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William L. Earl

Susan E. Trench

Diane P. Khim

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# Environmental Law in Florida: Recent State and Federal Developments

WILLIAM L. EARL,\* SUSAN E. TRENCH\*\* AND DIANE P. KHIM\*\*\*

*This comment surveys changing trends in Florida environmental law. State regulatory, statutory and decisional law is examined in light of recent federal legislation. The authors suggest that increased federal-state cooperation is the key to promoting greater predictability and consistency in the growing area of environmental law.*

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## I. INTRODUCTION

This article surveys recent developments in Florida legislative, administrative and judicial law which have an impact on the ex-

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\* J.D., University of Florida, 1971. Partner in the firm of Peeples, Earl, Smith, Moore & Blank, Miami, Florida.

\*\* J.D., University of Miami, 1978. Associated with the firm of Peeples, Earl, Smith, Moore & Blank, Miami, Florida.

\*\*\* Member, *University of Miami Law Review*.

panding field of environmental law. The interrelationship of federal and state environmental law is highlighted in order to demonstrate the limitations which federal law places on state regulatory programs. Florida's environmental policies are developing within the parameters set by federal legislation; evaluation of these policies must be made, therefore, within this context.<sup>1</sup>

The National Environmental Policy Act of 1969 declares the intent of the federal government to work "in cooperation with state and local governments" to protect the natural environment.<sup>2</sup> Subsequent federal environmental programs have pursued this mandate. Federal involvement is particularly critical in air and water pollution regulation, where national standards and goals have been established. A central example is the Clean Water Act of 1977<sup>3</sup> and the 1977 amendments to the Clean Air Act,<sup>4</sup> which call for a "division of labor" between federal and state branches.<sup>5</sup> State and local governments are primarily responsible for implementing the procedures and policies set forth in the Act and its amendments.<sup>6</sup> The focus of this article will be an analysis of the impact of these two major federal enactments upon state laws<sup>7</sup> and administrative regulations.<sup>8</sup>

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1. No attempt has been made to cover zoning, eminent domain or other similar land use controls not directly related to the environmental field. For articles reviewing these topics, see Rhodes & Haigler, *Land Use Controls, 1977 Developments in Florida Law*, 32 U. MIAMI L. REV. 1117 (1978); Rhodes, Haigler & Brown, *Land Use Controls, 1976 Developments in Florida Law*, 31 U. MIAMI L. REV. 1083 (1977). For a discussion of the Administrative Procedure Act, FLA. STAT. §§ 120.50-.73 (Supp. 1978), see Fleming & Mallory, *Administrative Law, 1978 Developments in Florida Law*, 33 U. MIAMI L. REV. 735 (1979). The environmental lawyer is well-advised, however, to keep abreast of developments and changes in administrative procedure, as the area of environmental law is often controlled by administrative procedures and regulations.

2. National Environmental Policy Act of 1969, § 101(a), 42 U.S.C. § 4331 (1970).

3. Clean Water Act of 1977, 33 U.S.C.A. §§ 1251-1376 (West Supp. 1977).

4. Clean Air Act Amendments of 1977, 42 U.S.C.A. §§ 7401-7428 (West Supp. 1977). For a thumbnail sketch of how the Clean Air Act Amendments will affect Florida law, see Mastriana, *1977 Clean Air Act Amendments—Weaker and Stronger*, 52 FLA. B.J. 149 (1978). See also Campbell, *Implementing the 1977 Amendments to the Clean Air Act*, ENV'T L. COM., Sept. 1978, at 10.

5. Campbell, *supra* note 4, at 10.

6. Section 101(a)(3) of the Clean Air Act, 42 U.S.C.A. § 7401 (West Supp. 1977), expresses the congressional intent "that the prevention and control of air pollution at its source is the primary responsibility of state and local governments."

7. Florida Environmental Land and Water Management Act of 1972, FLA. STAT. §§ 380.012-.12 (1977 & Supp. 1978); Florida Air and Water Pollution Control Act, FLA. STAT. §§ 403.011-.4153 (1977 & Supp. 1978).

8. FLA. ADMIN. CODE §§ 17-2 to 17-3 (1978).

## II. RECOGNITION OF THE IMPACT OF ENVIRONMENTAL REGULATION ON PRIVATE PROPERTY RIGHTS

The Private Property Rights Act<sup>9</sup> represents the first instance in which the Florida Legislature has specifically addressed the relationship between private property rights and permit issuance requirements under various environmental statutes. The Act provides that persons substantially affected by final agency action regarding permits authorized by chapters 161, 253, 373, 380 or 403 of the Florida Statutes may seek review in circuit court within ninety days of the decision.<sup>10</sup> Fear that the Act would preempt administrative proceedings under chapter 120, however, led to limitation of such review to determination of whether the final agency action was an unreasonable exercise of the state's police power, constituting a taking without just compensation.<sup>11</sup> Review of final agency action to evaluate its compliance with existing statutes and regulations must proceed in the district courts of appeal, pursuant to section 120.68 of the Florida Statutes.<sup>12</sup>

If the circuit court finds that the agency action is an unreasonable exercise of the state's police power, the court must remand the matter to the agency which, within a reasonable time, must agree to issue the permit, to pay appropriate damages or to modify its decision to remedy the unreasonable action.<sup>13</sup>

## III. LAND USE

### A. Overview

Environmental land use regulation experienced substantial changes during 1977-78. A major dispute arose concerning the question of state sovereignty over land underlying navigable waters. The legislature resolved the issue by enacting an exception to the Marketable Record Title Act,<sup>14</sup> which provided to the state title to such property.<sup>15</sup> A comprehensive, statewide plan for the long-term allo-

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9. 1978 Fla. Laws ch. 78-85 (codified in scattered sections of FLA. STAT. chs. 161, 253, 373, 380 & 403).

10. *Id.* §§ 1 & 2. The Act also provides for payment of appropriate money damages if the agency's action is found to be unreasonable. *Id.* § 3. Additionally, reasonable attorney's fees are to be awarded to the prevailing party. *Id.* § 5.

11. *Id.* § 2.

12. FLA. STAT. § 120.68 (Supp. 1978) provides for judicial review of agency decisions in the district court of appeals where the agency maintains its headquarters or where a party resides.

13. 1978 Fla. Laws ch. 78-85, § 3.

14. FLA. STAT. § 712.02 (1977).

15. 1978 Fla. Laws ch. 78-288; see *Odom v. Deltona Corp.*, 341 So. 2d 977 (Fla. 1977)

cation of resources<sup>16</sup> was established to promote cooperation among federal, state and local governments, particularly in areas affecting developments of regional impact, dredge and fill operations, coastal zone management,<sup>17</sup> and beach and shore preservation.<sup>18</sup>

## B. *Environmental Land and Water Management Act*

### 1. D.R.I. DESIGNATION CHANGES<sup>19</sup>

The Florida Environmental Land and Water Management Act<sup>20</sup> was passed in 1972 to coordinate decisions concerning the growth of land and water resources in the state. Regarded as a crucial piece of environmental legislation, the Act created a framework within which substantial policy decisionmaking authority was delegated to local authorities.<sup>21</sup>

The Act's provisions governing "Developments of Regional Impact" (D.R.I.) underwent significant changes during 1977-78.<sup>22</sup> In *General Development Corp. v. Division of State Planning*,<sup>23</sup> the District Court of Appeal, First District, examined the presumptions underlying stipulation of developments as those of regional impact,<sup>24</sup> and reviewed the use of "binding letters," as provided for by

(holding state's sovereign claim to beds underlying certain navigable waters extinguished by the Marketable Record Title Act).

16. 1978 Fla. Laws ch. 78-287 (codified at FLA. STAT. §§ 23.0112-.0193 (Supp. 1978)).

17. *Id.*, which enacted the Florida Coastal Management Act of 1972, 16 U.S.C. §§ 1451-64 (1976).

18. 1977 Fla. Laws ch. 77-379, which created the Erosion Control Trust Fund Account, whereby appropriations are retained in order to carry out proper state responsibilities in erosion control, beach preservation and hurricane protection, and 1978 Fla. Laws ch. 78-257, which established greater control for shoreline protection.

19. For an extensive discussion of the history and procedure governing "Developments of Regional Impact" (D.R.I.), see Pelham, *Regulating Developments of Regional Impact: Florida and the Model Code*, 29 U. FLA. L. REV. 789 (1977). Massachusetts has legislation which employs the D.R.I. concept. MASS. GEN. LAWS ANN. ch. 40A, § 7A (West 1975); An Act Protecting Land and Water on Martha's Vineyard, 1974 Mass. Acts ch. 637. This statutory scheme was upheld in *Island Properties, Inc. v. Martha's Vineyard Comm'n*, 361 N.E.2d 385 (Mass. 1977).

20. FLA. STAT. §§ 380.012-.12 (1977). For an analysis of the act, see Comment, *Environmental Land-Use Control: Common Law and Statutory Approaches*, 28 U. MIAMI L. REV. 135, 196 (1973). A similar regulatory scheme in the state of Rhode Island requires approval by the director of the municipality and department of natural resources in which land is located before a wetland may be altered. Fresh Water Wetlands Act, R.I. GEN LAWS §§ 2-1-18 to -24 (1976). See also Coastal Area Facility Review Act, N.J. STAT. ANN. §§ 13, 19-1 to -21 (West Supp. 1978).

21. FLA. STAT. § 380.021 (1977).

22. A D.R.I. is any development which by its character, magnitude or location would have an impact on an area larger than one county. *Id.* § 380.06(1).

23. 353 So. 2d 1199 (Fla. 1st DCA 1977) (statutory enumeration of factors which raise a presumption that the project constitutes a D.R.I. within the legislative definition).

24. FLA. ADMIN. CODE § 22F (1977).

section 380.06(4)(a) of the Florida Statutes.<sup>25</sup> The district court held inconclusive the statutory presumptions delineating which developments fall into the D.R.I. category; instead, the court found controlling the statutory definition of D.R.I.<sup>26</sup> According to the court, the location or character of the proposed development must be considered in the D.R.I. determination, in conjunction with the density and magnitude of the development.<sup>27</sup> In this manner, the ruling of the court enables projects to escape D.R.I. regulation although they meet the legislative criteria to create a D.R.I. presumption.

General Development additionally sought judicial review of the Division's revocation of a prior binding letter and its issuance of a new one, which applied the D.R.I. designation to the entire land holdings of General Development. The court found that, although such letters bind the "state, regional, and local agencies, as well as the developer,"<sup>28</sup> the Division's commitments in binding letters are only as good as its understanding of the developer's plan upon which the determination is predicated.<sup>29</sup> Thus, when the corporation does not perform its plan as agreed, the letter is revocable. The Division, however, may not employ vague language in a binding letter by stating that its prior determination may be revoked "if at any time in the future this development meets standards' for developments of regional impact."<sup>30</sup> Without a clear statement of the condition upon which the binding letter is issued, failure of the condition will not be presumed to release the Division from the letter.

The 1977 Florida Legislature amended and added new procedures to D.R.I. designations in sections 380.06 and 380.07 of the Florida Statutes.<sup>31</sup> Any future modifications of the guidelines contained in rule 22F-2 concerning D.R.I. designations must now be adopted by the Administration Commission, as defined by subsection 380.021(1) of the Florida Statutes, and reviewed by the legislature.<sup>32</sup> Such modifications will not affect rights vested prior to the Act's effective date of July 1, 1977, if the developer has changed his

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25. FLA. STAT. § 380.06 (1977), which provides that developers seeking to determine whether the proposed project will have regional impact may seek such a determination from the state land planning agency. The agency will issue a "binding letter" on the request within 60 days of its receipt.

26. 353 So. 2d at 1208.

27. *Id.*

28. FLA. STAT. § 380.06(4)(a) (1977).

29. 353 So. 2d at 1206.

30. *Id.*

31. 1977 Fla. Laws ch. 77-215.

32. *Id.* § 2 (codified at FLA. STAT. § 380.06(2) (1977)). The Administrative Commission consists of the governor and cabinet. FLA. STAT. § 380.021(c) (Supp. 1978).

position in reliance prior to that time.

Subsection 380.06(4)(b) was amended to preclude divestiture of a developer's rights unless a previously vested D.R.I. undergoes a substantial change. To determine whether a change is substantial, the state land planning agency must consider whether the altered project will conform to both Division rules and to the state comprehensive plan, whether it will meet the permit requirements of other affected agencies, the extent of regional impacts which would result from the proposed change, and the extent to which the developer has changed his position in reliance upon his vested rights status.<sup>33</sup>

Subsection 380.06(7)(g) was added to provide a standard by which to assess the need for further review of proposed change to a previously approved D.R.I. Such alteration may not be reviewed further unless the local government finds that it would result in "substantial deviation" from the terms of the original development order. The statutory definition of "substantial deviation" is "any change to the previously approved development of regional impact which creates a reasonable likelihood of additional adverse regional impact or any other regional impact created by the change not previously reviewed by the regional planning agency."<sup>34</sup> In determining whether a previously approved D.R.I. may be subject to further review, an addition to the Act requires that the local government afford an applicant, or any other substantially affected person, a reasonable opportunity to present evidence to support or refute an assertion of substantial deviation from the approved plan.<sup>35</sup>

Other changes were made in section 380 which modify D.R.I. application processing. The development order issued by the local government after hearing the application must include findings of fact and conclusions of law.<sup>36</sup> Developers anticipating expansion over an extended period of time may file a master plan for approval and subsequently present increments in the development for review.<sup>37</sup> Once a development order has been issued, it may be appealed within forty-five days to the Florida Land and Water Adjudicatory Commission.<sup>38</sup>

In *Sarasota County v. Department of Administration*,<sup>39</sup> the Dis-

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33. 1977 Fla. Laws ch. 77-215, § 2 (codified at FLA. STAT. § 380.06(4)(b) (1977)).

34. *Id.* (codified at FLA. STAT. § 380.06(7)(g) (1977)).

35. *Id.* (codified at FLA. STAT. § 380.06(7)(i) (1977)).

36. FLA. STAT. § 380.06(7)(e) (1977).

37. *Id.* § 380.06(13)(b).

38. *Id.* § 380.07(2) (Supp. 1978). Previously, only 30 days were allowed in which to file a notice of appeal.

39. 350 So. 2d 802 (Fla. 2d DCA 1977), *cert. denied*, 362 So. 2d 1056 (Fla. 1978). *See also*

trict Court of Appeal, Second District, considered the issue of who may seek to have a project determined to be a development of regional impact under section 380.06. Sarasota County petitioned the Department of Administration for a declaratory statement that an oil refinery being built in a neighboring county constituted a D.R.I. subject to the requirements of chapter 380 of the Florida Statutes and rule 22F-2 of the Florida Administrative Code. The Second District, in reviewing the declaratory statement issued by the Department, held that the county lacked standing to petition for the declaration. The court, in considering the comprehensive administrative scheme of section 380.06, held that the right to commence proceedings under section 380.06 is limited to the developer, the regional planning agency and appropriate state or local government planning agencies.<sup>40</sup> This ruling appears surprisingly at odds with the implicit intent of D.R.I. legislation to protect neighboring areas from projects with multi-county impact.

The majority in *Sarasota County* failed to reach the central substantive issue presented in the case: whether rule 22F-2 was all-inclusive in delineating projects of regional impact. The dissent by Chief Judge Boardman, however, clearly accords with the view of the District Court of Appeals, First District, that the criteria set forth in the rules are not exhaustive.<sup>41</sup>

The term "developer," as defined in chapter 380, was examined by the District Court of Appeal, Third District, in *General Electric Credit Corp. v. Metropolitan Dade County*.<sup>42</sup> The petitioner-mortgagee alleged that, as a subsequent interest holder, it was not a developer subject to the provisions of section 380.06.<sup>43</sup> The court held that the mortgagee must stand in the owner's shoes when seek-

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State *ex rel.* Sarasota County v. Boyer, 360 So. 2d 388 (Fla. 1978) (discharging rule nisi in prohibition).

40. 350 So. 2d at 806. The Second District determined that the statute does not directly state who may commence proceedings under § 380.06. The court, however, found guidance in §§ 380.06(3) and 380.06(4)(a). Section 380.06(3) allows regional planning agencies to recommend projects for D.R.I. designation. Section 380.06(4)(a) allows a developer to request a determination of D.R.I. status from the state law planning agency which then issues a binding letter of interpretation to all state, local and regional agencies, as well as to the developer. 350 So. 2d at 806.

41. 350 So. 2d at 808; *see text accompanying notes 16-20 supra*.

42. 346 So. 2d 1049 (Fla. 3d DCA 1977).

43. The actual developer submitted his development plan and application for zoning changes to the South Florida Regional Planning Commission under the provisions of chapter 380. The plan was rejected and the zoning changes denied. The denial of the zoning changes constituted a development order under § 380.031(2), which must be appealed by the developer to the Florida Land and Water Adjudication Commission. Also, the developer could have resubmitted the plan once it was revised for recommendations. Both the appeal and resubmission are administrative proceedings available to a developer. *Id.*



ing the identical result.<sup>44</sup> Consequently, the mortgagee was forced, under the exhaustion of remedies doctrine, to pursue its appeal before the Florida Land and Water Adjudication Commission according to procedures outlined in section 380.07.<sup>45</sup> The court reasoned that an alternative holding, permitting petitioner to appeal to the circuit court before applying to the Florida Land and Water Adjudication Commission, would "frustrate the obvious intent of the Legislature, which was to allow the fullest possible input by regional and state authorities into areas of development which will have extra-local impact."<sup>46</sup>

In *Estuary Properties, Inc. v. Board of County Commissioners*,<sup>47</sup> the Florida Division of Administration was presented with the question of whether denial of a D.R.I. development permit unreasonably limited the use by a private owner of his land, thus constituting a taking. The regional planning council had found that the proposed development would destroy 1,800 acres of mangrove forest, which served to protect local bays from the danger of upland run-off pollution.<sup>48</sup> All parties agreed that the taking issue involved the determination of a constitutional question which was beyond the power of an agency. The Division ruled, however, that requiring a land owner to refrain from an action which would result in pollution of state-owned waters was both reasonably restrictive of the use of land and statutorily mandated by chapter 380.<sup>49</sup>

## 2. CRITICAL AREA DESIGNATION<sup>50</sup>

In *Askew v. Cross Key Waterways*,<sup>51</sup> the Supreme Court of Florida declared unconstitutional subsections 380.05(1) and 380.05(2)(a) and (b) of the Florida Statutes, which granted authority to the Administrative Commission, upon the recommendation of the state land planning agency, to identify areas of critical environmental concern. The City of Key West and certain citizens groups

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44. *Id.* at 1053.

45. *Id.* at 1054.

46. *Id.*

47. 29 Florida Dep't of Administration Hearings 82 (June 20, 1977) [hereinafter cited as F.D.O.A.H.].

48. *Id.* at 98-99.

49. *Id.* at 100.

50. For an interesting contrast to the approach taken by Florida, see the Massachusetts scheme discussed at note 19 *supra*.

51. [1978] FLA. L.W. 546 (Fla. Nov. 24) (No. 52,251), *aff'g* 351 So. 2d 1062 (Fla. 1st DCA 1977) & *Askew v. Postal Colony Co.*, 348 So. 2d 338 (Fla. 1st DCA 1978) (consolidated with *Cross Key Waterways* by the Supreme Court of Florida to consider the constitutionality of FLA. STAT. § 380.05 (1977)).

challenged such designation of a major portion of the Florida Keys, asserting that section 380.05 improperly delegated legislative authority. The court found that "the primary policy decision of the area of critical state concern to be designated as well as principles for guiding development in that area are the sole province of an administrative body."<sup>52</sup> In effect, insufficiently articulated standards attempted to confer upon the agency, rather than upon the legislature, the power to make fundamental policy decisions. On that basis, the court held subsections 380.05(1) and 380.05(2)(a) and (b) unconstitutional under article II, section 3 of the Florida Constitution, which prohibits delegation of powers by one branch of government to another.<sup>53</sup>

Responding to this decision, the Florida Legislature, in special session, enacted a bill designating the Green Swamp and Florida Keys as areas of critical state concern.<sup>54</sup> The Act also provides for the formation of a joint select committee to study chapter 380 provisions, as well as all other rules and regulations governing the designation, regulation and protection of areas of critical state concern. The committee is not confined to an inquiry into current designations or procedures, "but rather may consider alternative concepts and processes to protect critical areas of the state."<sup>55</sup> Committee recommendations must be presented on or before March 15, 1979; repeal of the Act is scheduled for July 1, 1979.

Subsection 380.05(12) of the Florida Statutes (1977) provides for automatic termination of the designation, unless land development regulations are effectuated within twelve months after adoption of a rule identifying an area of critical state concern. In *Postal Colony Co. v. Askew*,<sup>56</sup> the District Court of Appeal, First District, adhered to strict construction of the twelve month rule.

### C. State Ownership

Controversy arose in 1977 regarding the title of the state to beds of certain nonmeandered lakes.<sup>57</sup> In *Odom v. Deltona Corp.*,<sup>58</sup> Del-

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52. [1978] FLA. L.W. at 552.

53. Article II, § 3 of the Florida Constitution provides as follows: "Branches of Government—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."

54. 1978 Fla. Laws ch. 78-627.

55. *Id.* § 3.

56. 348 So. 2d 338 (Fla. 1st DCA 1977), *aff'd on other grounds sub nom.*, *Askew v. Cross Key Waterways* [1978] FLA. L.W. 546 (Fla. Nov. 24) (No. 52,251).

57. When the United States obtained Florida from Spain, the federal government began a survey to ascertain which bodies of water were navigable. Surveyors determined navigabil-

tona sought injunctive and declaratory relief to resolve state claims to nonmeandered lakes located within the perimeter of lands owned by Deltona in Volusia and Hernando Counties. Trustees of the Internal Improvement Fund claimed that the lakes comprised navigable waters held by the state in its sovereign capacity for the public benefit. Title to the beds in question had been held by Deltona for a period exceeding the thirty years required for quieting title under the Marketable Record Title Act.<sup>59</sup>

Ruling that the Marketable Record Title Act applied to the state as well as to private citizens, the Supreme Court of Florida held that the state had validly conveyed title to the corporation under the Act without reserving public rights to the waters located on the land.<sup>60</sup> Title to the lakes, therefore, had properly vested in the corporation. The court went on to apply the doctrine of equitable estoppel to the state:

Stability of titles expressly requires that, when lawfully executed land conveyances are made by public officials to private citizens without reservation of public rights in and to the waters located thereon, a change of personnel among elected state officials should not authorize the government to take from the grantee the rights which have been conveyed previously without appropriate justification and compensation.<sup>61</sup>

The supreme court also offered an historical analysis of the definition of navigable waters which fall within the jurisdiction of the state. The *Odom* holding evidences judicial recognition of the importance of upholding previously granted private property rights in the face of "new standards of value relating to ecology and other matters created by population growth, recreational needs and other issues of current importance to Florida."<sup>62</sup>

In response to this decision as well as to claims involving the phosphate and oil industries, the Florida Legislature amended section 713.03 of the Florida Statutes, and thereby created a new class of exceptions to the Marketable Record Title Act.<sup>63</sup> This legislation

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ity through a process called meandering, whereby a meander line was established which followed the sinuosities of the body of water surveyed. The fact that a Florida waterbody was meandered raises a rebuttable presumption of navigability. The public has no right of access to such bodies under the trust doctrine. See E. MALONEY, S. PLAGER & F. BALDWIN, *WATER, LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE* 40 (1968).

58. 341 So. 2d 977 (Fla. 1976).

59. FLA. STAT. § 712.02 (1977).

60. 341 So. 2d at 989.

61. *Id.*

62. *Id.*

63. 1978 Fla. Laws ch. 78-288 (codified at FLA. STAT. § 712.03 (Supp. 1978)).

renders the *Odom* holding moot as it relates to the Marketable Record Title Act, since subsection 712.03(7) now provides: "State title to lands beneath navigable waters acquired by virtue of its sovereignty [is excepted from the Act]." <sup>64</sup> The State Lands Study Committee was created and authorized to analyze the effect of the Marketable Record Title Act upon prior or future sales of state-owned lands. <sup>65</sup>

Also passed during the same legislative session was an act exempting from the statute of limitations contained in chapter 95 of the Florida Statutes all actions brought on behalf of the state for conversion, trespass or other unauthorized use of state-owned lands. <sup>66</sup>

An amendment to subsection 253.115(4) of the Florida Statutes, effective July 1, 1977, exempts from the requirement of public notice and hearing called for under section 253.115 in the case of state land transactions, the lease of land by state agencies or political subdivisions under chapter 375, the Outdoor Recreation and Conservation Act. <sup>67</sup>

In the recent decision of *Weller v. Askew*, <sup>68</sup> private landowners challenged the designation and proposed acquisition of Big Cypress Swamp as a national preserve by the federal government. Plaintiffs alleged that funding of the acquisition by the State of Florida through the sale of bonds violated article VII, section 11(a) of the Florida Constitution. <sup>69</sup> The acquisition was further challenged as not constituting a state capital project. The Supreme Court of Florida, however, decided that the plan was undertaken to implement Florida's policy of preserving natural resources and scenic beauty pursuant to article II, section 7 of the Florida Constitution and, hence, could be considered a state capital project. According to the court, funds from the bonds contributed significantly to the conservational goal by inducing federal environmental protection of the

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64. FLA. STAT. § 712.03(7) (Supp. 1978).

65. 1978 Fla. Laws ch. 78-301, § 1. The report of the Committee is to be presented no later than March 1, 1979.

66. *Id.* ch. 78-289.

67. 1977 Fla. Laws ch. 77-130.

68. 363 So. 2d 1091 (Fla. 1978).

69. *Id.* at 1093. FLA. CONST. art. VII, § 11(a) provides:

State bonds pledging the full faith and credit of the state may be issued only to finance or refinance the cost of state capital projects upon approval by a vote of the electors; provided state bonds issued pursuant to this subsection (a) may be refunded without a vote of the electors at a lower net average interest cost rate. The total outstanding principal of state bonds issued pursuant to this subsection (a) shall never exceed fifty per cent of the total tax revenues of the state for the two preceding fiscal years.

### Big Cypress Area.<sup>70</sup>

Alternatively, the plaintiffs claimed that the grant of state-owned submerged lands to the federal government violated article X, section 11 of the Florida Constitution, which provides that the beds of navigable waters are held in trust for the people.<sup>71</sup> The court quickly disposed of this contention by finding that the "goal of environmental protection is unquestionably in the public interest."<sup>72</sup>

The Florida Division of Administration addressed the issue of granting easements over state-owned lands in *Florida Audubon Society v. Department of Natural Resources*.<sup>73</sup> The Division held that since the Trustees of the Internal Improvement Trust Fund are empowered to sell or convey limited interests in state-owned lands for the public benefit, they may also grant easements over those properties. The Division supported its holding by noting the consistent recognition by Florida courts of the broad responsibilities vested in the Trustees to manage state lands under chapter 253 of the Florida Statutes.<sup>74</sup>

In *Kruse v. Grokap, Inc.*,<sup>75</sup> an action involving private ownership of property bordering navigable waters, the District Court of Appeal, Second District, held that the validity of a title acquired through submergence and accretion rests upon a showing of where mean high tide falls. The owner of land ostensibly bordering on the Gulf of Mexico sought to quiet title to adjacent property along the water. A portion of the adjacent lot had slowly become submerged under low tide and reemerged subsequently as an addition to the owner's lot.

Under Florida law, private ownership of land bordering on navigable waters extends to the ordinary high water or high tide mark.<sup>76</sup> According to the doctrine of submergence and accretion, land is deemed lost once it is submerged below high tide. If, during the submergence, the high water mark has encroached on the land,

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70. 363 So. 2d at 1094.

71. *Id.*

72. *Id.*

73. 35 F.D.O.A.H. 249 (1977).

74. See FLA. STAT. § 253.02 (1977) (enumerating powers and duties of the Board of Trustees). See also *Hayes v. Bowman*, 91 So. 2d 795, 802 (Fla. 1957) (finding Trustees to have broad discretion in performing their statutory duty to manage state-owned property).

75. 349 So. 2d 788 (Fla. 2d DCA 1977).

76. The Second District cited *Miller v. Bay-to-Gulf, Inc.*, 141 Fla. 452, 193 So. 425 (1940), and *Brickell v. Trammell*, 77 Fla. 544, 82 So. 221 (1919), to support this proposition. See also *Borax Consol., Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935) (holding ordinary high water mark is synonymous with mean high tide).

upon reemergence at a different location it becomes the property of the remote owner through accretion. Utilizing the 18.6 periodic tide cycle to determine mean high tide, the Second District confronted the issue of whether appellee had sufficiently demonstrated the encroachment of mean high tide upon his property. Adjudging this problem to be of great public interest, however, the court certified the question of how to measure mean high tide to the Supreme Court of Florida.<sup>77</sup>

#### D. Dredge and Fill

An applicant for a dredge and fill permit must demonstrate that the long and short term effects of the project will neither violate environmental laws nor interfere with the coastal ecosystem or with natural resources in contravention of public interest.<sup>78</sup> Contrary to the cases evaluated in previous years, those reviewed in 1977 by the Division of Administration evidence consistent application of the statutory criteria.<sup>79</sup>

Under federal law, the Florida Department of Environmental Regulation must certify that granting a dredge and fill permit will not result in violation of applicable state water quality standards. No permit for dredging operations may be issued by the United States Army Corps of Engineers without such certification.<sup>80</sup>

In 1978, several proposals were made for altering chapters 17-3 and 17-4 of the Florida Administrative Code, both concerned with water quality standards. Suggested amendments to chapter 17-4<sup>81</sup> include new sections providing for the application of water quality standards to certain activities,<sup>82</sup> for more stringent protection of "Outstanding Florida Waters,"<sup>83</sup> for additional exemptions from

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77. 349 So. 2d at 791.

78. See FLA. ADMIN. CODE § 17-4.29(6) (implementing FLA. STAT. §§ 253.03, .123 & 403.061 (1977)).

79. See, e.g., Peterson v. Department of Environmental Regulation, 35 F.D.O.A.H. 77 (1977), motion to dismiss granted, 350 So. 2d 544 (Fla. 1st DCA 1977), aff'd without opinion, 363 So. 2d 872 (Fla. 1978); Johnstone v. Department of Environmental Regulation, 35 F.D.O.A.H. 62 (1977); Apple v. Department of Environmental Regulation, 35 F.D.O.A.H. 54 (1977); Board of County Comm'rs v. Department of Environmental Regulation, 35 F.D.O.A.H. 40 (1977); Lautham v. Department of Environmental Regulation, 35 F.D.O.A.H. 9 (1977).

80. Regulations for Army Corps of Engineers Permitting Procedure, 33 C.F.R. § 209.131(d)(11)(i) (1978) (implementing The Federal Water Quality Amendments to the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1975)).

81. See Department of Environmental Regulation publication of hearing on proposed rules (docket no. 77-26R) 4 FLA. ADMIN. WEEKLY 8 (June 16, 1978).

82. FLA. ADMIN. CODE § 17-4.241.

83. *Id.* § 17-4.242.

permit requirements,<sup>84</sup> and for equitable allocation of responsibility for reducing pollution of waters which fail to meet the water quality standards outlined in chapter 17-3 of the Florida Administrative Code.<sup>85</sup>

In 1977, the Department of Environmental Regulation was authorized to establish a permit system for the approval of spoil sites. Agencies sponsoring dredge and fill operations may request permits only if the projects will be supervised by the United States Army Corps of Engineers.<sup>86</sup>

As of 1978, construction permits for land fill operations issued by the Department under chapters 253 and 403 of the Florida Statutes may be extended from three to five years upon Department determination that the size and scope of the construction warrants such a continuation.<sup>87</sup> An additional extension of three years may be granted for good cause.

In *Albrecht v. Department of Environmental Regulation*,<sup>88</sup> owners of partially submerged lots sought review of a final order of the Department of Environmental Regulation denying a fill permit. They alleged that the Department lacked authority to consider the ecological factors set forth in section 253.124(2) of the Florida Statutes (1975) in reviewing a fill permit application. Additionally, the statutory phrase "contrary to public interest" was challenged as an overly broad administrative standard which improperly delegated legislative power to the Department of Environmental Regulation. The District Court of Appeal, First District, held that the Department was empowered to consider the criteria set forth in section 253.124(2). The court reasoned that the statute, which specifically lists the factors to be examined in application review and requires preparation of biological, hydrographic and ecological studies, contains adequate guidelines for the Department in reviewing permits. The court further noted that the procedural safeguards in chapter 120 have lessened the need for strict statutory standards.<sup>89</sup>

### E. State Comprehensive Plan

The State Comprehensive Planning Act was submitted for leg-

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84. *Id.* § 17-4.143.

85. *Id.* § 17-4.242. Proposed changes to chs. 17-3 and 17-4 will be discussed in the water quality section of this article.

86. 1977 Fla. Laws ch. 77-21 (codified at FLA. STAT. § 403.061 (1977)).

87. 1978 Fla. Laws. ch. 78-388 (codified at FLA. STAT. § 253.124 (Supp. 1978)).

88. 353 So. 2d 883 (Fla. 1st DCA 1977), *cert. denied*, 359 So. 2d 1210 (Fla. 1978).

89. *Id.* at 887.

islative approval in 1978 and passed with little fanfare.<sup>90</sup> The statute incorporates the elements of the original comprehensive state plan<sup>91</sup> drafted by the Division of State Planning and approved by Governor Askew. It emphatically asserts, however, that these elements are presently only advisory; the objectives enumerated in the incorporated plan may not be implemented without specific authorization by the legislature.<sup>92</sup>

The Division of State Planning currently serves in an advisory capacity, basing its analysis of specific programs on the State Comprehensive Plan. Thus, the Division reviews local government comprehensive plans under the Local Government Planning Act of 1975,<sup>93</sup> comments upon proposed electrical power plants pursuant to the Florida Electrical Power Plan Siting Act,<sup>94</sup> and evaluates federally funded projects in light of their relationship to the State Comprehensive Plan.

#### F. Coastal Zone Management

Coordination of federal and state efforts has been particularly apparent in the protection of coastal areas.<sup>95</sup> The federal interest derives from the commerce power to regulate waterways,<sup>96</sup> the state interest is grounded in its police powers.<sup>97</sup>

Congress provided for coastal zone protection in the Coastal Zone Management Act of 1972.<sup>98</sup> For the purpose of working alongside federal agencies, the Florida Legislature responded by passing the Florida Coastal Management Act of 1978.<sup>99</sup> The Act expresses a

90. 1978 Fla. Laws ch. 78-287.

91. DIVISION OF STATE PLANNING, THE FLORIDA STATE COMPREHENSIVE PLAN (1978).

92. 1978 Fla. Laws ch. 78-287, § 3 (codified at FLA. STAT. § 23.013(2) (Supp. 1978)).

93. FLA. STAT. § 163.3184(2) (1977).

94. *Id.* § 403.507(2).

95. See generally BUREAU OF COASTAL ZONE PLANNING, FLORIDA DEP'T OF NATURAL RESOURCES, ANALYSIS OF LAWS RELATING TO FLORIDA COASTAL ZONE MANAGEMENT (1976) [hereinafter cited as COASTAL ZONE LAWS ANALYSIS].

96. U.S. CONST. art. I, § 8.

97. COASTAL ZONE LAWS ANALYSIS, *supra* note 95, at 1. For an analysis of intergovernmental relations as they affect coastal zone management policies, see *id.* at 1-9.

98. 16 U.S.C. §§ 1451-64 (1976).

99. 1978 Fla. Laws ch. 78-287, §§ 5-10 (codified at FLA. STAT. §§ 380.20-.25 (Supp. 1978)). For a comparison of the concerns of another state with approximately 3,200 miles of shoreland along the Great Lakes, see Shoreland Protection and Management Act of 1970, MICH. COMP. LAWS ANN. §§ 281.631-.645 (Supp. 1976). For an analysis of Michigan's Act, see Note, *Assimilating Human Activity into the Shoreland Environment: The Michigan Shoreland Protection and Management Act of 1970*, 62 IOWA L. REV. 149 (1976). See also the statutory scheme for protection of Californian coastal areas, the California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-900 (West 1977) (repealing Coastal Zone Conservation Act of 1972, CAL. PUB. RES. CODE §§ 27000-650).



strong preference that local governments operate the state program wherever feasible.<sup>100</sup>

The state legislature rejected proposals which would have provided further review of coastal zone permit grants. Instead, it authorized the Department of Environmental Regulation to submit to the federal government a program based on existing law.<sup>101</sup> If there were a possibility that a specific activity might violate federal law, issuance or renewal of a license would constitute the state's finding that the activity comports with the federally-approved program. Conversely, denial of a permit or license would indicate the inconsistency of the activity with a federal plan. The Secretary of Commerce of the United States, however, could still determine that the activity was in the national interest.<sup>102</sup> It is hoped that this plan, established by the Florida State Comprehensive Planning Act of 1972 and amending chapter 23 of the Florida Statutes, will meet the minimum requirements to qualify for federal funding in the coming year.

#### G. *Beach and Shore Preservation*

Rights to the area between ordinary high and low water marks, known as the foreshore, are held in trust by the State of Florida for the beneficial use of the public.<sup>103</sup> Private ownership of riparian lands extending to the high water mark is unaffected, however, by this public trust doctrine.<sup>104</sup> The state, serving as mediator of the sometimes competing interests of private owners and local governments, must simultaneously attempt to protect beach and shore areas from environmental damage.

In 1977, the Florida Legislature created an "Erosion Control Trust Fund Account" to implement a long-range, comprehensive statewide plan for erosion control, beach preservation and hurricane protection.<sup>105</sup> Created out of treasury funds and administered by the Division of Marine Resources of the Department of Natural Resources, the account provides for up to seventy-five percent of the funding of nonfederal projects relating to biological monitoring, irrigation, monitoring of post-construction shoreline changes, construction of easements, rights of way and public access, costs of permits,

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100. FLA. STAT. § 380.20(1)(c) (Supp. 1978).

101. *Id.* § 380.20(2).

102. *Id.* § 380.23(1).

103. FLA. CONST. art. X, § 11.

104. See COASTAL ZONE LAWS ANALYSIS, *supra* note 95, at 437.

105. 1977 Fla. Laws ch. 77-379 (codified at FLA. STAT. § 161.091(1) (1977), as amended by 1978 Fla. Laws ch. 78-257, § 6).

costs of establishing erosion control lines, and all other nonfederal costs.<sup>106</sup>

In 1978, the Florida Legislature enacted general mandates regarding coastal construction control lines.<sup>107</sup> Section 161.042 of the Florida Statutes (Supp. 1978) was created to permit the Department of Natural Resources to require use for beach nourishment of sand dredged to maintain navigable depths in or next to a coastal barrier beach inlet under state control. An amendment to section 161.053 provided that, after public hearing, the Department shall establish coastal construction lines which define areas along the sand beaches within which severe fluctuation and erosion occur.<sup>108</sup> After designation of such lines, no construction seaward of them will be allowed without a permit from the Department. In lieu of setting coastal control lines, counties or municipalities may enact zoning or building codes, subject to Department approval.<sup>109</sup> The Department may also make recommendations to the governor and his cabinet regarding the purchase of lands seaward of the control line as "environmentally endangered . . . or as outdoor recreational lands."<sup>110</sup>

#### H. *State Wilderness System Act*

A 1977 amendment to the State Wilderness System Act charges the Department of Natural Resources with responsibility for administering wilderness areas in the state.<sup>111</sup> The Act permits the Department, after public hearing, to set aside wilderness areas upon the recommendation of the state agency involved in the management of such lands.<sup>112</sup> The Department is empowered to set aside lands "by any lawful means other than through the use of the power of eminent domain."<sup>113</sup> Lands owned by the Board of Trustees of the Internal Improvement Trust Fund may be so acquired,<sup>114</sup> as may be state-leased, privately-owned properties.<sup>115</sup> The Act creates an inter-agency advisory committee to assist in the selection of such areas.<sup>116</sup> Lands may be withdrawn from the wilderness system only after

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106. FLA. STAT. § 161.091(1) (Supp. 1978).

107. 1978 Fla. Laws ch. 78-257.

108. *Id.* § 5 (codified at FLA. STAT. § 161.053(1) (Supp. 1978)).

109. FLA. STAT. § 161.053(2) (Supp. 1978).

110. *Id.* § 161.052(9).

111. 1977 Fla. Laws ch. 77-126 (codified at FLA. STAT. § 258.17-.32 (1977)).

112. FLA. STAT. § 258.22 (1977).

113. *Id.* § 258.23(1).

114. *Id.* § 258.22(4).

115. *Id.* § 258.23(2).

116. *Id.* § 258.28.

public notice and formal resolution by the Department.<sup>117</sup> Each violation of the provisions of the Act carries a fine of up to \$500 to the offending person or corporation.<sup>118</sup>

### I. *Financial Incentives*

A recent enactment by the Florida Legislature offers tax incentives to owners of lands qualified as "environmentally endangered."<sup>119</sup> If the landowner agrees to convey property development rights to the local county commission or to the Board of Trustees of the Internal Improvement Fund, or covenants either to subject the land to the conservation restrictions of section 704.06 of the Florida Statutes (1977) or to refrain from employing it for other than outdoor recreation<sup>120</sup> or park uses for at least ten years, the property appraiser must value the land for tax purposes on the basis of such restrictive use.<sup>120</sup>

Through creation of the Coastal Energy Impact Program in 1978,<sup>121</sup> the legislature made financial assistance available, additionally, to local governments and state agencies. Grants awarded by the Division of State Planning may be used to help prepare for the growth stimulated by energy development in the areas of planning, credit assistance, repayment assistance and environmental protection.<sup>122</sup>

## IV. WATER

### A. *Overview*

Several important revisions of state water quality standards and permit-issuing procedures were proposed in 1977-78.<sup>123</sup> The Florida Safe Drinking Water Act<sup>124</sup> passed during the 1977 legislative session, and along with two judicial decisions, *Jupiter Inlet*

117. *Id.* § 258.32.

118. *Id.* § 258.331.

119. 1978 Fla. Laws ch. 78-354. Environmentally endangered land is defined as: [L]and which has unique ecological characteristics, rare or limited combinations of geological formations, or features of a rare or limited nature constituting habitat suitable for fish, plants, or wildlife, and which, if subject to . . . development restrictions appropriate to retaining such land or water areas predominately in their natural state, would be consistent with . . . conservation, recreation and open space . . . elements of the comprehensive plan . . . .

FLA. STAT. § 193.501(6)(h) (Supp. 1978).

120. *Id.* § 193.501(1),(3).

121. FLA. ADMIN. CODE ch. 22F-14 (amendments became effective April 5, 1978).

122. *Id.* ch. 22F-14.40.

123. *Id.* ch. 17-3 & -4. See also notes 81-85 and accompanying text *supra*.

124. 1977 Fla. Laws ch. 77-337 (codified at FLA. STAT. §§ 403.850-.864 (1977)).

*Corp. v. Village of Tequesta*<sup>125</sup> and *City of St. Petersburg v. Southwest Florida Water Management District*,<sup>126</sup> it further defined the doctrine of consumptive rights.

### B. Water Quality

Changes in chapter 17-3 of the Florida Administrative Code were contemplated by the Department of Environmental Regulation in 1978.<sup>127</sup> Implementation of the revisions would result in updating and clarifying water quality policies, procedures and criteria. Special protection would be afforded waters named as "Outstanding Florida Waters."<sup>128</sup> New water quality standards would provide minimum quality criteria for all waters,<sup>129</sup> as well as general criteria for surface<sup>130</sup> and ground waters.<sup>131</sup>

The new rules would reclassify state waters according to designated use, in order of the degree of protection required.<sup>132</sup> The classifications are as follows: Class 1-A "Potable Water Supplies—Surface Waters;"<sup>133</sup> Class 1-B "Potable and Agricultural Water Supplies and Storage—Groundwaters;"<sup>134</sup> Class II "Shellfish Propagation or Harvesting Surface Waters;"<sup>135</sup> Class III "Recreation—Propagation and Management of Fish and Wildlife—Surface Waters;"<sup>136</sup> Class IV "Agricultural Water Supplies—Surface Waters;"<sup>137</sup> Class V-A "Navigation, Utility and Industrial Use—Surface Waters,"<sup>138</sup> and Class V-B "Freshwater Storage and Utility and Industrial Use—Surface Waters."<sup>139</sup>

Alternatives of chapter 17-4 of the Florida Administrative Code relating to the issuance of permits were also proposed. One revision

125. 349 So. 2d 216 (Fla. 4th DCA 1977).

126. 335 So. 2d 796 (Fla. 2d DCA 1977).

127. See Department of Environmental Regulation publication of hearing on proposed rules (docket no. 77-25R, 4 FLA. ADMIN. WEEKLY 6 (June 16, 1978)).

128. *Id.* (proposed FLA. ADMIN. CODE § 17-3.041).

129. *Id.* (proposed FLA. ADMIN. CODE § 17-3.051).

130. *Id.* (proposed FLA. ADMIN. CODE § 17-3.061).

131. *Id.* (proposed FLA. ADMIN. CODE § 17-3.071).

132. *Id.* (proposed FLA. ADMIN. CODE § 17-3.081). See generally Trelease, *New Water Legislation: Drafting for Development, Efficient Allocation and Environmental Protection*, 12 LAND & WATER L. REV. 385 (1977).

133. Department of Environmental Regulation publication of hearing on proposed rules (docket no. 77-25R), 4 FLA. ADMIN. WEEKLY 6 (June 16, 1978) (proposed FLA. ADMIN. CODE § 17-3.091).

134. *Id.* (proposed FLA. ADMIN. CODE § 17-3.101).

135. *Id.* (proposed FLA. ADMIN. CODE § 17-3.111).

136. *Id.* (proposed FLA. ADMIN. CODE § 17-3.121).

137. *Id.* (proposed FLA. ADMIN. CODE § 17-3.131).

138. *Id.* (proposed FLA. ADMIN. CODE § 17-3.141).

139. *Id.* (proposed FLA. ADMIN. CODE § 17-3.151).

would allow the Department of Environmental Regulation to give special consideration to applications made by the Department of Health and Rehabilitative Services, *e.g.*, for mosquito control permits, or by the Department of Natural Resources, *e.g.*, for aquatic weed control permits, to use certain chemicals which might temporarily lower water quality but which ultimately would benefit public health.<sup>140</sup> Special protection for "Outstanding Florida Waters" would be afforded by strict standards for stationary installations in affected areas.<sup>141</sup>

Other changes would create exemptions for oil field salt water disposal wells. Permit issuance or certification would not be considered in the public interest after the effective date of any land or water management plan adopted by the legislature or by the Department of Environmental Regulation, unless application were made prior to the effective date of the plan, or unless stationary installations were to comport with the plan.<sup>142</sup>

Enforcement of established water quality standards through permit issuing procedures is an important function of the Department. In *City of Orlando v. Department of Environmental Regulation*,<sup>143</sup> a sewage treatment plant was denied a permit because the applicant could not show that its continued operation would not cause pollution in violation of the Class III water quality standards.<sup>144</sup> The hearing examiner noted that a Department memorandum had characterized the enforcement action as the "great motivator in [the] area of bringing awareness to governmental agencies of their responsibilities in the field of pollution abatement."<sup>145</sup>

To foster the protection of state water quality, the legislature authorized the Department to establish a method for determining the landward extent of water, based on ecological factors representing water fluctuation levels.<sup>146</sup>

*Peterson v. Department of Environmental Regulation*<sup>147</sup> ad-

140. *Id.* (proposed FLA. ADMIN. CODE § 17-4.241).

141. *Id.* (proposed FLA. ADMIN. CODE § 17-4.242).

142. *Id.* (proposed FLA. ADMIN. CODE § 17-4.248).

143. 35 F.D.O.A.H. 109 (May 25, 1977).

144. FLA. ADMIN. CODE § 17-3.09 ("Class III waters Recreation—propagation and management of fish and wildlife"). See Department of Environmental Regulation publication on proposed rules (docket no. 77-25R), 4 FLA. ADMIN. WEEKLY 6 (June 16, 1978) (proposed FLA. ADMIN. CODE § 17-3.121).

145. 35 F.D.O.A.H. at 116.

146. 1977 Fla. Laws ch. 77-170 (codified at FLA. STAT. § 403.072 (1977)).

147. 35 F.D.O.A.H. 77 (June 9, 1977), *motion to dismiss granted*, 350 So. 2d 544 (Fla. 1st DCA 1978) (judicial review of Department order permissible only after appeal to the full Environmental Regulation Commission).

dressed the question of land and water interface. Petitioner sought a permit to build several ponds on his property and to use the excavated materials for developing surrounding mangrove wetlands, asserting that the project would be in the public interest. The Department opposed the application, since it failed to assure that the project would not degrade water quality or cause pollution. Petitioner's survey of the mean high water line interpolated tidal data which had been gathered by measurements taken over a period of two months and averaged on the basis of an 18.6 year tidal cycle.<sup>148</sup> The hearing examiner found that the assertion that the project would be in the public interest lacked reasonable support, because petitioner's project was to fill in tidal wetlands, an area normally covered by average high tides<sup>149</sup> and falling within the state's regulatory powers under chapter 403 of the Florida Statutes.<sup>150</sup>

Legislative enactments in 1977-78 relating to water include the Water Resources Restoration and Preservation Act<sup>151</sup> and the Florida Safe Drinking Water Act.<sup>152</sup> Administrative rules involving public drinking water were also promulgated.<sup>153</sup>

The Water Restoration and Preservation Act requires the Department of Environmental Regulation to institute a program designed to restore and preserve bodies of water in Florida.<sup>154</sup> The Department is responsible for setting criteria by which to disburse funds from the General Revenue Fund, the Pollution Recovery Fund and other available federal monies.<sup>155</sup> The amended version of section 403.061 of the Florida Statutes (1977) empowers the Department additionally to control air and water pollution through the establishment of such a program.<sup>156</sup>

The Florida Safe Drinking Water Act<sup>157</sup> was the second major

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148. *Cf. Kruse v. Grokap, Inc.*, 349 So. 2d 788 (Fla. 2d DCA 1977) (finding evidence of tidal cycle at spot in question required to establish mean high tide).

149. Florida statutory and case law has recognized the high water mark as the logical point at which to differentiate water and land. *See E. MALONEY, S. PLAGER & F. BALDWIN*, *supra* note 57, at 67.

150. Furthermore, the court held that denial of the permit in this case did not rise to the level of a taking without just compensation. It observed that "the State, . . . in exercising its police powers, may regulate the use of property without having to compensate the owner even if the regulation diminishes the value of the property." 35 F.D.O.A.H. at 85.

151. 1977 Fla. Laws ch. 77-369 (codified at FLA. STAT. § 403.061(28) (1977)).

152. *Id.* ch. 77-337. (codified at FLA. STAT. §§ 381.261, .291, 403.101(3)-(7), .850-.864 (1977)).

153. FLA. ADMIN. CODE ch. 17-22 ("Public Drinking Water Systems").

154. 1977 Fla. Laws ch. 77-369, § 2 (codified at FLA. STAT. § 403.061(28) (1977)).

155. *Id.* § 1(2).

156. *Id.* § 2.

157. *Id.* ch. 77-337 (codified at FLA. STAT. §§ 381.261, .291, 403.101(3)-(7), .850-.864 (1977)).

legislative enactment of 1977. The statute is intended to assure the availability of safe drinking water. Primary responsibility for this water supply program has developed upon the Department of Environmental Regulation, with the Department of Health and Rehabilitative Services filling a supportive role.<sup>158</sup> The Act mandates the Department of Environmental Regulation to adopt and enforce primary and secondary drinking water rules and regulations in compliance with national standards;<sup>159</sup> variances or exemptions, however, may be granted.<sup>160</sup> After consultation with the Department of Health and Rehabilitative Services, the Department of Environmental Regulation may take emergency action to protect the public health in the event of imminent danger to the water system.<sup>161</sup> When a public water supply system fails to comply either with state primary and secondary drinking water regulations or with variances and exemptions, the owner or operator must notify the local public health departments, the Department of Environmental Regulation and the communications media.<sup>162</sup> The Department of Health and Rehabilitative Services may require owners of water systems which constitute a nuisance or menace to public health to correct the improper conditions.<sup>163</sup> A related statutory grant of authority empowers the Department of Environmental Regulation to regulate operation of water purification and waste treatment plants.<sup>164</sup>

Section 17-22 of the Florida Administrative Code sets out the state plan for implementation of both federal and state drinking water standards.<sup>165</sup> Under the Federal Safe Drinking Water Act,<sup>166</sup> the states possess primary responsibility for establishing acceptable public water system monitoring programs.<sup>167</sup> The Florida regulations seek to effectuate this through enumeration of quality standards, sampling methods<sup>168</sup> and requirements for construction, operation and maintenance of a public water system.<sup>169</sup> Variances and

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158. FLA. STAT. § 403.851 (1977).

159. *Id.* § 403.853.

160. *Id.* § 403.854.

161. *Id.* § 403.856. In case of imminent danger of a contaminant, the Department of Environmental Regulation may take action, which it deems necessary to protect the public health. Such actions include: (1) promulgation of emergency rules pursuant to § 120.54(9); (2) issuance of corrective orders; and (3) commencement of civil actions for a restraining order or injunction against violators. *Id.* § 403.855.

162. *Id.* § 403.857.

163. *Id.* § 381.291.

164. *Id.* § 403.101(3)-(7).

165. See generally FLA. ADMIN. CODE § 17-22 (implementing FLA. STAT. § 403.851 (1977)).

166. 42 U.S.C. §§ 201, 300f-300j(9) (Supp. V 1975).

167. In Florida, see generally FLA. ADMIN. CODE § 17-22.101 to .103.

168. *Id.* § 17-22.104 to .105.

169. *Id.* § 17-22.106 to .107.

exemptions may be granted.<sup>170</sup> The Department of Environmental Regulation is charged with surveillance of public water systems and the requisition of reports and records from the operators of such systems.<sup>171</sup> The regulations mandate owners not in compliance to notify persons served by the system.<sup>172</sup> The Department may invoke its powers under section 403.855 of the Florida Statutes (1977) to respond in an emergency situation where a contaminant presents an "imminent and substantial danger."<sup>173</sup> Penalties for violation of the Act include a fine of up to \$5,000 per day.<sup>174</sup>

### C. *Consumptive Use of Water*<sup>175</sup>

Examining the doctrine of consumptive water use in Florida, the District Court of Appeal, Fourth District, in *Jupiter Inlet Corp. v. Village of Tequesta*,<sup>176</sup> upheld a private right of ownership over the asserted public use. Plaintiff contended that the municipality had, through inverse condemnation, taken water from a shallow aquifer<sup>177</sup> lying beneath the owner's land. The court found the aquifer to be a form of private property, of which its owner could not be divested without due process and payment of just compensation.<sup>178</sup>

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170. *Id.* § 17-22.109.

171. *Id.* § 17-22.110 to .111.

172. *Id.* § 17-22.112.

173. *Id.* § 17-22.113.

174. *Id.* § 17-22.114.

175. The doctrine of consumptive use of water relates to a program in which employing artesian well water for other than beneficial purposes is prohibited. FLA. STAT. §§ 373.203-.249 (1977). Permits for the consumptive use of water may be issued when there is a "reasonable-beneficial use" for the water which "will not interfere with any presently existing legal use" and when this use is "consistent with the public interest." *Id.* § 373.223. See also discussion in *City of St. Petersburg v. Southwest Florida Water Management Dist.*, 355 So. 2d 796, 797-99 (Fla. 2d DCA 1977).

176. 349 So. 2d 216 (Fla. 4th DCA 1977). The Supreme Court of Florida has since handed down its decision in the case. *Village of Tequesta v. Jupiter Inlet Corp.*, 17 Fla. L.W. 193 (Fla. May 3, 1979) (No. 52,223). In quashing the holding of the Fourth District, the supreme court held that a landowner does not have a constitutionally protected property right in the water beneath his property requiring compensation for the taking of the water when used for a public purpose. Moreover, the Florida Water Resources Act now controls the use of water and, therefore, the landowner's only remedy is through proper application for a permit under that Act.

177. An aquifer is the waterbearing bed of porous, permeable sediment and the surface of the earth which stores ground water. An artesian aquifer occurs when water is confined under pressure beneath a relatively impervious formation. The Florida aquifer is the main source of water for consumptive use in the state. F. MALONEY, S. PLAGER & F. BALDWIN, *supra* note 57, at 141, cited in *City of St. Petersburg v. Southwest Florida Water Management District*, 355 So. 2d 796, 797 (1977).

178. *Id.* at 217. Cf. *White v. Pinellas County*, 185 So. 2d 468 (Fla. 1966); *State Road Dep't v. Tharp*, 146 Fla. 745, 1 So. 2d 868 (1941). But see *Valls v. Arnold Indus., Inc.*, 328 So. 2d 471 (Fla. 2d DCA 1966).



*Jupiter Inlet* is notable in its confirmation, or at least suggestion, of alternative means of adjudicating property rights in water without reference to the permit issuance requirements of chapter 373 of the Florida Statutes (1977). Because of its significance, the Fourth District certified the question to the Supreme Court of Florida.

In *City of St. Petersburg v. Southwest Florida Water Management District*,<sup>179</sup> the city petitioned for two consumptive use permits to withdraw water at volumes specified by the water management district. The District Court of Appeal, Second District, held that the volume measurement was consistent with state policy to maximize the use of resources. The court rejected plaintiff's argument that limitations on the withdrawal of water should have been set only by establishing the minimum level of water in the aquifer.<sup>180</sup>

Additional legislation concerning water use required water management districts, basins and taxing authorities subject to chapter 373 of the Florida Statutes<sup>181</sup> to provide for independent performance audits of their financial accounts. Other legislative action clarified the distinctions between water control and water management districts.<sup>182</sup>

In 1977, the attorney general issued two opinions on water use. One authorized the legislature to enact a special law dividing a drainage district into two zones and apportioning assessments accordingly;<sup>183</sup> the other transferred power to approve or deny agreements establishing regional water supply authorities from the governor and cabinet to the Department of Environmental Regulation,<sup>184</sup> as provided in the Florida Environmental Reorganization Act of 1975.<sup>185</sup>

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179. 355 So. 2d 796 (Fla. 2d DCA 1977).

180. *Id.* at 799. See FLA. STAT. § 373.016 (1977). The court observed further that ch. 373 of the Florida Statutes did refer specifically to measurement of water withdrawals by volume. See, e.g., FLA. STAT. § 373.299 (1977). On the further stated policy of efficient use and conservation of groundwater in Florida, see THE FLORIDA STATE COMPREHENSIVE PLAN (discussed in notes 90-94 and accompanying text *supra*). Under Objective D of the plan, the suggestion is made that the Department of Environmental Regulation and Water Management districts should: (1) identify and protect recharge areas; (2) preserve or restructure hydrological relationships to maintain the natural or highest practical ground water levels; (3) install optimum water retention capability in canals and ditches; (4) use water retention and other programs to increase percolation in recharge areas. See THE FLORIDA STATE COMPREHENSIVE PLAN, *supra* note 91, at 177.

181. FLA. STAT. § 373.507 (Supp. 1976).

182. 1978 Fla. Laws ch. 78-153.

183. FLA. OP. ATT'Y GEN. 77-45 (1977).

184. *Id.* at 77-51.

185. 1975 Fla. Laws ch. 75-22.

## V. AIR

## A. Overview

The Clean Air Act Amendments of 1977<sup>186</sup> continue to promote the federal-state-local partnership initiated by the passage of the 1970 Clean Air Act.<sup>187</sup> Several important deadlines were established which will have a direct impact on Florida air pollution regulations.<sup>188</sup> Nonattainment areas,<sup>189</sup> for example, must comply with federal standards by June 30, 1979; otherwise, no new construction of stationary sources, such as physical plants, will be permitted.<sup>190</sup> Areas which presently surpass federal standards of cleanliness must continue to do so.<sup>191</sup> Florida regulations in the area of "prevention of significant deterioration"<sup>192</sup> follow the Federal Act, although they have not yet been approved by the Environmental Protection Agency (EPA). The Florida Legislature also provided that implementation of air quality standards should proceed on a countywide basis. Such standards will preempt any attempts by municipalities to regulate air quality.<sup>193</sup>

## B. Impact on Florida of the Clean Air Act Amendments of 1977

Enactment of the Clean Air Act Amendments of 1977<sup>194</sup> marked a milestone in the effective enforcement of air pollution laws. Its present and potential impact upon Florida cannot be overemphasized. Many commentators have begun to sift through the provision of the Act, making predictions of the probable changes in local law pursuant to federal mandate.<sup>195</sup>

A basic premise of the Clean Air Act and its 1977 amendments

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186. 42 U.S.C.A. §§ 7001-7706 (West Supp. 1977).

187. 42 U.S.C. §§ 1857-1858a (1970) (current version at 42 U.S.C.A. §§ 7401-7642 (West Supp. 1977)).

188. For critical comment on Florida's responsibilities under the Clean Air Act Amendments of 1977, see Mastriana, *supra* note 4.

189. For any air pollutant, a nonattainment area is one "which is shown by monitored data or which is qualified by air quality modeling . . . to exceed any national ambient air quality standards for such pollutants." 42 U.S.C.A. § 7501(2) (West Supp. 1977).

190. *Id.* § 7410(a)(2)(I).

191. See *Id.* §§ 7470-71; Raffle, *The New Clean Air Act—Getting Clean and Staying Clean*, [1978] ENVIR. REP. (BNA) (Monograph No. 26).

192. FLA. ADMIN. CODE § 17-2.04.

193. FLA. STAT. § 125.275 (Supp. 1978).

194. Pub. L. No. 95-95, 91 Stat. 685-796 (amending 42 U.S.C. §§ 1857-1858a (1970)).

195. See, e.g., J. ARBUCKLE, M. JAMES, M. MILLER, T. SULLIVAN & T. WATSON, ENVIRONMENTAL LAW HANDBOOK (5th ed. 1978); Davis, Kurtz, Leape & Magill, *The Clean Air Act Amendments of 1977: Away from Technology Forcing?*, 2 HARV. ENV'T'L L. REV. 1 (1977); Raffle, *supra* note 191. See also authorities cited in note 4 *supra*.

is that federal and state governments must work cooperatively to prevent air pollution. Congress found that state and local governments possess primary responsibility for controlling air pollution with the federal government providing financial assistance and leadership to develop a joint program.<sup>196</sup> To fulfill this duty, the states must implement primary and secondary ambient air quality standards, as set by the EPA.<sup>197</sup> Under the Clean Air Act of 1970,<sup>198</sup> states must submit plans to meet the primary ambient air quality standards set by the administrator of the EPA. The Act, however, provided only general guidelines for procedures to be followed in the event of a state's failure to submit a plan.

The 1977 amendments require the states to submit revisions of their plans to comply with national ambient air quality standards within nine months of their promulgation by the EPA.<sup>199</sup> The amendments also require the administrator to complete review of national ambient air quality standards by December 31, 1980.<sup>200</sup> These changes should impact most critically upon nonattainment areas, as well as upon those which have air quality exceeding the minimum requirements sought to be protected by the designation of "prevention of significant deterioration."<sup>201</sup>

In nonattainment areas, states must revise their implementation plans by July 1, 1979, in order to permit construction or modification of any major stationary source in such areas.<sup>202</sup> The submitted plans must provide for attainment of the national ambient air quality standards "as expeditiously as practicable, but in the case of national primary ambient quality standards, not later than December 31, 1982."<sup>203</sup>

Prior to July 1, 1979, however, a state may elect to operate under the "emission offset" policy of the EPA<sup>204</sup> or to obtain the

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196. 42 U.S.C.A. § 7401(a)(3)-(4) (West Supp. 1977).

197. *Id.* §§ 7401(a)(3)-(4), 7407(a), 7410(a)(1). Some 246 state implementation plans in 45 states still require revision, as reported at [1976] ENVIR. REP. (BNA) 435.

198. 42 U.S.C. §§ 1857-1858a (1970) (current version at 42 U.S.C.A. §§ 7401-7642 (West Supp. 1977)).

199. 42 U.S.C.A. § 7410(a)(1) (West Supp. 1977).

200. *Id.* § 7409(d)(1).

201. *Id.* §§ 7470-79, 7491.

202. *Id.* §§ 7410(a)(2)(I). For a discussion of new standards involved with prevention of significant deterioration, see Pendley & Morgan, *The Clean Air Act Amendments of 1977: A Selective Legislative Analysis*, 13 LAND AND WATER L. REV. 747, 749-82 (1978); Tundermann, *Protecting Visibility: The Key To Preventing Significant Deterioration in Western Air Quality*, 13 NAT. RESOURCES LAW. 373 (1978).

203. 42 U.S.C.A. § 7502(a)(1) (West Supp. 1977).

204. The offset policy would allow a major source to locate in an area only if: (1) the new source could achieve "lowest achievable emission rate" for that type of source; (2) all its

approval of an alternative program which would attain the same overall emission reduction in the area by January 1, 1978.<sup>205</sup>

C. *Florida's Response to Date: Chapter 17-2 of the Florida Administrative Code*

Florida does not yet have a state implementation plan approved by the EPA. Clearly, unless a program is submitted by the deadline of July 1, 1979, no new economic growth will be permitted in nonattainment areas.<sup>206</sup>

The Department of Environmental Regulation has enacted its own prevention of significant deterioration standards in section 17-2.04 of the Florida Administrative Code.<sup>207</sup> These standards allow only limited increases in the ambient concentration of sulfur dioxide and particulate matter, in accordance with specific deterioration classes.<sup>208</sup> Section 17-2.03 of the Florida Administrative Code directs the Department to determine whether emission has been reduced to the lowest possible amount that can be produced by the "best available control technology."<sup>209</sup> Since the new rule permits use of the same applications in compliance with federal and state regulations, this revision will reduce the total administrative workload. Thus, the rule will eliminate duplication of effort and decrease the costs involved.<sup>210</sup>

The EPA, however, has not yet approved Florida's plan under section 17-2.03 of the Florida Administrative Code. Although provisions of both are similar, to date a two-tier review has been necessary. Change from the old standard of "latest reasonably available control technology" to the new case by case approach of the recent amendments may facilitate acceptance of Florida's scheme by the EPA. It also raises questions, however, as to whether under Florida law the Department of Environmental Regulation, as opposed to the Environmental Regulation Commission, may make amendment determinations.<sup>211</sup>

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existing sources within the same air quality control region were within state implementation plan requirements.

205. See § 129(a)(2) of the Clean Air Act Amendments of 1977 (appearing as a note under 42 U.S.C.A. § 7502 (West Supp. 1977)).

206. 42 U.S.C.A. § 7410(a)(2)(I) (West Supp. 1977).

207. FLA. ADMIN. CODE § 17-2.04 (amended June 8, 1978).

208. *Id.*

209. *Id.* § 17-2.03 (amended June 8, 1978) (tracing the federal definition at 42 U.S.C.A. § 7479(3) (West Supp. 1977)).

210. See Department of Environmental Regulation publication of hearing on proposed rules (docket nos. 77-15R & 16R), 4 FLA. ADMIN. WEEKLY 36-8 (Jan. 6, 1978) (proposed FLA. ADMIN. CODE §§ 17-2.02 & -2.03).

211. *Id.*

#### D. *Nonattainment County Air Ordinance*

The Florida Legislature has authorized the Board of County Commissioners of any county designated as a nonattainment area under both state and federal laws to adopt ordinances for the countywide protection of air quality.<sup>212</sup> The county commission will be the local implementing authority for the plan adopted in compliance with state and federal law. Municipalities are preempted from promulgating their own ordinances.<sup>213</sup> The Act further precludes counties from setting air quality standards which are more stringent than current state or federal standards.<sup>214</sup>

### VI. WASTE DISPOSAL

In 1977, the Florida Legislature enacted a bill requiring local governments to institute resource recovery and management plans which conform to the state program.<sup>215</sup> The Act provides for the creation of a Resource Recovery Council to approve proposed state and local resource recovery plans and to make recommendations to the Department of Environmental Regulation. This thirteen-member council consists of nine appointees of the governor representing varied community interests, together with two state senators and representatives.<sup>216</sup> This council will approve proposed state and local resource recovery programs and make recommendations to the Department. Abolition of the council is scheduled for October 1, 1980.

Changes in chapter 17-6 of the Florida Administrative Code, entitled "Domestic and Industrial Waste Treatment," were proposed in 1978.<sup>217</sup> The proposal would revise effluent limitations<sup>218</sup> and would also define an industrial waste water plan.<sup>219</sup>

In 1978, the Florida Legislature enacted a bill requiring the Department of Environmental Regulation to "encourage, or require, certain solid waste disposal areas to include certain facilities, equip-

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212. 1978 Fla. Laws ch. 78-240 (codified at FLA. STAT. § 125.275 (Supp. 1978)).

213. FLA. STAT. § 125.275(1)-(2) (Supp. 1978).

214. *Id.* § 125.275(3).

215. 1977 Fla. Laws ch. 77-466 (codified at FLA. STAT. §§ 403.706(1)-(2), .710(1),(4)&(9) (1977)).

216. FLA. STAT. § 403.710 (1977).

217. See Department of Environmental Regulation publication of hearing on proposed rule changes (docket no. 77-27R), 4 FLA. ADMIN. WEEKLY 10 (June 16, 1978).

218. *Id.* (proposed amendments to FLA. ADMIN. CODE § 17-6.10 to 6.20).

219. *Id.* (proposed amendment to FLA. ADMIN. CODE § 17-6.02).

ment and personnel," and to promulgate rules relating to certain types of solid waste disposal areas.<sup>220</sup>

## VII. CONCLUSION

No clear trend in Florida environmental law is apparent. Both within and without the state, a lack of harmony and predictability permeates those bodies implementing environmental programs. During the 1977-78 period, the Florida courts and legislature have increasingly recognized private property rights and the need to temper previously unchecked environmental controls. The Florida Private Property Rights Act of 1978<sup>221</sup> strongly reflects this shift. Increasing judicial concern for private rights as they conflict with environmental concerns is manifest in the *Cross Key Waterways*,<sup>222</sup> *Jupiter Inlet*<sup>223</sup> and *Odom*<sup>224</sup> decisions.

Contrary to the seeming attitude of the Florida Legislature and judiciary are the congressional mandates set forth in recent federal legislation, such as the 1977 Amendments to the Clean Air Act<sup>225</sup> and the Clean Water Act.<sup>226</sup> These, of course, necessitate sweeping changes in Florida's regulations and programs. When coupled with the tendency of the state environmental bureaucracy to strengthen its controls, the congressional objectives appear to conflict with those set by the Florida Legislature and courts. Whether these state branches are out of step with, or indeed ahead of, the slower reacting federal legislature will be determined only as the trends and directions at both levels become more fixed.

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220. 1978 Fla. Laws ch. 78-387, §§ 1-4 (codified at FLA. STAT. §§ 407.703(10)-(15), .704(12)-(15), .707(2)(c), .7075 (Supp. 1978)).

221. *Id.* ch. 78-85.

222. *Askew v. Cross Key Waterways*, [1978] FLA. L.W. 546 (Fla. Nov. 24) (No. 52,251).

223. *Jupiter Inlet Corp. v. Village of Tequesta*, 349 So. 2d 216 (Fla. 4th DCA 1977).

224. *Odom v. Deltona Corp.*, 341 So. 2d 977 (Fla. 1977).

225. 42 U.S.C.A. § 7401-7642 (West Supp. 1977).

226. 33 U.S.C.A. § 1251-1376 (West Supp. 1977).