RECENT DEVELOPMENTS

IAN E. WALDICK*

I. NOTABLE FEDERAL CASES

A. Yates v. United States

In 2007 John Yates ("Yates"), a commercial fisherman, was caught with several undersized red grouper on his vessel in federal waters in the Gulf of Mexico by a Florida Fish and Wildlife Conservation Commission officer ("the Officer"), who was deputized as a federal agent by the National Marine Fisheries Service to enforce

* B.A., University of Central Florida, 2013; J.D., Florida State University College of Law, May 2016.

federal fishing laws.[1] Before issuing Yates a citation for the violation, the Officer measured and recorded the length of the fish that appeared to be smaller than the allowable catch size and instructed Yates to keep the undersized fish on his vessel in a crate until he returned to port; several days later at port, the Officer again measured the fish in the crate and found that the measurements did not match those that he had previously recorded.[2] Upon questioning the other crew-members, the Officer discovered that Yates had instructed one of them to toss the undersized fish into the water and to refill the crate with larger, albeit still undersized, fish.[3] Ultimately, Yates was charged with and convicted of "destroying property to prevent a federal seizure, in violation of section 2232(a), and for destroying, concealing, and covering up undersized fish to impede a federal investigation, in violation of section 1519."[4] Yates challenged the conviction under section 1519, which provides that "[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object" with the intent to interfere with any government investigation or case "shall be fined . . . imprisoned not more than 20 years, or both."[5] He argued that it "sets forth 'a documents offense' and that its reference to 'tangible object[s]' subsumes 'computer hard drives, logbooks, [and] things of that nature,' not fish."[6] The United States Court of Appeals for the Eleventh Circuit affirmed the conviction, finding the text of section 1519 "plain" in meaning.[7]

In a plurality opinion, the United States Supreme Court reversed the decisions below, and found that section 1519, properly read, encompasses only "objects one can use to record or preserve information."[8] The lead opinion began by examining the history that led up to the passing of section 1519, highlighting that it was passed as part of the Sarbanes-Oxley Act that "was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating evidence."[9]

The Government argued that section 1519 extended beyond the specific actions that led to its passage and that the language supports "a general ban on the spoliation of evidence, covering all

1. Yates v. United States, 135 S. Ct. 1074, 1079 (2015).
2. *Id.* at 1079-80.
3. *Id.* at 1080.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 1081.
8. *Id.*
9. *Id.*

physical items that might be relevant to any matter under federal investigation."[10] Yates countered that the statute, read in context, was limited only to "records, documents, and tangible objects used to preserve them, *e.g.*, computers, servers, and other media on which information is stored."[11]

In its analysis, the Court first turned to an examination of the context in which the language of section 1519 is found, rejecting the Government's argument that the phrase "tangible objects" appears in a similar context in Federal Rule of Criminal Procedure 16 to require prosecutors to grant a defendant's request to turn over any evidence material to the charges brought against him or her.[12] The Court started by examining section 1519's title: "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," concluding that the narrow nature of the title "suppl[ies] cues that Congress did not intend 'tangible object' . . . to sweep within its reach physical objects of every kind."[13] To demonstrate its intended narrow reach the Court then noted section 1519's position within the United States Code, along with other sections at the end of the chapter, "each of which prohibiting obstructive acts in specific contexts."[14] Next turning to the legislative history, the Court observed that section 1512(c)(1) was drafted and proposed after section 1519 and provided punishments for anyone who corruptly "alters, destroys, mutilates, or conceals a record, document, or other object . . . with the intent to impair the object's integrity or availability for use in an official proceeding," holding that the Government's proposed reading of section 1519 would render section 1512(c)(1) superfluous because it would reach exactly the same conduct.[15] Finally, applying the *noscitur a sociis* and *ejusdem generis* canons of statutory construction, the Court held that when read in conjunction with the phrase "any record [or] document" and the verbs "falsif[y] and mak[e] a false entry in," it would not make sense to interpret "tangible objects" to encompass anything other than things used for record-keeping.[16]

At this point, the Government argued that the Court should take into account the origins of the phrase "tangible objects" from a 1962 Model Penal Code provision which was read in line with the Government's broad interpretation; however, the Court found that section 1519 could not be read that broadly because it did not have

10. *Id.*
11. *Id.*
12. *Id.* at 1082-83.
13. *Id.* at 1083.
14. *Id.* at 1083-84.
15. *Id.* at 1084-85.
16. *Id.* at 1085-87.

in place protections built into the 1962 provision – namely that violation of section 1519 constitutes a felony whereas the 1962 provision constitutes only a misdemeanor and section 1519 encompasses actions touching on any aspect of a government investigations whereas the 1962 provision was much narrower in scope in that regard.[17] The plurality opinion concluded by stating that even if there is any doubt remaining about the meaning of "tangible object," that the rule of lenity demands a narrow interpretation, because Yates could not have been on notice of such a broad application.[18]

Justice Alito filed a concurring opinion in which he stated that he would resolve the case "on narrow grounds" and based his opinion solely on examination of the *noscitur a sociis* and *ejusdem generis* canons, as well as the title of the section.[19] The dissenting Justices criticized the lead opinion's resort to unconventional tools of statutory construction such as examination of the section's title,[20] its placement within the United States Code,[21] its inconsistent use of the surplusage canon,[22] requiring that all of the verbs in the statute aligned perfectly with all of the nouns in the statute,[23] and its invocation of the rule of lenity because it "only kicks in when there remains ambiguity after all legitimate tools of interpretation have been exhausted.[24] The dissent further criticized the concurring opinion for many of the same issues, particularly the use of the *noscitur a sociis* and *ejusdem generis* canons, and concluded that the concurring opinion is "a shorter, vaguer version of the plurality's."[25] The dissenting opinion ultimately posited that the only thing that can account for the plurality and concurring opinion are "overcriminalization and excessive punishment in the U.S. Code" because of the plurality's reliance on the disproportionate penalties present for violations of section 1519 and the provision of the 1962 Model Penal Code on which it was partially based.[26]

17. *Id.* at 1087-88.
18. *Id.* at 1088-89.
19. *Id.* at 1089-90 (Alito, J. concurring).
20. *Id.* at 1094 (Kagan, J. dissenting).
21. *Id.* at 1094-95 (Kagan, J. dissenting).
22. *Id.* at 1095-96 (Kagan, J. dissenting).
23. *Id.* at 1097-98 (Kagan, J. dissenting).
24. *Id.* at 1098-99 (Kagan, J. dissenting).
25. *Id.* at 1099-1100 (Kagan, J. dissenting).
26. *Id.* at 1100 (Kagan, J. dissenting).

B. Michigan v. Environmental Protection Agency

The Environmental Protection Agency ("EPA") decided to begin regulating emissions from power plants in 2000, and reaffirmed the finding in 2012, pursuant to the Clean Air Act Amendments of 1990. The Amendments required the Agency to "perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [power plants] of [hazardous air pollutants] after imposition of" the Acid Rain Program, and to regulate power plants if the Agency "finds . . . regulation is appropriate and necessary after considering the results of the study," which was concluded in 1998.[27] Several states, as well as several industry groups, challenged the "appropriate and necessary" finding and the EPA's decision to begin regulating power plants in the United States Court of Appeals for the D.C. Circuit as unreasonable because the EPA did not explicitly take into account the costs, which were estimated to be $9.6 billion per year, and benefits, which were estimated to be $4 to $6 million per year ($37 to $90 billion per year if including ancillary benefits), of regulation in its decision to regulate.[28] The D.C. Circuit affirmed the EPA's decision and this appeal ensued.[29] It is important to note that although these costs were not explicitly taken into account in the EPA's "appropriate and necessary" finding, costs would have been taken into account at several steps in developing regulations, including the determination of "floor standards" and "beyond-the-floor standards."[30]

The majority began its analysis by invoking *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984): "*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers."[31] The Court held that "the phrase 'appropriate and necessary' requires at least some attention to cost because it is '"the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors."'[32] The Court held that the EPA's interpretation of the congressional directive as not requiring any consideration of costs actually precluded it from considering any types of costs whatsoever, and the EPA conceded as much.[33] The Court noted that although there are

27. Michigan v. EPA, 135 S. Ct. 2699, 2704-05 (2015).
28. *Id.* at 2705-06.
29. *Id.* at 2706.
30. *Id.* at 2705.
31. *Id.* at 2707.
32. *Id.* (quoting White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222 (2014)).
33. *Id.*

circumstances in which "appropriate and necessary" would not encompass costs, a determination of whether regulation is necessary is not one of them, particularly when consideration of costs is imposed in other subsections of the statute, one of which requires a study into mercury emissions from power plants to determine "the health and environmental effects of such emissions, technologies which are available to control such emissions, and the costs of such technologies."[34] In other words, Justice Scalia wrote that "[a]gainst the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether 'regulation is appropriate and necessary' as an invitation to ignore cost."[35]

The EPA argued that it was not required to consider the mercury study before making the determination to regulate power plants. The Court, however, dispelled this argument and pointed to several places where the EPA stated that it would rely on several studies, including the mercury study, in making its decision.[36] The Court also rejected the EPA's argument that the "appropriate and necessary" finding cannot require a cost analysis since it was silent as to whether cost must be considered and other Clean Air Act provisions expressly require a consideration of cost.[37] The Court determined that "[i]t is unreasonable to infer that, by expressly making cost relevant to other decisions, the Act implicitly makes cost irrelevant to the appropriateness of regulating power plants."[38] The Court then went on to distinguish its decision in *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001), which the EPA urged was controlling, because the phrase "requisite to protect public health," which does not require any consideration of cost, is much narrower than "appropriate and necessary."[39]

The EPA further argued that it need not consider cost when making the decision to regulate, because if it decided to regulate power plants, costs would be taken into account at multiple stages throughout the regulatory process.[40] The EPA continued that the Clean Air Act makes cost irrelevant to the decision to regulate sources other than power plants, so it should not require costs to be taken into account with regard to power plants unless explicitly stated and that power plants are treated differently "because of

34. *Id.* at 2708.
35. *Id.*
36. *Id.*
37. *Id.* a 2708-09.
38. *Id.* at 2709.
39. *Id.*
40. *Id.*

uncertainty about whether regulation of power plants would still be needed after the application of the rest of the [Clean Air] Act's requirements."[41] The Court dispensed with these arguments by pointing out that the scope of the inquiry before it was much narrower than the entire regulatory scheme pertaining to power plants: it was simply whether "appropriate and necessary" requires some consideration of costs to the industry.[42] It further pointed out that the fact that the Clean Air Act does not require costs to be taken into account for the decision to regulate other sources actually cuts against the EPA's argument because the Clean Air Act treats power plants differently, which is the same approach that the Court took, and that if Congress had been concerned only with the uncertainty of whether further regulation would be necessary, it should have made that the required determination rather than "appropriate and necessary."[43]

Justice Thomas filed a concurring opinion in which he questioned the constitutionality of affording an agency's interpretation of ambiguous statutory language deference.[44] He cited separation of powers concerns and highlighted the fact that allowing a politically motivated arm of the government to "interpret" what a statutory provision means undermines the judiciary's role as envisioned by *Marbury v. Madison*, 5 U.S. 137 (1803).[45]

Four justices dissented in an opinion written by Justice Kagan; their main criticism of the majority's opinion being that it completely ignored that the EPA has extensively taken cost into account in nearly every step of the regulatory process after making the initial decision that it was "appropriate and necessary" to regulate power plants.[46] The dissent also faulted the majority for not taking into account the costs and benefits of the decision to regulate that were determined by the EPA after having made the decision to regulate power plants[47] – a point to which the majority responded by citing that the EPA conceded that it took no costs into account when making the decision.[48]

C. Horne v. Department of Agriculture

The Hornes, who are raisin growers and handlers, challenged under the Takings Clause of the Fifth Amendment the constitu-

41. *Id.* at 2709-10.
42. *Id.* at 2709.
43. *Id.* at 2709-10.
44. *See id.* at 2712-14 (Thomas, J. concurring).
45. *Id.* at 2712 (Thomas, J. concurring).
46. *Id.* at 2714-26 (Kagan, J. dissenting).
47. *Id.* at 2714 (Kagan, J. dissenting).
48. *Id.* at 2711.

tionality of a "marketing order" promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937 that required raisin growers to turn over a portion of their crop to the government each year to be disposed of as the government wished, with some compensation provided to the grower if the government made enough of a profit to offset the price-benefit conferred by the market manipulation.[49] In 2002, when the Raisin Administrative Committee, the entity in charge of collecting the government's portion of raisins, required raisin growers to turn over 47 percent of their crop, the Hornes refused to turn any over; they were subsequently fined the market value of the raisins, $480,000, along with a civil penalty of approximately $200,000.[50] After the Supreme Court had determined that the District Court of Appeals for the Ninth Circuit had jurisdiction to consider the Hornes' constitutional defense to the fine, the Ninth Circuit determined that the regulation was constitutional and compared it to "a government condition on the grant of a land use permit."[51] The Hornes appealed.[52]

The Supreme Court first considered "[w]hether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property' . . . applies only to real property and not to personal property."[53] Turning to the history of the Takings Clause, the Court concluded that there is no reason to treat personal property and real property any differently, noting that "[t]he principle reflected in the Clause goes back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings."[54] The Court further held that the government's requirement to turn over raisins is clearly a physical taking because the raisins "are transferred from the growers to the Government."[55] The Government argued that it was "strange" that the Hornes would object to the reserve requirement while conceding that the government could prohibit a sale of raisins altogether without effecting a taking; however, the Court rejected this argument because the Constitution is not solely concerned with the ends that a regulation seeks, but also the means employed to reach them.[56]

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49. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2424-25 (2015).
50. *Id.*
51. *Id.* at 2425.
52. *Id.*
53. *Id.*
54. *Id.* at 2426.
55. *Id.* at 2428.
56. *Id.*

The Court next considered "[w]hether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion."[57] The Government argued that because "raisins are fungible goods whose only value is in the revenue from their sale" and that the marketing order "leaves that interest with the raisin growers" since after subsidies are deducted from the revenue made on the raisins by the Government any net proceeds are returned to the grower, that the requirement to turn over raisins did not constitute a taking.[58] The Court concluded, however, that simply the retention of a contingent interest in the raisins by the grower "does not mean there has been no physical taking, particularly since the value of the interest depends on the discretion of the taker" and because at least occasionally, that interest has been worthless because there were no net proceeds to return to the growers.[59]

Last, the majority considered "[w]hether a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects a per se taking."[60] In reaching the conclusion that it did, the Court distinguished *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), a case in which the government required pesticide manufacturers to disclose health and safety information about its products in order to sell them, and *Leonard & Leonard v. Earle*, 279 U.S. 392 (1929), a case in which the government required oyster packers to remit ten percent of the marketable detached oyster shells to the State for the privilege of harvesting the oysters.[61] The Court distinguished the former due to the risk to public safety if the hazards of the products were not disclosed,[62] and the latter because the oysters were found in state-owned water – meaning that they originally did not belong to the oyster packers as the raisins only ever belonged to the Hornes.[63]

The last argument that the Government made was that a taking does not violate the Fifth Amendment unless there is no just compensation and that "the Hornes are free to seek compensation for any taking by bringing a damages action under the Tucker Act in the Court of Federal Claims."[64] The Court dismissed this argu-

57. *Id.*
58. *Id.* at 2428-29.
59. *Id.* at 2429.
60. *Id.* at 2430.
61. *Id.* at 2430-31.
62. *Id.* at 2430.
63. *Id.* at 2431.
64. *Id.*

ment by pointing out that it had already decided that the Hornes do not have to pay the fine then seek redress for it in previous litigation: they may raise a takings defense to the fine itself.[65] The Government argued that if the Court determined that the marketing order constituted a taking, it should remand for the Ninth Circuit to calculate what compensation would have been due if the Hornes had complied with the requirement to turn over the raisins.[66] The Court concluded by stating that a remand would be unnecessary because the "just compensation" has traditionally been interpreted as the fair market value.[67]

Justice Thomas, joining the majority's opinion in its entirety, filed a brief concurring opinion arguing that the government's taking of raisins may not be permissible even if just compensation is paid because it is not "for public use."[68] Justice Breyer concurred with the majority that the regulation constituted a taking, but would have remanded the case for a determination of what would constitute "just compensation."[69] Specifically, Justice Breyer observed that "the relevant precedent indicates that the Takings Clause requires compensation in an amount equal to the value of the reserve raisins *adjusted to account for the benefits received*," particularly the overall increase in raisin prices as a result of this practice.[70]

Justice Sotomayor dissented, concluding that, in order for a governmental action to be considered a per se taking in this case the governmental action must "destroy" each of the owners' rights to "possess, use and dispose" of the property.[71] Justice Sotomayor pointed out that the Hornes maintained at least one meaningful property interest even after turning over the raisins to the Government: "the right to receive some money for their disposition."[72] Although perhaps the Hornes' property rights were "damaged" or even "substantially damaged" by this action, Justice Sotomayor remained unconvinced that their property rights were "destroyed."[73] The dissent would also find that the regulation did not effect a taking because it was a lawful condition of entry into a regulated market. Justice Sotomayor found the majority's distin-

65. *Id.*
66. *Id.* at 2431-32.
67. *Id.*
68. *Id.* at 2433 (Thomas, J. concurring).
69. *Id.* at 2433 (Breyer, J. concurring in part, dissenting in part).
70. *Id.* at 2436 (Breyer, J. concurring in part, dissenting in part) (emphasis added).
71. *Id.* at 2437-38 (Sotomayor, J. dissenting).
72. *Id.* at 2438-39 (Sotomayor, J. dissenting).
73. *Id.* at 2439 (Sotomayor, J. dissenting).

guishing of *Ruckelshaus* arbitrary because nowhere in the opinion did the Court discuss the danger of the products at issue.[74]

D. Energy and Environmental Legal Institute v. Epel

The Energy and Environment Legal Institute ("EELI"), an organization whose members contain at least one coal producer that sells coal to Colorado electricity generators, challenged under the Dormant Commerce Clause ("the Clause") Colorado's law that requires electricity generators to ensure that 20% of the electricity they sell to Colorado consumers comes from renewable sources.[75] The United States District Court for the District of Colorado held that the law did not violate the Dormant Commerce Clause, and so did the United States Court of Appeals for the Tenth Circuit.[76]

EELI argued that the law was unconstitutional under the test set forth in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), which held that "certain price control and price affirmation laws that control 'extraterritorial' conduct" violated the Clause.[77] EELI relied on language from *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), a case in which the Supreme Court struck down a price affirmation scheme that required shippers of beer to affirm that their posted prices for products sold in-state were no higher than in bordering states and had the effect of inhibiting out-of-state price competition.[78] It argued that this case stood for the assertion that the Supreme Court's jurisprudence required the Tenth Circuit to "declare 'automatically' unconstitutional any state regulation with the practical effect of 'control[ing] conduct beyond the boundaries of the State.'"[79]

The Tenth Circuit dismissed EELI's arguments, stating that EELI read precedent as standing for "a (far) grander proposition than we do."[80] The Court ultimately held that the *Baldwin* line of cases all shared three characteristics in common: "1) a price control or price affirmation regulation, 2) linking in-state prices to those charged elsewhere, with 3) the effect of raising costs for out-of-state consumers or rival businesses."[81] Although the Court recognized that Colorado's law might have the effect of raising prices for some types of electricity on the grid to which Colorado is

74. *Id.* at 2440-41 (Sotomayor, J. dissenting).
75. Energy & Envtl. Legal Inst. v. Epel, 793 F.3d 1169, 1170-71 (10th Cir. 2015).
76. *Id.* at 1171.
77. *Id.* at 1171-72.
78. *Id.*
79. *Id.* at 1174.
80. *Id.*
81. *Id.* at 1173.

connected, both in- and out-of-state,[82] the Court concluded that the law "isn't a price control statute, it doesn't link prices paid in Colorado with those paid out of state, and it does not discriminate against out-of-staters."[83] Ultimately, the Court rejected EELI's position because it would "risk serious problems of overinclusion" because it would likely require the striking down of state health and safety regulations that require out-of-state manufacturers to alter designs or labels for sale in-state because those laws would also "control conduct" out of state.[84] The Court also rejected EELI's alternative procedural complaint that the district court improperly granted Colorado's motion for summary judgment because EELI failed to follow a local rule that requires filing of a "motion" requesting deferral of decision on the summary judgment motion to grant more time for discovery, rather than filing an affidavit pursuant to Federal Rule of Civil Procedure 56(d).[85] The Court concluded that although EELI was correct that this was improper, the district court nevertheless correctly granted the motion for summary judgment because it did not rule on it until after discovery was concluded, and EELI never sought to supplement its summary judgment opposition papers with the new evidence or ask for additional discovery.[86]

E. Sierra Club v. Environmental Protection Agency

In 2011 the Environmental Protection Agency ("EPA") determined that the Cincinnati-Hamilton metropolitan area had attained national air quality standards for fine particulate matter due in part to utilization of regional cap-and-trade programs that reduced the flow of interstate pollution.[87] One of the cap-and-trade programs covered twenty-two states and the District of Columbia, and targeted precursor emissions to ozone and particulate matter; another was the Clean Air Interstate Rule that was promulgated by the EPA and subsequently declared illegal by the D.C. Circuit; and the third was the Cross-State Air Pollution Rule promulgated by the EPA, which was upheld by the Supreme Court.[88] The Sierra Club ("the Club") challenged Cincinnati's redesignation because it did not meet the Clean Air Act's requirement that the "improve-

82. *Id.* at 1173-74.
83. *Id.* at 1173.
84. *Id.* at 1175.
85. *Id.* at 1175-76.
86. *Id.* at 1176.
87. Sierra Club v. EPA, 793 F.3d 656, 659 (6th Cir. 2015).
88. *Id.* at 660.

ment in air quality is due to permanent and enforceable reductions in emissions."[89] It challenged the redesignation by first commenting on the proposed agency action, then, after the redesignation occurred, challenging the redesignation in the United States Court of Appeals for the Sixth Circuit.[90]

The Sixth Circuit first considered whether the Sierra Club had standing to bring the claim in the first place and ultimately concluded that it did.[91] The court noted at the outset that an organization has standing to pursue a claim on behalf of its members if "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[92] The court decided as a matter of first impression that in the context of a petition for direct appellate review of final agency action, the plaintiff must demonstrate standing by a burden of production similar to that required at summary judgment: through supporting "affidavit or other evidence specific facts."[93] The court found that the Club adequately alleged two distinct injuries in fact – aesthetic and recreational injury from "regional haze" and reduced outdoor activities, and "potential physical injury in the form of 'respiratory symptoms' caused by increased particulate matter."[94] After finding that the Club had adequately alleged injury in fact, the court concluded that surely the EPA's redesignation would have at least a marginal effect on the air quality in Cincinnati; thus, the Club adequately alleged the redressability and causation requirements, which the court noted "often run together."[95]

The court then addressed the merits of the Sierra Club's arguments.[96] First, the Sierra Club challenged the EPA's compliance with 42 U.S.C. § 7407 (d)(3)(E)(iii) of the Clean Air Act, "which bars redesignation to attainment unless 'the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions . . . .'"[97] Specifically, the Club argued that reductions from cap-and-trade programs are not "permanent and enforceable reductions" because on any given year the emissions could "increase . . . through purchase of credits from other sources or from 'spending' stored reduction credits from

89. *Id.* at 665-68.
90. *Id.* at 661.
91. *Id.*
92. *Id.*
93. *Id.* at 662.
94. *Id.* at 663.
95. *Id.* at 665.
96. *Id.* at 665-70.
97. *Id.* at 665-66.

previous years."[98] The EPA responded to this implicitly regionally-focused argument[99] by highlighting that the Clean Air Act provision was "silent on the location of the reductions" and that a regionally-focused approach was unnecessary to attain the air quality standards.[100] The court, after having concluded that the statutory language was ambiguous under the first step of the *Chevron* analysis, held that redesignation based upon the cap-and-trade program was a reasonable interpretation of the statute.[101] In particular, the court was persuaded that the EPA reasonably interpreted "permanent" due to the influence that "upwind" States' pollution could have on particulate matter concentrations in the Cincinnati area as well as the long-term enforcement of the cap-and-trade program.[102] Further, it rejected the Sierra Club's argument that the reductions due to the cap-and-trade program were not enforceable because Congress did not define "enforceable" measures to exclude cap-and-trade programs, as these are apparently an effective means by which to reduce pollution.[103]

The Sierra Club next argued that the EPA's redesignation of Cincinnati was illegal because it was predicated on approval of the implementation plans of the states subject to the cap-and-trade programs without including any "reasonably available control measures" ("RACM") that were specifically tailored towards fine particulate matter, as required by section 7502 (c) of the statute.[104] In approving Cincinnati's redesignation, the EPA decided that use of RACMs was only necessary to achieve the air quality standards, but not required for redesignation once the standards were achieved.[105] The court agreed with the Sierra Club, based largely on its prior decision in *Wall v. Environmental Protection Agency*, 265 F.3d 426 (6th Cir. 2001), in which it found that an almost identical provision governing redesignation for attainment of ozone air quality standards required states' adoption of RACT[106] measures.[107] The court ultimately rejected the EPA's arguments that "the phrase 'applicable implementation plan' in section 7407 (d)(3)(E)(ii) could conceivably refer to something other than the

98. *Id.*

99. *Id.* at 666 ("Sierra Club implicitly asks this court to read § 7407 (d)(3)(E)(iii) as requiring 'permanent and enforceable reductions in emissions *from sources in the nonattainment area*'" (emphasis in original.)

100. *Id.*

101. *Id.* at 666-68.

102. *Id.* at 666-67.

103. *Id.* at 667-68.

104. *Id.* at 668.

105. *Id.*

106. "RACT" means "reasonably available control technology," and is, for purposes of this case, the same as "RACM." *Id.* at 659.

107. *Id.* at 668.

pre-attainment [state implementation plan]," and that it only needed to approve a plan containing RACMs to meet the air quality standards, not to redesignate an area to attainment.[108] The court rejected this argument based on its reading of *Wall* as "unambiguously requir[ing] RACT in the area's [implementation plan] as a prerequisite to redesignation."[109]

II. NOTABLE FEDERAL LEGISLATION AND REGULATION

A. Microbead-Free Waters Act of 2015

This law amended 21 U.S.C. § 331 to ban the sale of cosmetics, including toothpastes, that contain intentionally-added plastic microbeads.[110] The Act also expressly preempts state law.[111]

B. Clean Water Rule

The Clean Water Rule ("CWR" or "the Rule"), whose implementation has been stayed by the United States Court of Appeals for the Sixth Circuit pending judicial review of its validity,[112] set out to define "the scope of waters protected under the Clean Water Act" ("CWA") in light of the statute, science, Supreme Court opinions, and the expertise of the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps").[113] The Rule set out to define "waters of the United States" and did so by defining "traditional navigable waters," "interstate waters," "territorial seas," "impoundments," "tributaries," "adjacent waters," "case specific 'waters of the United States,'" and by setting forth "waters and features that are not 'waters of the United States.'"[114]

The EPA and Corps defined "traditional navigable waters" as "all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide," in accordance with existing regulations.[115] Additionally, the Rule added those that 1) are subject to section 9 or 10 of the Rivers

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108. *Id.* at 669.
109. *Id.*
110. Microbead-Free Waters Act of 2015, Pub. L. No. 114-114, § 2 (2015).
111. *Id.*
112. *In re* EPA, 803 F.3d 804 (6th Cir. 2015).
113. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, and 401) [hereafter "Clean Water Rule"].
114. *Id.*
115. *Id.* at 37,074.

and Harbors Appropriations Act of 1899, 2) have been determined to be "navigable-in-fact" under Federal law by a Federal court, 3) are currently being used for commercial navigation, including commercial waterborne recreation, 4) have historically been used for commercial navigation and waterborne recreation, and 5) are susceptible to being used in the future for commercial navigation and commercial waterborne recreation.[116]

The Rule defined "interstate waters" in accordance with previous regulations as including interstate wetlands, even if they are not navigable themselves, while adding "impoundments of interstate waters, tributaries to interstate waters, waters adjacent to interstate waters, and waters adjacent to covered tributaries of interstate waters" because "[p]rotection of these waters is . . . critical to protecting interstate waters."[117] The Rule defined "territorial seas" in accordance with previous regulations, without making any substantive changes.[118] It then defined "impoundments" as "waters of the United States" in accordance with prior regulations because "scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, and the territorial seas."[119] The Rule also noted that "an impoundment of a water that is not a 'water of the United States' can become jurisdictional if, for example, the impounded waters become navigable-in-fact and covered under paragraph (a)(1) of the rule."[120]

The Rule narrowed the previous definition of "tributaries" which "regulate[d] all tributaries without qualification. The final rule protects only waters that have a significant effect on the integrity of traditional navigable waters, interstate waters, or the territorial seas."[121] Specifically, a tributary will be determined by "emphasizing the physical characteristics created by sufficient volume, frequency and duration of flow, and that the water contributes flow, either directly or through another water, to a traditional navigable water, interstate water, or the territorial seas."[122] First, the water "must flow directly or through another water or waters to a traditional navigable water, interstate water, or the territorial seas."[123] Second, the Rule examines two indicators of flow: "[t]here must be a bed and banks and an indicator of ordinary

116. *Id.*
117. *Id.*
118. *Id.* at 37,075.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 37,076.
123. *Id.*

high water mark."[124] Significantly, the "definition of tributary includes natural, undisturbed waters and those that have been man-altered or constructed, but which science shows function as a tributary;" this can include many man-made ditches.[125]

"Adjacent waters" were defined by the Rule as "bordering, contiguous, or neighboring, including waters separated from other 'waters of the United States' by constructed dikes or barriers, natural river berms, beach dunes, and the like."[126] These also include "wetlands within or abutting its ordinary high water mark" and are not limited to "waters located laterally to a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary."[127] They can include "wetlands, ponds, lakes, oxbows, impoundments, and similar water features."[128] For purposes of the "adjacency" inquiry, "neighboring" means that "any part of the water is bordering, contiguous, or neighboring"; this includes all waters that are 1) within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, or a covered tributary, 2) within the 100-year floodplain of a covered water, and 3) all waters within 1,500 feet of the high tide line of a covered water.[129]

The Rule established two circumstances under which "case-specific" determinations would be made: 1) five subcategories of waters including Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands, and 2) waters within the 100-year floodplain of a traditionally covered water and within 4,000 feet of the high tide line or ordinary high water mark of a traditionally covered water.[130] Last, the Rule discussed some waters and features that are excluded from "waters of the United States."[131] Specifically, the Rule excluded "[a]rtificially irrigated areas that would revert to dry land should application of irrigation water to that area cease," "[a]rtificial, constructed lakes or ponds created by excavating and/or diking dry land," "[a]rtificial reflecting pools or swimming pools created by excavating and/or diking dry land," "[s]mall ornamental waters created by excavating and/or diking dry

124. *Id.*
125. *Id.*
126. *Id.* at 37,080.
127. *Id.*
128. *Id.*
129. *Id.* at 37,080-81.
130. *Id.* at 37,086.
131. *Id.* at 37,096-101.

land for primarily aesthetic reasons," "[w]ater-filled depressions created in dry land incidental to mining or construction activity," "[e]rosional features," and "[p]uddles."[132]

C. Clean Power Plan

The Clean Power Plan ("CPP"), whose implementation has been stayed by the Supreme Court pending resolution of a legal challenge,[133] is a set of regulations issued by the Environmental Protection Agency ("EPA") under its authority pursuant to section 111(d) of the Clean Air Act ("CAA"). The CPP is intended to reduce carbon emissions from fossil fuel burning power plants by providing states with the option to adopt either a rate-based or mass-based emission standard by fall of 2016, or with an extension by 2018, that each state will be required to achieve by 2030.[134] The standards are based generally upon the EPA-determined best system of emission reduction ("BSER"), which constitutes three distinct "building blocks": "(1) increasing the operational efficiency of existing coal-fired steam electric generating units ["EGUs"], (2) substituting increased generation at existing [natural gas combined cycle "NGCC"] units for generation at existing steam EGUs, [and] (3) substituting generation from low- and zero-carbon generating capacity for generation at existing fossil fuel-fired EGUs."[135] The original proposal also contained a fourth building block which was dropped by the final rule: increasing demand-side efficiency.[136] States can reach these goals using any of the building blocks or essentially by any other means that they wish; however, it must be outlined in a state implementation plan ("SIP") that will be reviewed and approved by the EPA, or the EPA will impose a federal implementation plan ("FIP") if the SIP is not approved.[137]

The rate-based emission standards set a rate, measured as pounds of carbon dioxide per megawatt/hour (lb CO_2/MWh), which each state must achieve. The rate is calculated by "quantification of performance based on the BSER and embody the reductions estimated under building blocks 1, 2, and 3. . . ."[138] The EPA "applied these rates to the baseline generation levels to estimate the affected fleet emission rate that would occur if all affected EGUs in the

132. *Id.* at 37,098.

133. W. Va. V. EPA, --- S. Ct. ---, 2016 WL 502947 (Mem.) (Feb. 9, 2016).

134. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,663, 64,887-94, 64,894-911 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) [hereafter "Clean Power Plan"].

135. *Id.* at 64,717.

136. *Id.*

137. *Id.* at 64,840.

138. *Id.* at 64,821.

fleet met the subcategory-specific rates."[139] In other words, the EPA calculated the rate goal that it believed could be achieved by 2030 using the building blocks it provided, then it applied that rate to the current baseline fossil fuel electricity generation in each state, and came to the rate-based emission standard for each state.[140] These rate-based emission standards are published in Table 12 of the CPP.[141] The mass-based emission standards were similarly devised by applying the rate-based emission standard to all of the EGUs in a state and calculating the quantity of CO_2 emissions that would be allowed based on projected electric demand.[142] The mass-based standard for each state is listed in Table 13 of the CPP.[143] Each state may utilize essentially any means available to arrive at its emission standard, whether it opts for the rate-based metric or the mass-based one, including any of the EPAs three building blocks, demand-side efficiency, cap-and-trade programs, and the like.[144]

III. NOTABLE FLORIDA CASES

A. Florida Department of Transportation v. Clipper Bay Investments, LLC

In 2008 Clipper Bay Investments, LLC ("Clipper Bay") filed an action against the Florida Department of Transportation ("FDOT") and Santa Rosa County ("the County") for quiet title and ejectment from a seven acre portion of land adjacent to Interstate 10 ("I-10") pursuant to the Marketable Record Title Act ("MRTA"), alleging that it had acquired the land in 2006 and 2007 from an entity that had acquired the land from the original owner in 1970.[145] FDOT filed a counterclaim for quiet title and ejectment from the same land, alleging that the land "was a portion of what FDOT considered part of its Interstate 10 right-of-way," and that it had acquired the contested land through a single recorded deed from the same original owner as Clipper Bay, as well as others, in 1965.[146] FDOT alleged that it had used a portion of the land, as required in order to be exempt from the requirements of the MRTA, during the past thirty years by leasing it to the County.[147]

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139. *Id.*
140. *Id.*
141. *Id.* at 64,824.
142. *Id.* at 64,822.
143. *Id.* at 64,825.
144. *See id.* at 64,717-811.
145. Fla. Dep't of Transp. v. Clipper Bay Invs., LLC, 160 So. 3d 858, 860-61 (Fla. 2015).
146. *Id.* at 861.
147. *Id.*

The trial court partially granted Clipper Bay's petition to quiet title, awarding exclusive use of the contested property to Clipper Bay.[148] The First District Court of Appeals ("DCA") reversed, rejecting Clipper Bay's argument that the type of conveyance employed was dispositive; however, it found that FDOT failed to provide competent substantial evidence that it had maintained the right-of-way on the contested land.[149] The Florida Supreme Court, affirming the First DCA's reasoning that the type of conveyance employed was not dispositive, quashed the First DCA's opinion and remanded to the trial court because FDOT did provide competent substantial evidence that it had maintained the right-of-way required to be exempt from MRTA.[150]

The MRTA, which was enacted "to simplify and facilitate land transactions" "eliminates all stale claims to real property, with certain enumerated exceptions, unless notice of these claims is filed in a procedurally proper manner."[151] Clipper Bay argued that its root of title was a warranty deed from the original owner in 1970.[152] This root of title "provides [Clipper Bay] with marketability unless [F]DOT can demonstrate an exception."[153]

FDOT argued that the First DCA's decision expressly conflicted with the Fourth DCA's decision in *Florida Department of Transportation v. Dardashti Properties*.[154] In *Dardashti*, the Fourth DCA concluded that FDOT was given fee title, through a number of conveyances, to an eleven-foot strip of land near the Florida Turnpike even though the deed purported to create a "right of way and easement" that "would revert if not used as a public highway."[155] The Florida Supreme Court ultimately agreed with FDOT and, while disapproving of the Fourth DCA's approach in *Dardashti*, adopted the First DCA's reasoning from the case below.[156] Although the First DCA's correctly held that FDOT had established that it held a right-of-way because "[t]he focus . . . is the reason or purpose that the state holds the land in question rather than the manner in which the title is actually held," it erred when it determined that FDOT failed to demonstrate that its interest in the land preserved an exception from MRTA.[157]

148. *Id.* at 862.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 863.
153. *Id.*
154. 605 So. 2d 120 (Fla. 4th DCA 1992).
155. *Clipper Bay Invs., LLC*, 160 So. 3d at 864 (discussing *Dardashti*, 605 So. 2d 120).
156. *Id.* at 864-65.
157. *Id.* at 865.

The two exceptions to the MRTA that the Florida Supreme Court considered were sections 712.03(1) and (5), Florida Statutes.[158] Section 712.03(1) provides an exception for "[e]states or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which said estate is based beginning with the root of title" if the easements, use restrictions or other interests are "created prior to the root of title" and there is a specific reference to a recorded title transaction, subject to section 712.03(5).[159] Section 712.03(5) provides an exception for "[r]ecorded or unrecorded easements or rights . . . [and] rights-of-way . . ., including those of a public utility or of a governmental agency, so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof."[160]

With regard to subsection (1), the Court held that "[t]o apply this exception to marketability, [F]DOT must establish that the instrument provided to invoke the exception is a muniment of title that specifically references a pre-root conveyance."[161] Applying the test found in *Sunshine Vistas Homeowners Association v. Caruana*,[162] the Court held that FDOT has established that the 1987 lease from it to Santa Rosa County contained sufficiently specific identification of its interest in the property to exempt it from MRTA.[163] The Court then analyzed subsection (5) because the lease conveyed only a portion of the property; it concluded that "because the land described is included in [F]DOT's title, use of any part of it as a right-of-way excludes the remainder from the effect of the MRTA."[164] The Court held that FDOT was entitled to the exception for the remainder of the land because it used a portion of the land to maintain a right-of-way to access I-10 and conveyed another portion to maintain a right-of-way in a county road.[165]

B. Rogers v. United States

Property owners ("the Claimants") brought claims for compensation for taking of a 12.43 mile long, 100 foot wide strip of land in the United States Court of Federal Claims alleging that the conversion of a former railroad corridor that abutted their proper-

158. *Id.* at 865-66.
159. *Id.* at 865 (quoting § 712.03 (1), Fla. Stat.).
160. *Id.* at 867 (quoting § 712.03 (5), Fla. Stat.).
161. *Id.* at 865.
162. 623 So. 2d 490, 491 (Fla. 1993).
163. *Clipper Bay Invs., LLC*, 160 So. 3d at 866.
164. *Id.* at 867.
165. *Id.* at 867.

ties into a recreational trail had constituted a taking without just compensation.[166] The Court of Federal Claims found that the Claimants had no property interest in the contested property. After the case was appealed to the United States Court of Appeals for the Federal Circuit, it certified a question to the Florida Supreme Court to determine if section 2241, Revised Statutes of Florida (1892), governing conveyances of land from private parties to a railroad corporation, state policy, or factual considerations, limit a railroad's interest in property that on the face of the conveying deed granted the strip of land in fee simple.[167] The Federal Circuit set forth that property interests for the strip of land were received by the Seaboard Air Line Railway ("Seaboard") through a series of transactions between 1910 and 1941.[168] After having been conveyed a fee simple interest to the northern portion of the rail way corridor in 1911, Seaboard began laying track and operating trains along the entire corridor, even the southern part for which it had not received any deeds.[169] In 2003 Seminole Gulf, a successor operator of the rail way, sought an exemption from continuing to operate the rail line, which was granted, at which point Seminole Gulf entered into an agreement to convey the land to the Trust for Public Land to be used as a railbank and converted into a trail.[170]

The deeds used to convey the properties to Seaboard used such language as "the parties . . . hereby grant, bargain, sell, and convey unto the [other party] all their right, title and interest, of any nature whatsoever, in and to" the described property "TOGETHER WITH all and singular tenements, hereditaments, and appurtenances thereunto belonging or appertaining, and every right, title or interest, legal or equitable" in one deed and another where the seller "doth by these presents grant, bargain, sell, convey, alien, remise and release, unto the said Seaboard Air Line Railway Company . . . forever, all of its right, title and interest in and to the following real estate . . . TO HAVE AND TO HOLD . . . in fee simple, forever."[171]

The Claimants argued that the deeds did not convey a fee simple interest on their face, but rather a railroad right-of-way that, when such use was abandoned "gave them the right to claim the land free of the easements . . . and that the conversion of the land to a public recreational trail constitutes a taking for which they

166. Rogers v. United States, 184 So. 3d 1087 (Fla. 2015).

167. *Id.* at 1090-91.

168. *Id.* at 1090 (quoting Rogers v. United States, Nos. 2013-5098 & 2013-5102, slip op. at 5-7 (Fed. Cir. July 21, 2014).

169. *Id.*

170. *Id.*

171. *Id.* at 1091-92.

are entitled to compensation."[172] They argued that section 2803 (2), General Statutes of Florida (1906), applied and provided Seaboard with only an easement for a railroad right-of-way because it provided that "real estate received by voluntary grant shall be held and used for purposes of such grant only."[173] In order for this argument to have prevailed, however, the Claimants must have proved that the grant to the railroad conveyed only an easement rather than a fee simple interest.[174] The Florida Supreme Court did not find this argument persuasive because the provision only applies to "voluntary conveyances" which are those made without consideration; "the deeds were grants by bargain and sale for valuable consideration and conveyed fee simple title."[175] The Claimants also argued that the deeds indicated an intent to provide only easements because the purpose for which the land was purchased was for a railroad right-of-way. Because the Claimants could point to no Florida decisions to support their argument, however, and because "Florida law recognizes that railroads may hold fee simple title to land acquired for the purpose of building railroad tracks," the Florida Supreme Court held that nothing in section 2241, Revised Statutes of Florida (1892), "limited the railroad's interest in the property regardless of the language of the deed."[176]

Turning to the question of whether any state policy limits a railroad's interest in property, the Claimants argued that the railroads occupied and used the strips of land upon which the railways were built solely for railroad purposes as an easement and when the corridor stopped being used for railroad purposes and was effectively abandoned, title to the land reverted to the abutting landowners because the deeds showed that the railroad paid very little consideration for the land.[177] The Court rejected these arguments because the deeds were clear on their face that a fee simple interest was being conveyed to Seaboard and under Florida law the amount of consideration does not provide any grounds on which to challenge the validity of the conveyance.[178] The Claimants last argued that fee simple conveyances of strips of land are disfavored under Florida law, and that because the deed is ambiguous, Seaboard's interest should be treated as an easement: the Court rejected that argument because the Florida cases cited by the Claimants all involved cases where the intent of the parties was

172. *Id.* at 1091.
173. *Id.* at 1094.
174. *Id.*
175. *Id.* at 1094.
176. *Id.* at 1099.
177. *Id.* at 1096.
178. *Id.*

not easily discernible, whereas here the deed clearly purported to convey the strips of land to the railroads in fee simple.[179] Accordingly, the Court held that nothing in the State's public policy limits the railroad's interest in the property.[180]

The Court finally concluded that no other factual considerations, such as Seaboard's survey of the land before conveyance or laying track and beginning operation before the conveyance of a deed, limit a railroad's interest in land.[181] Although the Claimants argued that surveying the land prior to the conveyance "gave the process of purchasing the rights of way an 'eminent domain flavor,'" and that there was a possibility for coercion, the Court found that the deed, on its face, transferred a fee simple interest in the land, and that the Claimants had produced absolutely no evidence of coercion.[182] Accordingly, the Court found that no other factual considerations limited the railroad's interest in the land.[183]

C. Teitelbaum v. South Florida Water Management District

In 2004, a group of property owners ("Property Owners" or "Plaintiffs") in the Bird Drive Basin area of western Miami-Dade County ("the County") filed suit alleging that the South Florida Water Management District ("the Water District") engaged in "coercive acquisition policies" and "illicit actions" in order to acquire the Plaintiffs' property as part of an effort to create a buffer zone next to the Florida Everglades to prevent "massive flooding throughout Miami-Dade County and also to prevent saltwater intrusion from contaminating" the local freshwater wellfields.[184] The Plaintiffs alleged that the Water District artificially depressed their property values through governmental action by preventing development of the land in and near the Bird Drive Basin, specifically by preventing the County from rezoning the area from agricultural use to urban or residential use.[185] After the Water District abandoned its plan to acquire Plaintiffs' property through condemnation due to various studies that showed its buffer plan was no longer feasible, Plaintiffs amended their complaint to allege that the Water Districts acquisition of surrounding properties "left the area checkered with largely unusable, undeveloped, and

179. *Id.* at 1097.
180. *Id.*
181. *Id.* at 1099-1100.
182. *Id.* at 1099.
183. *Id.*
184. Teitelbaum v. S. Fla. Water Mgmt. Dist., 176 So. 3d 998, 1001 (Fla. 3d DCA 2015).
185. *Id.*

unsellable property."[186] Importantly, evidence was presented that Plaintiffs purchased their properties while the land was zoned for only agricultural use, and no evidence was presented that showed that Plaintiffs' property values had actually depreciated.[187]

Plaintiffs argued that the Water District's actions amounted to a taking of their property in violation of the Takings and Due Process Clauses of the Florida and United States Constitutions.[188] They argued that a per se taking should result when 1) the government publicly announces its intent to condemn a property, 2) the government engages in post-announcement unreasonable conduct, including delay in the proceedings or interference with the property owner's rights, and 3) the owner's use and enjoyment of the property is disrupted; they term this "condemnation blight."[189] Importantly, the Plaintiffs never argued that the Water District's actions constituted a physical taking or a regulatory taking.[190] However, the Water District argued, and the trial court held, that under Florida law, "condemnation blight is merely a factor to be considered during the valuation phase of condemnation (or inverse condemnation) proceedings assuming that a taking has already occurred" rather than an independent cause of action for taking.[191]

The Third District Court of Appeals ("DCA") summarized physical takings claims as well as inverse condemnation claims, concluding that "a property owner must demonstrate that the property has in fact been 'taken' by a governmental entity before being entitled to full compensation via inverse condemnation."[192] Moving to its analysis of "condemnation blight" under Florida law, the Third DCA observed that "condemnation blight is only relevant to the valuation of the taken property after a plaintiff has already established that a taking has occurred either by de jure condemnation via eminent domain proceedings or de facto condemnation via one of the three established tests; it is not itself a grounds for a de facto taking."[193] This is so because Florida cases have frequently held that "condemnation blight" referred to the depreciation of property value that occurs when the government announces its intentions to condemn a property, and that Florida law adequately addresses that devaluation by requiring the government entity taking the property to pay full valuation as of the date of the con-

186. *Id.* at 1002.
187. *Id.*
188. *Id.*
189. *Id.* at 1002-03.
190. *Id.* at 1004 n.2.
191. *Id.* at 1002.
192. *Id.* at 1003.
193. *Id.* at 1004.

demnation announcement.[194] The Third DCA reiterated that, in this context, the focus of the inquiry is the effect on the property at issue, rather than on the actions of the governmental entity.[195] It was also important to the court that the property at issue was purchased as "undeveloped wetland on the border of the Everglades . . . that . . . was already zoned exclusively for agricultural use."[196] No additional restrictions were ever placed on the use of the property – the zoning simply never changed the way that Plaintiffs expected that it would when they purchased their properties.[197]

D. Florida Audubon Society v. Sugar Cane Growers Cooperative of Florida

In 2012 the South Florida Water Management District ("the District") issued Everglades Works of the District ("WOD") Permits to several sugar cane growers whose farms are located in the Everglades Agricultural Area ("EAA"). These permits regulate the discharge of phosphorous, and require that sugar cane growers implement various techniques to reduce the nutrients present in agricultural discharge called Best Management Practices ("BMPs").[198] The WOD permits allow sugar cane growers to discharge phosphorous-rich water from their farms to Stormwater Treatment Areas ("STAs"), which are manmade wetlands constructed and operated by the District for the purpose of treating this discharged water and removing more phosphorous before the water is discharged into the Everglades Protection Area ("EvPA").[199] The EvPA is an area that has been protected by the Everglades Forever Act, in an effort to lower the amount of phosphorous in the water and restore the remaining Everglades ecosystem.[200] Discharge of water from the STAs into the EvPA is authorized by two permits issued to the District by the Florida Department of Environmental Protection ("FDEP") pursuant to the Everglades Forever Act and the Clean Water Act, issuance of neither of these permits was challenged by the Florida Audubon Society ("Audubon"), the Appellant in this case.[201]

Audubon challenged the issuance of the WOD permits in an administrative hearing before the District; the case was referred to

194. *Id.*
195. *Id.* at 1005.
196. *Id.*
197. *Id.*
198. Fla. Audubon Soc'y v. Sugar Cane Growers Coop. of Fla., 171 So. 3d 790, 792 (Fla. 2d DCA 2015).
199. *Id.* at 792-94.
200. *Id.* at 792.
201. *Id.* at 793-94.

an Administrative Law Judge ("ALJ") at the Division of Administrative Hearings who ruled for the District and held that the permits should be issued.[202] The District adopted the ALJ's order and Audubon appealed, arguing that the permits violate the Everglades Forever Act because they "do not impose 'additional water quality measures' beyond those imposed in permits issued before December 31, 2006," which is required by the statute and because the "discharges 'cause or contribute to' ongoing water quality violations in the EvPA," which is forbidden by the statute.[203]

After summarizing the "long and complex history of environmental regulation in the Everglades," the Second District Court of Appeal ("DCA") analyzed the District's interpretation of the Everglades Forever Act, noting at the outset that "[t]he agency's interpretation should only be reversed if clearly erroneous."[204] It held that the District "reasonably determined that the first sentence of [the relevant provision] does not require WOD permits to include more aggressive BMPs because the treatment actually provided by the STA's and the effectiveness of the BMPs must be taken into account"; this requires that "the District must consider the water quality that will be achieved by approved projects."[205] The Second DCA reasoned that this was a reasonable reading of the statute in light of the Long-Term Plan that was adopted by the legislature to address the overarching problem of phosphorous pollution in the Everglades and relies more heavily on expansions of the STAs rather than BMPs.[206] Audubon argued that this reading of the statute is inconsistent with the consent decree that was entered into as a result of litigation in 1992 in *United States v. South Florida Water Management District*, 847 F. Supp. 1567 (S.D. Fla. 1992), *aff'd in part, rev'd in part*, 28 F.3d 1563 (11th Cir. 1994), which states that "[t]he State parties shall not implement more intensive management of the STAs as the sole additional remedy."[207] The Second DCA held, however, that "expansion of the STAs is different than more intensive management of the STAs."[208] The court also ultimately rejected Audubon's argument that a plain reading of the Everglades Forever Act requires more aggressive BMPs since the phosphorous concentration goal was not met by the end of 2006, because it would conflict with the Legislature's recent implementations of a Long-Term Plan and Restoration

202. *Id.* at 794.
203. *Id.* at 797.
204. *Id.* at 794-97.
205. *Id.* at 798.
206. *Id.*
207. *Id.*
208. *Id.*

Strategies that need time to be put in place – Audubon's reading of the statute would ultimately require a farm-by-farm solution to the problem which would cut against the larger-scale solutions that are being set in motion.[209]

Audubon also challenged issuance of the permits because, it argued, the sugar cane growers "'cause and contribute' to a 'violation of water quality standards' in the EvPA" because they have failed to meet the phosphorous concentration goal.[210] However, the court held that the District reasonably determined that the discharge was not a violation of water quality standards because it has been approved by the STA permits and consent orders.[211] Essentially, as long as the District is on-track to meet the long-term goals for phosphorous reduction put in place by the Legislature and FDEP, it is allowed to discharge water into the EvPA.[212] The court ultimately held that "Audubon should have challenged the STA permits" that approved the discharge from the STAs into the EvPA, rather than the permits that allow the sugar cane growers to discharge water into the STAs.[213] Audubon finally argued that it should have at least been allowed to present evidence to the ALJ that the sugar cane growers' farming operations were causing or contributing to water quality violations in the EvPA, however the Court flatly rejected this argument because it is undisputed that the phosphorous concentration goals have not yet been met – therefore, the ALJ properly excluded this evidence on this point.[214]

E. Hussey v. Collier County

Between 1989 and 1991, Francis and Mary Hussey ("the Husseys") purchased 979 acres of land in a rural area known as North Belle Meade on which they began rock mining, which was an allowable use, so long as it was carried out incident to agricultural development, under Collier County's ("the County") Comprehensive Land Use Plan ("Land Use Plan") and recent enactments thereunder.[215] In 2002, the County amended its Land Use Plan and in so doing reclassified the Husseys' property to "Sending Lands," which are "deemed to have the highest degree of environmental value and sensitivity" and on which mining is prohibited

209. *Id.* at 798-99.
210. *Id.* at 799.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 800.
215. Hussey v. Collier Cty., 158 So. 3d 661, 663 (Fla. 2d DCA 2014).

and residential development is restricted.[216] The Husseys challenged the County's reclassification with the Department of Community Affairs and an Administrative Law Judge ("ALJ") at the Department of Administrative Hearings presided over the challenge. The ALJ found that the County had not violated the law in early 2003 and the First District Court of Appeal ("DCA") affirmed the ALJ's order, per curiam, in 2004.[217]

In 2004, the Husseys notified the County that they were seeking compensation under the Bert J. Harris Private Property Rights Act, Section 700.01, Florida Statutes ("the Harris Act") after which time, in 2008, they filed suit in the trial court against the County alleging a Harris Act claim as well as an inverse condemnation claim because the County's reclassification of their property deprived them of any future economic use.[218] The trial court dismissed the Husseys' complaint and they appealed to the Second DCA.[219]

The County argued that the Husseys could not challenge the amendments to its Land Use Plan because they "were 'general' ordinances, whereas only an 'as-applied' challenge was cognizable under the [Harris A]ct" and because the claims were barred under the statutes of limitation.[220] At oral argument on appeal, the County conceded that the claim was timely filed and that notice was timely provided to the County.[221] Thus, the Second DCA concluded that the Harris Act claim was timely.[222] The court further rejected the County's argument that the claim was barred because it was a challenge to a generally applicable ordinance: it concluded that because the Act was applied to the Husseys' property in order to reclassify it in a way that limited the use of the property, this action was properly a challenge to the amendments as-applied to their property.[223] The court finally concluded that the Husseys' inverse condemnation claim was barred by the four year statute of limitations.[224] Although both claims have the same limitation period, the time is tolled for the Harris Act claim while the property owner seeks relief "through lawfully available administrative or judicial proceedings," whereas there is no tolling available for the inverse condemnation claim.[225] In other words, the statute of limitations

216. *Id.*
217. *Id.* at 663-64.
218. *Id.* at 664.
219. *Id.*
220. *Id.*
221. *Id.* at 764-65.
222. *Id.* at 665.
223. *Id.* at 666.
224. *Id.* at 666-67.
225. *Id.*

for the Harris Act claim was tolled through the First DCA's affirmance of the ALJ's decision in 2004, whereas the inverse condemnation claim became ripe for judicial review immediately upon the ALJ's order in 2003 without having been subject to any tolling period.[226] Accordingly, the Second District affirmed the dismissal of that claim.[227]

IV. NOTABLE FLORIDA LEGISLATION AND REGULATION

A. An Act Relating to Environmental Resources – SB 552

First, this Act requires the Department of Environmental Protection ("DEP") to create a database of state conservation lands where public access is compatible with conservation and recreation and to make it available on the Internet by July 1, 2017.[228] It then creates section 373.037, Florida Statutes, which allows several Water Management Districts ("WMDs") in restricted allocation areas to develop pilot projects for alternative water supplies.[229] It next requires minimum flow and water levels ("MFLs") to be designated for all "Outstanding Florida Springs" by July 1, 2017 and puts in place procedures to prevent harmful withdrawals from the springs.[230] The Act creates section 373.0465, Florida Statutes, to codify the Central Florida Water Initiative Area and provides manners by which to control water consumption.[231] It requires a new, renewal of, or modification of a consumptive use permit authorizing withdrawal of 100,000 gallons or more of water per day from a well eight inches or more in diameter to be monitored by the WMD and gives WMDs authority to make rules to enforce this provision.[232] The Act also amended section 373.4595, Florida Statutes to provide that Basin Management Action Plans ("BMAPs") are now the primary pollution control planning tool for Lake Okeechobee, Caloosahatchee River, and St. Lucie River Watersheds, and to provide that DEP has responsibility for these BMAPs, rather than the South Florida WMD which used to.[233]

Importantly, the Act created the Florida Springs and Aquifer Protection Act to define "Outstanding Florida Springs" ("OFS") as

226. *Id.*
227. *Id.*
228. Act effective July 1, 2016, ch. 2016-1, 2016 Fla. Laws § 1.
229. *Id.* at § 4.
230. *Id.* at §§ 5-6.
231. *Id.* at § 7.
232. *Id.* at § 10.
233. *Id.* at § 15.

"all historic first magnitude springs, including their associated spring runs . . . ."[234] The Act directs DEP, in conjunction with WMDs, to determine "priority focus areas for each OFS or group of springs that contain one or more OFS and is identified as impaired."[235] DEP and the WMDs also must adopt recovery or prevention strategies if an OFS is below or is projected to fall below an MFL within 20 years, which includes specific projects identified for implementation of the plan, the estimated cost of completion, and a schedule with 5, 10, and 15-year targets.[236] It also forbids certain activities that have the potential to pollute water within a "priority focus area."[237] Further, it directs DEP to adopt rules to improve water quality and quantity.[238] Finally, the Act requires the Office of Economic and Demographic research to conduct an annual assessment of Florida's water resources and conservation lands.[239]

B. An Act Relating to the Fish and Wildlife Conservation Commission – HB 7021

This Act first amends various provisions of Florida Statutes to make the language of their life jacket requirements during various boating activities consistent with current and future U.S. Coast Guard requirements.[240] Next, the law eliminates the requirement for tarpon anglers to report any tarpon they possess to the Fish and Wildlife Conservation Commission ("FWC").[241] The Act further repealed most of section 379.361 (2)(b), Florida Statutes, which set forth specific provisions regarding "restricted species" endorsements for saltwater fishing licenses;[242] although these were repealed from the statute they were adopted by FWC rule.[243] The Act next added exemptions from alligator trapping and alligator trapping agency licenses for children under sixteen years of age, military, and disabled veterans during an FWC-sponsored event, as well as contracted nuisance alligator trappers; permanently disabled individuals are completely exempt from the fee for a

234. *Id.* at §§ 22-24.
235. *Id.* at § 25.
236. *Id.* at § 26.
237. *Id.* at § 28.
238. *Id.* at § 29.
239. *Id.* at § 36.
240. Act effective June 1, 2015, Ch. 2015-161, 2015 Fla. Laws §§ 1-3 (hereafter "FWC Act").
241. *Id.* at § 6.
242. *Id.* at § 7.
243. Fla. Admin. Code R. 68B-2.006.

license. [244] Last, the Act creates section 379.412, Florida Statutes, which sets forth the penalties for violations of FWC wildlife feeding rules: a first violation is now punishable by a $100 civil penalty, a second by a second degree misdemeanor, and a third by a third degree felony.[245]

C. Surface Water Quality Standards – Ch. 62-302, F.A.C.

The Department of Environmental Protection ("DEP") revised its Surface Water Quality Standards providing for mostly stylistic changes as well as updating internal cross-references.[246] The only substantive changes appear to be updating the formulas used to determine acceptable levels of various chemical compounds in surface water.[247] Additionally, the Rule now requires DEP to "take into account the variability occurring in nature and shall recognize the statistical variability inherent in sampling and testing procedures" when "applying the numeric and narrative water quality criteria to ambient waters."[248] It also requires DEP, when placing a manmade lake, canal or ditch, or stream converted to a canal in a water quality classification, to "evaluate the limited aquatic life support and habitat limitations of such waters, recognizing the physical and hydrologic characteristics and water management uses for which they were constructed."[249]

244. FWC Act, at § 9.
245. *Id.* at § 12.
246. Fla. Admin. Code R. 62-302.200 *et seq.*
247. *See, e.g.*, Fla. Admin. Code R. 62-302.530.
248. Fla. Admin. Code R. 62-302.530.
249. Fla. Admin. Code R. 62-302.400.