transfers.¹¹⁷ The Texas Water Development Board found that inter-basin transfers would have a "pronounced effect on resolving the prospective default deficit situations for many of the state's major metropolitan growth areas."¹¹⁸

While emphasizing conservation, the Texas Water Development Board has not abandoned the traditional approach of developing water supplies for growing urban areas in Texas, which is development of reservoirs. The Texas Water Development Board found:

State and local decision makers must not be misled that the magnitude of prospective growth in Texas can be addressed only through expanded use of existing supplies, minor local supply development, improved management measures, or inter-basin transfers. Even after all of this, there remains a need for additional water supply development. Eight new reservoirs ... have been recommended to meet remaining 'economic' water needs of the state by 2050.¹¹⁹

Another important aspect of the Texas State Water Plan is that it recognizes how essential cost-effective water supplies are for continued economic development in the state.¹²⁰ While industrial water users sometimes self-supply their water needs, manufacturers in water-scarce areas frequently rely on water utilities to provide their process water needs. Consequently, the cost of water provided by water supply utilities can have a direct impact on multiple economic sectors, including manufacturing operations.

The Texas State Water Plan identifies recommended major project needs, including: eight new reservoirs, three projects

115. *Id.* at 2-3, & 3-31.

116. *Id.*

117. *Id.*

118. *Id.* at 3-31.

119. *Id.*

120. *Id.*

reallocating currently permitted water storage, and two projects that would divert return flow into off-channel reservoirs.¹²¹ In addition, the State Water Plan recommends twenty-eight major conveyance projects, such as pipelines or canals to provide additional access to existing water supplies or new supply development.¹²² Of these recommended conveyance projects, twelve projects would involve inter-basin transfers of water.¹²³ This listing of recommended major projects is intended to provide an "organized schedule of needed activities that best balance competing needs, economic considerations, supply availability and acceptable environmental impact."¹²⁴ Because of the uncertainties in identifying projects for development over a fifty-year horizon, the State Water Use Plan also identifies a variety of other water supply development sites that could serve as alternatives for the recommended projects identified in the plan.

Texas provides funding for regional water supply projects through a number of programs. One method is through state participation in regional water supply projects.¹²⁵ Any local government or local water supply corporation constructing a regional water supply project can apply to the Texas Water Development Board for participation in the project.¹²⁶ The goal of the program is to allow for optimization of regional projects where the regional projects would be unaffordable without state participation.¹²⁷ Under this participation program, the state initially absorbs some of the cost of the projects; however, when the local sponsors need those additional water supplies, the state ultimately recovers its investment as those local sponsors buy out the state-funded portions of the project.

The Texas Water Development Board also operates a regional water supply facility-planning program. Through this program, the state of Texas provides financial assistance for developing the most feasible alternatives to meet regional water supply needs and for identifying institutional structures to provide regional water supplies.¹²⁸ These grants are only for regional efforts that include more than one service area or political subdivision and are consistent with applicable regional and statewide plans, such as the Texas State Water Plan.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *See* TEX. WATER CODE ANN. §§ 15.301-15.326 (Vernon 2000).

126. *See* 31 TEX. ADMIN. CODE § 363.4 (West 2002).

127. *See* TEX. WATER CODE ANN. § 15.306 (Vernon 2000).

128. *See* TEX. WATER CODE ANN. § 15.4061 (Vernon 2000).

Another way that Texas has provided leadership in developing statewide solutions to Texas' water needs is through the Texas Water Bank. The Texas Legislature created the Texas Water Bank in 1993 as a mechanism for voluntary transfer of water rights between willing buyers and sellers.¹²⁹ The transfers may be either temporary or permanent and, in most cases, will require a permit modification from the Texas Natural Resources Conservation Commission. The Water Bank is part of the Texas Water Development Board, which assists in the marketing and transfer of water throughout the state by identifying the availability and needs for water on a statewide basis.¹³⁰

The Texas water management system presents an important model for Florida policy-makers to consider. Unlike Florida, Texas has two separate state agencies involved in water management. The first is the Texas Water Development Board, which, as discussed above, focuses on the development of water supplies sufficient to meet the needs of Texas' growing population and economy. This agency serves as an advocate and provides statewide leadership in developing water supplies and overcoming obstacles to efficient and cost effective water supply development. The second agency is the Texas Natural Resource Conservation Commission. This agency is charged with the permitting of water resources to ensure environmental protection and conservation of natural resources.¹³¹ The Natural Resource Conservation Commission issues water permits, enforces water quality standards, permits surface water discharges, and administers the state's safe drinking water program. These are the types of environmental protection activities that are essential to protect the public health and natural resources of a modern society, but which can come in conflict with the efficiency and economic goals of statewide water supply development. As noted above, in states where the water supply development and water resource protection functions are conducted by the same agencies, one of the two mandates takes priority, and the other is neglected. This has frequently occurred in Florida and, as noted earlier, has also occurred in Hawaii where a similar statutory water management structure is in place. Texas has avoided this conflict by delegating these responsibilities to two separate agencies.

129. TEXAS AT A WATERSHED, *supra* note 108, at 11.

130. *See id.*

131. *See id.* ch. 297. *See generally* TEX. ADMIN. CODE ch. 295 (West 2000).

2. Kansas

In 1917, the Kansas Legislature created the State Water Commission to develop “a general plan for development of all the watersheds in the state to ensure that the [w]ater development of all kinds throughout the state ... conform[ed] to the general plans.”¹³² This was the beginning of strong state leadership in developing water supplies for agriculture, population growth, and other economic needs in the twentieth century. The Kansas State Water Commission was also charged with studying state water laws and proposing any necessary revisions.¹³³ Ultimately, in 1945, based on the recommendations of a subsequent study commission, the Kansas Legislature created a water permit administrative system that essentially converted Kansas’ water law from the eastern riparian rights system to the western prior appropriation system, with grandfathering of pre-existing riparian rights.¹³⁴ While Kansas’ water management statutes have changed over the years, there has consistently been a statewide water management agency charged with statewide water resource planning functions.¹³⁵

In the 1980’s, the Kansas Legislature created the Kansas Water Office as the water supply planning, policy, and coordination agency for the state of Kansas. The Kansas State Water Resource Planning Act mandates that the Kansas Water Office formulate, on a continuing basis, a state water plan for management, conservation, and development of the water resources of the state.¹³⁶ The Kansas Water Office conducts an annual water planning process with the goal of achieving “the proper utilization and control of the water resources of the state through comprehensive planning which coordinates and provides guidance for the management, conservation and development of the state’s water resources.”¹³⁷ One of the purposes of the annual water planning process is to avoid competing water needs. At the state level, the Kansas Department of Agriculture’s Division of Water Resources and the Kansas Office of Water have historically had large roles in the development of a variety of programs to address water competition in terms of water demand, availability, and accessibility. The Department of Agriculture’s Division of Water Resources is the state’s regulatory

132. John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective*, 43 U. KAN. L. REV. 735, 738 (1995) (quoting Act of Mar. 13, 1917, ch. 172 § 4, 1917 Kan. Sess. Laws 218, 218-19) (alterations in original) (citation omitted).

133. *Id.* at 739.

134. *Id.* at 741-42.

135. *Id.* at 751.

136. KAN. STAT. ANN. § 82a-903 (1997).

137. KAN. STAT. ANN. § 82a-901 (1997).

agency administering the Kansas Water Appropriations Act, and the Kansas Water Office is the state's planning agency that plans for development of necessary water supplies through the Kansas Water Planning Act.¹³⁸

The Kansas Legislature has established a number of programs to assist local agencies in meeting Kansas' water supply needs. One of these programs is the Kansas Water Assurance Program, which facilitates transfer of rights to storage space in twelve federal reservoirs in Kansas.¹³⁹ These surface water reservoirs were funded with both state and federal funds, and the water marketing program sells long-term, low interest contracts to water users to recover the state and federal governments' investments in the construction of the additional water supply storage space.¹⁴⁰

In 1985, the Kansas Office of Water developed the "multipurpose small lakes program act."¹⁴¹ This program uses existing, planned flood control dams as sources for water supply for small towns and rural areas. Under this program, the state pays for the cost of adding additional water supply storage over the immediate needs for flood control or other needs of the local project sponsors. The Kansas Water Office then enters into contracts with the local water users to repay the state's costs over time, and rights to the water are transferred to the local user as the state's costs are repaid.

3. Arizona

Historically in Arizona, urban growth relied heavily on use of large aquifers that received recharge from surface water systems at rates much lower than the rates of groundwater withdrawal necessary to meet urban needs. This created a situation where reliance on the groundwater aquifers for public supply was not sustainable.¹⁴² In response, the Arizona Legislature established a number of active management areas to manage the groundwater resource by increasing recharge and reducing withdrawals to achieve a "safe-yield."¹⁴³ One of the mechanisms used to achieve this safe-yield was establishment of the Assured Water Supply Program, which requires new growth to demonstrate that any

138. Memorandum from Raney Gilliland, Principal Analyst, & Mary Torrence, Revisor of Statute's Office, to the Special Committee on Environment, 1, 18-20 (August 27, 1999), available at <http://skyways.lib.ks.us/ksleg/KLRD/29028att.pdf> (last visited Oct. 14, 2002) (on file with author) [hereinafter Memorandum].

139. KAN. STAT. ANN. §§ 82a-1330 - 82a-1348 (1997).

140. Memorandum, *supra* note 138, at 9, 18-19.

141. KAN. STAT. ANN. § 82a-1601 (1997).

142. See Holly Jo Franz et al., *An Insatiable Thirst: The Impact of Water Law on Sprawl in the West*, 15 NAT. RESOURCES & ENV'T 228 (2001).

143. ARIZ. REV. STAT. ANN. § 45-562 (West 2002); Franz, et al., *supra* note 142, at 229-30.

increased demands placed on the aquifer system would be offset by increased groundwater recharge within the active management area.¹⁴⁴

Surface water supplies have been used to recharge the aquifer system as part of the Assured Water Supply Program.¹⁴⁵ One example of a large regional surface water delivery system used to recharge the aquifer system is the Central Arizona Project that diverts water from the Colorado River. Local government water utilities and private water suppliers are now faced with the problem of how to construct and finance the needed infrastructure to provide aquifer recharge, as well as supply drinking-water treatment and distribution systems.

Since direct grants for water supply development have become increasingly rare in Arizona, the state has looked to other methods of financing public works projects and infrastructure costs. One mechanism is the Arizona Water Infrastructure Finance Authority (WIFA).¹⁴⁶ The WIFA provides loans to local governments for the purpose of providing funding for public water supplies and the often-required groundwater recharge.¹⁴⁷ Frequently, a special district is established encompassing the area of benefit of the groundwater recharge or water supply infrastructure, and then the special district is used as the mechanism for funding.¹⁴⁸ This may be through either property taxes levied by the special district or special assessments on the properties benefiting from the groundwater recharge activities of the special district or the water supply infrastructure.¹⁴⁹ One type of special district in Arizona that is available for financing water supply related activities is a Domestic Water Improvement District.¹⁵⁰ Alternatively, local governments in Arizona can create multi-jurisdictional special districts through intra-local agreement.¹⁵¹ Through this mechanism, local governments could create a regional special district that could levy special assessments for funding aquifer recharge projects or water supply infrastructure.

144. ARIZ. ADMIN. CODE R4-28-B1202 (2002).

145. ARIZ. REV. STAT. § 45-576 (2001).

146. ARIZ. REV. STAT. § 9-571 (1996).

147. *Id.*

148. *See* ARIZ. REV. STAT. §§ 48-1019, 48-2011.01 (2000); Governor's Water Mgmt. Comm'n, Draft Tucson AMA Safe-Yield Task Force Issue Outline (July 3, 2000) [hereinafter Issue Outline]. (On file with author.)

149. ARIZ. REV. STAT. §§ 48-1019, & 48-2011.01.

150. *Id.* § 48-1019. *See* Issue Outline, *supra* note 148.

151. Issue Outline, *supra* note 148 (explaining that although Title 48 does not provide for special districts that would span multiple jurisdictions, a multi-way intergovernmental agreement is a potential financing mechanism that does not create a multi-jurisdictional district).

One of the reasons that special districts are used to finance water resource projects, rather than simply paying for these projects through water rates, is that paying for all related costs through rates is not always equitable.¹⁵² Repayment of costs through water rates establishes a level of equity among current water users (i.e., the more you use, the more you pay), but future users gain the benefit of a healthy water resource without having to pay for it, and the region as a whole benefits from the improved environmental conditions. However, payment of costs through special assessments or property taxes provides equity based on the ability to pay and enjoyment of the benefits of improved environmental protection even though some taxpayers may be subsidizing the water use of others. In addition, using assessments or property taxes from a special district to fund aquifer recharge and water supply infrastructure ensures that all water users in the special district who benefit from the aquifer recharge activities will pay equitably for the cost. For instance, where there are self-suppliers using either local domestic wells or permitted wells for agricultural or industrial water use, each of these water users would be bearing the cost of the aquifer restoration activities. If these restoration activities were paid for solely through water rates, these self-suppliers would benefit from the improved condition of the aquifer and the improved environmental conditions, but they would not be required to bear part of the cost.

4. California

California is a unique state, and its approach to water management is no exception. California has a dual system of water rights for surface water, which recognizes both riparian and prior appropriation rights. California has also developed a variety of approaches to developing water resources, including a number of large federal and federal/state water diversion and conveyance projects.¹⁵³ These include the Central Valley Project, CALFED Project, the Colorado River Aqueduct, and other regional reservoirs and water conveyances.¹⁵⁴

California's water supply development efforts are coordinated through the California Water Plan. The California Water Plan was first published in 1957 and has been updated at regular intervals subsequently.¹⁵⁵ The purpose of the updates to the California Water

152. See Issue Outline, *supra* note 148, at 2.

153. See, e.g., CAL. DEP'T OF WATER RES., CALIFORNIA WATER PLAN BULLETIN 160-98, 2-2 (1998) [hereinafter CALIFORNIA WATER PLAN BULLETIN].

154. CAL. DEP'T OF WATER RES., CALIFORNIA WATER PLAN BULLETIN 160-93 (October 1994).

155. *Id.*

Plan is to assess agricultural, environmental, and urban water needs and evaluate the available supplies so that the gap between future water demand and the corresponding water supplies may be quantified.¹⁵⁶ In addition, the update presents an overview of the current water management activities and provides water managers with a basis for prioritizing water resource efforts.¹⁵⁷

Much of California's water supply development has been in the form of regional water supply projects constructed by both the state and federal governments. For instance, in 1960, California voters approved a \$1.75 billion bond issue to build the California State Water Project.¹⁵⁸ This public works project was designed and constructed by the California Department of Water Resources, and by 1973 the initial facilities were completed and water delivery to southern California commenced.¹⁵⁹ The cost of the State Water Project is being repaid primarily through user fees paid by the project beneficiaries.¹⁶⁰ The operation and maintenance costs of the State Water Project are born primarily by twenty-nine water use contractors that the State Water Project supplies.¹⁶¹ The twenty-nine contractors with the state water project are primarily local water districts or water supply utilities.¹⁶² They supply water for domestic use, irrigation of commercial agricultural operations, and, in some cases, industrial and manufacturing uses.

In addition to a substantial financial commitment to water resource development at the state level, the California Legislature has enacted a number of initiatives intended to increase the incentives for water users to more efficiently use available water supplies and allow market forces to reallocate available water supplies as economic conditions change. For instance, in 1991, California established the Drought Water Bank, which was intended to supply water only in times of critical need.¹⁶³ The bank was charged with purchasing water from willing sellers and holding it to sell to water users with critical needs.¹⁶⁴ The Drought Water Bank has generally proven to be successful as a method of

156. *Id.*

157. CALIFORNIA WATER PLAN BULLETIN, *supra* note 153, at 1-1.

158. CAL. DEP'T OF WATER RES., MANAGEMENT OF THE CALIFORNIA STATE WATER PROJECT BULLETIN 132-99, 3 (Mar. 2001).

159. *Id.*

160. CALIFORNIA WATER PLAN BULLETIN, *supra* note 153.

161. *Id.*

162. *Id.*

163. CAL. DEPT. OF WATER RESOURCES, 1991 DROUGHT WATER BANK, 2 (January 1992) [hereinafter 1991 DROUGHT WATER BANK].

164. OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, PREPARING FOR AN UNCERTAIN CLIMATE, OTA-0-567 (1993).

reallocating supplies during times of drought.¹⁶⁵ Subsequently, additional water banks have been established to facilitate water trading and transfers.¹⁶⁶ California has established other programs promoting water trading and water marketing;¹⁶⁷ however, the success of these initiatives has been limited, and significant obstacles to effective and efficient water trading still exist.¹⁶⁸

It is important to note that the California Department of Water Resources, which is charged with planning for California's water supply needs through the State Water Plan and with developing, operating, and maintaining the State Water Project, is separate and independent from the California Water Resources Control Board, the state's water regulatory agency. This division of responsibilities appears to have served the residents of California well; while the Department of Water Resources has been able to devote its energies to ensuring a safe and reliable water supply for the growing population and economic development, the State Water Resources Control Board has been able to focus on managing water rights and protecting water resources.

V. ALTERNATIVES IN FLORIDA

It is obvious from the diverse approaches to water resource development highlighted above that there is no single model for successful statewide water resource development. Each of the

165. See generally, 1991 DROUGHT WATER BANK, *supra* note 165 and LOYD S. DIXON, NANCY Y. MOORE, SUSAN W. SCHECHTER, RAND INSTITUTE, CALIFORNIA'S 1991 DROUGHT WATER BANK, 66 - 71 (1993); but see Joseph W. Dellapenna, *The Importance Of Getting Names Right: The Myth Of Markets For Water*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 317, 362-63 (2000) (criticizing the 1991 Drought Water Bank for its limited scope and the relatively small quantity of water made available for use).

166. California also operated drought water banks in 1992, 1994 and 1995, which were also significant drought years. CAL. DEP'T OF WATER RES., MANAGEMENT OF THE CALIFORNIA STATE WATER PROJECT BULLETIN 132-96, Ch. 3 (1996). Local groundwater banks have also been established in California, such as the Kern Water Bank. WATER TRANSFER WORKGROUP, WATER TRANSFER ISSUES IN CALIFORNIA, FINAL REPORT TO THE STATE WATER RESOURCES CONTROL BOARD, 21-2 (JUNE 2000) [hereinafter WATER TRANSFER ISSUES IN CALIFORNIA].

167. One example is innovative legislation intended to allow transfers of conserved water. This effort is analyzed in Jennifer L. Cordua, *The Search for new Supplies: Salvaging the Remains of Agricultural Water Conservation in California*, 31 U.C. DAVIS L. REV. 591 (1998).

168. One obstacle to efficient water trading is the transmission of water from the existing point of use to the new point of use, thereby effectuating the transfer. In 1986 California Legislature passed legislation to facilitate water "wheeling," so that water could be conveyed through existing infrastructure with excess capacity. See CAL. WATER CODE ANN. § 1810 (2001). However, litigation over the rights of transferors to wheel water has been the subject of intense litigation that has limited large-scale transfers of water. *San Luis Coastal Unified School Dist. v. City of Morro Bay*, 97 Cal.Rptr.2d 323, 81 Cal.App.4th 1044 (App. 2 Dist. 2000); *Metropolitan Water Dist. of Southern California v. Imperial Irr. Dist.*, 96 Cal.Rptr.2d 314, 80 Cal.App.4th 1403 (App. 2 Dist. 2000). A detailed analysis of other obstacles to efficient water transfers in California is provided in WATER TRANSFER ISSUES IN CALIFORNIA, *supra* note 166.

states discussed has taken a different path to successfully achieving effective statewide water resource development.

Some of these methods are easily applicable to Florida's water management system, and others are not.¹⁶⁹ Below, a number of proposals are identified that could effectively increase water resource development in Florida without the need for revision of Florida's administrative water use permitting system.

A. Improve State Leadership

The Legislature should establish an office of state government whose sole purpose is to address Florida's water supply needs on a statewide basis. This office's sole mission would be to coordinate, develop, and implement plans to reduce and eliminate identified shortfalls in the water supplies necessary to meet the needs of Florida's growing population and economy.

Florida's water supply planning process has adequately identified water supply shortfalls throughout the state. Unfortunately, the next step in the planning process has been lacking. Frequently, the water supply planning process has produced a laundry list of water source options without any prioritization or identification of specific sources to meet specific needs. The costs estimated for these water supply options are often inaccurate or unrealistic. It is possible, with the right leadership, to identify cost-effective water supply sources to meet projected needs through a consensus building process with local governments, water suppliers, environmental interests, and other stakeholders. This was done in the planning process for the Lower East Coast Regional Water Supply Plan, and it may yet prove to be an effective water supply development tool.

The primary problem is that Florida's water management districts are tasked with two inconsistent and sometimes contradictory missions: development of sufficient water resources to meet all reasonable-beneficial uses and preservation of water resources.¹⁷⁰ Since their creation almost thirty years ago, the water

169. For instance, the water marketing and banking efforts initiated in western states such as Texas, California, and Kansas are not easily adaptable to Florida's water use permitting system. While the prior appropriation system in most western states is very conducive to reallocating water rights through water marketing and water banking, implementing similar reallocation systems in Florida would require reform of Florida's administrative water permitting system. A discussion of reforms of this nature is outside the scope of this paper.

170. See FLA. STAT. § 373.016(3) (2001); see also FLA. STAT. § 373.036(2)(d) (2001), which provides, in pertinent part:

In the formulation of the district water management plan, the governing board shall give due consideration to:

1. The attainment of maximum reasonable-beneficial use of water

management districts have delegated more and more responsibilities, without the necessary resources to fulfill these responsibilities. One function that has suffered is water resource development. Generally, the water management districts have given water resource preservation priority over water resource development. It is time for the state to create an advocate for development of the water supplies necessary to Florida's water needs and end the neglect of this important government function.

B. Coordinate Statewide Funding

The State should coordinate statewide funding for water resource development projects. Historically, the State of Florida has not played a significant role in the development of water resources. Most water resources development has been funded piecemeal by the local governments, special districts, and private utility companies. However, the era of easy, cheap water resource development in Florida has ended, and it is time for the state to play a leadership role.

The state could provide direct financial assistance to develop regional projects, like Texas provides through its state participation program or as Kansas provides through its reservoir and multi-purpose lake projects. Alternatively, the state could prioritize water resource projects for funding consistent with statewide water planning efforts, as is done in North Carolina.

However, the state can provide leadership in the development of water supplies without necessarily providing direct state funding. One way is by coordinating statewide water resource development funding through a statewide planning process. When water supply shortfalls are identified through state and regional planning efforts, the state should develop mechanisms to ensure that the financial resources will be available to meet water needs and limit the adverse public health and economic impacts of water shortages. There are numerous ways this could be done, one of which is by facilitating regional cooperation and leveraging regional, local, and

resources.

2. The maximum economic development of the water resources consistent with other uses.
3. The management of water resources for such purposes as environmental protection, drainage, flood control, and water storage.
4. The quantity of water available for application to a reasonable-beneficial use.
5. The prevention of wasteful, uneconomical, impractical, or unreasonable uses of water resources.
6. Presently exercised domestic use and permit rights.
7. The preservation and enhancement of the water quality of the state.

private financial resources. Pooling of regional resources could be done through regional special districts, which are discussed below in recommendation C. The state could also pursue facilitation through state bonding, as was done in California in 1960 and in 2000. This can be done with very little net cost to the state when the debt is repaid through fees paid by water users, as was the case with the California State Water Project. Florida is already moving in this direction through the bonding of its state revolving loan programs,¹⁷¹ and with additional effort, it may be possible to use these funds or a similar funding mechanism to facilitate regional water supply development projects.

C. Facilitate Creation of Local Revenue Sources

The legislature should authorize the establishment of regional water resource development districts. These special districts could be created either by special act or by local governments, and they could be used to facilitate the financing of regional water resource projects. It may be possible to create a special district to perform some water resource development function under present state law.¹⁷² However, legislation articulating the powers and functions of regional water resource development districts is necessary to clarify the legal authority and possibly expand the powers of the special district.

Enabling legislation for water resource development districts should include criteria for creation and dissolution of the district, as well as authorizing revenue options. The districts would need to be regional in nature and include two or more local governments or utility service areas. At a minimum, the districts should be authorized to levy special assessments for water resource development purposes. Additionally, the water resource development districts should be able to access a portion of the one mil property tax authorized for water management purposes by Article VII, section 9(b) of the Florida Constitution.

Notably, there is precedent for this approach in Florida law. In 1978, the Florida Legislature dedicated 0.1 mil of that one mil for water management purposes to West Coast Regional Water Supply Authority for a period of ten years. This funding source was essential to the development of the West Coast Regional Water Supply Authority (the predecessor to Tampa Bay Water), as well as to the present success of Tampa Bay Water. This type of taxing authority is not dissimilar from the establishment of a municipal

171. See Act effective June 14, 2000, ch. 00-271, 2000 Fla. Laws 2804.

172. See, e.g., FLA. STAT. § 373.1962 (2001).

services taxing unit (MSTU) by a county government in order to access the ten mills available under the Florida Constitution for municipalities.¹⁷³

Another innovative approach that would also enable local water resource development districts to access the one mill property tax for water management purposes is tax increment financing. Under this approach the water resource development district would be entitled to any increases in revenue over the existing revenues raised by the water management districts within a designated area. This funding mechanism is similar to the increment tax financing mechanism for community redevelopment agencies.¹⁷⁴

D. Authorize Cooperative Water Transfer Agreements

As water supplies in Florida become more limited, pressure will increase to transport water from water-rich areas of the state to water-scarce areas of the state. Frequently, this is the most cost-effective method of developing new water supplies. In many cases, the water-rich areas of Florida are rural areas with limited opportunities for economic development. Therefore, the legislature should authorize inter-local agreements between local governments, allowing water-rich areas to benefit financially from the transfer of water to the water-scarce areas of Florida. Such an agreement could be similar to the New York watershed agreement where revenues are paid over a period of years for both environmental protection and economic development activities in the water "donor" area.

173. See FLA. STAT. § 200.071 (2001).

174. See FLA. STAT. § 163.330-163.463 (2001).

CONSTITUTIONAL LIMITATIONS OF STATE GROWTH MANAGEMENT PROGRAMS

MICHAEL C. SOULES*

Table of Contents

I.	INTRODUCTION	145
II.	STATE GROWTH MANAGEMENT PROGRAMS	148
	<i>A. Vermont</i>	149
	<i>B. Oregon</i>	151
	<i>C. Florida</i>	152
III.	THE CONSTITUTIONALITY OF STATE GROWTH MANAGEMENT PROGRAMS	154
	<i>A. Relevance of Regulatory Takings</i>	154
	<i>B. Unlawful Delegation of Power</i>	155
	<i>C. Standing</i>	163
	<i>D. Due Process</i>	174
	<i>E. Other Constitutional Issues</i>	182
IV.	CONCLUSION	185

I. INTRODUCTION

Recent decades have seen an increasing recognition that the traditional model of land use planning, characterized by municipal-level decisionmaking and Euclidean-style zoning, is not meeting the needs of residents living with its results. Some state and local lawmakers have responded with policies designed to correct the problems of traditional planning. They have tried many potential solutions. One common response has been the establishment of new, state-level programs that increase state and regional planning authority and promote more compact, mixed-use patterns of development. These state growth management programs are the subject of this Article.¹

Fourteen states have currently implemented some form of statewide growth management program.² The lack of consensus

* J.D. candidate, Yale Law School, New Haven, CT. The author holds a Master of City Planning from the University of California, Berkeley. He gratefully acknowledges Professor Quintin Johnstone for his help with this piece.

1. Though there are numerous regional and local growth management programs, the scope of this Article is confined to state-level efforts.

2. These states are Delaware, Florida, Georgia, Hawaii, Maine, Maryland, New Jersey, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Washington, and Wisconsin. David R. Godschalk, *Smart Growth Efforts Around the Nation*, 66 *Popular Government* 17-18 (2000), available at <http://www.iog.unc.edu/pubs/electronicversions/pg/pgfal00/article2.pdf>. For a listing of most of these programs' governing statutes, see Douglas R. Porter, *State*

about the necessary components a successful program, together with the concessions required to pass growth management legislation, have generated great variety in the goals and legal structure of the state programs. These divergent models provide an opportunity for comparing different alternatives and can prove helpful for the many states considering growth management policies.³ Learning from the successes and failures of existing programs will be crucial as more state legislatures address the question of growth management in the future. The goal of this Article is to aid policymakers grappling with this issue by examining one under-analyzed facet of growth management efforts. It focuses on their constitutional limitations.

Most analyses of state growth management programs have concentrated on issues related to either the statutory scheme or the actions of agencies administering the program. Obviously, these programs' success depends upon well-crafted statutes and strong implementing regulations. However, the judicial response to growth management efforts can also affect their efficacy. Through their resolution of individual cases, courts have the power to either hinder or thwart the achievement of a program's goals.

There are generally two ways courts can significantly affect the scope of a state growth management regime. The first is through their interpretation of statutes and regulations. For example, the Vermont Supreme Court has construed the definitions of that state's program in a way that lowered the threshold of projects requiring a state-issued permit,⁴ thereby subjecting more projects to statewide public and governmental scrutiny. Second, courts can influence these programs' efficacy by their response to state and federal constitutional challenges.

The study of statutory interpretation questions would present several problems. Since most appellate decisions related to growth management programs involve some degree of statutory

Framework Laws For Guiding Urban Growth and Conservation in the United States, 13 PACE ENVTL. L. REV. 547, 548 nn.1-2 (1996). Hawaii's governing statute is located in sections 205-1 to 205-5 of the Hawaii Revised Statutes (2001). Some commentators classify Hawaii's planning regime separate from other state-level efforts, since the historic weakness of local government power has resulted in little tension over the state's usurpation of local land use authority. See James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 489 n.3 (1994). Because the State Land Use Commission, rather than municipal governments, largely controls land use, Hawaii's program has been described as "state-administered, rather than state-sponsored." Dennis E. Gale, *Eight State-Sponsored Growth Management Programs: A Comparative Analysis*, 58 J. AM. PLAN. ASS'N 425, 437 n.1 (1992).

3. See AMERICAN PLANNING ASS'N, PLANNING FOR SMART GROWTH: 2002 STATE OF THE STATES (2002), at <http://www.planning.org/growingsmart/>; Patricia E. Salkin, *Smart Growth at Century's End: The State of the States*, 31 URB. LAW. 601, 605-35 (1999) (discussing recent state efforts to address problems of growth management and propose state-level solutions).

4. See, e.g., *In re Spring Brook Farm Found., Inc.*, 671 A.2d 315 (Vt. 1995).

interpretation, a colossal number of cases would have to be surveyed. Moreover, constitutional issues are more compelling because of the crippling effect adverse decisions can have upon state growth management programs. By contrast, legislatures can, in theory, overrule decisions based solely upon statutory construction through the passage of new legislation.⁵ To that end, this Article focuses on the constitutional limits of state growth management efforts as well as how best to design such a program in order to avoid constitutional difficulties.

Because these state statutes have fundamentally altered the process of land use planning, there are a host of constitutional issues potentially implicated. One concern raised in legal challenges has been whether the authority vested in administrative agencies implementing the program constituted an unlawful delegation of power. Jurisdictional problems related to whether legislative standing provisions violate the constitutional requirements of standing have also developed, and some plaintiffs have brought procedural and substantive due process challenges. A handful of other constitutional issues, like state usurpation of home rule authority and equal protection of the laws, have also arisen from these programs. All of these issues are discussed in this Article.⁶

This Article is organized in the following manner. Part II describes the general structure of the growth management programs established in three states: Florida, Oregon, and Vermont. This study was conducted primarily by surveying case law, with these states serving as the principal focus. When instructive, cases from other states are used selectively to further explore the constitutional issues. Taking this multi-state approach helps to better identify the major constitutional concerns likely to arise from implementation of a growth management program. Nevertheless, policymakers will have to look to their own state's constitution and related jurisprudence to determine the risk of similar problems in their state.

Part III discusses the different constitutional topics. The discussion of each topic begins with a general introduction of the issue and explanation of how the constitutional doctrine relates to growth management programs. Results of the case law are

5. See *FDA v Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143-56 (2000) (imputing legal meaning to a Congressional failure to act, suggesting that Congress would have acted had its intent been thwarted).

6. One problem that will not be analyzed at length is the issue of regulatory takings. See *infra* Part III. A for the reasons this important constitutional topic has not been included in this study.

presented next, with a discussion of the most important cases for that issue and their implications. Finally, each subsection concludes with an examination of the possible methods by which any identified constitutional deficiencies could be corrected in a manner that best meets the goals of growth management.⁷ Part IV offers a brief conclusion.

This Article comes at an exciting time for those interested in land use planning reform. The American Planning Association (APA) recently developed a series of model statutes designed to improve states' planning processes.⁸ These statutes represent only the second major effort to improve upon the 1924 Standard Zoning Enabling Act,⁹ the statutory model most widely used today, and will hopefully energize planning reform efforts around the country. Accordingly, the presentation of curative measures in relevant sections of Part III includes a discussion of the approach taken by the model statutes. Because the issues discussed in this Article are pertinent to the design of growth management legislation, the Article addresses whether the applicable statutes resolve constitutional concerns without thwarting statewide growth management goals.

II. STATE GROWTH MANAGEMENT PROGRAMS

The decision by many states to adopt state-level growth management programs represented a rejection of the status quo of localized and uncoordinated planning processes, segregative zoning of uses, and few constraints on development at the urban periphery. Although important for understanding growth management more generally, the historical roots of this movement have been documented elsewhere and thus are not discussed here.¹⁰ However, a brief description of the basic structure of the Vermont, Oregon, and Florida programs is helpful for understanding constitutional challenges to them.

7. Though not taking a position on the desirability of growth management's goals, this Article assumes that policymakers hope to enact the strongest possible program within constitutional and political constraints. Obviously, policymakers interested in implementing a weaker program will have to approach these issues differently, and may be faced with fewer constitutional difficulties.

8. The model statutes are being published in a legislative guidebook to aid policymakers.

9. The first such effort was the American Law Institute's Model Land Development Code in 1975.

10. See, e.g., George E.H. Gay, *State Solutions to Growth Management: Vermont, Oregon, and a Synthesis*, 10 NAT. RESOURCES & ENV'T 13, 13-16 (1996); James C. Nicholas, *State and Regional Land Use Planning: The Evolving Role of the State*, 73 ST. JOHN'S L. REV. 1069, 1073-74 (1999); Wickersham, *supra* note 2, at 498-509; see generally JOHN M. DEGROVE, *LAND, GROWTH, AND POLITICS* (1984).

There are several reasons why these states represent an ideal sample for examining constitutional problems. First, they are geographically dispersed. Comparisons drawn between these states are more instructive than between neighboring states. Since most growth management programs have clustered in three general regions of the country (the Pacific Northwest, the Southeast, and mid-Atlantic to New England), Vermont, Oregon, and Florida provide an example from each. Geographic diversity also helps to control for the political leanings of a particular state's judiciary.

Second, these states have had the most experience with growth management, with programs in each state more than twenty-five years old. Consequently their case law is more developed case law than in states with newer programs. The programs in Vermont, Oregon, and Florida are also among the strongest in the nation. Because more rigorous programs generally trigger more legal challenges, they provide optimal case studies for the exploration of growth management's constitutional boundaries. Finally, since the structure of the programs in each the three states is very different, this sample better accounts for constitutional issues that might arise from a specific growth management structure. Brief descriptions of the programs are presented below.

A. Vermont

The centerpiece of Vermont's growth management program is the permitting process created under the 1970 State Land Use and Development Act, popularly known as Act 250.¹¹ The act requires that developments imposing regional impacts first obtain a state-authorized permit.¹² To acquire an Act 250 permit, an application must be filed with the three-member district environmental commission within whose jurisdiction the subject property lies.¹³ There are nine of these commissions throughout the state, with each commission having authority over a particular region.¹⁴ The relevant district commission evaluates a proposed project according to a series of statutorily specified criteria,¹⁵ and decides whether to grant the permit. The commission may deny the project if it would be "detrimental to the public health, safety or general welfare."¹⁶ If any party to the proceeding disagrees with the district commission's

11. VT. STAT. ANN. tit. 10, §§ 6001-6108 (1997).

12. VT. STAT. ANN. tit. 10, § 6081 (1997).

13. VT. STAT. ANN. tit. 10, § 6083 (1997).

14. VT. STAT. ANN. tit. 10 § 6026 (1997).

15. The criteria are listed at VT. STAT. ANN. tit. 10, § 6086 (1997).

16. VT. STAT. ANN. tit. 10, § 6087(a) (1997).

conclusion,¹⁷ the decision may be appealed to the state-level Environmental Board.¹⁸ The nine-member Board then conducts a de novo review of the application, once again considering the case in light of the relevant criteria, and issues an order.¹⁹ Appeals of the Board's decision are taken to the Vermont Supreme Court.²⁰

Many features of the Act 250 permit review process help to make it an effective growth management tool. The threshold required to define a development proposal as one of regional significance is very low, such that even relatively small development projects fall within the definition.²¹ In this way, the state has jurisdiction over most projects that significantly affect land use and the environment.²² The fact that these permits are required before development can proceed also contributes to Act 250's efficacy. Unlike many environmental review processes, such as that mandated by the National Environmental Policy Act (NEPA),²³ the decisions of the district commission or Environmental Board have binding legal consequences on whether or not a project can be implemented. Finally, the permitting process subjects large development projects to significant public scrutiny.

Yet, Act 250, in its current form, is not free from problems. The Act had originally called for the development of a statewide Land Use Plan, but friction between regional factions within the state legislature prevented the Plan from being developed.²⁴ Ironically, this imperfect form of Act 250, with its focus on review of individual projects without the benefit of an overarching plan, was later endorsed by others. The American Law Institute (ALI) based its Model Land Development Code²⁵ on Act 250, and the Code became the forerunner to Florida's Environmental Land and Water Management Act.²⁶ This site-specific model of growth management

17. Persons entitled to party status are described *infra* at note 125; *see also* VT. STAT. ANN. tit. 10, §§ 6084, 6085(c)(1) (1997).

18. VT. STAT. ANN. tit. 10 § 6089(a)(1) (1997).

19. VT. STAT. ANN. tit. 10 § 6089(a)(3) (1997).

20. VT. STAT. ANN. tit. 10 § 6089(b) (1997).

21. For example, Act 250 applies to "housing projects...with 10 or more units," commercial or industrial "improvements on a tract or tracts of land...involving more than 10 acres," as well as many other types of projects. VT. STAT. ANN. tit. 10, § 6001(3) (1997).

22. *See* Wickersham, *supra* note 2, at 513-14.

23. 42 U.S.C. §§ 4321-4370d (2001).

24. Its authorizing statute was repealed. Jeffrey F. Squires, *Growth Management Redux: Vermont's Act 250 and Act 200, in STATE AND REGIONAL INITIATIVES FOR MANAGING DEVELOPMENT: POLICY ISSUES AND PRACTICAL CONCERNS* 11, 14 (Douglas R. Porter ed., 1992).

25. AMERICAN LAW INSTITUTE, A MODEL LAND DEVELOPMENT CODE (1976) [hereinafter MLDC].

26. Act effective July 1, 1972, ch. 72-317, 1972 Fla. Laws 1162 (codified as amended at FLA. STAT. §§ 380.012- 380.12 (2000)).

has since fallen out of favor, with programs similar to Oregon's having become far more popular in recent years.²⁷

More recently, Vermont has made additional attempts to enact a statewide planning regime. To that end it passed the Growth Management Act (Act 200) in 1988.²⁸ However, the efficacy of Act 200 was limited soon thereafter when the state legislature passed a subsequent law making compliance with the Act's goals optional.²⁹ As one observer described Act 200, "there is less than meets the eye."³⁰ Because Act 200 has had little effect on Vermont's ability to manage growth, Act 250 remains the most important component of its growth management regime.

B. Oregon

Oregon's growth management program, considered one of the most effective in the nation, began in 1973 with passage of the State Land Use Act.³¹ The Act created a state-level Land Conservation and Development Commission (LCDC), which has authority to promulgate statewide land use goals.³² Nineteen goals have been adopted.³³ Local and regional governments are required to prepare comprehensive plans that are consistent with the statewide goals,³⁴ and LCDC reviews these plans to ensure goal compliance.³⁵ In this way, plans throughout the state remain consistent with LCDC's goals.

In addition to this rulemaking aspect of the program, there is also a quasi-judicial element. In order to improve the review of local

27. See Wickersham, *supra* note 2, at 519, 525. In the Oregon-style model, statewide planning goals or policies are adopted first, and there is a review process to ensure that local comprehensive plans are consistent with state goals. *Id.* at 530-31. Despite the increased popularity of the Oregon-style model, one analyst has suggested that an optimal growth management regime would combine elements of both models. Gay, *supra* note 10 at 73. He recommends using a Vermont-style case-by-case approach in rural areas, while promoting a more planning-oriented approach, such as Oregon's, for urban areas. *Id.* at 73-74.

28. Donald L. Connor et al., *State and Regional Planning: Summary of Selected Recent Acts and Initiatives*, in STATE AND REGIONAL INITIATIVES FOR MANAGING DEVELOPMENT, *supra* note 24, at 213, 223.

29. David L. Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress*, 26 URB. LAW. 197, 202 (1994).

30. Squires, *supra* note 24, at 32.

31. 1973 Or. Laws 80 (codified as amended at OR. REV. STAT. ch. 197 (2001)); GERRIT KNAAP & ARTHUR C. NELSON, *THE REGULATED LANDSCAPE: LESSONS ON STATE LAND USE PLANNING FROM OREGON* 22 (1992).

32. OR. REV. STAT. §§ 197.030, .040 (2001).

33. See KNAAP & NELSON, *supra* note 31, at 25-27. An updated list of Oregon's nineteen land use goals can be found at the LCDC website, <http://www.lcd.state.or.us/goalhtml/goals.html>.

34. OR. REV. STAT. § 197.175 (2001).

35. OR. REV. STAT. § 197.251 (2001).

government decisions made pursuant to their comprehensive plans, the Oregon legislature created the Land Use Board of Appeals (LUBA) in 1979.³⁶ LUBA was granted exclusive jurisdiction over review of all land use decisions.³⁷ Under Oregon law, parties wishing to challenge a local government's land use decision may appeal that decision to LUBA. Appeals from LUBA are taken to the Oregon Court of Appeals.

Beyond the statutory structure of the Oregon program, it has been noted for the restrictiveness of its substantive regulations. Its best-known feature is its creation of urban growth boundaries (UGBs) around municipalities. UGBs demarcate the divide between urban and rural land uses, with only limited development allowed outside the boundaries.³⁸ These and other stringent rules have enabled Oregon to protect much of its agricultural and forestland from development.

C. Florida

With characteristics of both the Vermont and Oregon programs, Florida's growth management program represents a hybrid approach.³⁹ It has two primary components. The first consists of the statutory framework created by the 1972 Florida Environmental Land and Water Management Act (ELWMA).⁴⁰ This act, based on the ALI's Model Land Development Code, provided two legal tools for managing growth. The first of these was allowing for the designation of "areas of critical state concern," which are regions within the state whose resources are of statewide importance and in need of special protection.⁴¹ The newly created Department of Community Affairs (DCA), a state planning agency, was charged with recommending appropriate areas for designation. Final

36. Arthur C. Nelson, *Comparative Judicial Land-Use Appeals Processes*, 27 URB. LAW. 251, 261 (1995). For a discussion of rationales favoring the creation of LUBA, see Edward J. Sullivan, *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979-1999*, 36 WILLAMETTE L. REV. 441, 446-48 (2000).

37. Nelson, *supra* note 36, at 261. "Land use decision" is very broadly defined under Oregon law. Its legal definition is as broad as this term's definition in popular use would be. See *infra* note 139; OR. REV. STAT. § 197.015(10) (2001).

38. For a discussion of Oregon's UGBs, see KNAAP & NELSON, *supra* note 31, at 39-68.

39. Having features of both programs has not necessarily led to more effective management of growth. There is no evidence suggesting that Florida's growth management efforts have been more successful than the other states.

40. Act effective July 1, 1972, ch. 72-317, 1972 Fla. Laws 1162 (codified as amended at FLA. STAT. §§ 380.012- 380.12 (2000)).

41. FLA. STAT. § 380.05 (2000). For a description of how the areas of critical state concern designation process originally operated, see Nicholas, *supra* note 10 at 1079-83. For a discussion of changes to this process in the wake of a Florida Supreme Court decision, see *infra* notes 90-98 and accompanying text.

designation decisions were vested in the Administration Commission, which is composed of the governor and cabinet members. Upon designation, local governments within an area were required to prepare a comprehensive plan conforming to development principles issued by the DCA.

The second growth management tool established by the 1972 Act was the “development of regional impact” (DRI) process, in which projects expected to have effects beyond the municipality wherein they are located are subjected to additional review.⁴² As with the Act 250 process, a developer must apply for a DRI permit. The regional planning commission then studies the impact of the proposed project and submits a report to the local government, which issues a development order either granting the permit application, denying it, or granting it with conditions.⁴³ Appeals from the development order are taken to the Administration Commission, which sits as the Land and Water Adjudicatory Commission for the purposes of DRI appeals.⁴⁴ The Commission relegates the case to a hearing officer, who holds a trial and makes a recommended decision, which the Commission is free to adopt or reject. Appeals from Commission rulings are taken to the state’s appellate courts.

The second major component of Florida’s growth management program came with the passage of the Growth Management Act in 1985⁴⁵ and the accompanying legislatively-adopted State Comprehensive Plan.⁴⁶ The 1985 act borrowed many elements from the Oregon planning program, including the adoption of statewide planning goals and a requirement that local and regional comprehensive plans be consistent with the state plan.⁴⁷ The DCA undertakes the review of local and regional plans.⁴⁸ If it finds that local plans are not in compliance, it may recommend sanctions

42. FLA. STAT. § 380.06 (2000). The DRI process is currently being phased out, as DRI review is no longer required in municipalities whose comprehensive plans have been adjudged to be in compliance with statewide goals. *See* Wickersham, *supra* note 2, at 519. Despite the imminent twilight of DRI review, it is nevertheless instructive to examine cases arising out of the DRI process for two reasons. First, Vermont continues to use the Act 250 permit process, which is similar to the DRI process. Second, the APA’s new model planning legislation includes provisions for a DRI review process. *See* AM. PLANNING ASS’N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND MANAGEMENT OF CHANGE, §§ 5-301 to 5-315 (2001), at <http://www.planning.org/growingSMART/>.

43. FLA. STAT. § 380.031(3) (2001).

44. FLA. STAT. § 380.07(1) (2001).

45. Act effective May 31, 1985, ch. 85-55, 1985 Fla. Laws 207 (codified as amended at FLA. STAT. §§ 163.3161-.3243 (2000)).

46. Act effective July 1, 1985, ch. 85-57, 1985 Fla. Laws 295 (codified at FLA. STAT. ch. 187 (2000)).

47. FLA. STAT. § 163.3177 (2001).

48. FLA. STAT. § 163.3177(9)(c) (2001).

against the municipality, which the Land and Water Adjudicatory Commission has the authority to impose.⁴⁹ Through these means, Florida has created a powerful system to ensure the consistency of local comprehensive plans with the statewide goals.

III. THE CONSTITUTIONALITY OF STATE GROWTH MANAGEMENT PROGRAMS

A. *Relevance of Regulatory Takings*

The issue of regulatory takings is certainly relevant to growth management programs. There is a very real risk that courts could find a program's land use restrictions to be sufficiently severe so as to constitute a taking. The regulatory takings doctrine is the most serious constitutional impediment to growth management and must be carefully considered in adopting a program. However, the takings question is not considered in this Article. Because this field has been so extensively written upon, and since takings issues are ubiquitous to all planning regimes, they are less uniquely relevant to state-level programs than the other constitutional issues addressed in this Article. The regulatory actions of federal, state, regional, and local governments all raise takings concerns. Moreover, given that judges' ideologies often affect the outcome of takings cases, it is extremely difficult to predict how courts would treat a particular land use regulation.

Nevertheless, before moving on to other constitutional topics, it is worth noting that the Florida, Vermont, and Oregon programs, despite facing numerous takings challenges, have not been seriously constrained by adverse decisions. Analyzing the issue somewhat differently, courts in Florida and Oregon have both upheld regulations that either prohibited development on significant proportions of a landowner's property or established large minimum lot sizes.⁵⁰ More significantly, the Oregon Supreme Court and Ninth Circuit Court of Appeals have both held that a regulation prohibiting all residential development on a parcel zoned exclusively for forest uses does not constitute a taking.⁵¹ The courts of these

49. FLA. STAT. § 163.3184(11) (2001).

50. See *Graham v. Estuary Props., Inc.*, 399 So. 2d 1374 (Fla. 1981) (upholding the denial of a DRI application which effectively prohibited development on 4600 acres of a 6500 acre property); *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. 1st DCA 1990) (finding no facial taking from a comprehensive plan restricting development to small areas of plaintiffs' properties); *Oregonians in Action v. LCDC*, 854 P.2d 1010 (Or. Ct. App. 1993) (finding that LCDC's order mandating 80 acre minimum lot sizes did not constitute a taking).

51. *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) (rejecting taking claim under the United States Constitution); *Dodd v. Hood River County*, 855 P.2d 608 (Or. 1993) (rejecting taking claim under the Oregon Constitution). In rejecting the taking claim, the

states have been generally sympathetic to the growth management programs in other takings challenges as well.⁵² Despite the relative success these programs have enjoyed against takings challenges, the increased judicial hostility to land use regulations in recent years puts effective growth management programs at risk of constitutional violations. Policymakers would be wise to consider the use of less restrictive regulatory tools, such as Transferable Development Rights (TDRs), in accomplishing the protection of undeveloped land.⁵³ A carefully designed program that follows the contours of state and federal case law should succeed in avoiding adverse takings decisions.

B. Unlawful Delegation of Power

The nondelegation doctrine is rooted in the principle of separation of powers: the legislative, executive, and judicial branches may not assume the functions of another branch. Separation of powers concerns have most commonly developed when the legislature delegates its legislative powers to administrative agencies.⁵⁴ They can also arise when administrative agencies perform quasi-judicial functions, an activity that potentially encroaches on the judicial power vested in the court system. At the federal level, the nondelegation doctrine's textual foundation are the grants of power to Congress under Article I,⁵⁵ while fears of

Oregon Supreme Court was persuaded by the fact that a substantial beneficial use, timber harvesting, remained on the property. The Ninth Circuit applied issue preclusion to the categorical taking, considering it to be same issue that had been litigated in state court, and proceeded to apply the three-pronged test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). Under this test, the court found that no taking had occurred. *Dodd*, 136 F.3d at 1229-30.

52. See, e.g., *Battaglia Props., Ltd. v. Florida Land & Water Adjudicatory Comm'n*, 629 So. 2d 161 (Fla. 5th DCA 1993); *Dunn v. City of Redmond*, 735 P.2d 609 (Or. 1987); *Killington, Ltd. v. State*, 668 A.2d 1278 (Vt. 1995). But see *Alexander v. Town of Jupiter*, 640 So. 2d 79 (Fla. 4th DCA 1994). See also *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. Ct. App. 1994) (finding, in light of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the city's conditioning of its approval of a parcel partition on the landowner's dedication of a right-of-way to be a taking).

53. Note, however, that a minority of the Supreme Court has even called into question the validity of TDRs as a technique that avoids takings problems. See *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 724, 745-50 (1997) (Scalia, J., concurring).

54. Application of the non-delegation doctrine resulted in the United States Supreme Court's invalidation of the National Industrial Recovery Act, a New Deal program, in two cases decided in 1935. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). However, the Court has not used the doctrine to invalidate a federal law since, and currently the doctrine, as applied in federal court, merely requires that Congress provide an "intelligible principle" to which administrative agencies must conform. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). The Court recently reaffirmed the current weakness of the doctrine in *Whitman v. American Trucking Associations*, 531 U.S. 457, 474-76 (2001).

55. Article I states that "[a]ll legislative powers...shall be vested in [the] Congress." U.S.

administrative encroachment on the courts stem from Article III's grant of "judicial Power" to the federal courts.⁵⁶ Similar provisions in state constitutions can create delegation of powers problems for state growth management programs.⁵⁷

Despite its decreasing relevance at the federal level, "the nondelegation doctrine has continued to play a significant role in state land use cases."⁵⁸ The majority of nondelegation cases that have arisen in state courts involve delegations of authority from local legislative bodies, like city councils, to administrative bodies, such as planning commissions. But state growth management programs also present nondelegation questions. Because these programs necessarily require significant delegations of power to administrative agencies, there is a risk of courts finding that power to have been unlawfully delegated from the legislative to the executive branch. Although courts have rarely abrogated planning statutes or agency decisions on this ground, there can be substantial effects when a nondelegation violation is found.

The most significant growth management case involving an unlawful delegation of authority was *Askew v. Cross Key Waterways*,⁵⁹ wherein the Florida Supreme Court invalidated the Administration Commission's designation of the Green Swamp and Florida Keys as areas of critical state concern. The court concluded that ELWMA did not provide sufficiently specific criteria to guide the Commission in designating these areas,⁶⁰ thereby effecting an unconstitutional delegation of legislative power to an administrative body.⁶¹ Its decision was based largely on the fact that section 380.05(2), *Florida Statutes*, which listed the types of resources that were eligible to be designated, "reposit[ed] in the Administration Commission the fundamental legislative task of determining which geographic areas and resources are in greatest need of protection."⁶² By failing to establish priorities to aid the Commission in deciding which areas were of critical concern, the state legislature had "unconditionally delegated to an agency of the executive branch the

CONST. art. I, § 1.

56. U.S. CONST. art. III, § 1.

57. The federal separation of powers doctrine is not applicable at the state level. *Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902). The doctrine's application at the state level is based on requirements specified in a state's constitution.

58. BRIAN W. BLAESSER ET AL., *LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE* 17 (1989).

59. 372 So. 2d 913 (Fla. 1978).

60. *Id.* at 919.

61. See FLA. CONST. art. II, § 3: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

62. *Askew*, 372 So. 2d at 919.

policy function of designating the geographic area” to be subjected to that agency’s development regulations.⁶³

Despite the rigidity with which the nondelegation doctrine was used to strike down the statutory scheme in *Askew*, two considerations suggest that separation of powers problems are generally less serious than this case might indicate. First, the Florida Constitution’s express grant of power to the three branches of government raises greater separation of powers concerns than other constitutions do. The *Askew* court pointed out that Florida’s constitution, unlike its federal counterpart, contains “an express limitation upon the exercise by a member of one branch of any powers appertaining to either of the other branches of government.”⁶⁴ It not only delineates the branches of government, but also circumscribes the extent to which they can exercise powers rooted elsewhere, thereby necessitating greater separation than required in other states. It was this limitation that led the court to reject an argument, based on the ideas of Professor Kenneth Culp Davis, that the need for strict legislative standards could be relaxed as long as administrative actions were tempered with adequate procedural safeguards.⁶⁵

A more typical response is that of Oregon, where the authority of LCDC and LUBA, the two most important agencies in its growth management scheme, were challenged on separation of powers grounds. In *Meyer v. Lord*,⁶⁶ the Oregon Court of Appeals considered whether LCDC’s authority to establish statewide planning goals presented nondelegation problems.⁶⁷ The court found that it did not, since the “delegation of legislative authority to an administrative agency does not violate the Oregon Constitution.”⁶⁸ It observed that while standards are relevant in determining whether a delegation is lawful, “the existence of safeguards for those whose interests may be affected is

63. *Id.* at 920.

64. *Id.* at 924.

65. *Id.* at 922-924.

66. 586 P.2d 367 (Or. Ct. App. 1978).

67. See OR. CONST. art. III, § 1: “The powers of the Government shall be divided into three separate (sic) departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided;” art. IV, § 1: “The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.”

68. *Meyer*, 586 P.2d at 371. This statement is all the more notable given the limitation circumscribing the exercise of powers of different branches contained in Article III, a provision similar to Florida’s.

determinative.”⁶⁹ The LCDC’s promulgation of planning goals featured both standards and safeguards, and accordingly caused no constitutional difficulties.⁷⁰ The Oregon courts’ endorsement of a less rigid, more pragmatic view of the separation of powers doctrine is also reflected in *Wright v. KECH-TV*,⁷¹ where the Oregon Supreme Court upheld the constitutionality of LUBA’s performance of quasi-judicial functions. The court summarily disposed of the issue, holding that separation of powers did not preclude LUBA from ensuring local government adherence to land use laws “through case-by-case decisionmaking in a quasi-judicial setting.”⁷²

Courts in other states have similarly refused to thwart the performance of quasi-legislative and quasi-judicial functions by administrative agencies,⁷³ and have accordingly recognized the need for “a certain amount of overlap of the powers exercised by the different branches.”⁷⁴ In *Diehl v. Mason County*,⁷⁵ the Washington Court of Appeals Division 2, considered a separation of powers argument arising from a hearings board’s invalidation of Mason County’s comprehensive growth management plan. The county challenged the authority of the board, an administrative tribunal, to abrogate a legislative act by a local government. The court dismissed this argument, noting that “it is well established that such agencies can constitutionally act in a quasi-judicial capacity,” and that the legislature can delegate to an agency the power “to determine facts and interpret the laws it is charged with administering.”⁷⁶

Second, the Florida courts’ jurisprudence in the years since *Askew* indicate that even in Florida separation of powers concerns

69. *Id.*

70. *See also* *Oregonians in Action v. Land Conservation & Dev. Comm’n*, 809 P.2d 718 (Or. Ct. App. 1991) (reaffirming the constitutionality of LCDC’s authority to adopt statewide planning goals).

71. 707 P.2d 1232 (Or. 1985).

72. *Id.* at 1236.

73. *See, e.g.,* *Milardo v. Coastal Res. Mgmt. Council*, 434 A.2d 266, 270-72 (R.I. 1981) (upholding the legislature’s delegation of legislative power authorizing the Council to manage coastal development).

74. *Chioffi v. Winooski Zoning Bd.*, 556 A.2d 103, 105 (Vt. 1989). In contrast to most separation of powers cases arising under land use laws, the *Chioffi* plaintiffs argued that the legislature had unlawfully delegated authority to the judicial branch by allowing courts to hold de novo trials of zoning variance decisions. The Vermont Supreme Court ruled that courts have the constitutional authority to hold a trial de novo when an administrative agency’s decisions arose from a quasi-judicial proceeding. *Id.* In so doing, the court articulated that state’s rule for analyzing separation of power questions: “when...one branch exercis[es] powers inherent to another branch, ‘these powers must be such as are incidental to the discharge of the functions of the department exercising them....’” *Id.* (quoting *In re Constitutionality of House Bill 88*, 64 A.2d 169, 172 (Vt. 1949)).

75. 972 P.2d 543 (Wash. Ct. App. 1999).

76. *Id.* at 551.

have not been an intractable obstacle to effective growth management.⁷⁷ In *Fox v. Treasure Coast Regional Planning Council*,⁷⁸ the First District Court of Appeal considered a nondelegation challenge raised in response to a decision of the Land and Water Adjudicatory Commission. As previously discussed, the Commission hears appeals from local government development orders related to DRIs. The court held that the power delegated to the Commission was not a constitutionally impermissible delegation of power “allowing a standardless review of local government DRI development orders.”⁷⁹ The court reached this determination even though the Commission is granted wide discretion under the ELWMA to make policy decisions in order to implement the legislative purposes of the Act.⁸⁰ Those broad purposes were sufficient to guide the Commission’s appellate review, notwithstanding the Florida Supreme Court’s holding in *Askew*.

In *Brown v. Apalachee Regional Planning Council*,⁸¹ the Florida Supreme Court held that a regional planning council’s imposition of fees for review of a DRI proposal was not an unlawful delegation of power. The court’s reasoning here evinces its ease with broad delegations of authority. It first noted that under other chapters of the Florida statutes,⁸² the Council had the authority to levy fees where “appropriate.”⁸³ Under the ELWMA, it had authority to “adopt additional rules...to promote efficient review of developments-of-regional-impact applications.”⁸⁴ Thus, the court reasoned, since imposition of fees to recover the costs of reviewing DRIs promoted efficient review, they were appropriate.⁸⁵ Other provisions of the ELWMA challenged on nondelegation grounds

77. Not even the *Askew* decision itself completely precluded the designation of areas of critical state concern. In response, the Florida Legislature rewrote the constitutionally deficient provisions of Chapter 380, *Florida Statutes*. See *infra* notes 93-95 and accompanying text.

78. 442 So. 2d 221 (Fla. 1st DCA 1983).

79. *Id.* at 227.

80. *Id.* Section 380.021, *Florida Statutes*, reads, in part:

It is the legislative intent that, in order to protect the natural resources and environment of this state as provided in s. 7, Art. II of the State Constitution, ensure a water management system that will reverse the deterioration of water quality and provide optimum utilization of our limited water resources, facilitate orderly and well-planned development, and protect the health, welfare, safety, and quality of life of the residents of this state, it is necessary adequately to plan for and guide growth and development within this state.

81. 560 So. 2d 782 (Fla. 1990).

82. FLA. STAT. §§ 160.02(12), 163.01(5)(h)(1988).

83. *Brown*, 560 So. 2d at 785.

84. FLA. STAT. § 380.06(22)(c)(1988).

85. *Brown*, 560 So. 2d at 785. The court accordingly viewed the fees as “a technical matter of implementation rather than a fundamental policy decision.” *Id.*

have also been upheld by the Florida courts,⁸⁶ and the Growth Management Act has similarly withstood nondelegation challenges.⁸⁷

Several lessons can be drawn from this examination of constitutional challenges based on separation of power grounds. First, a well-designed statutory scheme will generally withstand nondelegation challenges. Like their federal counterparts, while state courts continue to proclaim the viability of this doctrine, in practice they have rarely invalidated agency actions on these grounds. It appears that broad and relatively vague delegations of power, such as those at issue in the *Fox* and *Brown* cases, are valid even in light of the *Askew* precedent. As for *Askew* itself, the result likely turned on the additional clause in the Florida Constitution limiting each branch from exercising the powers of the others. Moreover, similar language in Article III of the Oregon Constitution did not prevent its courts from upholding an arguably broader delegation where the legislature authorized LCDC to adopt statewide planning goals. Except for *Askew's* effects, none of the states' growth management efforts have been severely impeded.

Nevertheless, policymakers can insulate growth management regimes from nondelegation attacks by examining the language providing for separate branches of government in a state's constitution, as well as the state courts' interpretation of those provisions. Growth management legislation must be precise in states with an aggressive nondelegation jurisprudence. Legislation should carefully present the criteria to be used by agencies in making land use determinations, which will also assure better implementation of the program's goals. Yet even minimal standards are likely to withstand constitutional scrutiny.⁸⁸ Essentially, only truly standardless delegations of legislative power would be at risk of invalidation. So legislators would do well to eschew growth management legislation "so lacking in guidelines that neither the

86. See, e.g., *Rathkamp v. Dep't of Cmty. Affairs*, 740 So. 2d 1209 (Fla. 3d DCA 1999); *Friends of the Everglade v. Zoning Bd., Monroe County*, 478 So. 2d 1126 (Fla. 1st DCA 1985); *Transgulf Pipeline Co. v. Bd. of Comm'rs*, 438 So. 2d 876 (Fla. 1st DCA 1983).

87. A statutory provision under the Growth Management Act, section 163.3184(11), *Florida Statutes*, survived a nondelegation challenge in *Florida League of Cities v. Administration Commission*, 586 So. 2d 397 (Fla. 1st DCA 1991). That statute granted discretionary authority to the Administration Commission to impose sanctions upon local governments that fail to timely submit comprehensive plans in compliance with statutory requirements. The court, in rejecting the plaintiff's argument, found that the statute had expressly limited the type of sanctions that could be imposed, and had put forth implied limits to the duration any sanctions could last. *Id.* at 411-12.

88. See *Milardo*, 434 A.2d at 271 (noting that the Rhode Island Supreme Court had "upheld delegations that provided general directions to the administrative agencies").

agency nor the courts can determine whether the agency is carrying out the intent of the legislature....”⁸⁹

The *Askew* case, as the only example of a nondelegation challenge significantly impacting the efficacy of a growth management program, merits special attention for the legislature’s resolution of the constitutional defect found by the Florida Supreme Court. In the decision, the court observed that “the legislature need only exercise its constitutional prerogative and duty to identify and designate those resources and facilities” in need of special protection.⁹⁰ It went on to state that this could be done by legislatively identifying a general area requiring protection, or “through [legislative] ratification of administratively developed recommendations....”⁹¹ In a supplemental opinion, the court made clear that the legislature was not limited to these two alternatives. What was needed, though, was some kind of “legislative delineation of priorities among competing areas and resources which require protection....”⁹² In the following year, the Florida Legislature responded to *Askew* through passage of a bill that both provided more detailed criteria for the designation of areas of critical state concern,⁹³ as well as required legislative approval of the designation.⁹⁴ It also specifically designated the Green Swamp and Florida Keys as areas of critical state concern.⁹⁵

Though the Florida Legislature managed to cure the constitutional defects found in *Askew*, in another sense its response can be seen as a failure of Florida’s growth management program and an indication of the potentially devastating effect of exceeding constitutional limits. The requirement of legislative approval of each area to be designated created an additional barrier to protecting imperiled natural resources. Moreover, allocating authority for designation approval to the legislative branch allowed specific designation proposals to be subjected to intense political

89. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 918-19 (Fla. 1978); *see also Brown*, 560 So. 2d at 784.

90. *Askew*, 372 So. 2d at 925.

91. *Id.* at 925.

92. *Id.* at 919. At the time of the decision, section 380.05(2)(a), *Florida Statutes*, merely required that “[a]n area of critical state concern may be designated ... for ... An area containing, or having a significant impact upon, environmental or natural resources of regional or statewide importance.” The original Florida statute governing areas of critical state concern was essentially identical to Section 7-201 of the American Law Institute’s (ALI) Model Land Development Code. MLDC, *supra* note 25, art. 7, § 7-201 257-59 (1976).

93. Act effective July 1, 1979, ch. 79-73, § 4, 1979 Fla. Laws 390, 394 (codified as FLA. STAT. § 380.05(2) (1979)).

94. Act effective July 1, 1979, ch. 79-73, § 4, 1979 Fla. Laws 390, 393 (codified as FLA. STAT. § 380.05(1)(c) (1979)).

95. Act effective July 1, 1979, ch. 79-73, §§ 5-6, 1979 Fla. Laws 390, 399-400 (codified as FLA. STAT. § 380.051, § 380.0551 (1979)).

pressure from the targeted opposition of a handful of legislators, thereby decreasing the probability of designation.⁹⁶ It subsequently became extremely difficult to designate additional areas.⁹⁷ Since the passage of the 1979 legislation, only one additional area of state critical concern has been established.⁹⁸

Unfortunately, the APA's newly developed model statutes have adopted a similar approach for states, like Florida, where there is greater judicial scrutiny of delegations of legislative authority. It does so in large part based on its misreading of the *Askew* decision. In the commentary accompanying the model statute, the APA notes that "the legislature must approve designations of areas of critical state concern, since ... [*Askew*] ... held that it is unconstitutional for a legislature to delegate that power to the executive branch."⁹⁹ But *Askew* did not foreclose delegation of the designation power; it merely required "a legislative delineation of priorities," which could presumably be accomplished by either prioritizing regions of the state for protection, or prioritization of the types of natural and historic resources most in need of state protection.¹⁰⁰ By allowing the ultimate designation decision to be made by the state legislature, as recommended for Florida and other states with

96. Administrative law scholars have noted that delegating decisional authority to the executive branch can allow administrators to make decisions that promote the overall public good but contravene the aims of certain interest groups. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 90-91, 95-98 (1985); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1541-43 (1992). Under favorable circumstances, decisions made within the executive branch can better represent the interests of citizens statewide, rather than allowing narrower local interests to triumph, as often occurs in the legislative branch through the practice of "logrolling."

The ossifying effect of requiring legislative approval can easily be seen at the national level. An example of this is the designation of federal wilderness areas, for which there is widespread popular support. See THE Wilderness Society, *Roadless Protection Favored by Overwhelming Majority of Americans* (July 27, 2000), at <http://www.wilderness.org/newsroom/roadlesspoll/national.htm>. While Congress made very few wilderness designations in the 1990s, the Clinton Administration succeeded, through its rulemaking authority and national monument declarations, in accomplishing what the legislative branch could not. These land protection actions, which were in accordance with the desires of most Americans, would have stood little chance of succeeding had Congressional approval been necessary. Another example can be seen with the issue of military base closures, which have become more difficult due to Congressional opposition from legislators seeking to thwart the closure of bases in their districts. See CNN, *Rumsfeld won't recommend veto of defense bill* (Dec. 15, 2001), at <http://www.cnn.com/2001/US/12/15/rumsfeld.bush/index.html>; see also Seidenfeld, *supra* note 96, at 1541-43 (discussing the example of military base closures).

97. See ROBERT G. HEALY & JOHN S. ROSENBERG, *LAND USE AND THE STATES* 142-43 (2d ed. 1979); Nicholas, *supra* note 10, at 1079-82.

98. See FLA. STAT. § 380.055 ("Apalachicola Bay Area Protection Act").

99. AM. PLANNING ASS'N, *supra* note 42, at 5-40 to 5-41.

100. *Askew v Cross Keys Waterways*, 372 So. 2d 913, 919 (Fla. 1978).

similar jurisprudence, the model statutes could render this statutory provision, practically speaking, a nullity.¹⁰¹

Yet there are two alternatives that would avoid subjecting specific designations to the political pressures of the legislature without running afoul of the principles articulated in *Askew*. These alternatives would be providing greater specificity, as well as a hierarchy of priorities, between either (1) different kinds of resources or (2) different geographic regions, in the designation criteria.¹⁰² For example, areas containing endangered species habitat might be given higher priority than historical sites, or areas facing great development pressures could have a higher priority than slow-growing locales.

In rejecting the complete surrender of designation procedures to the executive branch, the Florida Supreme Court distinguished multiple cases from other states in which the designations of particular types of resources or geographic regions have sustained nondelegation challenges.¹⁰³ These designations were often quite broad, such as the coastal zone in California, wetlands in Rhode Island, the coastal area of New Jersey, or the Martha's Vineyard area of Massachusetts. Though there is dicta in *Askew* suggesting the Florida Supreme Court's preference for granting agencies "discretion to act only in a geographical area well-defined by the legislature," its holding is much more limited, merely requiring prioritization among different kinds of resources.¹⁰⁴ Given that the *Askew* Court was evidently concerned with the nearly complete discretion granted to the executive branch, a clear listing of priorities for protection would more effectively promote the goals of growth management within the constitutional constraints of a state like Florida. Thus, the APA's model statutes may not represent the best solution to the nondelegation problem posed by *Askew*.

C. Standing

Another area of constitutional concern for state growth management programs is the doctrine of standing. This principle, which is grounded in the case-or-controversy requirement of Article III of the United States Constitution and analogous state

101. See AM. PLANNING ASS'N, *supra* note 42, at §§ 5-207(1), 5-209(1).

102. In the Florida context, this would require modification of section 380.05(2), *Florida Statutes*. The relevant criteria in the APA's model legislation, which are very similar to the Florida criteria, are contained at section 5-203.

103. *Askew*, 372 So. 2d at 920-22.

104. *Id.* at 922, 919, 925; see also Callies, *supra* note 29, at 203 (characterizing *Askew* as disapproving of the methodology of the designation process "because the state legislation did not set out priorities by which an administrative agency would designate such areas").

constitutional provisions,¹⁰⁵ restricts judicial review to those who have suffered injury to a legally protected interest that was caused by the defendant's complained-of conduct and is redressable by a favorable judicial decision.¹⁰⁶

In the federal context, constitutional problems have resulted from statutory schemes that provide broad grants of standing to any interested individuals. Typical of these grants is the citizen suit provision of the 1973 Endangered Species Act, which provides that "any person may commence a civil suit on his own behalf" to enjoin violations of the Act and compel the Secretary of the Interior to fulfill her legal duties.¹⁰⁷ In *Defenders of Wildlife*, the Supreme Court ruled that the plaintiffs, who were members of an environmental organization, failed to satisfy the standing requirements of the United States Constitution. It held that the plaintiffs' injury was not concrete, and further asserted that "ignoring the concrete injury requirement ... would ... discard[] a principle fundamental to the separate and distinct constitutional role of the Third Branch."¹⁰⁸ Similar problems can develop in states where judicial review is likewise limited to parties meeting certain constitutional requirements. In these states, legislative efforts to provide broad grants of standing may fail if courts confine judicial review to only those suffering individualized grievances.

The standing doctrine is important to state growth management programs because increased public involvement is a primary goal of many programs,¹⁰⁹ with some commanded by statute to promote it.¹¹⁰ Public participation in the land use decisionmaking process is manifested in a variety of ways. While much of it should and does occur during legislative and quasi-legislative processes, allowing public input is also important when a local government considers specific development proposals and zoning changes. Public involvement in these decisionmaking processes, through testifying before local governments and tribunals, submitting comments, and appealing unlawful decisions, helps to ensure that decisionmakers uphold the dictates and purposes of growth management laws. It

105. See, e.g., FLA. CONST. art. V, § 1.

106. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The formulation of the standing requirement elucidated in *Defenders of Wildlife*, though it has influenced the resolution of standing disputes in state courts, is not controlling over the states' disposition of this issue in state courts.

107. 16 U.S.C. § 1540(g) (2001).

108. *Lujan*, 504 U.S. at 576. For a complete discussion of this nightmare scenario imagined by the Court, see generally *id.* at 573-78.

109. See, for example, Goal 1 of Oregon's planning program: "Citizen Involvement." OR. ADMIN. R. 660-015-0000(1) (2002).

110. See, e.g., ME. REV. STAT. ANN. tit. 30-A, § 4312(2)(G) (West 1996); R.I. GEN. LAWS § 45-22.2-3(c)(10) (1999).

was perhaps for this reason that the Maine legislature encouraged “the widest possible involvement by the citizens of each municipality in all aspects of the planning and implementation process.”¹¹¹ Most of the means used to promote public participation do not trigger constitutional difficulties, and may even enhance constitutional objectives by foreclosing possible due process concerns. Broad standing, by allowing private citizens to enforce the purposes of the growth management program, also promotes valuable policy objectives in the same way that citizen suit provisions have increased enforcement of federal environmental laws. However, broad grants of judicial standing often face the same constitutional obstacle encountered at the federal level.

The statutes of the state programs focused on in this Article have provided for varying degrees of standing to appeal, to either administrative tribunals or courts, the land use decisions of local governments. These standing provisions, and the courts’ response to them, are presented below, followed by a discussion of how standing provisions could be designed to both comport with constitutional imperatives and meet the goals served by broad grants of standing.

Florida’s growth management program allows for differing degrees of standing based on the kind of decision a local government makes. For DRI proposals, standing to appeal the local government’s decision is quite limited. Only the owner of the subject property, the would-be developer, and the DCA are entitled to appeal to the Land and Water Adjudicatory Commission.¹¹² Because each of these parties each has easily identifiable interests that could motivate a possible appeal, the risk of violating the standing doctrine is minimal.

The Growth Management Act provides for broader standing than the DRI review process allows. It grants three different degrees of standing, which vary according to the nature of the local government action.¹¹³ The broadest standing is provided for comprehensive plan amendments. Under the Act, standing for administrative appeals is available for “affected person[s],” those “owning property, residing, or owning or operating a business within the boundaries of the local government” who provided oral or written comments to that government prior to the amendment’s

111. ME. REV. STAT. ANN. tit. 30-A, § 4312(2)(G).

112. FLA. STAT. § 380.07 (2001).

113. For a general discussion of the varying grants of standing under the Growth Management Act, see TERRELL K. ARLINE, 1000 FRIENDS OF FLORIDA, EFFECTIVE ADVOCACY PROMOTES GROWTH MANAGEMENT AND THE ENVIRONMENT, at http://www.1000fof.org/Legal_Advocacy/Effective_Advocacy.asp.

adoption.¹¹⁴ In cases where the DCA concludes that an amendment does not comply with state requirements, an affected person may intervene in the review of the amendment conducted by the Division of Administrative Hearings (DOAH).¹¹⁵ Affected persons may also petition for administrative review of the amendments even when DCA finds them to be in compliance.¹¹⁶ The Growth Management Act thus allows for broad public participation and opportunities for quasi-judicial review of plan amendments. And it avoids potential constitutional tripwires by not extending this broad standing to the court system.

A more limited grant of standing is provided for review of the land development regulations implemented pursuant to comprehensive plans. Under the Act, only “substantially affected person[s]” may bring administrative challenges to the adoption of land development regulations.¹¹⁷ Like challenges to plan amendments, review of regulations takes place through a DOAH hearing.¹¹⁸ Standing for challenges to a local government’s development order is also narrower than the broad standing allowed for plan amendments. Here, standing is provided to “any person or local government that will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan.”¹¹⁹ The statute notes that “[t]he alleged adverse interest may be shared in common with other members of the community at large, but must exceed in degree the general interest in community good shared by all persons.”¹²⁰ Notably, this statutory provision grants judicial, rather than administrative, standing for development order challenges. Importantly, the Florida legislature narrowed the breadth of standing allowed for these judicial challenges.

Taken together, the various grants of standing provided for under the Growth Management Act avoid exceeding potential constitutional limits. In those situations wherein the legislature wished to give more people the right to challenge local government

114. FLA. STAT. § 163.3184(1)(a) (2001).

115. The administrative law judge’s conclusions are transmitted to the Administration Commission for a final decision. FLA. STAT. § 163.3184(9) (2001).

116. FLA. STAT. § 163.3184(9)(a) (2001). It should be noted that while affected persons have this right of petition, they must demonstrate that the amendment’s validity is not “fairly debatable,” a presumption of validity that is difficult to overcome.

117. The “substantially affected” requirement is narrower than that needed to challenge plan amendments, but remains broader than would have been allowed in the absence of the statutory scheme. See FLA. STAT. § 163.3213(2)(a); § 120.56(1); *Florida Home Builders Ass’n v. Dep’t of Labor*, 412 So. 2d 351 (Fla. 1982).

118. FLA. STAT. § 163.3213(5) (2001).

119. FLA. STAT. § 163.3215(2) (2001).

120. *Id.*

decisions, such as for comprehensive plan amendments, it combined the broad grant of standing with a limitation on the type of review allowed. Review of these decisions was retained within the executive branch. Similarly, the legislature allowed for judicial review of challenges to development orders, but limited the breadth of standing to those adversely affected. The Act's coupling of broad standing with limited administrative review and narrow standing with judicial review may be a helpful template for policymakers designing growth management programs.

Neither the ELWMA nor the Growth Management Act standing provisions have been found to violate the Florida Constitution. No case analyzing standing under these laws has found the statutory standing to be more extensive than the constitution allows.¹²¹ The Florida courts have resolved standing questions by focusing on the degree of standing granted under the relevant statute, extending standing to parties when consistent with legislative objectives.¹²² However, it is unknown whether the courts would find a violation in the face of even broader statutory standing grants.

Vermont's standing provisions for appealing an Act 250 permit decision are broader than that of Florida's DRI program. Following the decision of a district environmental commission on a permit request, standing for appeals to the state Environmental Board is extended to "those who have received notice, adjoining property owners who have requested a hearing, and such other persons as the board may allow by rule."¹²³ Under current rules, the Board or district commission may grant party status for Act 250 proceedings to those not explicitly mentioned in the statute "if it finds that the petitioner has adequately demonstrated: (1) That a proposed development or subdivision may affect the petitioner's interest under [the DRI criteria] or (2) That the petitioner's participation will materially assist the board or commission by providing

121. There have been cases in which courts found standing violations, but these were based on statutory, rather than constitutional, grounds. *See, e.g.*, *Citizens Growth Mgmt. Coalition of W. Palm Beach v. City of W. Palm Beach*, 450 So. 2d 204, 206-07 (Fla. 1984) (resting its decision that plaintiff had no standing to challenge the validity of a zoning ordinance on the absence of a separate standing provision in the Local Government Comprehensive Planning Act of 1975); *see also* *Battaglia Fruit Co. v. City of Maitland*, 530 So. 2d 940, 943-44 (Fla. 5th DCA 1988).

122. *See, e.g.*, *S.W. Ranches Homeowners Ass'n v. County of Broward*, 502 So. 2d 931, 935 (Fla. 4th DCA 1987) (noting that the recently enacted § 163.3215 "liberalizes standing requirements and demonstrates a clear legislative policy" to grant standing to adversely affected parties); *see also* *Putnam County Env'tl. Council, Inc. v. Bd. of Comm'rs*, 757 So. 2d 590 (Fla. 5th DCA 2000).

123. VT. STAT. ANN. tit. 10, § 6085(e)(1) (1997). The parties identified in note 113, *infra*, constitute those who have received notice. Not only do the Vermont statutes explicitly grant standing to more entities than Florida, they also operate to further broaden standing through the issuance of Board rules.

testimony ... or offering argument or other evidence relevant to [the criteria].”¹²⁴ Judicial standing for the purpose of appealing Board decisions to the state supreme court is narrower, though still broader than Florida’s.¹²⁵ Persons who were granted party status for administrative proceedings under the Board rules, so-called “[p]ermissive parties,” are “affirmatively prohibited” from appealing its decision to the Vermont Supreme Court.¹²⁶

As with Florida, the Vermont Supreme Court has not found Act 250’s standing provisions unconstitutional. The Act mirrors Florida’s DRI review in providing for relatively limited judicial standing, with the only significant difference being Vermont’s provision of standing to additional parties representing the public interest, such as municipal and regional governmental entities. This represents a substantial expansion of standing beyond that allowed in Florida, where only the state planning agency may appeal a final administrative decision. Nevertheless, allowing these governmental entities the right to appeal does not trigger constitutional difficulties in the same way that a citizen suit provision might. Had the Vermont Legislature granted permissive parties the right of judicial appeal, the court would probably have seen more serious constitutional challenges to the standing granted by statute. And in Oregon, where the legislature passed a similar provision, such challenges have been made.

One of the features of Oregon’s growth management regime, consistent with the program’s goal of citizen involvement,¹²⁷ is its broad standing provisions. The Oregon program allows virtually any interested party to appeal a local government’s land use decisions to LUBA.¹²⁸ Under the current statutory formulation, “a

124. Environmental Board Rule 14(B)(1)-(2) (Jan. 18, 2001), at <http://www.state.vt.us/envboard/rules.htm>.

125. Those parties with judicial standing include the property owner, the developer, the municipality within which the project would be located, state agencies, municipal planning commissions, the regional planning agency within whose boundaries the project would be located, and the state planning agency. VT. STAT. ANN. tit. 10, §§ 6085(c)(1), 6089(b) (1997). At one time an adjacent property owner could also appeal decisions to the supreme court, but a subsequent statute abrogated this right. See *In re Wildlife Wonderland, Inc.*, 346 A.2d 645, 652 (Vt. 1975). For a discussion of the distinction between standing for administrative proceedings and for judicial appellate proceedings, see *Application of George F. Adams & Co.*, 353 A.2d 576, 577 (Vt. 1976).

126. *In re Cabot Creamery Coop., Inc.*, 663 A.2d 940, 941 (Vt. 1995).

127. See OR. ADMIN. R. 660-015-0000(1) (2002) (“Goal 1: Citizen Involvement”).

128. A “[l]and use decision” under the statute is a “final decision or determination made by a local government or special district that concerns the adoption, amendment or application of: (i) The goals; (ii) A comprehensive plan provision; (iii) A land use regulation; or (iv) A new land use regulation.” OR. REV. STAT. § 197.015(10) (2001). Thus, land use decisions encompass nearly all policy decisions local governments make with respect to land use. A “[l]imited land use decision” includes certain kinds of land use decisions made with respect to property located within an urban growth boundary. OR. REV. STAT. § 197.015(12) (2001).

person may petition the board for review of a land use decision or limited land use decision if the person ... [a]ppeared before the local government, special district or state agency orally or in writing.”¹²⁹ Parties may also move to intervene in a LUBA appeal if they can demonstrate that they appeared before the decisionmaking body.¹³⁰ The broad standing requirements of the Oregon program also extend to appeals of LUBA decisions, such that any party to a LUBA appeal may seek judicial review of the decision in the Oregon Court of Appeals.¹³¹ Thus, the statutes allow an individual who has not demonstrated that the land use decision will adversely affect her to appeal that decision to LUBA, and, eventually, the judiciary. The efficacy of the Oregon program rests, to some degree, on interest groups and citizens acting as “private attorneys general,”¹³² and these standing provisions promote such citizen involvement.

Though these standing provisions ably serve the public participation goals of the Oregon program, and provide the means for citizens to ensure governmental compliance with the law, their breadth is also constitutionally hazardous. Recently a court found these provisions to be unconstitutional. In *Utsey v. Coos County*,¹³³ the Oregon Court of Appeals held that the League of Women voters did not have standing to appeal a LUBA ruling to the appeals court. The court defined the question as “whether the constitution imposes limits on the authority of the legislature to confer a right to seek judicial review.”¹³⁴ In a lengthy opinion discussing the historical roots of the standing doctrine in Oregon and the federal courts, the court concluded that “justiciability includes the requirement that ‘the court’s decision in the matter will have some practical effect on the rights of the parties.’”¹³⁵ The court interpreted this practical effect requirement similarly to the “injury in fact” requirement described in *Defenders of Wildlife*, stating that “the simple assertion that another individual or government agency has violated the law” does not present a justiciable controversy.¹³⁶ Thus, the attempt of a private attorney general, like the League of Women Voters, to enforce the law without a potential threat to its own interests would

129. OR. REV. STAT. § 197.830(2) (2001). In addition to this substantive requirement, there are also timeliness requirements for the filing of a LUBA appeal. See *Miller v. Washington County*, 25 Or. LUBA 169 (1993); see generally OR. REV. STAT. § 197.830 (2001).

130. OR. REV. STAT. § 197.830(7)(b)(B) (2001).

131. OR. REV. STAT. § 197.850(1)-(3) (2001).

132. See Edward J. Sullivan, *Oregon Blazes a Trail*, in STATE AND REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT 51, 52 (Peter A. Buchsbaum & Larry J. Smith eds., 1993).

133. 32 P.3d 933 (Or. Ct. App. 2001).

134. *Id.* at 935.

135. *Id.* at 942 (quoting *Brumnett v. PSRB*, 848 P.2d 1194 (Or. 1993)).

136. *Id.* at 943.

be “no more than a request for an unconstitutional advisory opinion.”¹³⁷ The court made clear that the inquiry into whether a party has met constitutional standing requirements is independent whether that party has standing under the statute.¹³⁸ The effect of the court’s decision was to add a “practical effects” requirement onto the judicial review provision of section 197.850(1).¹³⁹ This new requirement is analogous to the need to show an “adverse effect” before challenging development orders under Florida law.

The risk of a court finding statutory standing to be too broad, as the *Utsey* court did, poses a challenge for policymakers designing a growth management program. The APA’s model statutes offer one attempt to resolve the difficulties associated with the standing doctrine. However, the model statutes’ standing provisions might not effectively advance the goals of the growth management. Policymakers wishing to promote citizen participation in the planning process and allow an avenue of appeal to those affected by land use decisions may wish to consider an alternative solution.

Not all of the model statutes’ standing provisions present difficulties, and some of them, like those concerned with the adoption of comprehensive plans and amendments thereto, could prove to be very effective. The comprehensive plan procedures offer state policymakers the option of including a broad array of “other interested parties” to be involved in the process, which could potentially lead to greater citizen involvement than Florida’s comprehensive plan review process. Whether it actually would depends on how broadly a state legislature defined “other interested party.”¹⁴⁰ Similarly, for those states looking to enact DRI legislation, the model statutes take no position on who should be allowed standing for DRI review appeals.¹⁴¹ Under the statutes interested parties are readily allowed to appeal a local government’s decision. And in cases where the state planning agency finds the amendment acceptable, interested parties can automatically petition for a hearing before the state-level Comprehensive Plan Appeals Board.¹⁴² Unlike in Florida, these parties would not have to overcome the fairly debatable standard to get a hearing. This appeals process represents an improvement over the procedure in Florida.

137. *Id.*

138. *Id.* at 947.

139. *Id.*

140. See AM. PLANNING ASS’N, *supra* note 42, § 7-402.2(5).

141. *Id.* at 5-65.

142. *Id.* at §§ 7-402.2(5), 7-402.2(7), 7-402.2(13).

However, the model statutes' standing provisions for other types of land use decisions are somewhat problematic. Appeals of a local government's decision on development permit applications, conditional uses, and variances are limited to "aggrieved" persons. The statute offers two different definitions of "aggrieved," thereby giving policymakers a choice as to how broadly they would like to extend standing. The alternative definitions are reprinted below. The narrow definition includes all the text within the block quotation, while the broader definition excludes the italicized words: 'Aggrieved' means that a land-use decision has caused, or is expected to cause, *special* harm or injury to a person, neighborhood planning council, neighborhood or community organization, or governmental unit, distinct from any harm or injury caused to the public generally....¹⁴³

Thus, the narrower definition "requires persons claiming standing to demonstrate that they have suffered harm distinct from the harm to the general public,"¹⁴⁴ while the broader definition merely requires that the party show some kind of injury.

The locus of the problem created by the definition stems from the far reaching effects of either alternative. Those who meet the definition may fully participate in the decisionmaking process. They "can be party to a hearing, ... submit information in an administrative review, ... ha[ve] standing in an appeal, ... appeal decisions to hearing officers, and ... bring judicial appeals."¹⁴⁵ But if they fall outside the definition, they are entirely foreclosed from participating in any of these activities. Thus, a state's adoption of the narrow definition would sharply constrain the public's involvement in land use decisions, allowing less public input than any of the standing provisions in Florida, Vermont, and Oregon.

By contrast, the adoption of the broad definition would resolve that problem by providing much greater opportunity for involvement.¹⁴⁶ However, the broad definition potentially runs afoul of the standing doctrine. Because the broad definition of aggrieved does not require a showing of greater injury than that suffered by the public at large, it would allow someone who had failed to show a "concrete and particularized"¹⁴⁷ injury to appeal an administrative decision to the courts. A court might find this statutory grant of standing to exceed the constitutional limits of justiciability, the

143. *Id.* at § 10-101.

144. *Id.* at § 10-18.

145. *Id.*

146. Note, however, that even the broad definition is a narrower grant of standing than that provided for under the Oregon program.

147. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

same problem the League of Women Voters faced in *Utsey*.¹⁴⁸ Thus, either definition of “aggrieved” could create serious problems that would threaten achievement of the goals of growth management.

For policymakers wishing to both maximize public involvement in the land use decisionmaking process and avoid constitutional difficulties, the model statutes’ standing provisions may be inadequate. But there is a viable alternative. Taking a bifurcated approach, wherein the degree of standing for administrative appeals differs from that of judicial appeals, would better meet these two conflicting purposes. In states adopting an Oregon-style growth management program,¹⁴⁹ the goals of growth management might be best achieved by adopting a variant of Oregon’s broad standing provisions. As has been seen, Oregon provides for extremely broad administrative and judicial standing. It allows for unparalleled citizen involvement in the review of local government land use decisions. However, as the *Utsey* decision demonstrated, the standing provisions were also unconstitutional. The best solution to this problem is simply to confine this broad grant of standing to the administrative review of land use decisions, while limiting judicial standing to those suffering a legally cognizable injury. Policymakers can implement this solution by creating a state-level appeals board to handle all land use appeals, similar to LUBA, with judicial review available upon the completion of the administrative appeals process. This system of review would allow broad standing for citizens wishing to contest a local government’s decision to the state administrative tribunal. But, unlike the Oregon program, only those meeting the constitutional requisites of standing could appeal the tribunal’s decision to the court system.

This bifurcated approach would solve the problem identified in *Utsey*. Courts have recognized that there are no constitutional barriers to broad grants of standing for administrative appeals. As Florida’s First District Court of Appeal noted, “[s]tanding in a Florida administrative proceeding is a judicially created prerequisite based upon statutory language and is not a

148. The commentary accompanying the Model Statutes indicates that the provision for standing for judicial review was intended to be based on that provided for in the Washington growth management program, section 36.70C.060, *Revised Code of Washington*. AM. PLANNING ASS’N, *supra* note 42, at 10-74. However, the actual statutes do not include the requirements elucidated in the Washington statute. If the language of the Washington statute were adopted, it is less likely a court would find a party meeting the statutory definition of standing to have run afoul of the case-or-controversy requirement.

149. Though there is discussion *infra* pertaining to states wishing to enact a DRI review statute, most states enacting growth management programs in the future will likely follow the “planning consistency” model of Oregon and other states. For a discussion of the superiority of the planning consistency model, see Wickersham, *supra* note 3, at 519, 546-47.

constitutional jurisdictional requirement.”¹⁵⁰ This same principle was extensively discussed in a concurring opinion in the *Utsey* case, where the author asserted that “the legislature is at liberty to make any individual or entity that it desires a party to an *executive* proceeding, including a party who represents only the public interest, rather than a personal interest.”¹⁵¹ Accordingly, granting party status for LUBA appeals to “any person or organization who has appeared before the local government” did not violate the Oregon Constitution.¹⁵²

The combination of broad administrative standing with the creation of an appeals board would promote the same goals that had been intended by the enactment of citizen suit provisions in federal environmental laws. The effectiveness of this citizen involvement can be magnified by statutorily mandating that the board’s decisions be given deference.¹⁵³ Such a provision would limit the ability of development proponents to easily overturn the appeals board’s determination by resort to the courts.

For policymakers looking to enact DRI legislation, broad standing provisions should also be considered. Though the purposes of the DRI review program are sometimes seen as best carried out by regional and state agencies working in the public interest,¹⁵⁴ the value of retaining expansive standing is arguably even more important for these developments than for most other land use decisions. DRIs, as the Florida First District Court of Appeal recognized in *Friends of the Everglades, Inc. v. Board of Commissioners of Monroe County*,¹⁵⁵ by definition affect individuals far beyond the neighboring properties. Accordingly, allowing broad standing for administrative appeals of DRI decisions would force DRI proponents to better internalize the spillover effects of their projects. Since many affected individuals may live outside the jurisdiction within which the DRI would be located, the likelihood

150. *Home Builders & Contractors Ass’n of Brevard, Inc. v. Dep’t of Cmty. Affairs*, 585 So. 2d 965, 968 (Fla. 1st DCA 1991).

151. *Utsey v. Coos County*, 32 P.3d 933, 953 (Edmonds, J., concurring).

152. *Id.* at 953.

153. An example of this can be found in Oregon. When reviewing an order issued by LUBA, the Oregon Court of Appeals does not conduct a trial *de novo*. It will only review the record, and will only reverse under very limited circumstances. In most cases it will only reverse if the order “is not supported by substantial evidence in the whole record.” OR. REV. STAT. § 197.850(9)(c) (2001). Vermont’s Act 250 grants similar deference to determinations of the Environmental Board, whose findings of fact will be upheld by the Vermont Supreme Court “if supported by substantial evidence on the record as a whole.” VT. STAT. ANN. tit. 10, § 6089(c) (1997).

154. *See, e.g., Friends of the Everglades v. Bd. of Comm’rs*, 456 So. 2d 904, 908-909 (Fla. 1st DCA 1984).

155. *Id.* at 909.

that they had previously been involved in that municipality's planning process is remote. Thus, allowing them to fully participate in the review process might be their first and only chance to affect the character of the proposed DRI. And, by allowing citizen standing, the efficacy of the review process will not hinge upon the leadership of what may be a politicized state planning agency or regional planning commission.¹⁵⁶

D. Due Process

Another constitutional concern for state policymakers is the principle of due process. Due process concerns are rooted in the Fifth and Fourteenth Amendments to the United States Constitution and similar state protections. Like their federal counterparts, typical state-level due process clauses provide that "[n]o person shall be deprived of life, liberty, or property without due process of law."¹⁵⁷ Notably, neither the Oregon nor Vermont constitutions have an explicit clause, so due process claims arising from growth management activities in these states rest largely upon the Fourteenth Amendment. Because both procedural and substantive due process claims have been made against growth management programs, a separate discussion of each doctrine follows.

1. Procedural Due Process

In the federal context, procedural due process rights are violated when the government deprives someone of a protected interest without following the requisite procedures. The Supreme Court has divided the due process inquiry into two steps. First, it must be determined whether the rights that were allegedly deprived were constitutionally protected.¹⁵⁸ The range of interests protected under the due process clause is narrow, with the claimant needing to show that either a property or liberty interest was implicated. While the jurisprudence of the last several decades has expanded this range beyond those rights traditionally protected,¹⁵⁹ there are still relatively few interests that enjoy due process protection. Once a court has decided that an interest is protected, it proceeds to analyze the adequacy of the procedures that resulted in its

156. *But see* Caloosa Prop. Owners Ass'n, Inc. v. Bd. of County Comm'rs, 429 So. 2d 1260, 1264-65 (Fla. 1st DCA 1983).

157. FLA. CONST. art. I, § 9.

158. *See, e.g.*, Bd. of Regents v. Roth, 408 U.S. 564, 569-572 (1972).

159. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 783 (1964).

deprivation.¹⁶⁰ Because of significant differences between the various rights given due process protection, certain interests require greater procedural protections than others. Since many of the rights allegedly infringed through implementation of growth management programs are less vital than other protected interests, they may be entitled to fewer protections than those interests at the heart of the due process clause.

In the context of state growth management programs, due process claims most commonly pertain to the adequacy of notice governments provided to potentially affected persons, as well as limitations on standing for land use appeals. To the extent that these due process concerns arise from statutory limitations on standing, they can be viewed as the corollary to the constitutional concerns related to excessively broad standing. While expansive grants of standing may exceed the jurisprudential constraints of the judicial branch, limited standing can trigger due process concerns. Despite the host of due process problems that could arise from a growth management program, few courts considering such claims have found violations of either state or federal due process.

No aspect of Florida's growth management program has been found to violate due process. The First District Court of Appeal considered a due process argument in *Friends of the Everglades*,¹⁶¹ wherein two environmental groups challenged their denial of standing to appeal a county's DRI approval to the Florida Land and Water Adjudicatory Commission. They asserted a right to adequate notice and an opportunity to comment on the DRI prior to its approval by the zoning board and county commission.¹⁶² The court rejected this due process claim. Though conceding that affected landowners were entitled to notice and a chance to be heard, it characterized "affected landowners" as those whose own land was the subject of government action.¹⁶³ The court asserted that "due process does not require that the local zoning authority 'hold a plebiscite' or 'poll' the neighborhood on the issue."¹⁶⁴ Thus, the environmental groups were not entitled to due process protection. The court also noted that once due process requirements had been satisfied at the local level, there was no need to grant neighboring landowners or others a right to judicial review. Other plaintiffs have fared no better. To date, no Florida decision has found either

160. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 260-71 (1970).

161. 456 So. 2d 904 (Fla. 1st DCA 1984).

162. *Id.* at 910-11.

163. *Id.* at 911.

164. *Id.*

the DRI review process or the Growth Management Act to abrogate due process rights.¹⁶⁵

The Vermont Supreme Court has similarly considered due process challenges to the Act 250 program without finding a violation. Its views were elucidated in *In re Great Waters of America, Inc.*,¹⁶⁶ which involved a due process claim brought by a landowner adjacent to a property for which an Act 250 permit was sought. This owner argued that Act 250 was constitutionally deficient in two ways. First, the act required only constructive, rather than actual, notice of a pending application be given to adjoining landowners. Second, it did not automatically grant these landowners party status in the proceedings.¹⁶⁷ Thus, the appellant claimed, the statute “falls short of the notice and full hearing requirements inherent in the due process clause of the Constitution.”¹⁶⁸ The court focused on the nature of her interest, “the right of landowners to participate in Act 250 hearings if adjoining property is the subject of a construction permit application.”¹⁶⁹ Finding that this property interest “is itself conditioned by procedural limitations,” it followed United States Supreme Court precedent in holding that the legislature’s coupling of an adjacent landowner’s participation right with limits on its exercise did not trigger additional due process protections.¹⁷⁰ The court concluded that the state legislature could have constitutionally foreclosed all participation of adjacent property owners in the Act 250 process.

The recent Vermont Supreme Court case of *In re White*¹⁷¹ considered the due process rights of Act 250 permit holders. That case involved an owner’s Act 250 permits for industrial activities.

165. The First District also rejected a due process argument based on access to the courts in *Caloosa Prop. Owners Ass’n, Inc. v. Bd. of County Comm’rs*, 429 So. 2d 1260, 1264-65 (Fla. 1st DCA 1983). In addition to the general due process clause of Article 1, section 9, the Florida Constitution also contains a clause ensuring that “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” FLA. CONST. art. I, § 21. In *Caloosa*, the appellant, an organization of property owners, argued that the DRI review process, by not granting it standing to appeal the county board’s approval of a DRI, violated its right of access to the courts. The court summarily rejected this contention, observing that this right only applied to causes of action that existed prior the adoption of the constitutional provision. The DRI review process was thus beyond the scope of interests protected by the clause.

166. 435 A.2d 956 (Vt. 1981).

167. Party status is granted to adjacent landowners who notify the district commission within the statutorily specified timeframe. VT. STAT. ANN. tit. 10, § 6085(c)(1) (1997).

168. *Great Waters*, 435 A.2d at 958.

169. *Id.* at 958.

170. *Id.* at 959. The Vermont Supreme Court relied on the United States Supreme Court decisions in *Arnett v. Kennedy*, 416 U.S. 134 (1974), and *Bishop v. Wood*, 426 U.S. 341 (1976).

171. 779 A.2d 1264 (Vt. 2001).

In response to a neighboring landowner's petition to the Environmental Board, and after a series of intervening procedural steps, the Board revoked five of his permits and subsequently reissued them with more stringent operating conditions. Because the hearing that actually led to revocation of White's permits was not technically a revocation hearing, the court ruled that White was not entitled to the full statutory protections provided for in Act 250. It then analyzed White's claim in constitutional terms. Applying the principles of due process enumerated in the United States Supreme Court's decision in *Mathews v. Eldridge*,¹⁷² the Vermont Supreme Court concluded that White had not been deprived of due process of law. It rested its decision on the many procedural safeguards provided in the Board's proceedings.¹⁷³ Thus, the Act 250 permitting process continues to comply with due process standards.¹⁷⁴

Though the Oregon courts have considered procedural due process questions tangentially related to the state's growth management program,¹⁷⁵ they have not directly ruled on the structure of the program itself. But the Oregon Supreme Court hinted at its disapproval of abstract due process challenges in *Fifth Avenue Corporation v. Washington County*,¹⁷⁶ which involved a challenge to the county's rezoning of its property. The plaintiff had advanced several constitutional arguments before the trial court that were dropped on appeal. Although not ruling on the due process issue, the court observed that "[t]he use of this type of generalized constitutional attack without reference to specific textual provisions has been persuasively criticized" in an article written by one of the justices.¹⁷⁷ This dismissive language suggests that, without great specificity of pleading and solid legal underpinnings, it would be difficult to mount a successful due process challenge to the Oregon planning regime.

172. 424 U.S. 319 (1976).

173. *White*, 779 A.2d at 1272.

174. In addition to due process claims based on the statutory structure, such as those in *Great Waters* and *White*, the Vermont Supreme Court has also rejected due process claims based on an alleged bias of an administrative decisionmaker. See *Secretary v. Upper Valley Reg'l Landfill Corp.*, 705 A.2d 1001 (Vt. 1997); *Secretary v. Earth Constr., Inc.*, 676 A.2d 769 (Vt. 1996); *In re Crushed Rock, Inc.*, 557 A.2d 86 (Vt. 1988).

175. See, e.g., *Neuberger v. City of Portland*, 603 P.2d 771 (Or. 1979) (discussing due process standards for a property rezoning); *Bienz v. City of Dayton*, 566 P.2d 904 (Or. Ct. App. 1977) (holding that due process requires only one full-scale evidentiary hearing at the local level of government for approval of a conditional use permit); see also *Fasano v. Bd. of County Comm'rs*, 507 P.2d 23 (Or. 1973) (articulating due process standards that affected the resolution of later land use cases).

176. 581 P.2d 50 (Or. 1978).

177. *Id.* at 52 n.2; see Hans A. Linde, *Without Due Process*, 49 OR. L. REV. 125 (1969).

The foregoing cases indicate the limited success of due process claims brought by individuals without a tangible property interest. The Oregon Appeals Court's decision in *Bienz* and the *Friends of the Everglades* opinion by the Florida First District suggest that neighboring landowners are entitled to a hearing at the local level. Yet, due process does not require that they be given additional procedural protections. Also, if there are both local and state-level approval processes for a development proposal, like in Vermont, *Great Waters* makes clear that due process does not entitle neighboring landowners to participate in the state process. The lack of success these challenges have enjoyed is also evidence of the ample opportunities for public involvement provided by most growth management programs.

Perhaps the most serious due process questions posed by growth management programs concern property owners whose land is the subject of a land use decision. Due process concerns are particularly heightened in the context of decisions that impose stricter regulations. Stripped of its procedural surplusage, this was essentially the question facing the Vermont Supreme Court in *White*. And, had the plaintiff not dropped its argument, this would have been the issue presented to the Oregon Supreme Court in *Fifth Avenue Corporation*. The treatment of the due process issue in both decisions suggests that the proper procedural protections of the Vermont and Oregon programs are sufficient to protect owners' rights. The existing growth management programs thus provide a good model for avoiding due process difficulties. As long as programs are designed with procedural protections like those found in Florida, Oregon, and Vermont, serious problems are unlikely. The case law makes clear, though, the importance of providing neighboring landowners with at least a local government hearing before a land use decision is made. Actions taken with no opportunity for input will run due process risks. And for landowners with concrete property interests, those processes resulting in more stringent regulations should provide plenty of procedural protections. In any event, the Florida, Vermont, and Oregon programs appear to have sufficiently protected their citizens' due process rights.

2. Substantive Due Process

In addition to the constitutional concerns raised by procedural due process, there is also a threat that the doctrine of substantive due process could be used to invalidate portions of a state's growth management program. Though this has not happened, one state's experience suggests that the risk exists. Substantive due process,

though at one time rigorously applied by courts in cases involving economic regulation,¹⁷⁸ has been increasingly discredited since the 1930s.¹⁷⁹ Despite suffering from a degree of desuetude in the federal courts, the doctrine of substantive due process has not been eradicated at the state level.¹⁸⁰

In Washington, the one state where substantive due process currently threatens the administration of a growth management program, the state supreme court has applied the test set forth in *Lawton v. Steele*¹⁸¹ to land use regulation. In *Lawton*, the United States Supreme Court ruled that a state's exercise of the police power must satisfy three requirements: First, that the interests of the general public require its exercise; second, that the means used are reasonably necessary for accomplishing the purpose; and third, that the means are not unduly oppressive upon individuals.¹⁸² The *Lawton* inquiry focused on the third requirement, and subsequent courts balanced the public need for a particular regulation against the private interests that would be affected.¹⁸³

When the Washington Supreme Court resurrected the *Lawton* test in *West Main Associates v. City of Bellevue*,¹⁸⁴ it similarly focused on this balancing test. The supreme court has applied it in striking down the imposition of impact fees to be paid by developers demolishing low-rent residential apartments.¹⁸⁵ The court found the impact fees, though meeting the first two prongs of the *Lawton* test,

178. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

179. Susan Boyd, Note, *A Doctrine Adrift: Land Use Regulation and the Substantive Due Process of Lawton v. Steele in the Supreme Court of Washington*, 74 WASH. L. REV. 69, 72-78 (1999). The dearth of due process challenges being advanced by property owners facing limits on use of their land is also partly attributable to the fact that many of these claims are brought under the Takings Clause instead. Though land use cases early in the last century often framed constitutional questions in the context of due process, see, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), the Takings Clause has since come to dominate analysis of the protection of a property owner's rights.

180. See *id.* at 69. Despite the discrediting of substantive due process in the context of economic regulation, some commentators have noted the doctrine's continued application to land use regulations. The record of a symposium of land use experts discussing this issue can be found in BLAESSER ET AL., *supra* note 58 at 53-59.

181. 152 U.S. 133 (1894).

182. *Id.* at 137. In a reflection of its anti-regulatory bias at that time, the Court went on to state:

The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. *Id.*

183. Boyd, *supra* note 179, at 73.

184. 720 P.2d 782 (Wash. 1986).

185. *Robinson v. City of Seattle*, 830 P.2d 318 (Wash. 1992); *Sintra, Inc. v. City of Seattle*, 829 P.2d 765 (Wash. 1992).

to be “unduly oppressive.”¹⁸⁶ Though the court distinguished these impact fees from the imposition of environmental mitigation fees under the State Environmental Policy Act, the theoretical distinction between these two kinds fees is slim, and may not be legally tenable.¹⁸⁷ Moreover, it has indicated that this same kind of balancing test is appropriate for determining whether prohibitions on development are valid,¹⁸⁸ a holding that could, in other cases, threaten the substantive restrictions of the state’s growth management regime. The Washington Supreme Court’s application of the doctrine, if extended to land use restrictions, could eviscerate that state’s growth management program. However, Washington’s experience is atypical.

A more representative response to substantive due process challenges can be seen in Vermont. In *Omya, Inc. v. Town of Middlebury*,¹⁸⁹ the Vermont Supreme Court considered a substantive due process argument based on the state constitution. Omya, whose business operations included the hauling of minerals through the town of Brandon, had requested that the district environmental commission increase the number of allowable daily trips it could take under its Act 250 permit. Because the commission did not raise it to the level desired, Omya appealed to the Environmental Board, which increased the limit only slightly. On appeal to the Vermont Supreme Court, Omya argued that this limitation violated substantive due process under the state constitution. In an argument reminiscent of the first prong of the *Lawton* test, Omya contended that there was no rational relationship between the daily trip limitation and the public health, safety, morals, or welfare.¹⁹⁰ The court rejected this argument, finding ample evidence that additional daily trips would create a host of disturbances in downtown Brandon.¹⁹¹ Accordingly, the substantive due process argument failed.

The Second Circuit Court of Appeal was faced with a federal substantive due process challenge related to Act 250 in *Southview Associates, Ltd. v. Bongartz*.¹⁹² Judge Oakes’ opinion in this case

186. *Robinson*, 830 P.2d at 329.

187. *Boyd*, *supra* note 179, at 89-90.

188. *Presbytery of Seattle v. King County*, 787 P.2d 907 (Wash. 1990).

189. 758 A.2d 777 (Vt. 2000).

190. *Id.* at 780.

191. *Id.* at 780.

192. 980 F.2d 84 (2d Cir. 1992). The panel unanimously found that Southview’s due process claim was unripe. However, Judge Oakes, the author of the opinion, also included a discussion of the merits of that claim. His colleagues did not join this section of the opinion, having found the court’s decision complete based on its ripeness determination alone. Their failure to join his discussion does not reflect disagreement with the merits of his argument.

reflects the weakness of the doctrine under recent federal case law. Southview had attempted to obtain an Act 250 permit for a residential development that would have displaced a deeryard. The Environmental Board rejected the application on the grounds that the development failed to meet one of the criteria used in considering permit applications, whether the development would “destroy or significantly imperil necessary wildlife habitat.”¹⁹³ Southview argued that the Environmental Board’s rejection of its permit application was arbitrary and capricious, and thus violated its guarantee of substantive due process.¹⁹⁴ Oakes rejected this argument for two reasons. First, he noted that because the Board possessed significant discretion in making its determination, Southview’s expectation of permit approval had not reached “‘the level of certainty required to give rise to a ... property right’, cognizable under the Fifth and Fourteenth Amendments.”¹⁹⁵ Thus, Southview’s expectation of being able to develop the land did not fall within the narrow zone of interests entitled to due process protections.

However, Oakes also stated that even if Southview’s expectation had risen to the level of a constitutional property interest, it still would not have adequately asserted a substantive due process violation. Government regulation of land use, Oakes wrote, “violates ... substantive due process only when [the] government acts with ‘no legitimate reason for its decision.’”¹⁹⁶ Such a violation could also have been shown “if it is ‘clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.’”¹⁹⁷ Because the Environmental Board had multiple reasons for rejecting the application, Southview had not overcome this presumption of validity. More important than the application of the doctrine to this particular case, where the governmental action was clearly based on valid reasons, is the decision’s articulation of the difficulty of successfully advancing a substantive due process argument. Barring a showing of maliciousness, or the complete absence of any underlying rationale at all, even those with protected interests cannot succeed.

Despite the risk of Washington’s program running afoul of substantive due process, the likelihood of its application to other state programs, and the degree of concern it should engender in policymakers, is minimal. For one reason, the Washington Supreme

193. *Id.* at 90.

194. *Id.* at 101.

195. *Id.* at 102 (quoting *Dean Tarry Corp. v. Freidlander*, 826 F.2d 210, 213 (2d Cir. 1987)).

196. *Id.* at 102 (quoting *Shelton v. City of College Station*, 780 F.2d 475, 483 (5th Cir. 1986)).

197. *Id.* at 102 (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

Court's jurisprudence remains inconsistent with the federal case law of substantive due process. The "federal roots of *Lawton v. Steele* dried up long ago,"¹⁹⁸ which suggests that the application of the doctrine at the state level is inapposite unless rooted in state constitutional provisions. Moreover, many of the concerns to which the Washington courts have applied the doctrine are more properly analyzed under the Takings Clause. Finally, Vermont's very different treatment of these claims further suggests that the Washington view is unusual. It should be noted, however, that despite the low risk of substantive due process impeding growth management efforts, similar arguments will continue to be raised under the Takings Clause.

As a general matter, policymakers need not be concerned about possible substantive due process violations. A legislature can foreclose possible challenges by providing a statement of legislative purposes and adequate criteria to guide those agency actions that infringe on property rights. These measures, which will also assuage non-delegation concerns, can help guard against the appearance or reality of arbitrary agency action. Since any growth management program should have these features anyway, substantive due process does not represent a special concern requiring significant attention in designing a statutory scheme.

E. Other Constitutional Issues

In addition to questions of regulatory takings, delegation of power, standing, and due process, other constitutional issues have developed from the implementation of state growth management programs. Three in particular meriting discussion are constitutional concerns related to home rule authority, the equal protection doctrine, and the federal Supremacy Clause. The past three decades of experience suggest the minimal likelihood that these issues will constrain growth management efforts. However, because courts may be faced with legal challenges based on these theories, identifying them will better prompt policymakers to avoid them.

One constitutional problem that could theoretically arise, but has not been a concern in practice, relates to local government's home rule authority. Many states provide for home rule in their constitution. For example, Oregon's constitution allows voters to adopt a county charter, which "may provide for the exercise by the county of authority over matters of county concern."¹⁹⁹ In 1000

198. Boyd, *supra* note 179, at 70.

199. OR. CONST. art. VI, § 10.

Friends of Oregon v. Washington County,²⁰⁰ the county argued that the state planning laws violated its home rule authority under the state constitution. The law at issue required the final decision on a local comprehensive plan amendment to be made by the governing body, while the county ordinance had allowed the planning commission to do it.²⁰¹ The court noted that policies related to comprehensive planning were of statewide concern, and dismissed the county's argument as "manifest nonsense."²⁰² The court's refusal to seriously entertain this argument is reflective of the little influence home rule concerns have had over state growth management programs. Despite the theoretical home rule violations that could result from the imposition of a state-level program, particularly one concerned with the traditionally local function of planning and zoning, serious problems have not developed.

Courts have also rejected equal protection challenges to growth management programs. As with other constitutional doctrines, equal protection is guaranteed in both the federal and state constitutions.²⁰³ Growth management efforts generally do not involve a suspect classification such as one based on race, so courts have applied only minimal scrutiny to these government actions. Although equal protection claims based on land use regulations can succeed even under rational basis scrutiny,²⁰⁴ the doctrine has posed no threat to growth management programs. The Florida First District's decision in *Caloosa* represents a typical response to such challenges. In that case, the plaintiff argued that two classes were created under the DRI review process: landowners applying for a DRI, and landowners substantially affected by DRI approval. The First District dismissed the plaintiff's state and federal equal protection claims after applying the rational basis test, which requires some rational relationship to a legitimate state interest.²⁰⁵ It easily found a rational basis for the unequal treatment.²⁰⁶

The Florida Supreme Court also rejected an equal protection challenge under the state constitution in *Department of Community Affairs v. Moorman*.²⁰⁷ In *Moorman*, the lead plaintiff had been

200. 720 P.2d 1316 (Or. Ct. App. 1986).

201. The county ordinance only required approval by the governing body when a private party appealed the planning commission's decision. *Id.* at 1317.

202. *Id.*

203. *See, e.g.*, OR. CONST. art. I, §§ 1, 20.

204. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

205. *Caloosa Prop. Owners Ass'n, Inc. v. Bd. of County Comm'rs*, 429 So. 2d 1260, 1266 (Fla. 1st DCA 1983).

206. *Id.*

207. 664 So. 2d 930 (Fla. 1995).

prohibited from building a fence around his property under an ordinance enacted to protect the remaining population of the endangered Florida Key deer. The court denied that there was an equal protection issue at all, asserting that the right to equal protection “does not restrict the State’s ability to establish or mandate reasonable environmental regulations, even those that may apply only in a certain area, where the State is addressing an environmental problem peculiar to the area.”²⁰⁸ It went on to note that, even had there been a theoretical equal protection question, the state would have satisfied the rational basis requirement. Accordingly, as long as courts continue to apply the rational basis test to these equal protection claims, the risk of an adverse decision remains minimal.

Finally, the United States Constitution’s mandate that federal law “shall be the supreme Law of the Land”²⁰⁹ may theoretically impose limits on the implementation of a strong growth management program. Yet here again, this constitutional provision poses little risk to growth management efforts. These claims have not come up in Oregon and Florida at all, and the Vermont Supreme Court has twice rejected Supremacy Clause arguments. *Vermont Agency of Natural Resources v. Duranleau*²¹⁰ involved a company’s blasting activities at a site it was preparing for development. Prior to the commencement of the blasting, the town suffered a flood, which required the rebuilding of several roads for which the town received a Federal Emergency Management Agency (FEMA) grant. Duranleau made an agreement with the town to supply crushed rock from its property for roadbuilding. The state halted Duranleau’s activities after concluding that it needed an Act 250 permit for the blasting. In its appeal of the imposition of fines for its violations, Duranleau argued that the work at the site could be done because there is a federal preference for local procurement for disaster relief, and the work was necessary to accomplish a FEMA-administered project.²¹¹ The court rejected this argument, noting that a state violates the Supremacy Clause if: 1) it regulates the federal government directly or discriminates against it; or 2) the state law conflicts with an affirmative command of Congress.²¹² The requirement that Duranleau obtain an Act 250 approval prior to blasting did neither. It simply “imposed permit requirements upon

208. *Id.* at 932.

209. U.S. CONST. art. VI, § 2.

210. 617 A.2d 143 (Vt. 1992).

211. *Id.* at 145.

212. *Id.* at 145 (citing *North Dakota v. United States*, 495 U.S. 423, 433-34 (1990)).

a local supplier of crushed stone.”²¹³ The court rejected a similar claim in *In re Commercial Airport*.²¹⁴ There the plaintiff appealed an Environmental Board decision that he needed an Act 250 permit to complete certain improvements to his private airport. In holding that the permit was not preempted by federal aviation law, the court concluded that the Federal Aviation Administration had not “fully occupied the field of land use as it relates to aircraft operation.”²¹⁵ These constitutional claims advanced in *Duranleau* and *Commercial Airfield*, though novel, are unlikely to affect the implementation of growth management.

There is little risk that any these three constitutional doctrines would substantially limit growth management programs. Though there is a possibility of prevailing on one of these theories, it remains a remote one. Avoiding potential problems appears to be relatively easy, at least for equal protection and Supremacy Clause claims. Though claims based on local home rule authority may be more likely to arise, they can be guarded against by allowing local governments to retain some planning and zoning powers.

IV. CONCLUSION

This survey suggests that there are several things lawmakers can do to avoid breaching the constitutional limits upon state growth management efforts. First, nondelegation concerns can be minimized by statutorily providing clear standards and principles to guide agencies’ implementation of the program. In addition to lowering the risk of a court invalidating part of a program on non-delegation grounds, clear legislative direction also has the benefit of promoting better overall policies. Lucid standards, in addition to thwarting potential non-delegation challenges, are likely to minimize the risk of overly politicized decisions, thereby best effectuating the goals of growth management.²¹⁶

For policymakers wishing to maximize public involvement while not exceeding constitutional limits to judicial standing, a bifurcated approach is the key to avoiding problems. By allowing all interested parties to take part in administrative proceedings, there will be ample opportunity for the concerns and policy preferences of citizens

213. *Id.*

214. 752 A.2d 13 (Vt. 2000).

215. *Id.* at 14-15.

216. As has been noted, forcing the legislature to make discrete policy decisions, such as in Florida’s areas of critical concern program, would overly politicize such decisions. Yet standardless delegations of power also carry a risk of over-politicization, as the agencies’ policy direction would shift all the more easily with changes in the gubernatorial administration.

to be accounted for. Limiting judicial standing to those who can demonstrate an adversely affected legal interest eliminates the risk of a court finding a constitutional violation. The overall effect of citizen intervention in the administrative review process can be enhanced by repositing appeals from the administrative tribunal directly in an appellate court with a narrow standard of review.

Due process principles should also be accounted for when designing a growth management program. Procedural due process problems can generally be minimized by following the example of existing growth management programs. A well-designed program must mandate that all local government land use decisions be preceded by at least one public hearing, and decisions imposing stricter land use controls should provide adequate procedures for the property owners subjected to those regulations. As for substantive due process, the Washington experience notwithstanding, the doctrine poses little danger to the effective administration of a growth management regime. Ensuring that governmental decisions are based on solid reasoning, and providing standards to guide those decisions, will help minimize the likelihood of substantive due process challenges. Finally, there are potential constitutional concerns related to home rule authority, equal protection, and the Supremacy Clause. However, the likelihood of a serious challenge based on any of these theories is small.

The issues discussed in this Article represent only one issue among the many that must be carefully considered in designing an effective growth management program. However, given the potentially crippling effect of an adverse constitutional decision, policymakers should strive to create statutory schemes that minimize such difficulties. With cognizance of the issues raised in this article and careful program design, an effective growth management program conforming to constitutional dictates can be readily crafted.

RECENT DEVELOPMENTS

ALICE F. HARRIS

Table of Contents

I. INTRODUCTION	187
II. FEDERAL CASE LAW	188
III. FLORIDA CASE LAW	196
IV. FLORIDA'S 2002 LEGISLATIVE SESSION	199

I. INTRODUCTION

The author has attempted to include in this section federal and state court decisions which are expected to have a significant impact on environmental and land use law. Of course, much has already been written about some of these decisions, especially those of the U.S. Supreme Court. In addition, pertinent legislation passed by the Florida Legislature in the 2002 session is discussed, along with recent changes to regulations and procedures that may be important to those interested in environmental and land use matters.

A number of organizations post information on their websites, which serve as a good source of up-to-date information. Among these are government entities, including the Florida Legislature¹, the Florida Department of Environmental Protection², and the Florida Department of Community Affairs³. Private organizations whose websites are of interest include The Florida Bar Environmental and Land Use Law Section⁴ and Business and Legal Reports, Inc., which publishes various materials dealing with environmental compliance and related matters.⁵ Finally are law firm websites, some of which include information on recent developments in the law.⁶

1. <http://www.leg.state.fl.us>.
2. <http://www.dep.state.fl.us>.
3. <http://www.dca.state.fl.us>.
4. <http://www.eluls.org>.
5. <http://www.blr.com>.
6. <http://www.hgss.com>.

II. FEDERAL CASE LAW

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).

Possibly the most widely-publicized environmental case decided by the Supreme Court in 2001 involved a decision which may affect the jurisdiction of the United States Army Corps of Engineers (Corps) over isolated waters, which for many years had been within the dredge-and-fill permitting authority of the Corps.⁷ In 1986, the Corps issued the “Migratory Bird Rule,” which extended “to intrastate waters: [w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties; or [w]hich are or would be used as habitat by other migratory birds which cross state lines.”⁸ Permitting authority for this was authorized under § 404(a) of the Clean Water Act (CWA). The Supreme Court described two questions presented by the case, writing that it was asked “to decide whether the provisions of § 404(a) may be fairly extended to these waters, and, if so, whether Congress could exercise such authority consistent with the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3.”⁹ The second question was not answered because the Court answered the first in the negative.¹⁰ Thus, the applicability of the commerce clause in this matter remains unresolved.

The waters involved here were located on a 533-acre parcel that had been abandoned since about 1960.¹¹ The parcel had previously been used as a sand and gravel pit mining operation by the Chicago Gravel Company.¹² The petitioners, a consortium of 23 suburban cities and villages near Chicago, wanted to use the site for the disposal of non-hazardous solid waste, which would require that some of the permanent and seasonal ponds in the pit be filled.¹³ The Corps never determined that wetlands were present and originally declined to exert jurisdiction over the waters on the site; however, after being made aware that some 121 migratory birds used the site, it decided that the area contained ‘waters of the United States’ and exerted jurisdiction under the “Migratory Bird Rule.”¹⁴ The Corps declined to issue the needed permit to fill these waters and was sued

7. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

8. *Id.* at 164.

9. *Id.* at 162.

10. *Id.*

11. *Id.* at 163.

12. *Id.*

13. *Id.* at 162-63.

14. *Id.* at 164.

in the Northern District of Illinois.¹⁵ The District Court upheld the jurisdiction of the Corps in summary judgment and the petitioners appealed.¹⁶

The Court of Appeals for the Seventh District agreed with the Corps that the Commerce Clause of the U.S. Constitution allows Congress “to regulate such waters based upon ‘the cumulative impact doctrine.’”¹⁷ It also decided that the CWA “reaches as many waters as the Commerce Clause allows and ... followed that the [Corps] ‘Migratory Bird Rule’ was a reasonable interpretation of the Act.”¹⁸

In the narrowest of decisions (5 to 4, with Justices Stevens, Souter, Ginsburg and Breyer dissenting), the Supreme Court disagreed, finding that while Congress intended the CWA to “regulate wetlands ‘inseparably bound up with the “waters” of the United States,” it did not intend to regulate wetlands that are “not adjacent to open water.”¹⁹ The Court determined that even the Corps did not at first interpret the CWA to extend as far as the Migratory Bird Rule allowed, originally confining its jurisdiction to “waters ... subject to the ebb and flow of the tide” and waters “susceptible for use for purposes of interstate or foreign commerce.”²⁰ The Corps argued that when Congress approved its 1977 definition of navigable waters by formally adopting 33 CFR § 323.2(a)(5) (1978), it “charted a new course” and “recognized and accepted a broad definition of ‘navigable waters’ that includes nonnavigable, isolated, intrastate waters.”²¹ The Corps also argued that the rejection by Congress of legislation that would have “overturned the Corps’ 1977 regulations and the extension of jurisdiction in § 404(g) to waters ‘other than’ traditional ‘navigable waters,’” further proved congressional intent.²² However, the Court rejected this argument, pointing out that it has always “recognized congressional acquiescence to administrative interpretations ... with extreme care,”²³ and remained unpersuaded that Congress intended to regulate anything other than navigable waters and wetlands adjacent to them.²⁴

15. *Id.* at 165.

16. *Id.*

17. *Id.* at 166.

18. *Id.*

19. *Id.* at 167-68.

20. *Id.* at 168.

21. *Id.* at 169.

22. *Id.*

23. *Id.*

24. *Id.* at 170-71.

While recognizing that it had previously agreed that the term ‘navigable’ in § 404 means more than the “classical understanding” of the word, the majority refused to take what it called the “next ineluctable step”²⁵ of including “isolated ponds ... because they serve as habitat for migratory birds.”²⁶ To do so, wrote the Court, would not just give the word ‘navigable’ limited effect, it would “give it no effect whatever.”²⁷ The Court was not willing to go there, especially since the administrative interpretation in question “alters the federal-state framework by permitting federal encroachment upon a traditional state power” – regulation of land use.²⁸

The dissenting opinion, written by Justice Stevens, is critical of the majority’s decision on several counts, and concludes that “[n]othing in the text, the stated purposes, or the legislative history of the CWA supports the conclusion that in 1972 Congress contemplated – much less commanded – the odd jurisdictional line that the Court has drawn today.”²⁹ The dissent is critical of the majority’s decision to “reverse course” and ignore its conclusion in *United States v. Riverside Bayview Homes, Inc.*,³⁰ “that the 1977 Congress acquiesced in the very regulations at issue.”³¹ The *Riverside Bayview* decision established that § 404(a) extended federal jurisdiction to “nonnavigable wetlands adjacent to open waters.”³² The dissenting opinion points out that wetlands are “the most marginal category of ‘waters of the United States’ potentially covered by the statute” and that the question not answered by *Riverside Bayview* is whether federal jurisdiction properly extends to isolated wetlands, not to isolated waters, which were the subject of contention here.³³

Borden Ranch Partnership v. U.S. Army Corps of Engineers, 261
F. 3d 810 (9th Cir. 2001).

In a case that may significantly affect farming and ranching activities, the Ninth Circuit upheld the finding of the trial court that even on farm and ranch lands that are ordinarily exempt from the requirements of the Clean Water Act (CWA), the activity of “deep ripping,” that results in “substantial hydrological alterations” to

25. *Id.* at 171.

26. *Id.* at 171-72.

27. *Id.* 172.

28. *Id.* at 173.

29. *Id.* at 182.

30. 474 U.S. 121 (1985).

31. *Solid Waste*, 531 U.S. at 186.

32. *Id.* at 172.

33. *Id.* at 187 n. 13.

wetlands, requires a permit under the CWA.³⁴ The ranch in the *Borden* case contained several wetlands which the new owners altered by a process called “deep ripping.”³⁵ A clay layer near the surface of the soil in these wetlands normally impedes the downward movement of surface waters, causing water to collect above the clay – near or above the soil’s surface.³⁶ It is the impermeability of this clay layer that causes the wetlands to form.³⁷ To increase the drainage of these wetlands, which would allow them to be planted in vineyards and orchards (and subdivided for residential development) – rather than to remain as wetlands on land used for cattle grazing – the owners used deep ripping.³⁸ In this process, metal prongs are dragged through the soil, breaking up the clay layer and allowing the area to drain more rapidly afterwards.³⁹

The court determined that deep ripping is not subject to the farming exclusion of the CWA, which allows farmers to discharge, without a permit, dredged or fill material into wetlands

from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.⁴⁰

The Court determined that the “deep ripping at issue in this case is governed by the recapture provision,”⁴¹ which provides that

Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.⁴²

34. *Borden Ranch P’ship v. U.S. Army Corps of Eng’rs*, 261 F.3d 810, 815-16 (9th Cir. 2001).

35. *Id.* at 812.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. 33 U.S.C. § 1344(f)(1)(A) (2002).

41. *Borden Ranch*, 261 F.3d at 815

42. 33 U.S.C. § 1344(f)(2).

Under this decision, farming or ranching “activities that require ‘substantial hydrological alterations’ require a permit” from the Corps.⁴³ The Ninth Circuit’s decision is being appealed to the U.S. Supreme Court, which granted certiorari on June 10, 2002. If the Supreme Court upholds the decision, the impunity with which agriculturalists have previously altered and drained wetlands may well be ended.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002).

An important, but narrowly posed, regulatory takings question was answered by the U.S. Supreme Court in another case originating in the Ninth Circuit.⁴⁴ Landowners in the Lake Tahoe basin complained that two development moratoria imposed by the Tahoe Regional Planning Agency (TRPA), lasting a total of 32 months, constituted an unconstitutional taking of their property without just compensation. The Ninth Circuit determined that these moratoria did not constitute such a taking and the Supreme Court agreed in a nine to three decision, the dissenters being Justices Rehnquist, Thomas, and Scalia. The question posed was whether “a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation”⁴⁵ under the Fifth Amendment. The property in question is located in the drainage basin of Lake Tahoe, an exceptional body of water noted for the extreme clarity of its water which is a consequence of an extremely limited supply of nutrients to the lake.⁴⁶ In an attempt to gain control over development and prevent the degradation of Lake Tahoe, which is located on the border between Nevada and California, the two states adopted the Tahoe Regional Planning Compact in 1968.⁴⁷ TPRA created by the compact, developed a Land Use Ordinance for the land in the Basin. However, this ordinance did not “significantly limit the construction of new residential housing.”⁴⁸ As a consequence of California’s desire to provide greater resource protection in the Basin, the original compact was extensively revised in 1980 to provide greater protection for Lake Tahoe and the Compact severely limited new construction until a

43. *Borden Ranch*, 261 F.3d at 815.

44. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 122 S. Ct. 1465 (2002).

45. *Id.* at 1470.

46. *Id.* at 1471.

47. *Id.*

48. *Id.* at 1472.

new regional plan was adopted. Being unable to meet the deadline for adoption of that plan, the TPRA imposed two sequential moratoria on development which totaled 32 months in duration. These are the moratoria that were challenged by affected landowners as takings of their property without just compensation.⁴⁹

The petitioners argued for “a categorical rule requiring compensation whenever the government imposes such a moratorium on development.”⁵⁰ The rather extreme view of the petitioners was that “it is enough that a regulation imposes a temporary deprivation – no matter how brief – of all economically viable use to trigger a *per se* rule that a taking has occurred.”⁵¹ The plaintiffs grounded their argument for this *per se* rule on the Court’s opinions in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*⁵² and *Lucas v. South Carolina Coastal Council*,⁵³ but the Court rejected the idea that these cases support such a rule, stating that “the answer to the abstract question whether a temporary moratorium effects a taking ... depends upon the particular circumstances of the case.”⁵⁴ Both *First English* and *Lucas* were premised on a taking determined to “*have already worked a taking of all use of the property.*”⁵⁵

The Court maintained that it had always made a clear distinction between physical takings (acquisitions of property for public uses) and regulatory ones (regulations prohibiting private uses), pointing out that the Fifth Amendment does not contemplate regulatory takings and that “[t]he Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.”⁵⁶ Furthermore, wrote the court, it is “inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.”⁵⁷

Emphasizing that *Lucas* involved a regulation that permanently deprived the owner of “*all* economically beneficial uses” of his land, the Court rejected the idea that it should “sever a 32 month segment from the remainder of each landowner’s fee simple estate, and then ask whether that segment has been taken in its entirety by the

49. *Id.* at 1473.

50. *Id.* at 1477.

51. *Id.* at 1478.

52. 482 U.S. 304 (1987).

53. 505 U.S. 1003 (1992).

54. *Id.*

55. *Id.* at 1482.

56. *Id.* at 1478.

57. *Id.* at 1479.

moratoria,⁵⁸ pointing out that any “portion of property ... taken ... is always taken in its entirety”⁵⁹ and that “[t]he starting point for the court’s analysis should have been to ask whether there was a total taking of the entire parcel.”⁶⁰

The *Tahoe-Sierra* Court also discussed at some length the widespread use of development moratoria in the land-planning community and their widely-acknowledged usefulness in the promotion of orderly and appropriate development.⁶¹ Also of interest is the Court’s acknowledgment that “there is reason to believe property values often will continue to increase despite a moratorium.”⁶² The majority on the Court concluded that the “familiar *Penn Central* approach” should continue to be used in regulatory takings cases.⁶³

*Anderson v. Smithfield Foods, Inc., 209 F. Supp. 2d 1270
(M.D. Fla. 2002).*

A novel attempt to use the RICO statutes as a method of enforcing environmental compliance failed when Defendant Smithfield Foods’s 12(b)(6), Federal Rules of Civil Procedure, motion to dismiss was granted by a federal district court.⁶⁴ A group of Florida environmentalists brought a class action lawsuit against Smithfield Foods, Inc., a pork processing company, alleging that the company polluted the environment and engaged in mail and wire fraud, money laundering and violations of the Travel Act.⁶⁵ The plaintiffs alleged that Smithfield violated RICO by violating environmental laws, misrepresenting to the public their compliance with environmental laws, and using proceeds of those illegal activities to carry on the business.⁶⁶ The federal court dismissed the lawsuit, commenting that “[t]he money that Defendants allegedly illegally obtained to violate RICO and environmental laws, and to allegedly commit mail and wire fraud, was money that Defendants legally obtained through the operation of its business.”⁶⁷ With regard to the Plaintiff’s concern for the alleged environmental violations, the court wrote, “RICO is not the proper remedy ...

58. *Id.* at 1483.

59. *Id.*

60. *Id.* at 1483-84.

61. *See id.* at 1487-88.

62. *See id.* at 1489.

63. *Id.*

64. *Anderson v. Smithfield Foods, Inc., 209 F. Supp. 2d 1270 (M.D. Fla. 2002).*

65. *Id.* at 1272.

66. *Id.*

67. *Id.* at 1275.

Plaintiffs may have remedies available through federal or state agencies, or other causes of action available in federal or state court.”⁶⁸

Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc. 300 F.3d 1294 (11th Cir. 2002).

This lawsuit was brought by an environmental organization seeking to enforce the Clean Water Act’s requirement that any party discharging pollutants from a “point source” into navigable waters have a National Pollutant Discharge Elimination System (NPDES) permit.⁶⁹ Closter Farms, which grows sugar cane on land leased from the State of Florida located adjacent to Lake Okeechobee, also operates an extensive drainage system which handles water from its farm lands as well as water from the Palm Beach/Glades Airport, the Pahokee Wastewater Treatment Plant, a Palm Beach County park, some vacant land formerly occupied by a tractor sales business, and State Road 715.⁷⁰ This extensive drainage system is needed because all these lands would otherwise be submerged as a part of Lake Okeechobee during parts of the year.⁷¹ Despite the fact that the district court found that Closter Farms was polluting Lake Okeechobee, it decided that it “complied with the established legislative scheme.”⁷² The circuit court affirmed the ruling of the district court.⁷³

68. *Id.*

69. *Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1295-96 (11th Cir. 2002).

70. *Id.* at 1296.

71. *Id.*

72. *Id.* at 1297.

73. *Id.* at 1298.

III. FLORIDA CASE LAW

Flo-Sun, Inc. v. Kirk
783 So. 2d 1029 (Fla. 2001).

Former Governor Kirk and other Palm Beach County residents brought a public nuisance lawsuit against various sugar cane growers (United States Sugar Corporation, Sugar Cane Growers Cooperative of Florida, Flo-Sun, Incorporated, Okeelanta Corporation, and A. Duda & Sons Incorporated) and QO Chemicals in a complaint that alleged that the sugar cane growers have maintained a public nuisance “by engaging in the cultivation, harvesting and processing of sugar cane in a manner that annoys the community and injures the health of the community” and that the chemical company is disposing of furfural, a chemical by-product of sugar cane processing, by deep-well injection without a needed permit from the Department of Environmental Protection (DEP).⁷⁴

The trial court determined that the doctrine of primary jurisdiction bars the lawsuit and that “chapter 823 was impliedly superseded by part I of chapter 403, at least as the former relates to air and water pollution ... and because the claims were related to alleged pollution ... Respondents’ public nuisance claim warranted dismissal on this basis as well.”⁷⁵ The Fourth District Court of Appeals reversed the trial court’s decision, which would have allowed the public nuisance suit to go forward, and the Defendants appealed.⁷⁶ The Supreme Court of Florida reversed the District Court’s decision, but agreed with the lower court’s finding that chapter 823 was not impliedly superseded by chapter 403 and that “a cause of action for public nuisance relating to air and water pollution still remains a viable option.”⁷⁷ The Court also agreed with the district court regarding the application of the doctrine of primary jurisdiction, writing that “the doctrine of primary jurisdiction counsels in favor of having an administrative agency with the experience and expertise to deal with the complex issues raised in this case.”⁷⁸ The decision discusses the five situations in which Florida courts have found that parties “need not resort to administrative remedies.”⁷⁹ Finally, the Supreme Court agreed that

74. *Flo-Sun, Inc., v. Kirk*, 783 So. 2d 1029, 1032 (Fla. 2001).

75. *Id.* at 1033.

76. *Id.*

77. *Id.* at 1036.

78. *Id.* at 1041.

79. *Id.* at 1038. These are as follows: “(1) the complaint must demonstrate some compelling reason why the APA (Chapter 120, Florida Statutes) does not avail the complainants in their grievance against the agency; or (2) the complaint must allege a lack

the case should not have been dismissed with prejudice, finding instead that “the court is to suspend consideration of the issues until these have been presented to the appropriate administrative agency.”⁸⁰

Chancellor Media Whiteco Outdoor Corp. v. State,
796 So. 2d 547 (Fla. 1st DCA 2001)

Different results reached on reconsideration by: Chancellor Media Whiteco Outdoor Corp. v. DOT, 2001 Fla. App. LEXIS 14157, 26 Fla. L. Weekly D 2420 (Fla.1st DCA Oct. 9, 2001) *Review denied by: Chancellor Media Whiteco Outdoor Corp. v. Fla. DOT*, 821 So. 2d 293, 2002 Fla. LEXIS 1225 (Fla. 2002).

In response to the wildfires that raged in Florida during the summer of 1998, the Florida legislature passed a law in 1999 that allowed rebuilding of “buildings, houses, businesses, or other appurtenances to real property” which were destroyed in those fires “unless prohibited by Federal law or regulation.”⁸¹ Unfortunately for the owners of six Brevard County billboards that burned, this state law does not allow rebuilding of grandfathered billboards destroyed by fire. According to the First District Court of Appeal, which upheld the ruling of the administrative law judge who recommended that Chancellor Media be required to remove the signs that it rebuilt adjacent to U.S. Highway 1 and Interstate 95, such would violate the Highway Beautification Act.⁸²

To conform with the federal Highway Beautification Act of 1965,⁸³ – and be eligible for full federal highway funding – Florida entered into an agreement with the United States Department of Transportation regarding “size, lighting, and spacing of signs.”⁸⁴ In general, signs that do not conform to the federal regulations are not allowed; however, state and federal regulations and rules allow non-

of general authority in the agency and, if it is shown, that the APA has no remedy for it; or (3) illegal conduct by the agency must be shown and, if that is the case, that the APA cannot remedy that illegality; or (4) agency ignorance of the law, the facts, or public good must be shown and, if any of that is the case, that the Act provides no remedy; or (5) a claim must be made that the agency ignores or refuses to recognize related or substantial interests and refuses to afford a hearing or otherwise refuses to recognize that the complainants' grievance is cognizable administratively.” *Id.* (citing *Communities Fin. Corp. v. Florida Dep't of Envtl. Regulation*, 416 So. 2d 813, 816 (Fla. 1st DCA 1982).

80. *Id.* at 1041.

81. Act effective June 8, 1999, ch. 99-292, § 24, 1999 Laws of Florida (3221, 3236).

82. *Chancellor Media Whiteco Outdoor Corp. v. State*, 796 So.2d 547, 547-48 (Fla. 1st DCA 2001).

83. 23 U.S.C. § 131 (2002).

84. *Chancellor Media*, 796 So.2d at 548.

conforming signs that were in place before the state-federal agreement to remain in place for the duration of their normal life.⁸⁵ Such signs are “grandfathered” as long as they remain in essentially the same condition as when they became non-conforming.⁸⁶ Another provision of the federal law allows grandfathered signs to be rebuilt if they are destroyed “due to vandalism and other criminal or tortious acts” and state law allows such rebuilding.⁸⁷

In reaching its decision that the rebuilt billboards must be removed, the district court wrote, “[t]he legislature surely did not intend to cast aside these years of effort and imperil the state’s share of future highway funds simply to allow erection of some nonconforming highway billboards.”⁸⁸ The court was persuaded that the legislature intended to authorize post-fire reconstruction “only if erection of the signs would not be contrary to the Highway Beautification Act.”⁸⁹

Davis v. Starling, 799 So. 2d 373 (Fla. 4th DCA 2001).

This case involved a purchase of land with undisclosed environmental contamination in the form of an abandoned underground gasoline storage tank which had been paved over by the previous owner.⁹⁰ The appellant purchased the land for \$285,000 in 1994 after the seller gave assurances that the property was free of environmental contamination.⁹¹ However, the site was contaminated with gasoline that had leaked from the storage tank.⁹² The cost of clean-up was estimated to be from \$38,500 to \$64,500.⁹³ The purchaser sued to recoup the cost of clean-up from the current holder of the mortgage, the daughter of the deceased former owner.⁹⁴ The trial court issued summary judgment for the mortgage holder on the basis that recoupment of these costs are barred by section 733.710, Florida Statutes, the nonclaim statute.⁹⁵

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 549-50.

89. *Id.* at 550.

90. *Davis v. Starling*, 799 So.2d 373, 374 (Fla. 4th DCA 2001).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 375.

95. FLA. STAT. § 733.710 (“Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.”).

The appeals court reversed the trial court's decision, pointing out that Florida case law establishes that

the defense of recoupment is available even though an underlying claim based on the same facts may be barred as an independent action by the applicable statute of limitations.... The theory is that the defense should be viable as long as the claim to which it responds is viable.⁹⁶

Thus, the court determined that "recoupment is nonetheless still available defensively to lessen the amount owed on the mortgage debt."⁹⁷

IV. FLORIDA'S 2002 LEGISLATIVE SESSION

The Tallahassee law firm of Hopping, Green & Sams traditionally provides an annual legislative overview. The following section, covering environmental and land use developments, is adapted from the 2002 legislative overview written by that law firm.⁹⁸ More details are included in the Hopping, Green & Sams publication and all recently-enacted legislation is available on the Florida Department of State website.⁹⁹

HB 813 Everglades Funding and Citizen Suits, *Chapter 2002-261*.

What has been described as the most visible environmental legislation of the 2002 session is HB 813, Everglades Funding and Citizen Suits. The bill provides, for the first time, an independent source of funding for the Comprehensive Everglades Restoration Plan (CERP), a goal highly sought by environmentalists. The bill authorizes \$100 million per fiscal year (from 2002-2003 through 2009-2010) in "Everglades restoration bonds." Funds from these bonds are to be used to cover the state's financial commitment to Everglades restoration.

The same bill eliminates the ability of unaffected citizens to initiate an administrative hearing under Chapter 120, Florida Statutes, to contest an environmental permit or license under Chapter 373 or Chapter 403, Florida Statutes. Citizenship alone is not sufficient. Unaffected citizens will still be able to intervene in

96. *Id.* at 376.

97. *Id.* at 377.

98. <http://www.hgss.com/HotNews/2002LegislativeSummary/summary02.pdf>

99. <http://election.dos.state.fl.us/laws/02laws/Shotitle.htm>

a proceeding that has been initiated by an affected person. The bill makes clear that a citizen who uses and enjoys a resource that would be adversely affected by the license or permit does have standing to contest the action and that such a citizen's injury would not have to be different than that of the general public. Legal standing for Florida environmental groups is also clarified by HB 813. Automatic standing is provided for not-for-profit corporations with 25 members or more in the affected county. Additionally, to qualify for automatic standing, the not-for-profit corporation must have been in existence for at least a year. Nothing in HB 813 changes the ability of a person to bring suit in circuit court, but because lawyer's fees are recoverable from the losing party in cases that go to circuit court, this avenue is rarely used.

CS/HB 1285 Miscellaneous Environmental Exemptions, *Chapter 2002-253*.

A variety of exceptions and extensions of deadlines found in Chapters 373 and 403, Florida Statutes, were added to this bill that exempts from permitting the use of floating vessel platforms which are used to keep boats and jet skis out of the water while stored at a traditional wet slip. Floating vessel platforms of 500 square feet or less (200 square feet in Outstanding Florida Waters) are exempt from permitting and the DEP is to develop a general permit by January 1, 2003 for larger floating vessel platforms. Another provision of the bill exempts from environmental resource permitting the paving of existing dirt roads and improvement of bridges within the Northwest Florida Water Management District and requires that DEP investigate and report on the function and impact of this exemption for possible expansion to the entire state. In addition, the deadline for adoption of the uniform functional wetland assessment method is extended for six months (from January 31, 2002 until July 31, 2002). The bill makes clear that this method will be binding on all local governments and that it deals only with the amount of mitigation required, not the appropriateness of that mitigation. Other parts of the bill strengthen the authority of the Southwest Florida Water Management District to grant mining exemptions and extend the life of the citrus processing pilot project enacted two years ago but still not approved by the EPA.

CS/SB 508 Exemptions for the Removal of Muck from Freshwater Rivers or Lakes and for Installation of Floating Vessel Platforms, *Chapter 2002-164.*

This bill also involves environmental exceptions for particular activities. Individual residential property owners will be allowed to remove, without permitting under Chapters 253, 369, 373 and 403, Florida Statutes, organic detrital material (muck) from freshwater rivers or lakes that are not aquatic preserves and that have sand or rocky substrates below the muck. Muck may not be removed from wetlands, no native wetland trees can be removed, muck must be deposited in an upland site, and the removal must include appropriate turbidity controls to prevent water quality violations. Muck removal must extend no farther into the water than 100 feet from the ordinary high water line and must not infringe upon riparian rights. Also, the DEP must be notified in writing of the muck removal at least 30 days before the work begins. The bill also requires the DEP and the Fish and Wildlife Conservation Commission to jointly prepare a report to the Governor and the Legislature by November 1, 2004 on the effects of the muck removal exemption on water quality and aquatic and fish habitat in areas where the exemption has been used.

The second part of the bill allows floating vessel platforms and floating boat lifts to be used without permitting under Chapters 373 and 403, Florida Statutes, and without obtaining permission for use of sovereign submerged lands. Floating vessel platforms must be contained within a previously permitted boat slip or, if at a dock without defined slips, must be no larger than 500 square feet (200 square feet if in an Outstanding Florida Water). They must float in the water for the sole purpose of supporting a vessel out of the water when not in use, must not be used for commercial purposes, and must not substantially impede the flow of water, create a navigation hazard, or unreasonably infringe upon the riparian rights of adjacent property owners. In addition, the DEP is required to adopt a rule creating a general permit for floating vessel platforms that are not exempt under this bill, but which do not cause significant adverse impacts either individually or cumulatively.

CS/HB 1243 Fish and Wildlife Conservation Commission - Saltwater Fisheries and Manatee Protection, *Chapter 2002-264.*

A number of changes relating to marine resources (and strengthening their protection) are included in this bill, including penalizing the use of illegal nets, limiting the purchase of saltwater products taken in violation of the constitutional net ban, changing

the provisions for confiscation, seizing and forfeiting property, and creating criminal penalties for interfering with freshwater fishing gear. Several important changes to the Manatee Sanctuary Act are also made, including requiring local (county) rule review committees to evaluate proposed manatee protection rules, clarifying where manatee protection zones are to be established (local governments will be required to use the same scientific information standards used by the state to establish such zones), requiring 13 “key” counties (identified by the Governor and cabinet in 1989) to adopt manatee protection plans (and requiring that the boating facility siting elements of future manatee protection plans be incorporated into the county comprehensive plan), directing that measurable biological goals for manatee recovery be developed and adopted, and requiring the Fish and Wildlife Conservation Commission (FWCC) to study public compliance with manatee protection rules.

CS/HB 1085 Fish and Wildlife Conservation Commission,
Chapter 2002-46.

This bill is the annual legislative package developed by the FWCC. It includes substantial revisions to the definitions in Chapter 372, Florida Statutes, and changes in the statutes relating to recreational licenses, permits and authorization numbers. The bill also recognizes citizens’ rights to hunt, fish, and take game. Among the bill’s specifics are a provision that the clerk of court may dismiss a citation for not having a boating safety identification card in his possession when the person brings to the clerk a card that was valid at the time, authorization for the FWCC to accept title to vessels for use in the artificial reef program, limitation on the amount of certain fees that can be spent on administration, provision for credit card purchases of licenses and permits via telephone and internet, and several changes to hunting and fishing licenses and permits.

HB 1601 Electric Utilities Environmental Cost Recovery, *Chapter 2002-276.*

This bill addresses air pollution in the northwestern region of Florida, an area served by Gulf Power Company, which is in danger of becoming a non-attainment zone for ozone. As an inducement for Gulf Power Company to reach an agreement with DEP to implement air pollution measures at its facilities, this bill allows for cost recovery of precautionary pollution control measures. Historically, a power company was not allowed to recover costs through rate increases for implementing precautionary pollution

control measures. A second part of the bill requires the Florida Public Service Commission to study the costs, feasibility and potential implementation schedule for renewable energy in the state and to report to the Legislature by February 1, 2003.

CS/SB 678 Pollution Reduction and Lake Okeechobee Protection,
Chapter 2002-165.

Improving water quality in Lake Okeechobee is the focus of this bill. Total maximum daily load (TMDL) law is amended to allow for voluntary development and implementation of interim measures, best management practices and other measures for any water body or segment where a TMDL has not been established. Agencies implementing the Lake Okeechobee Protection Program are authorized to give priority in funding to projects on privately-owned lands that make the best use of certain methods designed to reduce nutrient loadings to the lake. Favored measures include restoring the natural hydrology of the basin, restoring wildlife habitat on impacted wetlands, reducing peak flows after storm events, increasing aquifer recharge, and protecting range and timberland from development. In addition, the bill requires limits be placed on phosphorus concentrations in domestic wastewater in the Lake Okeechobee watershed.

CS/HB 574 Minimum Flows and Levels for Springs, *Chapter 2002-15.*

The increasing use of Florida springs as a source of bottled water has led the DEP to devote considerable attention to their protection. This bill requires the water management districts to develop a schedule for setting minimum flows and levels for larger (first-magnitude) springs (and smaller springs located on state or federal property), taking into consideration the threat from consumptive uses. The effect of this bill is to tighten the consumptive use criteria applicable to withdrawals in and around the larger springs.

CS/SB 1926 Citrus Canker Treatment, *Chapter 2002-11.*

The Department of Agriculture and Consumer Services (DACS) is to remove and destroy all citrus trees infected with citrus canker and all trees exposed to infection. Property owners must be given notice of the pending removal and destruction of trees (appealable to the district court of appeal within 10 days after receiving notice), citrus trees within 1,900 feet of an infected tree are exposed to infection and must be destroyed, the sheriff or other chief law

enforcement officer must assist the DACS in removing and destroying trees, and DACS may seek a search warrant to enter property if it suspects a violation of the citrus canker quarantine or to inspect, seize, or destroy infected or exposed trees.

CS/HB 851 Solid Waste Management, *Chapter 2002-291*.

Last year saw the passage of Chapter 2001-224, Laws of Florida, which required DEP, and others, to review the solid waste recycling and reduction provisions in Chapter 403, Florida Statutes, and to make a report with recommendations to the Legislature in October 2001. This bill is the result of that study and report and makes changes in the funding and implementation of the state's solid waste management program that affect state regulatory agencies, local governments, businesses handling tires, and private solid waste management companies. Several changes, including the transfer in some sales tax proceeds from the Solid Waste Management Trust Fund to the Ecosystem Management and Restoration Trust Fund, the elimination of a mandate to counties concerning composting and mulching, and the substitution of "significant portion" for "majority" in the requirement that local governments recover certain recyclable materials, indicate a reduction in emphasis on solid waste and recycling matters.

SB 266 Solid Waste Collection, *Chapter 2002-23*.

This bill provides protection to solid waste collection firms that have contracts in unincorporated areas by requiring that newly formed municipalities must honor existing solid waste contracts in the geographic area subject to incorporation. Existing contracts must be honored for five years or for the remainder of the contract, whichever is less. The bill also exempts from the prohibition against leaving motor vehicles unattended vehicles that are being used for collection of solid waste and recovered materials.

CS/HB 1591 Coastal Zone Management Act Update and Transfer, *Chapter 2002-275*.

This bill moves Coastal Zone Management activities from the Department of Community Affairs (DCA) to the DEP, updates the Coastal Zone Management Act in several ways, authorizes DEP to assist in the study, funding, and preservation of lighthouses on the Florida coast, and provides for DEP to assist state agencies and local governments to develop a uniform system of warning and safety flags and signs along coastal public beaches. Several

technical matters relating to the Coastal Zone Management Act are corrected, legislative intent is clarified and DEP is given the authority to adopt rules establishing the procedures and information it needs to determine consistency with the Coastal Zone Management Program.

HB 1079 Reenactment of Everglades Agricultural Area
Environmental Protection District, Palm Beach, Hendry and
Glades Counties, *Chapter 2002-378*.

Previous authority relating to the Everglades Agricultural Area is repealed and replaced with this single comprehensive special act which restates the purposes, boundaries and powers granted to the Environmental Protection District, outlines the District Board's composition, meeting requirements, duties and responsibilities, and describes the financial obligations, bonding authority, and special assessment powers granted the District.

CS/SB 1906 & 550 Growth Management, *Section 2002-296*.

Landowners and developers throughout Florida will be impacted by the growth management bill, which covers school facilities and water linkage, as well as comprehensive plan and development-of-regional-impact (DRI) reforms. Among the many changes to growth management in the bill is a new requirement that local planning agencies include a non-voting representative of the school board in meetings where increases in residential density are considered and that each regional planning council include an elected school board member. Another new mandate is that all local comprehensive plans must be coordinated with the regional water supply plan approved by the water management district. Water reuse will also be more strongly encouraged: an applicant must prepare a feasibility study and give significant consideration to reuse if the results of the study indicate that reuse is feasible.

Closer and more consistent coordination between school districts and counties will be required by this bill with interlocal agreements to address matters such as population growth and school enrollment projections; school renovations, construction and closings; determining the need for and timing of on-site and off-site improvements to support school renovation and construction; updating district educational facilities plans; and joint-use facilities. Education facilities benefit districts are authorized for the purpose of financing schools and school districts are required to contract with a third party every five years for a financial management and performance audit of the district's capital outlay activities.

Several changes to DRI laws are included in the bill. A “bright-line” rule is established that any project of less than 100 percent of the numeric threshold is conclusively not a DRI, while a project between 100 and 120 percent of a threshold is rebuttably presumed to be a DRI. DRI reports will be required every 2 years instead of every year and acreage thresholds will no longer be used to determine whether a development is a DRI. “Bright line” rules are established for determining whether a proposed change in land use in an approved DRI is a substantial deviation that requires further review and certain statutory exemptions to DRIs are added. Among things exempted are petroleum storage facilities that are consistent with the local comprehensive plan and a port master plan, marinas in a jurisdiction with a boating facility siting plan or policy that meets statutory criteria, and “any renovation or development within the same land parcel which does not change land use or increase density or intensity of use.”

Also included in the bill is language limiting the authority of local governments to deny permits for solid waste management facilities that are permitted by DEP and language that exempts from the definition of “development” construction of electrical facilities in established rights-of-way.

CS/CS/SB 694 Mobile Homes, Condominiums and Multi-Condominiums, *Chapter 2002-27*.

Several changes to the mobile home, mortgage foreclosure and condominium statutes are included in this bill. Mobile home park owners must, upon request, hold a second meeting with home owners when rents are increased and statutory payments associated with eviction of mobile home park residents affected by land use changes are now to be paid to the Relocation Corporation, which is granted an additional 30 days to approve payments to mobile home owners. Liens to secure payments of condominium and cooperative assessments are now included in the definition of “mortgage” and are subject to the provisions of Chapter 702, Florida Statutes, regarding foreclosure of mortgages. Condominium sales no longer require use of the “question and answer” sheet and condominium associations can contract for preparation of the annual financial report and mail it to unit owners within 120 days after the end of fiscal year.

CS/HB 1681 Agriculture and Consumer Services Omnibus Bill,
Chapter 2002-295.

Several matters related to the Department of Agriculture and Consumer Services (DACCS) are addressed in this bill. Among the topics are changes in state funding for mosquito control districts; authorization for the department to destroy any animal that is liable to spread a contagious, infectious, or communicable disease if the Governor or Commissioner has declared a state agriculture emergency; creation of a Pest Control Enforcement Advisory Council; provision for enforcement of the “no-gouging” law during a declared emergency by the State Attorney and the Department of Legal Affairs in addition to the DACCS, creation of the Off-Highway Vehicle Recreation Advisory Committee and an act relating to those vehicles; and making it a second degree misdemeanor for a person to leave a recreational fire unattended.

CS/HB 715 Transportation, Concurrency and Outdoor Signs,
Chapter 2002-13.

This transportation bill limits the ability of governmental entities to remove any lawfully erected roadside sign without paying just compensation to the owner. In addition, it revises concurrency requirements related to transportation facilities that are part of the Florida Intrastate Highway System. Among other changes, the bill provides that transportation facilities that are part of the Florida Intrastate Highway System and are needed to serve new development are to be in place or under construction not more than five years after issuance of a certificate of occupancy.

CS/HB 1341 Community Redevelopment, *Chapter 2002-294.*

This bill alters the authority of local government to create a community redevelopment agency (CRA) for the purpose of using tax increment financing for implementing redevelopment plans. The bill will also allow the brownfield redevelopment bonus refund program to allow a \$2,500 bonus per job for any qualified target industry business, and certain other businesses, which create jobs in a brownfield area.

CS/HB 489 Land Surveyors and Mappers, *Chapter 2002-41.*

This bill makes several changes to laws relating to land surveyors and mappers. Definitions are added, certification by endorsement is limited and requires all applicants to pass the

Florida law and rules portion of the examination, changes are made in the authorization for entry onto lands of thirds parties, more prohibited acts relating to practice without a license are added, and the liability and duty of care for professional surveyors and mappers relative to agricultural lands is addressed.

CS/SB 460 Special Assessments on RV Parks, *Chapter 2002-241*.

This bill requires that non-ad valorem special assessments on RV parks be based on the assertion that the RV park is a commercial entity like a hotel or motel. RV parks are not to be considered as being comprised of residential units.

CS/HB 547 Affordable Housing, *Chapter 2002-160*.

Developers of affordable housing projects who rely upon financing from the Florida Housing Finance Corporation will benefit from this legislation. It may indirectly benefit other developers who rely upon those who specialize in developing low-cost housing to meet various regulatory requirements. The bill directs that “permits for affordable housing projects shall be expedited to a greater degree than other projects” and makes other changes to benefit affordable housing.