

Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 12
Issue 2 *Spring 2005*

Article 2

2005

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Recommended Citation

Alfred R. Light, *Of Square Pegs, Round Holes and Recalcitrants Lying in the Weeds: Superfund's Legal Lessons for Everglades Restoration*, 12 Mo. Env'tl. L. & Pol'y Rev. 91 (2005)
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ARTICLE

OF SQUARE PEGS, ROUND HOLES AND RECALCITRANTS LYING IN THE WEEDS:
SUPERFUND'S LEGAL LESSONS FOR EVERGLADES RESTORATION

Alfred R. Light *

Florida is in the midst of a major experiment in ecosystem restoration.¹ Under the leadership of the U.S. Army Corps of Engineers (the Corps) and the South Florida Water Management District (SFWMD), dozens of projects are being planned to restore the Everglades while providing a water supply for the growing South Florida population and preserving flood control.² Having obtained express Congressional and State legislative approval of the Comprehensive Everglades Restoration Plan (CERP), the Corps and the District have developed a decision-making and project implementation process which is open and transparent.³ Anyone interested in any of a number of Everglades programs or specific projects can read relevant materials on the Corps' website and attend the Project Delivery Team (PDT) meetings at which the scientific and technical decisions are crafted.⁴ Major policy meetings, such as those of the Governing Board of the SFWMD, and the Task Force and Working Group of the South Florida Ecosystem Restoration Task Force, are broadcast live for anyone on the

* Professor of Law, St. Thomas University School of Law, Miami Gardens, Florida; B.A. The Johns Hopkins University, Ph.D. University of North Carolina at Chapel Hill. J.D. Harvard. Paper presented at the First National Conference on Ecosystem Restoration, December 8, 2004, Orlando, Florida. This research has been supported by the United States Environmental Protection Agency, Science to Achieve Results (STAR) Program, EPA Grant #R830843, *Risk Communication in Community Participation: Comparing Regional Programs in South Florida*. However, the analysis and conclusions herein are those of the author alone.

¹ See W. HODDING CARTER, *STOLEN WATER: SAVING THE EVERGLADES FROM ITS FRIENDS, FOES, AND FLORIDA* (Simon & Schuster 2004); John J. Fumero, *Florida Water Law and Environmental Water Supply for Everglades Restoration*, 18 J. LAND USE & ENVTL. L. 379 (2003); John J. Fumero & Keith W. Rizzardi, *The Everglades Ecosystem: From Engineering to Litigation to Consensus-Based Restoration*, 13 ST. THOMAS L. REV. 667 (2001); Keith W. Rizzardi, *Translating Science into Law: Phosphorus Standards in the Everglades*, 17 J. LAND USE & ENVTL. L. 149 (2001); Mary Doyle, *Implementing Everglades Restoration*, 17 J. LAND USE & ENVTL. L. 59 (2001); Alfred R. Light, *Ecosystem Management in the Everglades*, 14 NAT. RESOURCES & ENV'T 166 (2000); Michael Voss, Comment, *The Central and Southern Florida Project Comprehensive Review Study: Restoring the Everglades*, 27 ECOLOGY L.Q. 751 (2000). There is an ongoing debate over what ecosystem restoration, ecosystem management, or ecosystem management is. See J. B. Ruhl, *The Myth of What is Inevitable Under Ecosystem Management: A Response to Pardy*, 21 PACE ENVTL. L. REV. 315 (2004); Bruce Pardy, *Changing Nature: the Myth of the Inevitability of Ecosystem Management*, 20 PACE ENVTL. L. REV. 675 (2003).

² The Internet is a good way to keep track of all the projects. The official website of the Comprehensive Everglades Restoration Plan (CERP) is <http://www.evergladesplan.org>. Also very useful is the official website of the intergovernmental South Florida Ecosystem Restoration Task Force, available at <http://www.sfrestore.org> (last visited Feb. 4, 2005), and the website for the South Florida Water Management District (SFWMD), available at <http://www.sfwmd.gov> (last visited Feb. 4, 2005). Both Congress, in the Water Resources Development Act (WRDA) of 2000, and the State of Florida, in the Comprehensive Everglades Restoration Plan Act, have established the threefold purposes of the Plan: restoration, water supply, and flood protection; the representations of journalist Hodding Carter and the out-of-state newspapers such as the Washington Post to the contrary notwithstanding. Water Resources Development Act (WRDA) of 2000, Pub. L. 106-541, § 601(b), 114 Stat. 2572, 2680-81 (2000); FLA. STAT. ch. 1502(2)(a) (West Supp. 2005). *Contra* CARTER, *supra* note 1, at 255-57 (characterizing CERP as a "half-assed" solution).

A series of *Washington Post* articles criticizing Everglades restoration are posted on the newspaper's website at <http://www.washingtonpost.com/wp-dyn/nation/specials/everglades/> (last visited Jan. 30, 2005). See also *infra* notes 157-67 and accompanying text; Michael Grunwald, *A Rescue Plan. Bold and Uncertain: Scientists, Federal Officials Question Benefits for Ailing Ecosystem*, WASHINGTON POST, June 23, 2003, at A01 (Everglades restoration is "riddled with uncertainties and delayed for decades, though it delivers swift and sure economic benefits to Florida homeowners, agribusinesses and developers.").

³ Congress approved the CERP in the WRDA § 601(b). The Corp's decision-making process is set forth in its Programmatic Regulations. Programmatic Regulations for the CERP, 68 Fed. Reg. 64,200 (Nov. 12, 2003) (to be codified at 33 C.F.R. Part 385).

⁴ The ongoing projects are set forth on the official website of the CERP, available at http://www.evergladesplan.org/pm/landing_pp.cfm (last visited Feb. 01, 2005); and the schedule of meetings of the Public Delivery Teams is found on CERP's website, available at <http://www.evergladesplan.org/news/calendar.cfm> (last visited Jan. 30, 2005).

web.⁵ And this is in addition to an elaborate outreach program and formal public participation process seeking comment and public interaction with respect to key Everglades' restoration milestones, such as Program Management Plans (PMPs), Project Implementation Reports (PIRs), Pilot Project Design Reports (PPDRs), Feasibility Studies (FSs), and Environmental Impact Statements (EISs).⁶

In late 2004, the first set of PIRs coming out of CERP made their way to Congress for authorization and construction funding.⁷ The local consensus supporting the Indian River Lagoon - South project, estimated to cost in excess of a billion dollars, was remarkable, as local governments; environmental groups; commercial, industrial, and recreational interests; scientists, and academics met at a local community center in Martin County, Florida, to push for the project.⁸ The Indian River Lagoon - South project looks forward to the restoration of oyster beds, a living St. Lucie River, and the elimination of fish-kills associated with freshwater discharges from Lake Okeechobee during Florida's wet season.⁹ While airboat operators complained about access restrictions, environmental groups cheered the PIR for restoration of the Southern Golden Gates Estate (Picayune Strand) project, which seeks to restore over 55,000 acres.¹⁰

A somewhat more controversial set of projects soon will follow Indian River Lagoon and Picayune Strand, the regional study and pilot projects needed to assess the viability of Aquifer Storage and Recovery (ASR) technology to store and later use Everglades' water now "discharged to tide."¹¹ In Florida, where municipalities have used deep well injection for disposal of sewage waters for decades,¹² there is considerable public confusion and skepticism about ASR.¹³ Despite an initial underestimation of costs for the pilot projects,

⁵ For meetings of SFWMD, see <http://www.sfwmd.gov/site/index.php?id=69> (last visited Jan. 30, 2005); for meetings of South Florida Ecosystem Restoration's Task Force and Working Group, see <http://www.sfrestore.org/calendar/index.html> (last visited Jan. 30, 2005).

⁶ See, e.g., Pub. Outreach, 33 C.F.R. § 385.18 (2004); Project Mgmt. Plans, 33 C.F.R. § 385.24; Program Mgmt. Plans, 33 C.F.R. § 383.25; Project Implementation Reports, 33 C.F.R. § 385.26; Project Cooperation Agreements, 33 C.F.R. § 385.27; Programmatic Regulations for the CERP, 68 Fed. Reg. 64,230-36 (Nov. 12, 2003) (to be codified at 33 C.F.R. pt. 385).

⁷ The Chief of Engineers submitted the report on the Indian River Lagoon - South project to the Secretary of the Army for transmittal to Congress on August 6, 2004. Memorandum from Lt. Gen. Carl A. Strock, Chief of Army Corps of Eng'rs. to the Sec'y of the Army (Aug. 6, 2004), available at

http://www.evergladesplan.org/pm/projects/project_docs/pdp_07_irl_south/080604_irl_s_final_report.pdf.

⁸ JACKSONVILLE DIST., U.S. ARMY CORPS OF ENG'RS, INDIAN RIVER LAGOON - SOUTH FINAL INTEGRATED PROJECT IMPLEMENTATION REPORT (PIR) AND ENVIRONMENTAL IMPACT STUDY (EIS) (2004), available at

http://www.evergladesplan.org/pm/studies/irl_south_pir.cfm (posted Apr. 20, 2004). Also of interest is Martin County's website tracking the project. *CERP / Indian River Lagoon Study*, County of Martin, Fla., available at

<http://www.martin.fl.us/GOVT/depts/adm/rivers/> (last updated Dec. 2, 2004).

⁹ See the project description for Indian River Lagoon - South on the CERP website at

http://www.evergladesplan.org/pm/projects/proj_07_irl_south.cfm (last visited Jan. 30, 2005).

¹⁰ See JACKSONVILLE DIST., U.S. ARMY CORPS OF ENG'RS, S. GOLDEN GATES ESTATES, DRAFT INTEGRATED PIR & EIS (2004),

available at http://www.evergladesplan.org/pm/projects/docs_30_sgge_pir.cfm. In October 2004, Florida Governor Jeb Bush and SFWMD entered into an agreement to accelerate construction of some of these less controversial restoration projects (in cooperation with the Corps) in advance of receipt of federal appropriations in a program colloquially known as ACCELER8 Everglades Now. See also *ACCELER8 EVERGLADES NOW!: An Overview*, SFWMD, at http://www.evergladesnow.org/a8_overview.shtml (last visited Jan. 30, 2005). Under the program, designs proceed in advance of the completion of the decision-making documents needed for federal appropriations. *Id.*

¹¹ See JACKSONVILLE DIST., U.S. ARMY CORP OF ENG'RS, FINAL AQUIFER STORAGE AND RECOVERY (ASR) PILOT PROJECT DESIGN REPORT (PPDR)/FINAL EIS, VOL. 1 (2004) [hereinafter PILOT PROJECT DESIGN REPORT], available at

http://www.evergladesplan.org/pm/projects/project_docs/pdp_asr_combined/asr_ppdr_main_report_final.pdf; see also JACKSONVILLE DIST., U.S. ARMY CORP. OF ENG'RS, FINAL EIS: ASR PPDR (2004), available at

http://www.evergladesplan.org/pm/projects/project_docs/pdp_asr_combined/asr_eis_main_body_final_oct_2004.pdf.

¹² The state's program for Underground Injection and Control is described on the Florida Department of Environmental Protection's website at <http://www.dep.state.fl.us/water/uic/index.htm> (last visited Jan. 30, 2005).

¹³ LaBelle Public Meeting (Jun. 3, 2004) (personal observation of discussion at public meeting by Alfred R. Light, Principal Investigator). See generally PILOT PROJECT DESIGN REPORT, *supra* note 11, at App. E.

the Corps is proceeding with the regional study and pilot projects while it assesses alternatives should ASR not prove feasible on the scale contemplated in the "Yellow Book."¹⁴ Public meetings on the regional study and pilot projects were quite open, as Corps and SFWMD hydrogeologists and engineers engaged the few (at Okeechobee, LaBelle, and Jupiter) or the many (Boca Raton).¹⁵

CERP is still in its early stages of development. Most projects are still years away from submitting the PIR that must precede any specific project appropriation to Congress.¹⁶ CERP involves massive intergovernmental collaboration and cooperation. Although the Corps and SFWMD are making heroic efforts to involve all interested federal, state, and local agencies in CERP decision-making, there have been obstacles. For example, in order to keep these intergovernmental meetings open without violating the Federal Advisory Committee Act, Florida's Sunshine Act, the Corps structures CERP Project Delivery Team (PDT) (meetings as well as other meetings of federal, state, and local representatives) to allow for "public comment" from non-governmental entities and persons, but not to permit dialogue.¹⁷ After gaining some experience with intergovernmental collaboration on individual projects in these teams, it became apparent to the Corps that the multiplicity of projects was stretching the capabilities of local environmental agencies. To address this, the Corps decided to convene periodic regional PDT meetings for two CERP subregions, Central Florida and South Florida, to resolve controversies with agency representatives who could speak with authority regarding the agency's position.¹⁸

Obviously much of the value of intergovernmental cooperation and public participation is in avoiding or resolving controversy early. Students of administrative law also understand that the better the administrative process preceding an agency decision, the less likely a court will go beyond the administrative record on

¹⁴ The *Yellow Book* (CERP, also known as the "Restudy"), approved by Congress in WRDA 2000, can be viewed on the internet in its entirety. See JACKSONVILLE DIST., U.S. ARMY CORP OF ENG'RS, CENTRAL AND SOUTHERN FLORIDA PROJECT COMPREHENSIVE REVIEW STUDY: FINAL INTEGRATED FEASIBILITY REPORT AND PROGRAMMATIC EIS (1999), available at http://www.evergladesplan.org/pub/restudy_eis.cfm#mainreport.

¹⁵ However, few members of the public at such meetings have the time, inclination, or possibly the competence, to read and understand the lengthy, technical documents upon which they are to comment. At the Okeechobee meeting on ASR, upon inquiry all members of the public present acknowledged that they had not read the PPDT or EIS documents which were the subject of the June 1, 2004 meeting (personal observation by Alfred R. Light, principal investigator).

¹⁶ See *infra* notes 193-208 and accompanying text.

¹⁷ See JACKSONVILLE DIST., U.S. ARMY CORP OF ENG'RS, CGM NO. 011.02, CERP GUIDANCE MEMORANDUM: FEDERAL ADVISORY COMMITTEE ACT (FACA) REQUIREMENTS FOR CERP TEAMS (2003) [hereinafter REQUIREMENTS FOR CERP TEAMS], available at http://www.evergladesplan.org/documents/cgm/cgm_011.02.pdf; Programmatic Regulations for the CERP, 68 Fed. Reg. 64,200, 64,207 (Nov. 12, 2003) (to be codified at 33 C.F.R. pt. 385) (discussing FACA as inapplicable to meetings of RECOVER); see also JACKSONVILLE DIST., U.S. ARMY CORP OF ENG'RS, CGM NO. 034.00, CERP GUIDANCE MEMORANDUM: FLORIDA SUNSHINE LAW REQUIREMENTS (2003), available at http://www.evergladesplan.org/documents/cgm/cgm_034.00.pdf.

¹⁸ The Corps began the first set of regional Project Delivery Team (PDT) meetings in Ft. Lauderdale with a briefing by counsel on FACA and the consequent limitations on public participation. On the first day (July 13, 2004), the meeting leader who immediately followed this briefing appeared to contradict counsel as to certain aspects of the procedure and purpose of the meeting. This problem did not exist in the second meeting (July 15, 2004), but a different issue emerged. During that meeting, the leader stated that the regional PDT meeting would now provide the opportunity for public comment to PDTs and that individual PDT meetings would no longer be noticed on the web or the public invited. See Memorandum from Everglades Plan Joint Venture, to Attendees of Central Florida Regional Product Delivery Team (RPDT) Meeting 2-3 (Jul. 15, 2004), available at http://www.evergladesplan.org/pm/pm_docs/rpdt/central_docs/071504_crpdt_minutes.pdf. "Public opportunity will not[sic] longer occur at the Project Specific Team level; the RPDT is now the forum for public comments." *Id.* "The Project Specific team meetings will not be publicized." *Id.* PDT meetings are required to be noticed in advance and open to the public, with an opportunity for public comment, by legal requirement in CERP's programmatic regulations; see also 33 C.F.R. § 385.18(b)(5) (2004), 68 Fed. Reg. 64230 (Nov. 12, 2003); see generally *Regional Product Delivery Teams*, CERP, available at http://www.evergladesplan.org/pm/regional_pmts.cfm (last visited Feb. 8, 2005). After the regional PDT system was created, the Corps stopped having individual PDT meetings, though obviously there are project-related meetings between the Corps and SFWMD to prepare documents and monitor contractors all the time. *Id.* In practice, sometimes the public is not excluded from such meetings, but public notice of the meetings is not provided consistently as a matter of course. *Id.*

judicial review to permit the introduction of new evidence, or the trial of specific issues.¹⁹ Providing for a dispute resolution process in advance is always advised.²⁰

There are indications of public participation problems on the horizon for CERP. One of the more intriguing features of the public involvement processes, which now accompany CERP during the research study, has been the absence (at least in the sense of identifiable physical presence) of certain key stakeholders from the Corps' very open process.²¹ While environmental groups and local governments frequently observe, and occasionally participate, in CERP public meetings, appearances by representatives of developers or the sugar industry are rare. Their absence from the annual meeting of the Everglades Coalition each January (a meeting which has become an important convocation of environmentalists, federal, state, and local administrators, and elected politicians) has also been notable.²²

Representatives of the federal and state judiciary, or their representatives, have also been noticeable by their absence.²³ Despite public controversy over the replacement of the federal judge overseeing an Everglades consent decree, neither Judge Hoeveler, nor his replacement Judge Moreno, nor the newly-appointed special master John Barkett seem to have much to do with most of the CERP administrative processes.²⁴ In fact, relatively few lawyers are participating in the Corps' administrative processes, which are dominated by scientists, engineers, and administrators. This leads some to suspect that the lawyers representing nongovernmental interests are lying in the weeds.²⁵

Herein we address two procedural problems with the ongoing CERP restoration process familiar to environmental lawyers – two imperfections which also characterize the early Superfund program administered by the United States Environmental Protection Agency (EPA). First, the CERP processes which produce PIRs do not adequately take into account at an early stage the “legal” (i.e. regulatory and permitting) requirements that CERP projects must address. While PIRs acknowledge that there are such requirements, the details are not being worked out early enough to avoid subsequent delays. On these matters, the devil is in the details, and these details are being deferred rather than addressed early on. As important, the Superfund experience suggests that attempts to fit regulatory requirements(which were designed for other purposes) to restoration

¹⁹ See e.g., *Fla. Power & Light v. Lorian*, 470 U.S. 729, 744 (1985) (counseling remand to the agency where its administrative record is insufficient); *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 770 F.2d 423, 437 (5th Cir. 1985); *Asarco, Inc. v. E.P.A.*, 616 F.2d 1153 (9th Cir. 1980); *County of Suffolk v. Sec'y of Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977) (allowing new evidence in NEPA cases); *Parravano v. Babbitt*, 837 F. Supp. 1034, 1039 (N.D. Cal. 1993) (setting forth the exceptions where courts may supplement the administrative record).

²⁰ 33 C.F.R. § 385.23; WRDA Of 2000, Pub. L. 106-541, § 601(i), 114 Stat. 2572, 2691 (2000) (mandating dispute resolution procedures regarding controversies between the state and federal governments). This dispute resolution agreement, *Agreement Between Department of the Army, the State of Florida, and SFWMD for Resolving Disputes under the CERP*, dated September 9, 2002, is available at http://www.evergladesplan.org/pm/pm_docs/dispute_resolution_agreement.pdf. Although the agreement permits mediation, it does not provide for dispute resolution if the parties reach impasse. See *id.*

²¹ Since early 2004, U.S. EPA has been funding a research project in which we have been developing comparisons between EPA's Superfund program and CERP. In this connection, investigators for the project have been observing various intergovernmental and public meetings in connection with CERP decision-making. See *Risk Communication in Community Participation: Comparing Regional Programs in South Florida*, EPA, at <http://cfpub.epa.gov/ncer/abstracts/index.cfm/fuseaction/display.abstractDetail/abstract/6268/report/0> (last visited Feb. 02, 2005) (describing project).

²² See the Everglades Coalition website at <http://www.evergladescoalition.org> (last visited Feb. 8, 2005) for links to materials on the annual conference of the Everglades Coalition.

²³ Mr. Barkett has been attending meetings of the Technical Oversight Committee of SFWMD. See e.g., *Summary of Technical Oversight Committee Special Meeting*, SFWMD (Apr. 6, 2004), available at http://www.sfwmd.gov/org/ema/toc/archives/040604_draft_summary_040604.pdf.

²⁴ Judge Moreno has “closed” the Everglades case, having given his special master “broad authority” to monitor “compliance.” See Catherine Wilson, *Judge Sets Up Review of Water Cleanup Work*, MIAMI HERALD, Mar. 4, 2004.

²⁵ See *infra* note 327 and accompanying text.

projects may lead to less restoration than is possible from a cost-effective value engineering perspective.²⁶

Second, the CERP process does not adequately provide the Corps with decision-making authority to make dispute resolution final, where stakeholder positions are entrenched and opportunities for litigation abound. Again, the Superfund experience is informative. The early years of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) were characterized by massive and wasteful litigation, until a legal regime evolved which deferred or precluded litigation over decisions made by an authoritative decision maker, usually the EPA Regional Administrator.²⁷

In Part I below, we introduce the foundational or philosophical dimension that distinguishes the EPA's "legalistic" approach to environmental decision-making from the "integrative" approach of the Corps, using the two agencies' policies on the application of the National Environmental Policy Act (NEPA) to their agency's respective decisions as the example.²⁸ Part II then describes the EPA's development of its approach to environmental regulatory compliance in its remedial action projects under CERCLA, which was codified in the Superfund Amendments and Reauthorization Act of 1986 (SARA), and has been applied to many Superfund decisions in Florida since that time.²⁹ We focus on compliance issues involving several environmental statutes of significance to both the Superfund and Everglades Restoration Programs - the Safe Drinking Water Act and the Clean Water Act.³⁰ The EPA carefully nurtured authority to waive compliance with regulatory requirements from these statutes in remedial actions under CERCLA. Part III describes the Corps' development of its approach to regulatory compliance under CERP, the establishment of interim goals through special intergovernmental scientific institutions and the incorporation of state law compliance into CERP decision-making. The Corps (or its state-level partner the SFWMD) must seek variances and exceptions from environmental regulatory requirements under other laws where necessary.³¹ The Corps' decision-making process incorporates state requirements that early "assurances" of such compliance be made prior to funding a project.³² We catalog the limited experience thus far with this new process and suggest potential problem areas based on pre-CERP experiences with Everglades restoration projects. Part IV contrasts the current balkanized framework for judicial review under CERP with the more uniform framework, which developed over a period of years under CERCLA.³³ The 2004 *Miccosukee* decision of the United States Supreme Court strongly indicates the potential for unnecessary wasteful litigation.³⁴ Part V briefly evaluates the possibility that the Corps might use Superfund authorities to structure judicial review under CERP. We also briefly consider the possible direct application of CERCLA authorities to Everglades restoration.³⁵ Part VI summarizes CERCLA's lessons for the public participation and judicial review processes of CERP and suggests two statutory changes

²⁶ See EPA, SUPERFUND: BUILDING ON THE PAST, LOOKING TO THE FUTURE 57 (2004), available at <http://www.epa.gov/superfund/news/120daystudy.pdf>. The EPA's report states:

One common practice utilized by the construction industry to achieve greater cost efficiency is value engineering during the design stage. What value engineering adds to the process is a third party review of the detailed design to determine if there are any ways to accomplish the same goal at a lesser overall cost. The Superfund program has at times used value engineering, but its application is made much more complex by the statutory requirement to comply with all applicable and relevant and appropriate requirements (ARARs). These ARARs, particularly those which are only relevant and appropriate, often add cost to the remedy which a value engineering review quickly highlights as unnecessary. The selected remedy is required by law to meet these requirements. This makes the use of value engineering at Superfund site, while potentially helpful, very difficult to achieve in practice. *Id.*

²⁷ See *infra* notes 336-40 and accompanying text.

²⁸ See *infra* notes 37-56 and accompanying text.

²⁹ See *infra* notes 57-86 and accompanying text.

³⁰ See *infra* notes 87-156 and accompanying text.

³¹ See *infra* notes 157-276 and accompanying text.

³² See *infra* notes 188-208 and accompanying text.

³³ See *infra* notes 232-302 and accompanying text.

³⁴ See *infra* notes 303-13 and accompanying text.

³⁵ See *infra* notes 314-43 and accompanying text.

that may improve prospects for achieving significant restoration benefits in a timely manner.³⁶

I. INTRODUCTION: INTEGRATIVE VS. LEGALISTIC APPROACHES TO NEPA

A fundamental reason why the current CERP process does not take outside regulatory and permitting requirements into account early has to do with the Army's full embrace of the "environmental impact statement" process under (NEPA).³⁷ The EPA has always understood the problematic nature of trying to integrate NEPA with government programs directed to improving the environment (as opposed to other governmental purposes that have negative environmental externalities).³⁸ The Army has not.³⁹

In its regulations, the United States Army has committed to "actively incorporate environmental considerations into informed decision-making, in a manner consistent with NEPA."⁴⁰ Thus, even where NEPA does not legally apply, the Army has committed to "incorporate the values of NEPA" through public participation and the analysis of all reasonable alternatives.⁴¹ The Army treats statutory exemptions from the NEPA analytic process under the Resource Conservation and Recovery Act (RCRA) and under CERCLA as procedural; for example, not requiring a "separate NEPA analysis."⁴² The Army approach has been to "develop guidance on the Army policy of *integrating* NEPA procedures into the Remedial Investigation/Feasibility Study (RI/FS) stages of hazardous substance cleanup actions" under CERCLA.⁴³ This integration includes application of a detailed "public involvement" process, including coordination of each phase of a project and milestones with representatives of federal, state, and local agencies; "two-way communications channels" open with the public; identification of affected "population segments" and interest groups; small workshops and discussion groups; and surveys or polls.⁴⁴

The EPA has been more circumspect in assessing its own need to comply with NEPA. The agency acknowledges that it "is legally required to comply with the procedural requirements of NEPA for its research and development activities, facilities construction, wastewater treatment construction grants under Title II of the Clean Water Act (CWA), the EPA-issued National Pollutant Discharge Elimination System (NPDES) permits for new sources, and for certain projects funded through the EPA annual Appropriations Acts."⁴⁵ However, Congress and the EPA have sought to separate out certain EPA activities not appropriate for NEPA review. For example, Section 511(c) of the Clean Water Act exempts the construction of publicly owned treatment works from NEPA requirements.⁴⁶ The Energy Supply and Environmental Coordination Act of 1974 completely exempts all actions taken under the Clean Air Act.⁴⁷ And despite the absence of a similar express exemption under CERCLA, the agency has taken the position from the genesis of the statute in 1980 that actions under that statute need not comply with NEPA because the CERCLA remedial action procedure provides the "substantial

³⁶ See *infra* notes 344-70 and accompanying text.

³⁷ National Environmental Policy Act (NEPA) of 1969 §§ 102-209, 42 U.S.C. §§ 4321-70(f) (2000).

³⁸ See *infra* notes 45-55 and accompanying text.

³⁹ See *infra* notes 40-44 and accompanying text.

⁴⁰ Env'tl Analysis of Army Actions, 32 C.F.R. § 651.5(b) (2004).

⁴¹ 32 C.F.R. § 651.5(l).

⁴² *Id.*

⁴³ Env'tl Effects of Army Actions, 53 Fed. Reg. 46,322 (Nov. 16, 1988) (to be codified at 32 C.F.R. pt. 651) (stating NEPA to be unnecessary in light of RI/FS under CERCLA). See 32 C.F.R. § 651.8(a)(8) (requiring NEPA evaluation of environmental impacts as part of feasibility study for restoration projects under CERP).

⁴⁴ 32 C.F.R. § 651.35.

⁴⁵ *EPA Compliance with the NEPA*. EPA [hereinafter *Compliance with NEPA*], available at <http://www.epa.gov/compliance/nepa/epacompliance/index.html> (last updated Dec. 20, 2004). See also Notice of Policy and Procedures for Voluntary Preparation of NEPA Documents, 63 Fed. Reg. 58,045 (Oct. 29, 1998).

⁴⁶ Clean Water Act § 511(c), 33 U.S.C. § 1371(c)(1) (2000).

⁴⁷ 15 U.S.C. § 793(c)(1) (2000).

equivalent" to NEPA.⁴⁸ In 1998, the EPA adopted its "Policy and Procedure for Voluntary Preparation of National Environmental Policy Act (NEPA) Documents."⁴⁹ In this policy, the agency only committed to voluntarily complying with NEPA "on a case-by-case basis in connection with Agency decisions where the Agency determines that such an analysis would be beneficial."⁵⁰ It expressly reserved the right to exempt itself from its "voluntary" obligation where compliance "would not be practicable or appropriate."⁵¹ The Agency obviously maintains considerable pride in its litigation successes, as it has explained, "Courts . . . consistently have recognized that EPA procedures or environmental reviews under enabling legislation are functionally equivalent to the NEPA process and thus exempt from the procedural requirements in NEPA."⁵²

The D.C. Circuit has set forth the policy rationale which underlies the EPA's general exemption from NEPA's strictures. Where a decision "is necessarily infused with the environmental considerations so pertinent to Congress in designing the statutory framework," to require an EIS "in addition to a decision setting forth the same considerations, would be a legalism carried to the extreme."⁵³ As the Eleventh Circuit subsequently explained, the express statutory exemptions are seen "as Congress's way of making more obvious what would likely occur as a matter of judicial construction."⁵⁴ To require an agency pursuing environmental objectives to "stop in the middle of its proceedings in order to issue a separate and distinct impact statement . . . would decrease environmental protection activity rather than increase it."⁵⁵

For these reasons, the EPA has successfully resisted the application of separate NEPA requirements to CERCLA. The remedial investigation/feasibility study (RI/FS) under CERCLA, directed to developing alternatives for environmental improvement, became the functional equivalent of an EIS.⁵⁶ Under the Army's "integrative" approach used in CERP, as well as its other programs, the PIRs and PPDRs are in addition to a tag-along EISs, despite the natural system restoration goals of the PIRs and PPDRs. The matter may be more symbolic than practically significant, but it is an important symbol. Government activity intended to increase environmental protection should not be held up for the sake of a duplicative EIS process. To integrate is to duplicate, and it may be a legally unnecessary duplication.

II. SQUARE PEGS IN ROUND HOLES: THE ARARs APPROACH TO COMPLIANCE WITH OTHER LAWS UNDER CERCLA

The EPA's difficulty applying NEPA to CERCLA remedial actions goes beyond the symbolic. In practice, the problem is the need to accommodate the remedial goals at a particular site (with its particular set of complex environmental conditions on the ground) with "environmental" goals and objectives embodied in regulatory and permitting requirements under laws other than the remedial CERCLA statute. In Superfund parlance, this has become known as the "how clean is clean" or the Applicable or Relevant and Appropriate

⁴⁸ See *Compliance with NEPA*, *supra* note 45.

⁴⁹ Notice of Policy and Procedures for Voluntary Preparation of NEPA Documents, 63 Fed. Reg. at 58,045 (Oct. 29, 1998).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* See *Ala. ex rel Sigelman v. EPA*, 911 F.2d 499 (11th Cir. 1990) (holding RCRA's hazardous waste facility permit issuance process takes the place of NEPA). NEPA procedures not required where "the agency's organic legislation mandate[s] specific procedures for considering the environment that [are] functional equivalents of the impact statement process." *Tex. Comm. on Nat'l Res. v. Bergland*, 573 F.2d 201, 207 (5th Cir. 1978); *Wyoming v. Hathaway*, 525 F.2d 66, 69 (10th Cir. 1975); *Indiana & Michigan Elec. Co. v. EPA*, 509 F.2d 839, 843 (7th Cir. 1975); *S. Terminal Corp. v. EPA*, 504 F.2d 646, 676 (1st Cir. 1974); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 380 (D.C. Cir. 1973); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 174 (6th Cir. 1973), *overruled on other grounds*; *Appalachian Power Co. v. EPA*, 477 F.2d 495, 508 (4th Cir. 1973), *overruled on other grounds*.

⁵³ *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650 n130 (D.C. Cir. 1973).

⁵⁴ *Ala. ex rel Sigelman*, 911 F.2d at 505 n.12.

⁵⁵ *Id.* at 504.

⁵⁶ See *infra* notes 277-302 and accompanying text (describing EPA CERCLA processes).

Requirements (ARARs) issue.⁵⁷ The EPA decided to develop ARAR policy level in its revisions to CERCLA's principal regulation, the National Contingency Plan (NCP) in 1985 and in the 1986 amendments to CERCLA, SARA.⁵⁸ The agency's experience is informative.

In 1980, President Carter signed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. As numerous courts have opined, the statute has two essential purposes: "to facilitate the expeditious cleanup of environmental contamination caused by hazardous waste releases."⁵⁹ The Act addressed the inadequacies of prior environmental laws, which were directed more to the regulation of ongoing activities than to the remediation of past releases of hazardous substances into the environment.⁶⁰ "How Clean is Clean?" under CERCLA began to make reference to Applicable or Relevant and Appropriate Requirements or ARARs in the 1985 revisions to that statute's primary regulation, the National Contingency Plan.⁶¹ Since 1986 CERCLA's cleanup standard has been codified in the statute to require that remedial actions must "comply with all 'legally applicable or relevant and appropriate . . . requirements,' including any 'State environmental' requirements that are 'more stringent' than the governing federal requirements." The EPA has regulations providing guidance as to the determination of ARARs.⁶² They define what may be considered a "relevant and appropriate" standard using a number of factors depending "in part, on whether a requirement addresses a chemical, location, or action."⁶³ The factors include: (i) The purpose of the requirement and the purpose of the CERCLA action; (ii) The medium regulated or affected by the requirement and the medium contaminated or affected at the CERCLA site; (iii) The substances regulated by the requirement and the substances found at the CERCLA site; (iv) The actions or activities regulated by the requirement and the remedial action contemplated at the CERCLA site; (v) Any variances, waivers, or exemptions of the requirement and their availability for the circumstances at the CERCLA site; (vi) The type of place regulated and the type of place affected by the release or CERCLA action; (vii) The type and size of structure or facility regulated and the type and size of structure or facility affected by the release or contemplated by the CERCLA action; (viii) Any consideration of use or potential use of affected resources in the requirement and the use or potential use of the affected resource at the CERCLA site. These regulatory criteria have been upheld as consistent with the statute.⁶⁴

The ARAR provision, officially added to CERCLA in the Superfund Amendments and Reauthorization Act of 1986 (SARA), "does not judge the suitability of clean-up according to some ad hoc, case-by-case measure, but according to either existing federal standards, such as those arising under the [Resource

⁵⁷ See *infra* notes 61-69 and accompanying text.

⁵⁸ See *infra* notes 70-86 and accompanying text.

⁵⁹ *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992); *Monarch Tile, Inc. v. City of Florence*, 212 F.3d 1219, 1221 (11th Cir. 2000) ("CERCLA is a broad, remedial statute animated by a sweeping purpose to ensure that those responsible for contaminating America should shoulder the costs of undoing that environmental damage."); *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 163 (2d Cir. 1999); *Public Service Co. of Colo. v. Gates Rubber Co.*, 175 F.3d 1177, 1181 (10th Cir. 1999) (Congress enacted CERCLA "to establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactivity waste disposal sites."); *Kalamazoo River Study Group v. Rockwell Int'l Corp.*, 171 F.3d 1065, 1068 (6th Cir. 1999); *Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 242 (5th Cir. 1999); *United States v. Chromalloy Am. Corp.*, 158 F.3d 345, 348 (5th Cir. 1999); *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997); *United States v. Olin Corp.*, 107 F.3d 1506, 1508 (11th Cir. 1997); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996), *overruled on other grounds*; *United States v. CDMG Realty Co.*, 96 F.3d 706, 717 (3d Cir. 1996); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986).

⁶⁰ *United States v. A & N Cleaners and Launderers, Inc.* 854 F. Supp. 229, 235 (S.D.N.Y. 1994) ("Congress enacted CERCLA in 1980 because then-existing laws, particularly [RCRA] . . . were inadequate to respond to the problems raised by hazardous waste produced and abandoned in the past.")

⁶¹ For a history of the concept, see National Oil and Hazardous Substances Pollution Contingency Plan, 53 Fed. Reg. 51,394, 51,435 (Dec. 21, 1988) (proposed rule) (to be codified at 40 C.F.R. pt. 300).

⁶² 40 C.F.R. § 300.400(g)(2) (2004).

⁶³ *Id.*

⁶⁴ *Ohio v. EPA*, 997 F.2d 1520 (D.C. Cir. 1993).

Conservation and Recovery Act] RCRA, the Safe Drinking Water Act [SDWA], the Clean Water Act [CWA], and the Toxic Substances Control Act [TSCA], or their state counterparts”⁶⁵ As Professors Applegate, Laitos, and Campbell-Mohn have explained, the concept becomes complex in application because it “often involves adapting standards that were not originally developed for clean-up purposes, an exercise akin to fitting a square peg in a round hole.”⁶⁶

The 1990 National Contingency Plan for CERCLA narrowly defined “applicable” requirements as “those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that specifically address a hazardous substance, pollutant, or contaminant, remedial action, location, or other circumstance found at a CERCLA site. Only those state standards that are identified by a state in a timely manner and that are more stringent than federal requirements may be applicable.”⁶⁷ For example, the Safe Drinking Water Act requirements applicable to public water systems would not be “legally applicable” to a remedial action at a Superfund site. As Professor William Rodgers has explained, “an applicable standard must be substantive, properly promulgated, and specifically on point.”⁶⁸ Moreover, a statute or ordinance imposing stricter standards after the EPA has selected a remedy for a site is inapplicable because ARARs are “frozen” as of the time of the record of decision (ROD).⁶⁹

The key to determining whether federal or state environmental standards must be complied with under CERCLA most often will be whether the standard proposed is “relevant and appropriate.” At the outside, it is plain that requirements are relevant and appropriate if they would be “legally applicable” but for “jurisdictional restrictions associated with the requirement.”⁷⁰ CERCLA’s NCP now defines relevant and appropriate requirements as those that “address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site.”⁷¹ Moreover, the EPA has limited authority to waive compliance with ARARs, which it has elaborated in CERCLA’s NCP as follows:

“(C) An alternative that does not meet an ARAR under federal environmental or state environmental or facility siting laws may be selected under the following circumstances: (1) The alternative is an interim measure and will become part of a total remedial action that will attain the applicable or relevant and appropriate federal or state requirement; (2) Compliance with the requirement will result in greater risk to human health and the environment than other alternatives; (3) Compliance with the requirement is technically impracticable from an engineering perspective; (4) The alternative will attain a standard of performance that is equivalent to that required under the otherwise applicable standard, requirement, or limitation through use of another method or approach; (5) With respect to a state requirement, the state has not consistently applied, or demonstrated the intention to consistently apply, the promulgated requirement in similar circumstances at other remedial actions within the state; or (6) For Fund-financed response actions only, an alternative that attains the ARAR will not provide a balance between the need for protection of human health and the environment at the site and the availability of Fund monies to respond to other sites that may present a threat to human health

⁶⁵ JOHN S. APPLGATE, ET. AL., *THE REGULATION OF TOXIC SUBSTANCES AND HAZARDOUS WASTES 907-08* (Foundation Press 2000).

⁶⁶ *Id.* at 908. It is “better” to be round peg in a square hole than a square peg in a round hole. *See Square Pegs in Round Holes*, New Zealand Maths, available at <http://www.nzmaths.co.nz/PS/L6/Measurement/SquarePegs.htm> (last visited Jan. 30, 2005).

⁶⁷ 40 C.F.R. § 300.5 (2004).

⁶⁸ WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* § 8.5 (2d ed. 1994).

⁶⁹ *Missouri v. Indep. Petrochemical Corp.*, 104 F.3d 159, 162 (8th Cir. 1997).

⁷⁰ Nat’l Oil and Hazardous Substances Pollution Contingency Plan, 50 Fed. Reg. 47,912, 47,954 (Nov. 20, 1985) (to be codified at 40 C.F.R. pt. 300).

⁷¹ 40 C.F.R. § 300.5.

and the environment.⁷²

“Where this waiver is exercised, findings together with an explanation and appropriate documentation must be published.”⁷³

Discerning Congressional intent about terms used in CERCLA is not for the faint of heart.⁷⁴ The term “relevant and appropriate” is no exception. The principal Senate SARA bill emphasized the need for flexibility (to take account of site specific circumstances, such as mixtures of waste, topography, and geology) by stating that “no rigidly uniform remedy would be the best at all of these sites.”⁷⁵ The House Energy & Commerce Committee defined “relevant” to be when the site-specific circumstances are “very similar” to those anticipated by the standard and states that “relevant standards would be used when appropriate.”⁷⁶ The Committee emphasized that the “relevance” of a requirement must be based on “the factors that would cause the requirements to come into play” and repudiates the rigid imposition of requirements unless these factors are present.⁷⁷ For example, a Safe Drinking Water Act standard for tap water would not be “relevant and appropriate” if the water is or would not be used for purposes SDWA was designed to protect.⁷⁸ The Committee warned that these factors needed case-by-case flexibility to a proper balance, and that rigid imposition “could lead to absurd and costly results . . . without achieving any additional meaningful protection of human health and the environment.”⁷⁹ The House Public Works and Transportation Committee defined “relevance” to include the use of the medium for purposes protected by the incorporated requirement, or the types of human exposure and adverse effects to health and the environment regulated by the incorporated requirement.⁸⁰

In the Senate and House debates over SARA, legislators provided a somewhat less flexible interpretation to the phrase “relevant and appropriate” than these Committees. Senator Mitchell, for example, looked primarily to the media which served as the pathway for exposure (e.g., Clean Water Act or Safe Drinking Water Act for contaminated water, Clean Air Act for ambient air emissions) and would apply standards whenever the purpose for which they were developed involved reduction of the contamination of such pathway to safe levels. For example, SDWA standards would not be appropriate for briney aquifers that would not be fit for human consumption even if cleaned up.⁸¹

The legislative history is thus somewhat contradictory and confused. Consider, for example, the potential use of surface water and drinking water standards for groundwater cleanup. In determining whether water quality criteria are “relevant and appropriate,” the amendments direct the EPA to consider designated or potential use of surface or groundwater, implying that water quality criteria may be used to establish groundwater standards in at least some instances.⁸² In the debates, Senators Mitchell and Chafee made it clear that they believed water quality criteria should apply to contaminated groundwater where the groundwater is or

⁷² 40 C.F.R. § 300.430(f)(1)(ii)(C) (tracking CERCLA § 121(d)(4)(A)-(F), 42 U.S.C. § 9621(d)(4)(A)-(F) (2000)).

⁷³ Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 § 121(d)(4), 42 U.S.C. § 9621(d)(4).

⁷⁴ Many courts, including the United States Supreme Court, have commented on the poor “legislative draftmanship” of CERCLA. *Exxon v. Hunt*, 475 U.S. 355, 363 (1986). See ALFRED R. LIGHT, CERCLA LAW & PROCEDURE § 2.3 (1991).

⁷⁵ S. REP. NO. 99-11, at 20 (1986).

⁷⁶ H.R. REP. NO. 99-253, pt. 1, at 96-97 (1986), reprinted in 1986 U.S.C.C.A.N. 2878-79.

⁷⁷ *Id.* at 98.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ H. REP. NO. 99-253, at pt. 5 (1986), reprinted in 1986 U.S.C.C.A.N. 2835, 3176.

⁸¹ 132 CONG. REC. S14,895, 14,915 (Sept. 24, 1986) (statement of Sen. Mitchell); accord 132 CONG. REC. H9561, 9587 (Oct. 8, 1986) (statement of Rep. Florio). See also 132 CONG. REC. H9561, 9600 (statement of Rep. Roe); 132 CONG. REC. S14,895, 14,927 (statement of Sen. Chafee).

⁸² 42 U.S.C. § 9621(b)(2)(B)(i) (2000). See also H. REP. NO. 99-253 at pt. 5, (1986), reprinted in 1986 U.S. C.C.A.N. 2835, 3176-77.

could be used as drinking water.⁸³ In determining relevance and appropriateness, however, the statute also directs the EPA to consider the purposes for which the criteria were developed.⁸⁴ In practice, the EPA has adjusted water quality criteria by isolating data on drinking water ingestion and then applying the adjusted water quality criteria to groundwater.⁸⁵ In the final debates over SARA, this approach appears to have been endorsed by some legislators.⁸⁶

A. SDWA Standards as ARARs: MCLs and MCLGs

Considerable attention in SARA's legislative process was devoted to the application of SDWA standards to CERCLA cleanups. The statutory language expressly states that a CERCLA remedial action "shall require a level or standard of control which at least attains Maximum Contaminant Level Goals established under the Safe Drinking Water Act and water quality criteria established under section 304 or 303 of the Clean Water Act, where such goals or criteria are relevant and appropriate under the circumstances of the release or threatened release."⁸⁷ However, under the SDWA, Maximum Contaminant Level Goals (MCLGs) are unenforceable health goals which serve as targets for the enforceable Maximum Contaminant levels (MCLs).⁸⁸ As the EPA explained in its regulations, "[b]y promulgating [health goals], no system is forced to remove contaminants to this level or to take other action regarding contaminants."⁸⁹ MCLGs are set at a level where there are no known or anticipated adverse health effects, and include an adequate margin of safety.⁹⁰ For carcinogens, MCLGs are promulgated at zero.⁹¹

There was considerable confusion in CERCLA's legislative history about the use of MCLs or MCLGs as an ARAR. In one floor statement, Senator Mitchell expressed a view that MCLGs should be chosen because MCLGs were based solely on health concerns and MCLs relied on cost considerations that are improper for Superfund cleanups.⁹² However, Congressman Lent opined that MCLGs should be achieved "to the maximum extent practicable taking into account available technology and cost."⁹³ Available technology and cost are the two significant adjustments that derive MCLs from MCLGs. Moreover, a number of legislators apparently viewed MCLs as the appropriate ARAR in some cases (either as a SDWA standard or through RCRA).⁹⁴ In any event, after SARA was enacted, the EPA decided in its NCP to make a categorical determination that MCLGs set at "zero" would not be considered "relevant and appropriate" under CERCLA.⁹⁵ This regulation was upheld over challenges from both states and environmentalists.⁹⁶

⁸³ 132 CONG. REC. S14,985, 14,916 (statement of Sen. Mitchell); 132 CONG. REC. S14,985, 14,927 (statement of Sen. Chafee); accord 132 CONG. REC. H9561, 9587 (statement of Rep. Field); 132 CONG. REC. H9561, 9600 (statement of Rep. Roe).

⁸⁴ 42 U.S.C. § 9621(d)(2)(B)(i).

⁸⁵ See generally EPA, EPA/540/G-89/004, GUIDANCE FOR CONDUCTING REMEDIAL INVESTIGATIONS AND FEASIBILITY STUDIES UNDER CERCLA (INTERIM FINAL) (1988).

⁸⁶ See *supra* note 83.

⁸⁷ 42 U.S.C. § 9621(d)(2)(A)(ii).

⁸⁸ 42 U.S.C. § 300g-1(b)(4).

⁸⁹ Nat'l Primary Drinking Water Regulations; Volatile Synthetic Organic Chems., 50 Fed. Reg. 46,880, 46,881 (Nov. 13, 1985) (to be codified at 40 C.F.R. pt. 141).

⁹⁰ 42 U.S.C. § 300g-1(b)(4)(A).

⁹¹ E.g., Nat'l Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8750 (Mar. 8, 1990) (to be codified at 40 C.F.R. pt. 300); Nat'l Primary Drinking Water Regulations; Volatile Synthetic Organic Chems., 50 Fed. Reg. at 46,888, 46,891.

⁹² 132 CONG. REC. S14,895, 14,915 (Sept. 24, 1986) (statement of Sen. Mitchell).

⁹³ 132 CONG. REC. H9561, 9566 (Oct. 8, 1986) (statement of Rep. Lent).

⁹⁴ 132 CONG. REC. S14,895, 14,916 (statement of Sen. Mitchell, though Mitchell seems somewhat confused on this point); 132 CONG. REC. S14,895, 14,927 (statement of Sen. Chafee); 132 CONG. REC. H9561, 9565 (statement of Cong. Lent).

⁹⁵ 40 C.F.R. § 300.430(e) (2004).

⁹⁶ *Ohio v. EPA*, 997 F.2d 1520, 1530 (D.C. Cir. 1993) (holding the fact that it is impossible to detect zero levels is a sufficient justification for EPA's decision). See Nat'l Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8750-52 (1990).

There is language in SARA's legislative history, moreover, to indicate that SDWA standards should only be used as cleanup standards where an aquifer is, or could be, used for drinking water.⁹⁷ Legislators differed on whether the SDWA should be applied at the tap, or anywhere in the aquifer where contaminated water is found.⁹⁸ Senator Chafee expressed his opinion that SDWA standards "cannot be applied by the use of extrapolation that projects the conditions of water at some hypothetical tap."⁹⁹ On the other hand, if the tap is the point at which Maximum Contaminant Levels are "appropriate," the limit may be achievable and cost-effective in some cases only because of the amount of dilution and aeration, or basic water system treatment, between the site and the tap.¹⁰⁰ In its early guidance on ARARs, the EPA explained that MCLs should *not* be used as ARARs in many circumstances, "MCLs are generally not appropriate where ground water is not potentially drinkable due to widespread naturally occurring contamination or due to location in a large industrial area with substantial contamination where there is no actual, planned, or potential use of ground water for drinking."¹⁰¹ In addition, the EPA advises that "MCLs are generally not appropriate for site-specific circumstances where a well would never be placed and ground water would never be consumed (e.g. a twenty-foot strip of land between the toe of a landfill and river, if there is no surface water contamination resulting from man-made ground water contamination at the site)."¹⁰² Even for noncarcinogens, the use of MCLGs as an ARAR sometimes may be problematic. MCLGs are based on an assumption that drinking water contributes only 20% of the exposure to humans to the particular pollutants.¹⁰³ At specific sites, this assumption may not accurately reflect site-specific circumstances, and the MCLG ought to be adjusted to reflect the predominance of exposure through ingestion of water. "Appropriateness" under CERCLA is supposed to account, on a site-specific basis, for the practical factors that are used to establish MCLs, such as technological and economic feasibility.¹⁰⁴

The Resource Conservation and Recovery Act (RCRA) establishes standards for the protection of groundwater in connection with the disposal of hazardous wastes in landfills. These are found in Subpart F of RCRA's regulations.¹⁰⁵ These regulations establish several categories of groundwater protection standards, which the EPA considers under CERCLA as possible ARARs: background concentrations, RCRA Maximum

⁹⁷ H.R. REP. NO. 99-253, pt. 1, at 98 (1986); H.R. REP. NO. 99-253, pt.5, at 53-54; *cf.* H.R. REP. NO. 99-253, pt. 1, at 48; 132 CONG. REC. S14,895, 14,910 (statement of Sen. Bentsen); 132 CONG. REC. H9561, 9566 (statement of Rep. Lent) (SDWA should only be used if water is used or is projected to be used as drinking water.); 132 CONG. REC. S14,895, 14,915 (statement of Sen. Mitchell); 132 CONG. REC. H9561, 9624 (statement of Rep. Eckart) (SDWA to be used where an aquifer may have any potential use as a source of water supply.); 132 CONG. REC. H9561, 9600 (Rep. Roe) (SDWA to be used where there is a reasonably foreseeable use as a drinking water supply.).

⁹⁸ 132 CONG. REC. S14,985, 14,910 (statement of Sen. Bentsen) (stating the SDWA should be applied at the tap); 132 CONG. REC. H9561, 9564 (statement of Cong. Lent) (stating the SDWA should be applied at the tap); 132 CONG. REC. S14,895, 14,915 (statement of Sen. Mitchell) (stating the SDWA should be applied anywhere contaminated water is found); 132 CONG. REC. S14,895, 14,927 (statement of Sen. Chafee) (agreeing that the SDWA should be applied anywhere contaminated water is found).

⁹⁹ 132 CONG. REC. S14,895, 14,927 (statement of Sen. Chafee).

¹⁰⁰ H.R. REP. NO. 99-253, pt. 1, at 98 (1986).

¹⁰¹ EPA, EPA 540/G-89/006, CERCLA GUIDANCE ON COMPLIANCE WITH OTHER LAWS MANUAL (INTERIM FINAL) 1-69 (1988)

[hereinafter CERCLA GUIDANCE ON COMPLIANCE WITH OTHER LAWS], *available at* <http://www.epa.gov/superfund/resources/remedy/pdf/540g-89006.pdf> ("Groundwater in such an industrial area (where there is no actual, planned, or potential use of groundwater for drinking) would still be classified as Class IIB aquifers, although MCLs may be determined to be relevant and appropriate, according to this guidance."). *Id.* at 1-69 n.19.

¹⁰² *Id.*

¹⁰³ Nat'l Primary Drinking Water Regulations: Volatile Synthetic Organic Chem., 50 Fed. Reg. 46,880, 46,886 (Nov. 13, 1985) (to be codified at 40 C.F.R. pt. 141). *See id.* at 46,895.

¹⁰⁴ 42 U.S.C. § 300g-1(b)(5) (2000); 132 CONG. REC. H9561, 9566 (statement of Rep. Lent); CONF. REP. 99-575, at 4. *See also* 50 Fed. Reg. 46,902, 46,904 (Nov. 13, 1985) (to be codified at 40 C.F.R. pts. 141 and 142).

¹⁰⁵ 40 C.F.R. § 264.90-101(F) (2004).

Concentration Limits (MCLs), and Alternate Concentration Limits (ACLs).¹⁰⁶ Although EPA guidance indicates that, in general, the SDWA MCL is the "relevant and appropriate" standard, cleanup also must be consistent with RCRA MCLs.¹⁰⁷ The more frequent application of RCRA in this context occurs where no MCL is established. In that event, for groundwater with the characteristics of Class I and Class II aquifers (those with a beneficial use as drinking water) CERCLA remedial actions must meet "a remediation level that is the equivalent of a health-based (i.e., assuming human exposure) ACL under RCRA."¹⁰⁸ For groundwater with the characteristics of a Class III aquifer (it cannot be used as drinking water because of high salinity or naturally occurring widespread contamination), a low-level of human exposure is assumed in establishing the relevant RCRA ACL.¹⁰⁹ Background levels generally are not adopted as ARARs under CERCLA.¹¹⁰ The procedure for establishing ACLs under RCRA is quite complex, requiring the evaluation of a large number of factors such as adverse affects on ground water quality and hydrologically-connected surface water.¹¹¹ The objective is to find a level regarding a hazardous constituent that does not pose a substantial present or potential hazard to human health or the environment.¹¹² The SARA amendments also contain a very precise limitation on the use of RCRA ACLs for purposes of an on-site cleanup that "assumes a point of human exposure beyond the boundary of a facility."¹¹³ Such an assumption is deemed appropriate only where there are "known and projected points of entry of such groundwater into surface water."¹¹⁴

Underground injection is regulated under the Safe Drinking Water Act. This program divides wells into five classes. Of particular interest are Class I wells, "those used to inject industrial, hazardous and municipal wastes beneath the lower most formation containing, within one-quarter (1/4) mile of the well bore, an underground drinking water source,"¹¹⁵ and Class V wells, defined as all wells not incorporated in Classes I-IV." Typical examples of such wells are recharge wells, septic system wells, and shallow industrial (non-hazardous) disposal wells. UIC requirements may be ARARs for CERCLA remedial actions involving the reinsertion of treated ground water. Under the EPA's interpretation of CERCLA, "[u]nderground injection wells that are constructed off-site are subject to all provisions of the SDWA relating to underground injection of fluids and must be permitted by an authorized state agency, or the EPA, and comply with the UIC permit requirements. Superfund sites that construct underground injection wells on site are not required to comply with the administrative requirements of the UIC program; however, they must meet the *substantive* requirements of this program where the requirement is determined to be applicable or relevant and appropriate to the CERCLA remedial action."¹¹⁶

There are a number of these *substantive* requirements. For example, "no owner or operator may construct, operate, or maintain an injection well in a manner that results in the contamination of an underground source of drinking water at levels that violate MCLs or otherwise adversely affect the health of persons."¹¹⁷ In general, the purpose of underground injection control

is to protect the quality of the State's underground sources of drinking water and to prevent

¹⁰⁶ 40 C.F.R. § 264.94.

¹⁰⁷ CERCLA GUIDANCE ON COMPLIANCE WITH OTHER LAWS, *supra* note 101, at 2-26.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ 40 C.F.R. § 264.94.

¹¹² *Id.*

¹¹³ 42 U.S.C. § 9621(d)(2)(B)(ii) (2000).

¹¹⁴ 42 U.S.C. § 9621(d)(2)(B)(ii)(I).

¹¹⁵ 40 C.F.R. § 144.6.

¹¹⁶ CERCLA GUIDANCE ON COMPLIANCE WITH OTHER LAWS, *supra* note 101, at 4-11 (emphasis added).

¹¹⁷ 40 C.F.R. § 144.12.

degradation of the quality of other aquifers adjacent to the injection zone that may be used for other purposes. This purpose is achieved through rules that govern the construction and operation of injection wells in such a way that the injected fluid remains in the injection zone, and that unapproved interchange of water between aquifers is prohibited.¹¹⁸

There are dozens of aquifer storage and recovery facilities in Florida, permitted by the state's Department of Environmental Protection and operated by public water utilities and others to store and later use water for drinking purposes.¹¹⁹ Water injected into ASR wells must meet primary and secondary drinking water standards.¹²⁰ Interestingly, the state does not require UIC operation permits for ASR wells "when the injection fluid meets the primary and secondary drinking water standards contained in Chapter 62-550, F.A.C., and the minimum criteria contained in Rule 62-520.400, F.A.C., and have been processed through a permitted drinking water treatment facility."¹²¹ Remedial action plans, which include aquifer remediation wells, are exempt from permits under the same provision.¹²²

B. CWA Standards as ARARs: Water Quality Criteria and Water Quality Standards

Considerable attention has also been devoted to the use of water quality criteria under the Clean Water Act, as ARARs under CERCLA. As with MCLGs, the legislative history of SARA indicates considerable congressional confusion over the use of WQCs. A number of members of Congress perceived that "water quality criteria are essential to a comprehensive system of Superfund cleanup standards" because, even at that time, they covered approximately 140 chemicals found at Superfund sites, as compared to 20-30 chemicals covered by other federal standards.¹²³ Water Quality Criteria represent the compilation of scientific knowledge upon which State water quality standards are based, but they are not enforceable under the Clean Water Act.¹²⁴ They are established for the protection of human health and aquatic life. According to the statute, water quality criteria should accurately reflect

the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in any body of water, including ground water; (B) on the concentration and dispersal of pollutants, or their byproducts, through biological, physical, and chemical processes; and (C) on the effect of pollutants on biological community diversity, productivity, and stability, including information on the factors affecting rates of eutrophication and rates of organic and inorganic sedimentation for varying types of receiving waters.¹²⁵

¹¹⁸ FL. ADMIN. CODE ANN. r. 62-528.100(1) (2004).

¹¹⁹ For a list of ASR facilities in Florida as of November 2003 see Florida Department of Environmental Protection's Aquifer Storage and Recovery Facilities in Florida Table at http://www.dep.state.fl.us/water/uic/docs/ASR11_2003%20table.pdf (last visited Feb. 02, 2005). See also *Aquifer Storage and Recovery Map*, Fla. Dep't of Env'tl. Prot., available at http://www.dep.state.fl.us/water/uic/docs/ASR11_2003%20map.pdf (last visited Feb. 02, 2005).

¹²⁰ See *Underground Injection Control Program*, Fla. Dep't of Env'tl. Prot., available at <http://www.dep.state.fl.us/water/uic/index.htm> (last updated Jun. 16, 2004).

¹²¹ FLA. ADMIN. CODE ANN. r. 62-528.640(1)(c).

¹²² *Id.* See FLA. ADMIN. CODE ANN. r. 62-528.630(2)(c).

¹²³ 132 CONG. REC. S14,895, 14,916 (Sept. 24, 1986) (statement of Sen. Mitchell); 132 CONG. REC. H9651, 9600 (Oct. 8, 1986) (statement of Rep. Roe).

¹²⁴ 33 U.S.C. §§ 1312-1314 (2000).

¹²⁵ 33 U.S.C. § 1314(a)(1).

For non-carcinogens, these criteria generally establish pollutant concentrations which will protect human health or aquatic life with an ample margin of safety. For carcinogens and suspected carcinogens, the Water Quality Criteria are zero, as with MCLGs. There is no “safe” level. Unlike MCLGs, however, WQCs establish distinct pollutant concentrations, which, over an average lifetime, increase an individual’s risk of cancer by 10^{-5} , 10^{-6} , and 10^{-7} .

Unlike other ARARs, for WQC the SARA amendments set forth specific factors for consideration in determining the “relevance and appropriateness” of WQC. These are “the designated or potential use of the surface or groundwater, the environmental media affected, the purposes for which such criteria were developed, and the latest available information.”¹²⁶ Of particular interest to the Everglades is the treatment of the pollutant phosphorus under the Clean Water Act. In 1998, the EPA established a National Nutrient Strategy for the Development of Regional Nutrient Criteria as part of state water quality standards.¹²⁷ In December 2000, the EPA published its ecoregional criteria documents for lakes and reservoirs in Nutrient Ecoregion XIII (South Florida Coastal Plain).¹²⁸ The document established limits for total phosphorus, total nitrogen, and chlorophyll.¹²⁹ The EPA adopted a regional approach to water quality criteria for these nutrients “[b]ecause some parts of the country have naturally higher soil and parent material enrichment, and different precipitation regimes.”¹³⁰ The EPA’s water quality regulations require states and Indian tribes to adopt criteria that contain sufficient parameters and constituents to protect the designated uses of their waters.¹³¹ “The intent of developing ecoregional nutrient criteria is to represent conditions of surface waters that are minimally impacted by human activities and thus protect against the adverse effects of nutrient over enrichment from cultural eutrophication.”¹³²

Under the Clean Water Act, however, states and Indian tribes rather than the EPA set numerical or narrative water quality standards. Setting water quality standards for Everglades’ waters by the Miccosukee Indian Tribe and by the State of Florida, through state legislation and litigation, has proven very controversial. Once established by state law, however, these standards may be ARARs for remedial actions under CERCLA. In 1998, the EPA approved the Miccosukee establishment of a 10ppb criterion for phosphorus in Class III-A waters under that tribe’s jurisdiction.¹³³ Indian tribe standards are potential ARARs.¹³⁴ In the 1990 NCP, the EPA decided that water quality criteria would not be considered ARARs where a state had adopted water quality standards which more “fully matches” the situation at a CERCLA site.¹³⁵ A state’s prospective antidegradation laws for groundwater, however, are not ARARs, and temporary degradation of groundwater

¹²⁶ CERCLA § 121(d)(2)(B)(i), 42 U.S.C. § 9621(d)(2)(B)(i).

¹²⁷ See OFFICE OF WATER, EPA, EPA-822-F98-002, NATIONAL STRATEGY FOR THE DEVELOPMENT OF REGIONAL NUTRIENT CRITERIA (Jun. 1998), available at <http://www.epa.gov/waterscience/standards/nutsi.html>.

¹²⁸ OFFICE OF WATER, EPA, EPA 822-B-00-210, AMBIENT WATER QUALITY CRITERIA RECOMMENDATION INFORMATION SUPPORTING THE DEVELOPMENT OF STATE AND TRIBAL NUTRIENT CRITERIA: LAKES AND RESERVOIRS IN NUTRIENT ECOREGION XIII (2000) [hereinafter NUTRIENT ECOREGION XIII], available at http://www.epa.gov/waterscience/criteria/nutrient/ecoregions/lakes/lakes_13.pdf.

¹²⁹ *Id.* at vi.

¹³⁰ *Id.* at 3.

¹³¹ 40 C.F.R. § 131.11(a) (2004). See also 40 C.F.R. § 131.3 (defining “State”).

¹³² See NUTRIENT ECOREGION XIII, *supra* note 128, at 4.

¹³³ See EPA, NUMERIC CRITERION FOR CLASS III-A WATERS OF THE MICCOSUKEE TRIBE FEDERAL RESERVATION IN THE EVERGLADES (Jun. 3, 1999), available at <http://www.epa.gov/region4/southflorida/miccosukee/> (last updated Jul. 1, 2002).

¹³⁴ See 40 C.F.R. § 300.5; Nat’l Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8741-42 (Mar. 8, 1990) (to be codified at 40 C.F.R. pt. 300) (preamble to NCP); see also EPA, OSWER Directive 9375.5-02A, REVISED INTERIM FINAL GUIDANCE ON INDIAN INVOLVEMENT IN THE SUPERFUND PROGRAM (1989).

¹³⁵ See OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, EPA, PUB. NO. 9234.2-01/FS-A, ARARs Q’S & A’S: GENERAL POLICY, RCRA, CWA, SDWA, POST-ROD INFORMATION, AND CONTINGENT WAIVERS (1991) [hereinafter ARARs Q’S & A’S], available at <http://www.epa.gov/oerrpage/superfund/resources/remedy/pdf/92-34201fsa-s.pdf>; see also 40 C.F.R. § 300.415(i); 40 C.F.R. § 300.435(b)(2).

quality as part of a remedial action is permissible in the EPA's view.¹³⁶

C. Waivers of ARARs: Preempting Other Laws

As described above, the EPA has interpreted CERCLA to provide a fairly narrow definition of "applicable" standards,¹³⁷ and this interpretation has been upheld by the courts. In addition, the EPA has incorporated a number of pragmatic considerations into its determinations as to whether a regulatory requirement developed under another environmental law is "relevant and appropriate" within the meaning of CERCLA. This has made the use of CERCLA's ARAR waiver authorities relatively rare. The National Contingency Plan adopted in 1990 answered a number of other questions and also requires compliance with ARARs. For example, the regulations required compliance during remedial actions as well as at completion, and compelled attainment of ARARs during removal actions to the extent practicable, considering the exigencies of the situation.¹³⁸

The SARA amendments also provided considerable flexibility to the EPA in devising remedial actions. For example, CERCLA § 104(d)(4) allows the EPA to combine wastes from a number of "reasonably related" non-contiguous sites for treatment at a common site without having to obtain permits required by the statute for "off-site" treatment.¹³⁹

However, the ARAR waiver authorities added to CERCLA in SARA can play an important role in CERCLA remedial actions. For example, after adoption of the 1990 NCP, in general non-zero MCLGs or MCLs constituted ARARs for a current or potential drinking-water source.¹⁴⁰ However, where these cannot be obtained because of complex hydrogeology due to fractured bedrock, an ARAR waiver for technical impracticability can be used.¹⁴¹ Over time, the EPA has also learned as a rule of thumb that cleanup of groundwater can be impractical, and a waiver necessary, if dense nonaqueous phase liquids (DNAPL) are present in the groundwater.¹⁴² For example, the EPA waived SDWA MCLs for PCBs directly beneath the

¹³⁶ See ARARs Q's & A's, *supra* note 135; see also EPA, PUB. NO. 9243.2-11/FS, ARARs Q's & A's, STATE GROUND-WATER ANTIDegradation ISSUES (1990).

¹³⁷ See 40 C.F.R. § 300.5; see also Nat'l Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. at 8814 (stating must "specifically address a hazardous substance, pollutant, and contaminant, remedial action, location, or circumstance at a CERCLA site").

¹³⁸ See 40 C.F.R. § 300.415(d); 40 C.F.R. § 300, 435(b)(2); see also Nat'l Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. at 8843; *id.* at 8852.

¹³⁹ 42 U.S.C. § 9604(d)(4). See ARARs Q's & A's, *supra* note 135; see also 55 Fed. Reg. at 9690-91 (preamble to NCP); J. WINSTON PORTER, EPA, OSWER Directive 9347-01, INTERIM RCRA/CERCLA GUIDANCE ON NON-CONTIGUOUS SITES AND ON-SITE MANAGEMENT OF WASTE RESIDUE (1986); Amendment to Nat'l Oil and Hazardous Substance Contingency Plan, 49 Fed. Reg. 37,070, 37,076 (Sept. 21, 1984) (to be codified at 40 C.F.R. pt. 300).

¹⁴⁰ 40 C.F.R. § 300.430(e)(2)(i)(B)-(D). See ARARs Q's & A's, *supra* note 135, at 5; OFFICE OF GROUND-WATER PROTECTION, EPA, GROUND-WATER PROTECTION STRATEGY (1984), available at <http://www.epa.gov/superfund/resources/gwdocs/strategy.pdf>.

¹⁴¹ OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, EPA, EPA 540-R-98-031, A GUIDE TO PREPARING SUPERFUND PROPOSED PLANS, RECORDS OF DECISION, AND OTHER REMEDY SELECTION DOCUMENTS § 9.5, at 9-8 - 9-12 (1999). See ARARs Q's & A's, *supra* note 135, at 5; 42 U.S.C. § 9621(d)(4)(C); see e.g., EPA, EPA/ROD/R04-89/054, SUPERFUND RECORD OF DECISION, SYDNEY MINE SLUDGE PONDS, BRANDON, FLORIDA 16 (1989), available at <http://www.epa.gov/superfund/sites/rods/fulltext/r0489054.pdf>. On the other hand, "if attainment of a non-zero MCLG or MCL is impossible because of the background level of the chemical subject to CERCLA authority (e.g. man-made chemical) is higher than that of the MCLG or MCL, attainment of the MCLG or MCL would not be relevant and appropriate." ARARs Q's & A's, *supra* note 135, at 5. See also EPA, OSWER PUB EPA/9234.2-06/FS, CERCLA COMPLIANCE WITH THE CWA AND SDWA (1990).

¹⁴² OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, EPA, EPA-540-R-97-013, RULES OF THUMB FOR SUPERFUND REMEDY SELECTION 18-19 (1997), available at <http://www.epa.gov/superfund/resources/rules/rulesthm.pdf>. See EXPERT PANEL ON DNAPL REMEDIATION, EPA, EPA/600/R-03/143, THE DNAPL REMEDIATION CHALLENGE: IS THERE A CASE FOR SOURCE DEPLETION xiii (2003), available at <http://www.epa.gov/ada/download/reports/600R03143/600R03143-fm.pdf> ("[A]chievement of drinking water MCLs in these source zones as well as source zones in more challenging heterogeneous hydrogeologic conditions (e.g. bedrock, karst

Yellow Water Road Dump in Baldwin, Florida, because of technical impracticability.¹⁴³ Waivers are available for interim remedies where the final remedy, once completed, can attain ARARs.¹⁴⁴ As important in practice, the EPA sometimes has selected remedies where there was uncertainty as to whether MCLs would be met after the remedy was completed – the Record of Decision contemplates that the waiver authority could be used should the levels prove to be technically impracticable in the future.¹⁴⁵ In other cases, waivers have been used where proposed remedies to attain a standard would have presented a greater environmental risk.¹⁴⁶ Similarly, the EPA preserves its options to grant waivers under the statute should contamination increase at a site.¹⁴⁷

In more recent years, the EPA has on occasion exercised its ARAR waiver authority in a more problematic way. At the Homestead Air Force Base west of Miami, the Remedial Investigation/Feasibility Study found arsenic levels in excess of the relevant MCL for arsenic.¹⁴⁸ The EPA selected a remedy involving access and use restrictions for soil and groundwater and groundwater monitoring.¹⁴⁹ To do this, it exercised its ARAR waiver authority with respect to the arsenic in the groundwater, stating, “a waiver to the chemical-specific ARARs is appropriate because Alternative 2 will attain a standard of performance considered protective of human health and the environment through access and use restrictions and assesses the compliance of groundwater ARARs through annual groundwater monitoring and a 5-year site review.”¹⁵⁰ Although the precise legal authority for this waiver is not clear, presumably the Homestead waiver invokes CERCLA § 121(d)(4)(D), where “the remedial action selected will attain a standard of performance that is equivalent to that required under the otherwise applicable standard, requirement, criteria, or limitation, through use of another method or approach.”¹⁵¹ Other Records of Decision take a different approach. Where natural attenuation can bring groundwater into compliance in a reasonable time (perhaps 100 years), waivers may not be considered

systems, multiple stratigraphic units) is unlikely.”); *see generally Non-Aqueous Phase Liquids (NAPLs) and Ground Water*, EPA, available at http://www.epa.gov/superfund/resources/gwdocs/non_aqu.htm (last visited Jan. 26, 2005).

¹⁴³ EPA, EPA ROD/R04-92/103, SUPERFUND RECORD OF DECISION, YELLOW WATER ROAD DUMP, BALDWIN, FLORIDA 3, 34 (1992).

¹⁴⁴ 42 U.S.C. § 9621(d)(4)(A); EPA, EPA/ROD/R04-91/079, EPA SUPERFUND RECORD OF DECISION, PETROLEUM PRODUCTS CORP. 12 (1990).

¹⁴⁵ *E.g.*, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, EPA, EPA 540/R-96/023, PRESUMPTIVE RESPONSE STRATEGY AND EX-SITU TREATMENT TECHNOLOGIES FOR CONTAMINATED GROUNDWATER AT CERCLA SITES, FINAL GUIDANCE 5, 16 (1996); EPA, EPA/ROD/R08-98/107, EPA SUPERFUND RECORD OF DECISION, HILL AIR FORCE BASE (1998); EPA, EPA/ROD/R04-93/140, EPA SUPERFUND RECORD OF DECISION, ANODYNE, INC., NORTH MIAMI BEACH, FLORIDA 1 (1993); EPA, EPA/ROD/R02-89/088, EPA SUPERFUND RECORD OF DECISION, PREFERRED PLATING CORP. (1989); EPA, EPA/ROD/R04-00/074, EPA RECORD OF DECISION, JACKSONVILLE NAVAL AIR STATION OUS, 2-110 (2000); EPA, EPA/AMD/R-4-92/113, EPA SUPERFUND RECORD OF DECISION AMENDMENT, WHITEHOUSE OIL PITS, WHITEHOUSE, FLORIDA 20 (1992) (“[C]onsideration may be given to a waiver of chemical-specific ARARs for the aquifer based on the technical impracticability of achieving further contaminant reduction . . .”).

¹⁴⁶ 42 U.S.C. § 9621(d)(4)(B); EPA, EPA/ROD/R04-96/275, EPA SUPERFUND RECORD OF DECISION, USN AIR STATION CECIL FIELD, JACKSONVILLE, FLORIDA 21 (Oct. 2, 1995) (waiving Florida water quality standard for iron, lead, and nickel “because compliance with this requirement would result in greater risk to the environment than alternative options”); EPA, EPA/ROD/R04-90/061, EPA SUPERFUND RECORD OF DECISION, SCHUYLKILL METALS CO., PLANT CITY, FLORIDA 20-37 (1990) (waiving water quality criteria in a Florida Superfund site in light of environmental risks posed by excavating sediments in flooded area); EPA, EPA/ROD/R04-90/072, EPA SUPERFUND RECORD OF DECISION, KASSAUF-KIMERLING BATTERY DISPOSAL, TAMPA, FLORIDA 11 (1990) (waiving water quality criteria for lead because of environmental damage that would occur if marsh sediments were disturbed). *See also* EPA, EPA/ROD/R04-90/067, EPA SUPERFUND RECORD OF DECISION, YELLOW WATER ROAD DUMP, BALDWIN, FLORIDA 14-15 (1990) (showing regional administrator exercising waiver authority under TSCA regulations 40 C.F.R. § 761.75(c)(4) is of no unreasonable risk of injury resulting from noncompliance).

¹⁴⁷ EPA, EPA/ROD/R04-94/180, EPA SUPERFUND RECORD OF DECISION, DAVIE LANDFILL, DAVIE, FLORIDA 34 (1994) (“Should contaminants reach asymptotic levels prior to reaching performance standards, a waiver may be considered provided affected residential areas are provided with public water.”).

¹⁴⁸ EPA, EPA/ROD/R04-99/070, EPA SUPERFUND RECORD OF DECISION, HOMESTEAD AIR FORCE BASE OU7 70 (1999).

¹⁴⁹ *Id.* at 196.

¹⁵⁰ *Id.* at 195.

¹⁵¹ 42 U.S.C. § 9621(d)(4)(D) (2000).

necessary.¹⁵²

Though not determinative, costs are obviously relevant to waivers of ARARs. For example, cost is relevant to technical impracticability because engineering feasibility ultimately is limited by cost.¹⁵³ Waivers to adopt technologies that meet an “equivalent level of performance” can “provide cost-saving flexibility.”¹⁵⁴ The fund-balancing waiver can shape EPA decisions when resources are limited such that the agency needs to balance the need for protection at a site against the need to address other sites.¹⁵⁵ In addition, over time the EPA has adjusted the time-frames in which a remedy can attain certain ARARs, such as MCLs under the SDWA, based on the projected uses of the aquifer in the near future. “[A]llowing for an extended time frame to achieve cleanup standards provides the opportunity to develop less intensive, lower cost alternatives.”¹⁵⁶

III. Everglades Restoration

A. Interim Restoration Goals under CERP

The enabling statute for the Comprehensive Everglades Restoration Plan (CERP) is Section 601 of the Water Resources Development Act of 2000 (WRDA 2000).¹⁵⁷ The Act generally expresses congressional approval of “the Comprehensive Everglades Restoration Plan contained in the ‘Final Integrated Feasibility Report and Programmatic Environmental Impact Statement, dated April 1, 1999’”¹⁵⁸ To Everglades Restoration aficionados, this Plan incorporated by reference in WRDA 2000 is known as “The Yellow Book.” As with CERCLA before the 1986 SARA amendments, however, neither WRDA 2000 nor The Yellow Book addresses the “how clean is clean,” or “how much restoration is enough” issues.

WRDA 2000 requires the Army Corps of Engineers to promulgate Programmatic Regulations “to ensure that the goals and purposes of the Plan are achieved.”¹⁵⁹ The regulations are to include the “establishment of interim goals to provide a means by which the restoration success of the Plan may be evaluated throughout the implementation process.”¹⁶⁰ The Corps finally promulgated its first Programmatic Regulations in 2003.¹⁶¹ WRDA 2000 refers to the “natural system restoration goals” of the Plan.¹⁶² “Natural system” is broadly defined to include “all land and water managed by the Federal Government or the state within the South Florida ecosystem,”¹⁶³ and includes “tribal land that is designated and managed for conservation purposes, as approved by the tribe.”¹⁶⁴ The “South Florida ecosystem” includes “the land and water within the boundary of the South Florida Water Management District in effect on July 1, 1999.”¹⁶⁵

¹⁵² EPA, EPA/ROD/R04-94/204, RECORD OF DECISION, AGRICO CHEMICAL CO., PENSACOLA, FLORIDA 48 (Aug. 1994) (referencing EPA, GUIDANCE ON REMEDIAL ACTIONS FOR CONTAMINATED GROUND WATER AT SUPERFUND SITES (1988)), available at www.epa.gov/superfund/sites/rods/fulltext/r0494204.pdf. See also *Information on OSWER Directive 9200.4-17P, Use of Monitored Natural Attenuation at Superfund, RCRA Corrective Action, and Underground Storage Tank Sites*, EPA (Apr. 1999), available at <http://www.epa.gov/swerust1/directiv/d9200417.htm>.

¹⁵³ OFFICE OF EMERGENCY AND REMEDIAL RESPONSE, EPA, PLB. NO. 9200.3-23FS, EPA 540/F-96/018, THE ROLE OF COST IN THE REMEDY SELECTION PROCESS 6 (1996), available at http://www.epa.gov/superfund/resources/cost_dir/cost_dir.pdf.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 7.

¹⁵⁷ WRDA of 2000, Pub. L. 106-541, § 601, 114 Stat. 2572, 2680-2693 (2000).

¹⁵⁸ *Id.* at § 601.

¹⁵⁹ *Id.* at § 601(a)(4), (b)(1).

¹⁶⁰ *Id.* at § 601(h)(3)(C)(III).

¹⁶¹ See Programmatic Regulations for the CERP: 68 Fed. Reg. 64,200 (Nov. 12, 2003) (to be codified at 33 C.F.R. pt. 385).

¹⁶² WRDA § 601(j)(1) (eliciting National Academy of Sciences to review Plan’s progress).

¹⁶³ *Id.* at § 601(a)(3).

¹⁶⁴ *Id.* at § 601(a)(3)(B)(vi).

¹⁶⁵ *Id.* at § 601(a)(5).

The statutory goals for the Plan are stated in a quite general way, and reflect the balancing of several potentially conflicting goals, only one of which is natural system restoration. The “Central and Southern Florida Project,” i.e. the system of canals, levels, dykes, etc. currently in place, is to be modified “to restore, preserve, and protect the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection.”¹⁶⁶ The statute makes reference to “the protection of water quality in, the reduction of the loss of fresh water from, and the improvement of the environment of the South Florida ecosystem and to achieve and maintain the benefits to the natural system and human environment described in the Plan”¹⁶⁷

In its proposed Programmatic Regulations, the Corps acknowledged the multiple “overarching goals” of the Plan.¹⁶⁸ The division of opinion over priorities among the goals emerged in a dispute over the definition of the term “restoration” as used in the rules. Initially, the Corps proposed to define the term to mean “the level of recovery and protection described in the Plan that was approved by Congress in enacting WRDA 2000 [the Yellow Book] with such modifications as Congress may provide in the future.”¹⁶⁹ To accommodate those who would promote the natural system restoration goals over other goals, however, the Corps also made express and detailed reference to a number of the natural system restoration goals.¹⁷⁰ Controversy involving the restoration definition continued after the 2002 proposal, and the Corps decided to drop the incorporation of the Yellow Book measures of restoration, which the Everglades Coalition had described in its comments as based on “anticipated performance” of the remedial measures rather than “ecological necessity.”¹⁷¹ Though the Natural Resources Defense Council argued for a more forceful promotion of restoration over other statutory goals, arguing that the “regulations must preclude the achievement of water supply and flood protection goals at the expense of restoration goals,”¹⁷² other commentators feared the demotion of the other statutory goals of “water supply and flood protection” by “scientists” seeking to “advance an elusive and constantly changing vision of restoration . . . instead of the Plan approved by Congress.”¹⁷³ The revised somewhat less precise definition of “restoration” explicitly balanced the views of these commentators:

Restoration means the recovery and protection of the South Florida ecosystem so that it once again achieves and sustains those essential hydrological and biological characteristics that defined the undisturbed South Florida ecosystem. As authorized by Congress, the restored South Florida ecosystem will be significantly healthier than the current system; however it will not completely replicate the undisturbed South Florida ecosystem.¹⁷⁴

Since this largely symbolic definition provides little guidance as to precise restoration goals, we must look elsewhere to answer the “how much is enough?” question. WRDA 2000 mandates that the Programmatic Regulations establish a “process . . . to ensure the protection of the natural system consistent with the goals and purposes of the Plan, including the establishment of *interim goals* to provide a means by which the restoration success of the Plan may be evaluated throughout the implementation process.”¹⁷⁵ This language also became

¹⁶⁶ *Id.* at § 601(b)(1)(A).

¹⁶⁷ *Id.*

¹⁶⁸ Programmatic Regulations for the CERP Pt. III, 67 Fed. Reg. 50,540 (Aug. 2, 2002).

¹⁶⁹ *Id.* at 50,542 (preamble discussion of debate over the restoration definition precipitated by Advanced Notice of Proposed Rulemaking).

¹⁷⁰ *Id.*

¹⁷¹ Programmatic Regulations for the CERP Pt. II, 68 Fed. Reg. 64,200, 64,204 (Dec. 12, 2003) (to be codified at 33 C.F.R. pt. 385).

¹⁷² *Id.* at 64,205.

¹⁷³ *Id.*

¹⁷⁴ Programmatic Regulations for the CERP, 33 C.F.R. § 385.3 (2004) (emphasis added).

¹⁷⁵ WRDA of 2000, Pub. L. No. 106-541, § 601(h)(3)(C)(i)(III), 114 Stat. 2572, 2689 (2000).

the focus of considerable debate in connection with the 2003 regulations. There was considerable disagreement as to whether the interim goals themselves should be a part of the regulations, or, alternatively, whether the regulations simply should lay out the *process* for establishing these goals.¹⁷⁶ The Corps decided not to include such goals in the first set of regulations “because more time [was] needed to model them to satisfaction.”¹⁷⁷ While “clarifying” that the interim goals would not be “standards or schedules enforceable in court,”¹⁷⁸ the Corps committed in the Programmatic Regulations to development and recommendation of a set of interim goals “no later than six months after the effective date of the programmatic regulations,” which was December 11, 2003.¹⁷⁹ The regulations call for execution of an Interim Goals Agreement between relevant federal, state, and tribal entities by December 13, 2004.¹⁸⁰ The regulations set forth general principles for development of the interim goals, initially to be recommended by REStoration COOrdination & VERification (RECOVER).¹⁸¹ “RECOVER is an interagency and interdisciplinary scientific and technical team described in the *Yellow Book*.”¹⁸² By January 30, 2004, RECOVER had circulated an Interim Targets and Goals Report for Review.¹⁸³

RECOVER’s proposed approach to interim goals is practical and logical. Initially, the group focused on hydrologic, water quality, and biological indicators.¹⁸⁴ It divides its list of recommended CERCLA Interim Goal indicators into three groups: (1) “Indicators that will be developed into Interim Goals using established predictive methods;” (2) “[i]ndicators that will be developed into Interim Goals, although the predictive tools are still under development and/or review;” and (3) “[i]ndicators that, at present, cannot be developed into Interim Goals, although progress will be reported to Congress at five-year intervals, and for which predictive measures will be developed.”¹⁸⁵ Interim Goals in the first category, obviously the farthest along in development in early 2004, deal with the quantity and distribution of water, salinity patterns in coastal bays, and measures of phosphorus concentration.¹⁸⁶

Most interesting for present purposes is RECOVER’s careful attempt not to overlap its effort with regulatory efforts by other environmental agencies. Though RECOVER has an ongoing water quality team (WQT), it characterizes its effort as devising “system-wide water quality performance measures” rather than water quality standards, to which it defers to the State of Florida, the Miccosukee and Seminole tribes, and the EPA.¹⁸⁷ The features of water quality upon which RECOVER focuses obviously overlap with features measured under these other regulatory regimes.

¹⁷⁶ Programmatic Regulations for the CERP Pt. II. 68 Fed. Reg. at 64,208-209.

¹⁷⁷ *Id.* at 64,209.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ 33 C.F.R. § 300.38(a)(1) (2004): 68 Fed. Reg. at 64,243.

¹⁸¹ 33 C.F.R. § 300.38(c). 68 Fed. Reg. at 64,243.

¹⁸² 33 C.F.R. § 300.20(a). 68 Fed. Reg. at 64,230.

¹⁸³ See RESTORATION COORDINATION AND VERIFICATION (RECOVER), RECOMMENDATIONS FOR INTERIM GOALS AND INTERIM TARGETS FOR THE COMPREHENSIVE EVERGLADES RESTORATION PLAN (DRAFT) (2004), available at www.evergladesplan.org/pm/recover/recover_docs/rlg/013004_rlg_ig_it_report.pdf.

¹⁸⁴ *Id.* at 3.

¹⁸⁵ *Id.* at 11.

¹⁸⁶ *Id.*

¹⁸⁷ *Frequently Asked Questions (FAQs)*, RECOVER, at Q14, available at http://www.evergladesplan.org/pm/recover/recover_faqs.cfm (last visited Jan. 31, 2005).

B. Compliance with Other Laws under CERP: Section 1501 Assurances and Permitting

The Project Implementation Reports under CERP typically contain a separate chapter of “compliance” with environmental laws, which is separate and apart from the Interim Goals and other internal CERP evaluative methods. The Programmatic Regulations require the Corps in a PIR to “comply with all applicable Federal, State, and tribal laws.”¹⁸⁸ The State of Florida in turn has linked the participation in a CERP project of the non-federal sponsor, the South Florida Water Management District, to specific findings regarding a Project Implementation Report. Florida Statutes ch. 373.1501 requires the SFWMD to convene a “preapplication conference with all state and federal agencies with applicable regulatory jurisdiction.”¹⁸⁹ The SFWMD must “determine with reasonable certainty that all project components are consistent with applicable laws and regulations, and can be permitted and operated as proposed.”¹⁹⁰ The SFWMD determination in this regard is subject to the approval of the Florida Department of Environmental Protection (DEP) “before any project component is submitted to Congress for authorization or receives an appropriation of state funds.”¹⁹¹ State law also requires the SFWMD to prepare its own project implementation report “[p]rior to executing a project cooperation agreement with the Corps for the construction of a project component.”¹⁹²

Until recently, project documents under CERP did not address regulatory compliance issues except in a very general way. In early stage CERP documents, this seems deliberate. For example, the January 2002 Project Management Plan for Everglades Agricultural Area Storage Reservoirs, Phase 1, simply laundry-listed a large number of federal and state statutes that might apply to the project.¹⁹³ The March 2002 Project Management Plan for WCA-3 Decompartmentalization and Sheetflow Enhancement Part 1 provided, “Specifically, prior to submittal to Congress the SFWMD will submit the PIRs for FDEP approval as provided herein.”¹⁹⁴ By 2004, PMPs complied with a guidance memorandum which the Corps had issued to mandate postponement of any discussion of permitting issues. CERP Guidance mandated inclusion of the following language in PMPs:

Currently, the application and timing of permits and other authorizations that may be required from the State of Florida for permits for CERP are being negotiated and discussed between the Florida Department of Environmental Protection, the South Florida Water Management District, and the U.S. Army Corps of Engineers. When these issues are resolved, the permitting and other authorization requirements in this PMP will be modified to conform to those conclusions.¹⁹⁵

¹⁸⁸ Programmatic Regulations for the CERP, 33 C.F.R. § 385.26(a)(3)(iii) (2004).

¹⁸⁹ FL. STAT. ch. 373.1501(5)(c)(1) (2000 West Supp. 2005).

¹⁹⁰ FL. STAT. ch. 373.1501(5)(c).

¹⁹¹ FL. STAT. ch. 373.026(8)(b).

¹⁹² FL. STAT. ch. 373.470(3)(c).

¹⁹³ JACKSONVILLE DIST., U.S. ARMY CORPS OF ENGINEERS, PMP: EVERGLADES AGRICULTURAL AREA STORAGE RESERVOIRS PHASE 1 61 (2002), available at http://www.evergladesplan.org/pm/program/program_docs/pmp_08_eaa/pmp_eaa_main_current.pdf. Project management plans are described in the Programmatic Regulations at 33 C.F.R. § 385.24.

¹⁹⁴ JACKSONVILLE DIST., U.S. ARMY CORPS OF ENGINEERS, PMP: WCA-3 DECOMPARTMENTALIZATION AND SHEETFLOW ENHANCEMENT PROJECT PART 1 84 (2002), available at

http://www.evergladesplan.org/pm/program/program_docs/pmp_12_wca/decomp_main_apr_2002.pdf.

¹⁹⁵ JACKSONVILLE DIST., U.S. ARMY CORPS OF ENGINEERS, NO. 0101.00, CERP GUIDANCE MEMORANDUM: INTERIM PERMITTING GUIDANCE LANGUAGE IN PMPs (2002). *E.g.*, JACKSONVILLE DIST., U.S. ARMY CORPS OF ENGINEERS, WINSBERG FARM WETLANDS RESTORATION PMP (FINAL) 12 (2004), available at http://www.evergladesplan.org/pm/program/pmp_91_winsberg.cfm; JACKSONVILLE DIST., U.S. ARMY CORPS OF ENGINEERS, PMP: BROWARD COUNTY WPA PMP 18 (2004) [hereinafter BROWARD COUNTY PMP], available at http://www.evergladesplan.org/pm/program/program_docs/pmp_45_broward_wpa/050404_pmp_45_broward_wpa_final.pdf.

Of particular note in light of the recent Supreme Court decision regarding the S-9 pumping station, is the PMP prepared for the Broward County WPA, which includes a project to reduce the discharge of runoff into water conservation 3A through the S-9 pump, employs this language regarding permitting.¹⁹⁶

In March 2004, for example, the Corps released its Final Integrated Project Implementation Report and Environmental Impact Statement for the Indian River Lagoon-South project. This document includes as part of its Appendix J - Project Assurances a Section 7 "State Compliance Report" directed to these various state law assurances.¹⁹⁷ This document reports the concurrences of the various agencies in the PIR in an obscure manner. For example, with respect to the DEP, the Appendix states, "The Florida Department of Environmental Protection has reviewed and by signing-off on the minutes of the preapplication conference has indicated that they do not anticipate any permitting issues with the project as currently proposed."¹⁹⁸ A separate Appendix enumerates comments of the DEP and other agencies on the draft PIR but does not directly address compliance requirements.¹⁹⁹

The draft Southern Golden Gates Estate (Picayune Strand) Hydrologic Restoration Integrated Project Implementation Report/Environmental Impact Statement, dated May 2004, provides a second example of the way PIRs address compliance with other environmental laws.²⁰⁰ After describing the statutory and regulatory compliance requirements in the draft Report's Section 12 (assurances) the Report discusses various state requirements.²⁰¹ As to permitting, the draft Report is quite vague, stating, "The project is still in the early stages of development and design, so it is difficult to establish with great certainty what regulatory issues might arise as the project proceeds. The DEP will continue to participate with the SFWMD staff in coordination of pre-application meetings and the preparation of information to be submitted to the DEP for review and approval."²⁰²

The Aquifer Storage and Recovery Pilot Projects have devoted more attention to permitting requirements and state assurances. The draft ASR Pilot Project Design Report/Draft Environmental Impact Statement was published in April 2004.²⁰³ The draft PPDR addresses three pilot projects: Lake Okeechobee Pilot Project, Hillsboro ASR Pilot Project, and Caloosahatchee (C-43) River Pilot Project.²⁰⁴ Section 6.0 of this Report addresses "Regulatory and Permitting Consideration."²⁰⁵ Prior to public meetings on the pilot projects, project managers thought through the principal anticipated permitting requirements and the lead regulatory agencies for those permits. In Florida, the DEP is the permitting authority for aquifer storage and recovery wells in the state, and readers of the draft pilot project design report were made aware of the project's need to involve Tallahassee in obtaining a UIC water quality criteria exemption for the project, "industrial" NPDES permits for the discharge of water into rivers or lakes after storage, as well as possible other exemptions. The UIC water quality criteria exemption process is contemplated to release the projects from a need to comply with "TDS, color, odor, iron, foaming agents, and aluminum" requirements, including MCLs under the Safe Drinking Water Act, since these "aesthetic" requirements purportedly have "no effects on human health."²⁰⁶ The ASR projects must obtain a consolidated state permit to operate the CERP project, under the state's

¹⁹⁶ BROWARD COUNTY PMP, *supra* note 195, at 18.

¹⁹⁷ JACKSONVILLE DIST., U. S. ARMY CORPS OF ENG'RS, PROJECT INDIAN RIVER LAGOON - SOUTH, FINAL INTEGRATED PIR AND EISJ-51-J-122 (2004), available at http://www.evergladesplan.org/pm/studies/study_docs/irl_south/pir_2004/AppendixJ.pdf.

¹⁹⁸ *Id.* at J-92.

¹⁹⁹ *Id.* at H-21, available at http://www.evergladesplan.org/pm/studies/study_docs/irl_south/pir_2004/AppendixH.pdf.

²⁰⁰ See JACKSONVILLE DIST., U.S. ARMY CORPS OF ENG'RS, S. GOLDEN GATE ESTATE'S DRAFT PIR & EIS (2004), available at http://www.evergladesplan.org/pm/projects/docs_30_sgge_pir.cfm.

²⁰¹ *Id.* at § 12.6.

²⁰² *Id.* at § 12.6.2.

²⁰³ See generally JACKSONVILLE DIST., U.S. ARMY CORPS OF ENG'RS, FINAL ASR PPDR FINAL EIS, VOL. 1 (2004), available at http://www.evergladesplan.org/pm/projects/pdp_asr_comb_deis_ppdr.cfm.

²⁰⁴ *Id.*

²⁰⁵ See *id.*, available at http://www.evergladesplan.org/pm/projects/project_docs/pdp_asr_combined/asr_ppdr_main_report_final.pdf.

²⁰⁶ *Id.* at 6-5.

Comprehensive Everglades Restoration Plan Regulation Act (CERPRA).²⁰⁷ CERPRA mimics the state's Environmental Resource Permits (ERPs).

With the exception of the ASR reports, therefore, early PIRs and PPDRs largely avoided discussion of regulatory and permitting requirements of CERP projects. CERP Guidance requires Project Milestones prior to the draft PIR or PPDR to include the "FS 1501 Pre-Application Meeting" and "Pre-Application Concurrence Letter Received."²⁰⁸ Presumably, the ongoing discussions between the Corps, the SFWMD, and the DEP will yield a permitting "process" consistent with CERPRA. Whether the permit "negotiations" between these entities will lead to a rational accommodation of restoration goals and regulatory requirements remains to be seen.

C. Permitting and Non-Compliance for non-CERP Everglades Restoration Projects

We have little direct experience to judge how smoothly the permitting process for CERP projects is going to work. As of late 2004 construction has not yet begun on any project officially part of the CERP approved in 2000, although the DEP has committed to having the "1501" process for the Indian River Lagoon - South project completed during the 2004 calendar year.²⁰⁹ Nonetheless, ongoing non-CERP projects provide some glimpses into potential difficulties. Non-CERP projects critical to Everglades restoration include the Kissimmee River Restoration, Modified Water Deliveries to Everglades National Park, Canal C-111, a number of smaller "Critical Projects" authorized in WRDA 1996, and the Everglades Construction Project. The Corps and the District have had to work through permitting issues for each of these projects.

The Everglades Construction Project is the moniker for the SFWMD's first major water quality improvements projects for Everglades waters. This project consists primarily of the construction and operation of six Stormwater Treatment Areas between the Everglades Agricultural Area and natural areas to its south, the so-called Everglades Protection Area, designed to reduce the concentration of phosphorus. The project began in the 1990's as part of the settlement agreement reached between the United States and Florida to improve the quantity, quality, timing, and distribution of water into federal lands such as Everglades National Park and the Loxahatchee National Wildlife Refuge. Florida's Everglades Forever Act, enacted in 1994, provided the framework for this project.²¹⁰ Interestingly, under this pre-CERP regime the SFWMD played the role of the "polluter," i.e. the permittee who must comply with environmental regulations, including the restoration of environmental damage. Under the Everglades Forever Act, the DEP is the permitting authority for the "construction, operation, and maintenance" of the Project to be conducted by the SFWMD.²¹¹ The statute expressly authorizes the DEP to include in its permits to the SFWMD "any standard conditions provided by department rule which are appropriate and consistent" with the Everglades Forever Act.²¹²

There is considerable irony in the fact that the Corps has also played a "regulator" role in the Everglades Construction Project. This was so even though the Corps had been intimately involved in the construction of the Central and Southern Florida Project, which the SFWMD operates, and which caused much of the environmental damage which the Everglades Construction Project addresses. The Corps required that the

²⁰⁷ FL. STAT. ch. 373.1502 (West Supp. 2005).

²⁰⁸ JACKSONVILLE DIST., U.S. ARMY CORPS OF ENG'RS, NO. 0150.00, CERP GUIDANCE MEMORANDUM: CERP PROJECT MILESTONES 4 (2003), available at http://www.evergladesplan.org/documents/cgm/cgm_015.00.pdf.

²⁰⁹ SOUTH FLORIDA ECOSYSTEM RESTORATION TASK FORCE, COORDINATING SUCCESS 2004: STRATEGY FOR RESTORATION OF THE SOUTH FLORIDA ECOSYSTEM AND TRACKING SUCCESS: BIENNIAL REPORT FOR AUGUST 2002-JULY 2004, DRAFT 5A 13 (2004) [hereinafter 2004 SFRTF REPORT], available at http://www.sfrestore.org/tf/minutes/2004_meetings/6oct04confcall/oct04_draft_sp.pdf (last visited Feb. 1, 2005).

²¹⁰ See FLA. STAT. ch. 373.4592(9) (2000 West Supp. 2005).

²¹¹ FLA. STAT. ch. 373.4592(9)(d)-(e).

²¹² FLA. STAT. ch. 373.4592(9)(g).

project obtain a federal permit under the dredge and fill provisions of the Clean Water Act.²¹³ The Corps permit initially served as the vehicle for other federal agency input into the design and operation of the project. Specifically, the Corps initially imposed water quality discharge standards similar to those which might be imposed under the NPDES system administered by the EPA or the DEP rather than the Corps.²¹⁴ The Corps claimed to be acting “in the public interest” in light of the absence of an NPDES permit to regulate these discharges.²¹⁵ The Corps later modified its “dredge and fill” permit to leave such issues to NPDES permitting.²¹⁶ Differences between the Corps and the SFWMD over terms in a Section 404 dredge and fill permit for the marshes led to creation of a Joint Legislative Committee on Everglades Oversight “to monitor permitting issues related to the Everglades.”²¹⁷ The EPA and the SFWMD argued over the applicability of NPDES permits for the STAs.²¹⁸ The state permitting process included “hundreds of pages of conditions and appendices.”²¹⁹

The Everglades Construction Project continues to operate under its permits from the DEP under the Everglades Forever Act. While the SFWMD designed and built the first five STAs, the Corps became responsible for the sixth.²²⁰ By 2004, the project had begun to show measurable results. The South Florida Ecosystem Restoration Task Force reported:

As of June 2004, over 35,000 acres of stormwater treatment areas (STAs) had been constructed by the [District]. Almost 30,000 acres were in flow-through operation and removing total phosphorus that otherwise would have gone into the [Everglades Protection Area]. During water year 2004, STA-1W, STA-2, STA-3/4, STA-5, and STA-6 Section 1 removed more than 87 metric tons of total phosphorus, bringing the total removal to over 425 tons since 1994. Inflow concentrations averaged 136 ppb, while the outflow concentrations averaged 42 ppb. STA performance varied, ranging from 13-14 ppb for STA-2 and STA-6, to almost 100 ppb for STA-5. Portions of the stormwater treatment areas were being managed for submerged aquatic vegetation, and the remainder for cattails and other emergent vegetation.²²¹

The DEP permit for the Everglades Construction Project set a flow weighted goal of 50 ppb phosphorus. The Stormwater Treatment Areas have averaged approximately 41 ppb phosphorus since the beginning of operation in 1994. According to the Community Watershed Fund, “[i]n WY 2003, two of the four operational Stormwater Treatment Areas (2 and 6) achieved the treatment goal. Stormwater Treatment Area 1 West discharge slightly exceeded the treatment goal (53 ppb total phosphorus). Stormwater Treatment Area 5, which is still in the stabilization phase and not yet subject to the treatment goal, had a discharge of about 150 ppb total phosphorus.”²²²

²¹³ Dep’t of the Army, Permit No. 199404532 (Mar. 13, 1997).

²¹⁴ See Keith Rizzardi, *Regulating Watershed Restoration: Why the Perfect Permit is the Enemy of the Good Project*, 27 NOVA L. REV. 51, 57 (2002).

²¹⁵ Memorandum from Bob Barron, U.S. Army Corps of Eng’rs, for Record of Decision for Permit No. 199404532 (Mar. 13, 1997). See also 33 C.F.R. § 320.4(a) (2004).

²¹⁶ U. S. Army Corps of Eng’rs, Permit No. 199404532 (Mar. 13, 1997).

²¹⁷ Rizzardi, *supra* note 214, at 57 (2002). See also FL. STAT. ch. 11.80 (2004).

²¹⁸ Rizzardi, *supra* note 214, at 57-58.

²¹⁹ *Id.* at 63.

²²⁰ This division of responsibility came about under the consent decree which settled the litigation brought by the United States against the State of Florida regarding the quality of Everglades water entering federal properties. See GOV’T ACCOUNTING OFFICE (GAO), GAO/RCED-00-23. CERP: ADDITIONAL WATER QUALITY PROJECTS MAY BE NEEDED AND COULD INCREASE COSTS App. II, at 40 (2000), available at <http://www.gao.gov/new.items/rc00235.pdf>.

²²¹ 2004 SFRTF REPORT, *supra* note 209, at 68-69.

²²² *Everglades Water Quality*, Community Watershed Fund, available at <http://cwfund.org/EvergladesWaterQuality.htm> (last visited

The Everglades Construction Project is not the only pre-CERP Everglades restoration project that may signal CERP permitting problems to come. The 1994 Everglades Forever Act also required that there be a 25% phosphorus reduction program in the Everglades Agricultural Area through an Everglades Best Management Practices Program, but did not require a compliance determination until 2003. The determination in 2003 for the C-139 Basin found that the area was out of compliance. “This determination triggered inspections by the SFWMD staff to verify initial BMP implementation.”²²³ Nonetheless, the SFWMD determined in August 2004 that C-139 remained out of compliance and that landowners will have to increase the best management practices to control phosphorus.²²⁴

In 2000, moreover, the Florida legislature passed the Lake Okeechobee Protection Act, a phased, comprehensive program to restore the Lake, sometimes called “the liquid heart” of the Everglades, which operates in addition to CERP. While the statute established presumptive phosphorus loads for the Lake, the DEP subsequently, in May 2001, established a Total Maximum Daily Load (TMDL). The agency is now working on TMDLs for the tributaries into the Lake and schedules associated with the agency’s watershed management program. After the agency proposed TMDLs for tributaries just northeast of the Lake, Earth Justice sued the agency over them.²²⁵

Under the Everglades Forever Act, by the end of 2006, water delivered to the Everglades Protection Area is supposed to achieve state water quality standards.²²⁶ In July 2003, the DEP proposed that this water quality standard be the geometric mean of 10 ppb total phosphorus for the “long-term” with “natural variability.” Florida officially adopted the standard on June 25, 2004.²²⁷ None of the Stormwater Treatment Areas part of the Everglades Construction Project or the Lake Okeechobee permitted discharges are achieving this level of reduction. The rule authorizes discharges above the criteria, provided measures are taken to achieve the best available phosphorus reduction technologies (such as the District’s Long-Term Plan), and compliance methodology for determining achievement of such criteria.²²⁸ The DEP decided to build flexibility into the state water quality standard concurrent with the state legislature’s 2003 amendment of the state CERPRA statute to require that water quality standards be “met” rather than attained only “to the maximum extent practicable.”²²⁹ WRDA 2000, moreover, requires that CERP project implementation reports “comply with applicable water quality standards and applicable water quality permitting requirements”²³⁰ The federal statute expressly requires that the Secretary of the Army “take into account water quality by considering applicable state water quality standards.” and “include such features as the Secretary determines are necessary to ensure that all ground water and surface water discharges from any project feature . . . will meet all applicable water quality standards and applicable water quality permitting requirements.”²³¹ Even without the

Feb. 10, 2005).

²²³ SFRTF 2004 REPORT, *supra* note 209, at 43.

²²⁴ Press Release, SFWMD, C-139 Basin Exceeds Phosphorus Limits Landowners to Increase Best Management Practices (Aug. 11, 2004), available at http://www.sfwmd.gov/newsr/8_04_newsrel.html (stating phosphorus regulatory limit for 2004 of 45 metric tons exceeded by 24 metric tons).

²²⁵ SOUTH FLORIDA ECOSYSTEM RESTORATION TASK FORCE, COORDINATING SUCCESS 2004: STRATEGY FOR RESTORATION OF THE SOUTH FLORIDA ECOSYSTEM AND TRACKING SUCCESS: BIENNIAL REPORT FOR AUGUST 2002-JULY 2004 (2004) [hereinafter SFRTF JULY 2004] (omitted from Draft 5A in Oct.).

²²⁶ FLA. STAT. ch. 373.4592(4) (2000 West Supp. 2005).

²²⁷ See Press Release, Everglades Restoration, Florida Adopts Everglades Water Quality Standard (Jun. 25, 2004), available at <http://www.dep.state.fl.us/evergladesforever/news/2004/0625.htm>.

²²⁸ SFRTF JULY 2004, *supra* note 225 at 29 (omitted from Oct. draft).

²²⁹ FLA. STAT. ch. 373.1502(3)(b)(2) (West Supp. 2005). See also Rizzardi, *supra* note 214, at 75 (praising the former version of the statute for its “remarkable” flexibility but questioning whether the concept would be accepted by EPA and the federal government “as consistent with the Clean Water Act”).

²³⁰ WRDA 2000, Pub. L. 106-541, § 600(h)(4)(A)(iii)(VI), 114 Stat. 2572, 2680 (2000).

²³¹ WRDA 2000 § 600(B)(2)(A)(ii)(II).

2003 amendment to the state statute, therefore, federal law would now probably require the state's "water quality standards" be "met" in Everglades restoration projects.

IV. THE ROLE OF JUDICIAL REVIEW

A. The Current CERP Process: Florida APA Review of CERP Decisions

The South Florida Ecosystem Restoration Task Force met to review its draft annual report in 2004. Members of the Task Force each made editorial suggestions for the Report. The Miccosukee Tribe asked that the following draft language be deleted from the Report:

The Task Force will facilitate the prevention and resolution of conflict to the extent possible by clarifying the issue(s), identifying stakeholder concerns, obtaining and analyzing relevant information, and identifying possible solutions. Although these efforts are intended to facilitate conflict resolution, opportunities will always exist for parties to pursue conflicts through litigation. Litigation may prove to be time consuming, costly, and uncertain, and it may divert resources from restoration efforts...²³²

The Miccosukee Tribe has been represented over the past several years by Dexter Lehtinen, who was formerly the Interim U.S. Attorney who brought the Everglades Restoration lawsuit on behalf of the United States against the State of Florida.²³³ Since Mr. Lehtinen has been representing the Miccosukee Tribe, his client has proven quite litigious, including 2004 litigation against the South Florida Water Management District before the United States Supreme Court, as well as a number of trips to the United States Court of Appeals for the Eleventh Circuit.²³⁴

Everglades lawsuits have not, however, been limited to those brought by the Miccosukees. One of the most important features of the settlement of Lehtinen's original suit was the preservation of the right of non-parties to challenge aspects of the proposed remedy through Florida's Administrative Procedure Act.²³⁵ The sugar industry forced public disclosure of draft documents prepared in interagency settlement negotiations.²³⁶ It then challenged the settlement under the Florida APA.²³⁷ It also raised other challenges in federal court.²³⁸ After passage of the Everglades Forever Act, the Miccosukees attacked modifications of the settlement made to conform it to the state's new Act in federal court.²³⁹ They joined with Friends of the Everglades to challenge the DEP's issuance of permits to the SFWMD in state administrative proceedings and then state court.²⁴⁰

²³² SFRTF Report, *supra* note 209, at 21.

²³³ See Lisa Gibbs, *Knee-Deep in the Endless Muddy*, MIAMI REVIEW, June 14, 1991, at 13A, 17A, available at 1991 WL 2898299. Regarding the original Everglades settlement, see *United States v. SFWMD*, 847 F.Supp. 1567 (S.D. Fla. 1992).

²³⁴ See e.g., *Miccosukee Tribe of Indians of Fla. v. SFWMD*, 541 U.S. 95 (2004); *Miccosukee Tribe of Indians of Fla. v. EPA*, 105 F.3d 599 (11th Cir. 1997).

²³⁵ See *Statement of Principles*, Univ. of Miami School of Law, (Jul. 1993), available at

http://exchange.law.miami.edu/everglades/litigation/state_agency/state_administrative/docs/st_prin_071393.html.

²³⁶ *Fla. Sugar Cane League v. Fla. Dep't of Env'tl. Reg.*, No. 91-2108 (Fla. Cir. Ct. 1991), *per curiam aff'd*, 606 So.2d 1267 (Fla. Dist. Ct. App. 1992).

²³⁷ *Fla. Sugar Cane League v. SFWMD*, 617 So.2d 1065 (Fla. Dist. Ct. App. 1993)

²³⁸ *United States v. SFWMD*, 847 F. Supp. 1567, 1573 (S.D. Fla. 1992).

²³⁹ *United States v. SFWMD*, No. 88-1886 (S.D. Fla. 1988). See also Fumero & Rizzardi, *supra* note 1, at 679-80.

²⁴⁰ See *Miccosukee Tribe v. Fla. Dep't of Env'tl. Prot.*, 677 So.2d 110 (Fla. Dist. Ct. App. 1996); *Miccosukee Tribe of Fla. v. Fla. Dep't of Env'tl. Prot.*, 656 So.2d 505 (Fla. Dist. Ct. App. 1995); *Miccosukee Tribe of Indians & Friends of the Everglades v. SFWMD*, DOAH Case No. 96-3151 (Fl. Dep't of Env'tl. Prot., Final Order entered April 21, 1998). See also Fumero & Rizzardi, *supra* note 1, at 680.

Numerous agricultural interests intervened. Florida's citizens approved constitutional amendments requiring those "in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area or the Everglades Agricultural Area [to] be primarily responsible for paying the costs of abatement of that pollution."²⁴¹ This precipitated advisory opinions by the Attorney General, and then the Florida Supreme Court, over whether the provision was "self-executing."²⁴²

After Congress approved the Comprehensive Everglades Restoration Plan in the Water Resources Development Act of 2000, many hoped that "the cycle of litigation may have finally come to an end."²⁴³ CERPRA, the state Act enacted in 1999 prior to WRDA 2000, nonetheless continued to provide that for challenges to implementation of a CERP project through the Florida Administrative Procedure Act.²⁴⁴ Former SFWMD attorneys have warned, for example, about the various litigation opportunities to delay or frustrate the permitting of Aquifer Storage and Recovery wells.²⁴⁵ CERPRA provides a two-step process, in which the DEP and the SFWMD determine prior to the PIR's completion that permitting will occur for that project with "reasonable certainty,"²⁴⁶ with the actual permitting process occurring later.²⁴⁷ In general, administrative and judicial challenges are postponed until the DEP acts to approve the project during the first phase since CERPRA declares that actions by the district under step-one do not constitute "final agency action."²⁴⁸

Once agency action is final under Florida's APA, the process is rather formal compared with the federal APA.²⁴⁹ One of the Florida statute's most significant features is its so-called "substantial interest" hearing. Affected parties may precipitate an adversarial hearing before the state's Division of Administrative Hearings (DOAH) and an administrative law judge who works for DOAH rather than the agency that referred the matter for hearing. To obtain the hearing before DOAH, the party must have been the subject of a "decision" by the state agency. To request the "substantial interest" hearing, the party files a petition with the clerk of the agency.²⁵⁰ A properly framed petition is referred to DOAH within fifteen days unless "otherwise provided by law."²⁵¹ The evidentiary rules in the hearing are familiar to trial lawyers, since the Florida Administrative Code incorporates the discovery rules of the Florida Rules of Civil Procedure.²⁵² Any person whose substantial interests are affected by a proposed agency final permit decision may file a request for a formal or informal administrative proceeding.²⁵³

Formal proceedings involve disputed issues of material fact.²⁵⁴ Since a permit hearing is *de novo*, the agency is able and has been known to change its position during the course of the hearing.²⁵⁵ Virtually all permit disputes are formal proceedings.²⁵⁶ Informal proceedings involve only disputed legal issues.²⁵⁷ To have

²⁴¹ Fla. const. art. II, § 7(b).

²⁴² Advisory Opinion to the Governor— 1996 Amendment 5 (Everglades), 706 So.2d 278 (Fla. 1997). *See also* 96 Op. Att'y Gen. Fla. 92 (1996).

²⁴³ Fumero & Rizzardi, *supra* note 1, at 692.

²⁴⁴ FLA. STAT. ch. 373.1501(8) (2000 West Supp. 2005). *See also* FLA. STAT. ch. 120 (2002 West Supp. 2005).

²⁴⁵ Rizzardi, *supra* note 214 at 64-65.

²⁴⁶ FLA. STAT. ch. 373.1501(5)(c).

²⁴⁷ FLA. STAT. ch. 373.1502(3)(b) (West Supp. 2005).

²⁴⁸ FLA. STAT. ch. 373.1501(8).

²⁴⁹ The general discussion of Florida's Administrative Procedure Act follows the author's description found in Matthew Bender's Environmental Law Practice Guide, Chapter 51, Florida, published in 2003. ALFRED R. LIGHT, ENVTL. LAW PRACTICE GUIDE § 51 (Matthew Bender 2003).

²⁵⁰ FLA. ADMIN. CODE ANN. r. 28-101.001(2)(d)-(e), 28-106.104(1) (2004).

²⁵¹ FLA. STAT. CH. 120.569(2)(a) (2002 West Supp. 2005); FLA. ADMIN. CODE ANN. r. 28-106.201(3).

²⁵² FLA. STAT. ch. 120.569, 120.57; FLA. ADMIN. CODE ANN. r. 28-106.206.

²⁵³ FLA. STAT. ch. 120.569, 120.57.

²⁵⁴ FLA. ADMIN. CODE ANN. r. 28-106.201

²⁵⁵ *E.g.*, Hopwood v. DER, 402 So.2d 1296 (Fla. App. 1 Dist. 1981).

²⁵⁶ FLA. STAT. ch. 120.569(1).

²⁵⁷ FLA. STAT. ch. 120.57(2).

standing to initiate a formal proceeding under the APA, a party generally must prove its substantial interests are affected.²⁵⁸ However, Florida's Environmental Protection Act allows any "citizen" of the state to initiate a formal administrative proceeding on environmental decisions upon the filing of a verified petition asserting that the activity to be licensed "will have the effect . . . of polluting or impairing the air, water or other natural resources of the state."²⁵⁹ A 2002 amendment limits citizen initiation of such a proceeding to groups with membership in the area in existence more than a year, or citizens who can demonstrate "that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water, or natural resources protected by this chapter."²⁶⁰ Any citizen may continue to intervene in an ongoing proceeding without such limitation. These provisions enable parties assertedly representing the public interest, who would otherwise be unable to establish standing, to challenge final agency action. Where mediation is available, an agency is required to note that option in its point of entry notice and, where initiated, tolls the time for requesting an administrative hearing.²⁶¹ Where initiated there is public notice with a twenty-one day period to decide whether to participate in the mediation.²⁶² Under a separate procedure, property owners who believe an agency permitting decision is unreasonable or burdensome may initiate a special master proceeding which tolls the time to request an administrative hearing.²⁶³ Similarly, any person substantially affected by a decision who believes that the agency action constitutes a taking without compensation can seek judicial review.²⁶⁴ Under the so-called "Harris Act," in limited circumstances one may also seek to obtain compensation from the agency for loss of value of the property because of the agency action.²⁶⁵

Formal proceedings may be conducted by the agency itself or referred to a hearing officer of the Division of Administrative Hearings (DOAH) of the Department of Administration.²⁶⁶ Rarely will an agency act as a hearing officer. A formal hearing is similar to a non-jury trial. The primary role of the hearing officer, who must be a member of the Florida Bar, is to decide disputed issues of material fact. The applicant has the initial burden of proof in a permit application dispute.²⁶⁷ Under provisions of CERPRA, the proceeding challenging a CERP project is to be conducted as a summary hearing.²⁶⁸ The parties submit proposed recommended orders (PROs) after the hearing.²⁶⁹ After reviewing the PROs, the hearing officer forwards a recommended order and the record back to the agency for entry of a final order. A recommended order consists of findings of fact, conclusions of law and a recommendation. The parties may submit written exceptions to the recommended order. In its final order, the agency must rule on the exceptions. Findings of fact may be reversed

²⁵⁸ FLA. STAT. ch. 120.569(1).

²⁵⁹ FLA. STAT. ch. 403.412(5) (2002 West Supp. 2005).

²⁶⁰ FLA. STAT. ch. 403.412(5). See Lawrence E. Sellers, Jr. & Cathy M. Sellers, *Legislature Revises Citizen Standing Under Section 403.412(5): The "Devil's Deal" or Much Ado About Nothing?*, FLA. BAR ENVTL. & LAND USE REPTR., LEGISLATIVE ED. (May 2002), available at <http://www.epa.gov/ada/download/reports/600R03143/600R03143-fm.pdf> (last visited Feb. 21, 2005); *Manasota v. DER*, 441 So.2d 1109 (Fla. App. 1 Dist. 1983). Cf. *Sierra Club v. Suwannee Amer. Cement, Inc.*, 802 So.2d 520 (Fla. App. 1 Dist. 2001) (holding environmental groups' generalized interest in the environment held insufficient to establish standing for appeal under FLA. STAT. ch. 120.68(1)).

²⁶¹ FLA. ADMIN. CODE ANN. r. 28-106.402 (2004).

²⁶² FLA. ADMIN. CODE ANN. r. 28.106.111(5).

²⁶³ FLA. STAT. ch. 70.51 (2004 West Supp. 2005). See John N. Conrad & William B. Smith, *Special Master Proceedings for Regulatory Disputes- Pitfalls and Practical Considerations*, FLA. BAR ENV'T. & LAND USE REPTR. (Apr. 2002), available at http://www.eluls.org/reporter-april2002/apr2002_conrad&smith.html.

²⁶⁴ FLA. STAT. ch. 253.763 (2003); FLA. STAT. ch. 373.617 (2000); FLA. STAT. ch. 403.90 (2002).

²⁶⁵ FLA. STAT. ch. 70.001.

²⁶⁶ FLA. STAT. ch. 120.569(1) (2002 West Supp. 2005).

²⁶⁷ *Fla. Dept. of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. App. Dist. 1981). Specific burdens may be specified in particular environmental statutes. For example, the applicant must provide "reasonable assurance" that state water quality standards and public interest requirements are not violated by a wetlands permit. FLA. STAT. § 373.414 (2000 West Supp. 2005).

²⁶⁸ FLA. STAT. ch. 373.1501(8).

²⁶⁹ FLA. STAT. ch. 120.57(1).

if the agency concludes that no competent and substantial evidence in the record supports the finding. Conclusions of law may be reviewed de novo. The final order is subject to judicial review in the district courts of appeal and, in limited circumstances, may be subject to administrative review by the Governor and Cabinet.²⁷⁰

In applying the Florida APA to CERP decisions, one needs to consider the federalism aspects of these joint federal/state projects. Although in general the permit applicant to construct and to operate the projects under state law is a state agency, the SFWMD, is seeking permission of another state agency, the DEP,²⁷¹ the actual “decision” to proceed with a project, embodied in a Record of Decision, under federal law is a federal official, the Assistant Secretary of the Army for Civil Works upon recommendation of the Chief of Engineers.²⁷² Under the Corps’ Programmatic Regulations, the agency has committed to including “such information and analyses, consistent with this part, as are necessary to facilitate review and approval of projects by the SFWMD and the State pursuant to the requirements of Florida law.”²⁷³ Any action against a federal official in Florida state court is subject to removal to federal court.²⁷⁴ As the Miccosukee Tribe has discovered in its various litigation forays, federal court jurisdiction over state agencies such as the SFWMD may be limited by the Eleventh Amendment to the United States Constitution.²⁷⁵ The Corps has been concerned about opportunities for judicial review under federal law, such as lawsuits invoking the National Environmental Policy Act or the Federal Advisory Committee Act regarding the federal agency’s decision-making procedures.²⁷⁶ Nonetheless, these protections against litigation-related delays may be ineffective in light of the Corps’ “consistency” requirement incorporating the requirements of Florida law into the federal decision-making process. Like the original Everglades Ecosystem Settlement, a federal CERP process may be driven by administrative and judicial challenges under state law in state forums.

B. The Contrasting Judicial Review Scheme Under CERCLA: Deferential Federal Court Review on an Informal Administrative Record

The CERCLA statute provides a converse solution to the judicial review problem from that embarked on thus far for Everglade Restoration. CERCLA expressly centralizes remedial decision-making authority in the federal executive, literally the President of the United States, and directs all public participation in and challenges of such decisions to a federal forum with federal law governing the timing, scope, and standard of judicial review.²⁷⁷ Originally developed under the 1980 Act through careful orchestration of federal district

²⁷⁰ FLA. STAT. ch. 120.68, 373.114; FLA. ADMIN. CODE ANN. r. 42-2.013, -0132 (2004). Only a party who is “adversely affected” may seek judicial review of a final order. Fla. Stat. § 120.68(1). *E.g.*, Legal Envtl. Assistance Found. v. Clark, 668 So.2d 982, 987 (Fla. 1996); Fla. Chapter of the Sierra Club v. Suwannee Amer. Cement Co., Inc., 802 So.2d 520 (Fla. App. 1 Dist. 2001). (Standing to seek judicial review obviously is narrower than standing to initiate or to intervene in administrative proceedings.)

²⁷¹ See FLA. STAT. ch. 373.1502(3) (vesting permit authority in the “department” except where the “department” for a particular project component, in which case the “district” is the permitting authority).

²⁷² Programmatic Regulations for the CERP Subpart C. 33 C.F.R. § 385.26(f)(7) (2004) (describing three different submission processes for Project Implementation Reports after review and approval by Assistant Secretary of the Army for Civil Works).

²⁷³ *Id.* at § 385.15.

²⁷⁴ 28 U.S.C. § 1442(a) (2004).

²⁷⁵ See *United States v. SFWMD*, 28 F.3d 1563, 1570 (11th Cir. 1994); *Miccosukee Tribe of Indians of Fla. v. United States*, 980 F. Supp. 448, 460 n.16 (S.D. Fla. 1997). For a further discussion see Alfred R. Light, *The Myth of Everglades Settlement*, 11 ST. THOMAS L. REV. 55, 70-72 (1998).

²⁷⁶ *E.g.*, 33 C.F.R. § 385.14 (incorporating of NEPA and related considerations into implementation process); see also 68 Fed. Reg. 64,200, 64,207 (Nov. 12, 2003) (codified at 33 C.F.R. 385) (discussing public concern that RECOVER is an advisory body subject to the Federal Advisory Committee Act); 68 Fed. Reg. at 64,216-17 (discussing NEPA compliance, categorically excluding certain documents produced in CERP processes); REQUIREMENTS FOR CERP TEAMS, *supra* note 17 (setting forth guidelines for conduct of CERP meetings to avoid FACA application).

²⁷⁷ See CERCLA, 42 U.S.C. §§ 9604, 9606, 9607, 9613, 9617, 9620, 9621, 9622 (2000).

litigation by the United States Department of Justice, the regime was codified in the 1986 Superfund Amendments and Reauthorization Act.²⁷⁸

The statute vests all “response authority” under the statute in the President of the United States and sets forth a relatively straightforward decision-making framework through which the President is to select a “remedial action” under the statute’s cleanup standards.²⁷⁹ While the affected state is provided “substantial and meaningful involvement” in the decision-making process at various stages, the final decision is the President’s alone.²⁸⁰ The statute also sets forth the familiar “notice and comment” type of public participation by others, including persons potentially liable to pay the costs of or to perform the remedial action.²⁸¹ As we have discussed above, the federal cleanup standard in general incorporates state law requirements but permits the President to “waive” (i.e. to preempt) requirements in limited circumstances so long as the remedy involving the protection of health and the environment.²⁸² The EPA has regulations establishing the method for selecting a remedy.²⁸³

PRPs and others seeking to influence CERCLA decision-making have learned, frequently the hard way, that the only meaningful way to affect remedial action decisions at a Superfund site is to participate in this administrative process and/or in settlement negotiations, which ultimately must be approved by a federal district court. In fact, a very unusual “settlement” provision of the statute guarantees settlements in connection with a remedial action must have judicial approval.²⁸⁴ Except for the CERCLA administrative and judicial processes set forth in the statute, the statute declares that no court has jurisdiction to review actions taken or secured under the statute’s authority.²⁸⁵ This “review preclusion” provision forces all stakeholders to participate in the statutory process, or forego any opportunity to influence it.

Judicial review of the President’s action is ordinarily limited to the administrative record.²⁸⁶ The court lacks authority to overturn the decision unless it is “arbitrary and capricious,” a very deferential standard of judicial review indeed.²⁸⁷ In many cases, a court must uphold the President’s decision even though it would have shaped the remedy differently under its traditional equitable discretion in shaping mandatory injunctions.²⁸⁸

Although CERCLA contains a citizen suit provision, Congress made clear that it did not wish that litigation be available to thwart or delay remedial actions.²⁸⁹ Thus, the citizen suit is not available with respect to a remedial action “taken or secured” under the statute until after completion of construction of the remedy. Only then is a citizen suit available to enforce the environmental standards or requirements with which the

²⁷⁸ For further discussion of the development of CERCLA’s judicial review scheme through litigation and legislation see Alfred R. Light & M. David McGree, *Preenforcement, Preimplementation, and Postcompletion Preclusion of Judicial Review Under CERCLA*, 22 ENVTL. L. REP. 10397 (1992); see also LIGHT, *supra* note 74, § 5.3.2.

²⁷⁹ 42 U.S.C. §§ 9604(a), 9617, 9621.

²⁸⁰ 42 U.S.C. §§ 9621(f), 9604(a).

²⁸¹ 42 U.S.C. § 9617.

²⁸² 42 U.S.C. § 9621.

²⁸³ 40 C.F.R. § 300.430 (2004).

²⁸⁴ 42 U.S.C. § 9622(d).

²⁸⁵ 42 U.S.C. § 9613(h).

²⁸⁶ 42 U.S.C. § 9613(j)(1).

²⁸⁷ 42 U.S.C. § 9613(j)(2).

²⁸⁸ *United States v. Akzo Coatings of Amer., Inc.*, 949 F.2d 1409, 1424-25 (6th Cir. 1991); *Browning-Ferris Indus. of S. Jersey v. Muszynski*, 899 F.2d 151, 164 (2d Cir. 1990). *But see United States v. Hardage*, 663 F.Supp. 1280 (W.D. Okla. 1987).

²⁸⁹ 42 U.S.C. §§ 9613(h)(4), 9659. See *Voluntary Purchasing Groups v. Reilly*, 889 F.2d 1380, 1389 n.17 (5th Cir. 1989) (quoting 132 CONG. REC. H9582 (Oct. 8, 1986) (statement of Rep. Glickman), and 132 CONG. REC. S14928 (Oct. 3, 1986) (statement of Sen. Thurmond)).

remedy must comply.²⁹⁰ With respect to permitting, the most important feature of the statute is Section 9261(e).²⁹¹

Even when an action must meet ARARs within the meaning of CERCLA, if the remedy selected for a site under CERCLA is “conducted entirely onsite,” no “Federal, State, or local permit shall be required.”²⁹² This provision has also been held to implicitly preempt “non-uniform and potentially conflicting zoning laws [that] could override CERCLA remedies.”²⁹³ Where a claim asserted under state law would present an obstacle to completion of a remedial action plan under CERCLA, the state or local law is preempted.²⁹⁴ Read in *pari materia* with provisions of CERCLA requiring that remedial actions meet legally applicable, or relevant and appropriate, requirements of “Federal environmental law” and “State environmental or facility siting law that is more stringent . . .”, the provision obviously preempts procedural but not substantive requirements applicable under other environmental law.²⁹⁵ The EPA has strongly resisted the efforts of some to require it to participate in some sort of permit “equivalency” requirement in which the agency must go through procedural hoops and waive fees.²⁹⁶

This “permitting” provision under CERCLA reflects the harder line that the EPA has tried to draw between “remedial” activities and other regulated activities, where permitting procedures are appropriate and required. There are several important consequences of the regime encouraged by this provision. First, as alluded to above, the provision places the assessment of federal, state, and local requirements within the context of one procedure, rather than a set of duplicative procedures with their own separate timetables and methods of public participation. Second, through the ARAR waiver provision and related response authority, the statute clearly places the ultimate decision-making authority over selection of remedial action in the hands of federal authority. States have “substantial and meaningful involvement . . . in initiation, development, and selection of remedial actions to be undertaken in that State,”²⁹⁷ but final authority rests in federal authority, the President or his delegate, and federal courts in judicial review.²⁹⁸ States have to pay for compliance with state requirements for which a remedial action is not legally required to conform.²⁹⁹ Perhaps most important, the timing of judicial review is largely within the control of the President, or its delegate, since judicial review of the action is available only when the President decides to “enforce” its remedy in court (or perhaps at the time of completion of the remedy).³⁰⁰ Courts have agreed with the Government’s position that the statute’s preclusion of “pre-enforcement judicial review” applies to review under virtually all other legal authority.³⁰¹ Significantly, the Ninth Circuit has opined that the provision is intended to postpone litigation over whether a state standard is

²⁹⁰ A thorough though critical discussion of this legislative history appears in Alfred R. Light, *The Importance of “Being Taken”: To Clarify and Confirm the Litigative Reconstruction of CERCLA’s Text*, 18 B.C. ENVTL. AFF. L. REV. 1, 43-45 (1990).

²⁹¹ 42 U.S.C. § 9621(e) (2000).

²⁹² 42 U.S.C. § 9621(e)(1).

²⁹³ *United States v. City and County of Denver*, 100 F.3d, 1509, 1513 (10th Cir. 1996). See Paul S. Weiland, *Preemption of Local Efforts to Protect the Environment: Implications for Local Government Officials*, 18 VA. ENVTL. L.J. 467, 478-481 (1999).

²⁹⁴ *In re: Reading Co.*, 115 F.3d 1111, 1117 (3d Cir. 1997); *Arrest the Incinerator Remediation v. OHM Remediation Servs.*, 5 F.Supp.2d 291, 294 (M.D. Pa. 1998), *affirmed in part without opinion, rev’d in part without opinion* 185 F.3d 861 (3rd Cir. 1999).

²⁹⁵ 42 U.S.C. § 9621(d)(2).

²⁹⁶ Memorandum from Henry L. Longest II, Director of Office of Emergency and Remedial Response, to Director of Waste Management Division, Permits and Permit ‘Equivalency’ Processes for CERCLA On-site Response Actions (Feb. 10, 1992), available at <http://www.epa.gov/superfund/resources/remedy/pdf/93-55703.pdf>.

²⁹⁷ 42 U.S.C. § 9621(f)(1).

²⁹⁸ See 42 U.S.C. § 9621(f)(2)(B).

²⁹⁹ *Id.*

³⁰⁰ 42 U.S.C. § 9613(h).

³⁰¹ See, e.g., *Oil, Chemical, & Atomic Workers Union, AFL-CIO v. Richardson*, 214 F.3d 1379, 1382 (D.C. Cir. 2000); *Clinton Co. Commissioners v. EPA*, 116 F.3d 1018 (3d Cir. 1997); *Schalk v. Reilly*, 900 F.2d 1091 (7th Cir. 1990); *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882 (3d Cir. 1985).

“applicable or relevant and appropriate.”³⁰²

C. Wake-Up Call: The Miccosukee Supreme Court Decision

The 2004 United States Supreme Court decision in *Miccosukee Tribe v. SFWMD*³⁰³ demonstrates the potential utility of a provision similar to CERCLA Section 121(e) in the Everglades Restoration context. Dissatisfied with the Corps and the District’s decisions in Broward County, the Miccosukee Tribe sued to force the District to obtain an NPDES permit to operate the S-9 pumping station near the upper middle class suburban community of Weston. After the 2004 decision of the United States Supreme Court, a lower court will have to decide whether polluted stormwater in Weston is part of the same “navigable waters” as the water in Water Conservation 3A, on the other side of the levee from the suburban homes. If not, the District may have to obtain an “industrial” NPDES permit for the pump’s operation, necessary to prevent flooding.

The SFWMD touted the Supreme Court’s decision as a victory and seemed confident in 2004 that it would be able to show that the Weston and Water Conservation 3A waters were the same, eliminating need for an NPDES permit.³⁰⁴ The stakes of losing on this issue were, however, quite high for the District.³⁰⁵ Were the District to find that it had to obtain NPDES permits for the various features of the Central and Southern Florida Project it now operates, Everglades restoration probably would remain on the drawing boards as the agency devoted attention to a complex paperwork drill with little likely environmental benefits.³⁰⁶

This would assuredly be true with respect to the Broward County Water Preserve Area projects.³⁰⁷ The CERP project envisioned reduction of discharges from Weston into Water Conservation 3A as part of a larger project, “the purpose of the C-11 Impoundment is to direct runoff from the western C-11 drainage basin into the impoundment in lieu of pumping the untreated runoff via S-9 pump station into the WCA 3A.”³⁰⁸ At oral argument in the Supreme Court case, the Tribe really had no adequate explanation as to why, as a practical matter, an NPDES permit was needed given this Everglades Restoration Plan.³⁰⁹

³⁰² *Fort Ord Toxics Project, Inc. v. Cal. EPA*, 189 F.3d 828, 831-32 (9th Cir. 1999) (holding that the preclusion does not apply to Superfund remedial actions at federal facilities undertaken under CERCLA § 120 but postpones litigation in all other Superfund actions).

³⁰³ *SFWMD v. Miccosukee Tribe of Indians of Fla.*, 541 U.S. 95 (2004).

³⁰⁴ See Press Release, SFWMD, U.S. Supreme Court Decision ‘A Victory for the Everglades’ (Mar. 23, 2004), available at http://www.sfwmd.gov/gover/s_9final/releases/news_release/decision.pdf.

³⁰⁵ The implications of the decision also could be quite high for others. See e.g., Brief of Amici Curiae Nat’l Pub. Projects Coalition, et al., *Miccosukee Tribe*, 541 U.S. 95 (No. 02-262) and Amicus Brief of City of N.Y., et al., *id.* See also OFFICE OF WASTEWATER MGMT., EPA, EPA ICR No. 0226.15, INFORMATION COLLECTION REQUEST FOR APPLICATIONS FOR NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM DISCHARGE PERMITS AND THE SEWER SLUDGE MANAGEMENT PERMITS (FINAL DRAFT) (1999), available at <http://www.epa.gov/icr/icrs/icrpages/0226ss15.htm>; OFFICE OF WASTEWATER MGMT., EPA, EPA ICR No. 1427.06, INFORMATION COLLECTION REQUEST FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)/COMPLIANCE ASSESSMENT/CERTIFICATION INFORMATION (DRAFT) § 1.b (2000), available at <http://www.epa.gov/icr/icrs/icrpages/1427ss06.htm>; *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F.Supp.2d 41 (N.D.N.Y. 2003) (imposing civil penalties and injunctive relief for operating tunnel without an NPDES permit).

³⁰⁶ The SFWMD explained in its brief to the Supreme Court that “[t]he application of NPDES at each structure would conflict with many of CERP’s goals of environmental improvement by restricting water flows--the very purpose of NPDES--or imposing technological treatment requirements that are different from the planned consensus solution and that would dramatically increase restoration costs and time. NPDES would only add a lengthy and burdensome permitting process for every structure, which would in turn result in additional time- and resource-consuming litigation by those dissatisfied with CERP.” Brief of SFWMD at 41, *Miccosukee Tribe*, 541 U.S. 95 (No. 02-626).

³⁰⁷ See *Broward County Water Preserve Areas, CERP*, available at http://www.evergladesplan.org/pm/projects/proj_45_broward_wpa.cfm (last visited Feb. 1, 2005).

³⁰⁸ *Id.*

³⁰⁹ Consider this exchange from the oral argument:

Some commentators have argued that the potential for interference with restoration efforts through permitting challenges and litigation is so serious that Congress should exempt CERP and other watershed restoration projects from federal regulatory requirements, and the state should consolidate its regulatory requirements for such projects into one law.³¹⁰ This would be a strange federalism solution indeed, with the United States providing half the money and making the key project-related decisions, but leaving the stakeholder and public involvement in regulatory processes to state law. Such a regime would move further in the strange direction of the original Everglades Ecosystem Settlement, and the present CERP processes, in which outsiders may kibbutz arrangements struck between the federal and state agency partners through the formalistic Florida Administrative Procedure Act, a state forum under state law challenging a project authorized under federal law.³¹¹ Nonetheless, the *Miccosukee* case is a wakeup call for the possible Everglades Restoration nightmare over permitting. As attorney Keith Rizzardi put it, “Environmental permits, developed to protect the environment, are creating a needless maze of regulation for watershed restoration projects.”³¹² The Corps’ attempt to reconcile state permitting processes with federal permitting under ERP does little to resolve the matter.³¹³

IV. CERCLA JURISDICTION FOR THE CORPS

A. Could CERCLA Help Restore the Everglades?

Leon Billings, a key Senate staff aide in the early days of the environmental movement, once suggested that the Superfund might be used in a comprehensive approach to remedying the pollution of the Chesapeake Bay.³¹⁴ The language of the statute is quite broad. Response authority and use of the Fund is available to provide “remedial action” and other “response action” which the President deems “necessary to protect the public health or welfare or the environment.”³¹⁵ The definition of “remedy” or “remedial action” expressly includes such actions as “confinement, perimeter protection using, dikes, trenches, or ditches, . . . diversion, . . . collection of leachate and runoff. . . . and any monitoring reasonably necessary to assure that such actions protect the public health and welfare and the environment.”³¹⁶ It is at least arguable that an ecosystem-wide effort involving “unitary waters” such as Everglades restoration might fall within the scope of this definition.

The subject of a CERCLA “remedial action” is a “release” of a “hazardous substance, pollutant, or contaminant” from a “facility.”³¹⁷ The definition of “facility” is also very broad, including any “well, pit, pond, lagoon, impoundment, ditch . . . or any site or area where a hazardous substance has been deposited, stored,

QUESTION: Could you explain what's at stake here practically? We're told that there are other means to deal with this phosphorus problem. If the permit you envision were required, what would that permit demand?

MR. LEHTINEN: This permit would most likely require simply that the plan that the district already has--has on the books and which they mentioned in their brief would be implemented within a reasonable period of time and under a reasonable compliance schedule.

SFWMD v. Miccosukee Tribe of Indians of Fla., 2004 WL 11643, *45 (U.S. oral argument, Jan. 14, 2004).

³¹⁰ Rizzardi, *supra* note 214, at 76-78.

³¹¹ See *supra* notes 244-270 and accompanying text.

³¹² Rizzardi, *supra* note 214, at 78.

³¹³ See *supra* notes 271-276 and accompanying text.

³¹⁴ LIGHT, *supra* note 74, at § 7.2.3. See also Light, *supra* note 275 at 58 n.28 (stating that the use of CERCLA authority in Everglades context “boggles the mind”).

³¹⁵ 42 U.S.C. § 9604(a)(1) (2000).

³¹⁶ 42 U.S.C. § 9601(24).

³¹⁷ 42 U.S.C. §§ 9601(24) (remedial action), 9601(22) (release), 9601(14) (hazardous substance), 9601(33) (pollutant or contaminant), 9601(9) (facility).

disposed of, or placed or otherwise come to be located.”³¹⁸ To show that an area is a “facility,” one need only show that a hazardous substance has come to be located there.³¹⁹ Its boundaries need not be coextensive with an owner’s property lines.³²⁰ Moreover, noncontiguous facilities can be treated as one facility where they are “reasonably related.”³²¹ A facility may be the bed of a navigable stream³²² or municipal sewers leading to POTWs.³²³ A facility may include both surface structures and underlying, contaminated soil and groundwater.³²⁴ For example, one district court treated thirty-five miles of river, two miles of tributary creek, and riparian and nonriparian properties of defendants as a single site at or from which PCBs affecting the river and creek may have been released.³²⁵ Might the Corps approach the EPA to seek a listing of the Everglades on the Superfund national priorities list?³²⁶ After all, phosphorus, the element upon which most Everglades water quality study has focused, is a “hazardous substance” under CERCLA. A Corps partnership with the EPA could force “recalcitrant” parties “lying in the weeds” to participate in its administrative processes, which would then be the “only game in town.”³²⁷

Interestingly, Congress did not vest CERCLA’s authorities in the EPA, but instead vested them in the President, contemplating that he would delegate them to relevant federal agencies. For example, CERCLA authorities with respect to federal facilities generally are vested in the agencies that operate those facilities.³²⁸ This presents an interesting prospect: Might the President delegate CERCLA response authority over the Everglades to the Army Corps of Engineers, enabling the Corps to force interested parties to engage in its administrative processes rather than to sue under other federal or state environmental law? Even if federal or state standards might constitute ARARs under the CERP, the invocation of CERCLA authority would bar an interested party from diverting attention from the Corps’s processes to obscure state or local permitting proceedings. It would also have the salutary effect of barring litigation over regulatory compliance issues until such time as the Corps might choose to “enforce” its authorities against those opposing its “remedial action plan.”

³¹⁸ 42 U.S.C. § 9601.

³¹⁹ *United States v. Bliss*, 667 F. Supp. 1298, 1305 (E.D. Mo. 1987).

³²⁰ *Louisiana-Pacific Corp. v. Beazer Materials & Servs.*, 811 F. Supp. 1421, 1430-31 (E.D. Cal. 1993); *United States v. Stringfellow*, 661 F. Supp. 1053, 1059 (C.D. Cal. 1987)

³²¹ 42 U.S.C. § 9604(d)(4); *Montrose Chem. Corp. v. EPA*, 132 F.3d 90, 92 (D.C. Cir. 1998); *United States v. Taylor*, 31 ERC 1197, 1198-1199. (M.D.N.C. 1989).

³²² *United States v. Union Gas Corp.*, 25 Chem. Waste Lit. Rep. 1448, 1453 n.5 (E.D. Pa. 1992).

³²³ *Westfarm Assocs. v. Int’l Fabricare Inst.*, 66 F.3d 669, 678-80 (4th Cir. 1995).

³²⁴ *Clear Lake Prop. v. Rockwell Int’l Corp.*, 959 F. Supp. 763, 767-68 (S.D. Tex. 1997).

³²⁵ *Kalamazoo River Study Group v. Rockwell Int’l*, 3 F. Supp.2d 799, 802 (W.D. Mich. 1998).

³²⁶ See 42 U.S.C. § 9605 (establishing NCP).

³²⁷ The term “recalcitrant” is part of the official language of the CERCLA process. EPA includes the term in the glossary of its PRP Search Manual. According to this Manual, a “recalcitrant” is “[a] PRP that is persistently uninterested in or refuses to reach settlement or that fails to comply with a settlement or order.” EPA, PRP SEARCH MANUAL 368 (Sept. 2003). *available at* <http://www.epa.gov/compliance/resources/publications/cleanup/superfund/prpmanual/prp-search-man-cmp.pdf>. The term “weeds” is now part of casino poker jargon, defined as “[t]he place where sneaky poker players lie in wait, usually accompanied by powerhouse hands they have sandbagged, or otherwise slow-played (see slow-play), to trap unwary aggressive players.” Planet Poker, *Poker Dictionary*, *available at* <http://www.planetpoker.com/games/dictionary/vocabw.asp> (last visited Feb. 10, 2005). A recalcitrant lying in the weeds is a potential CERCLA defendant who avoids settlement discussion hoping that others who are more forthcoming will pay for or perform a necessary cleanup and who freeloads on others to challenge government decisions without having to pay for the challenge itself. CERCLA aficionados say the recalcitrant is “lying” rather than “hiding” in the weeds because of the obvious double-meaning of the word “lying.” See also Casey Kelly, et. al. *Only Game in Town, on AMERICA’S GREATEST HITS* (Capitol-EMI, 1999).

³²⁸ See Exec. Order No. 12,580, 3 C.F.R. 1987 (1986-1990): Superfund Implementation, 52 Fed. Reg. 2923 (Jan. 23, 1987) (listing response authorities at federal facilities delegated to operator agencies under certain circumstances).

B. A "Superfund" for Everglades Restoration?

To pursue this fantasy a bit farther, under the extremely broad definition of "release" and the terms "operator" and "arrange for disposal" it is quite plausible that an Everglades restoration in which the Corps invoked CERCLA authority might have a cause of action against polluters who are discharging or in the past have discharged the "hazardous substances" into the Everglades which have impaired water quality in the Everglades National Park.³²⁹ Though the restoration is currently a public works project, CERCLA might serve as a vehicle for obtaining contributions from the sugar and other polluting industries, even if Florida's citizens have been unable to get their state legislature to implement relevant provisions of the State Constitution placing "responsibility" for Everglades restoration on those who generated the pollution.³³⁰

Perhaps even more interesting, CERCLA could serve as a vehicle for cost recovery not only for the Corps, but also for the South Florida Water Management District. On the face, the first cost recovery provision of CERCLA, Section 107(a)(4)(A), places a State in the same posture as the United States Government in seeking the recovery of response costs under the statute.³³¹ Costs are recoverable so long as they are "not inconsistent with the national contingency plan," which places the burden of proof as to recoverability on the defendant.³³² The National Contingency Plan imposes some significant procedural and public participation requirements on those who would seek cost recovery.³³³ However, CERCLA does not abrogate a state's

³²⁹ A generator may be liable for releases of a hazardous substance in any quantity, no matter how small. *Kalamazoo River Study Group v. Menasha Corp.* 229 F.3d 648, 658-61 (6th Cir. 2000). The type of arrangement for disposal may include many different varieties, e.g. *N.J. Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 104 (3d Cir. 1999); *United States v. Aceto Agricultural Chem.*, 872 F.2d 1373 (8th Cir. 1989). Nonetheless, some activities, such as a landowner contracting for the aerial spraying of pesticides, have been held not to be such an arrangement. *SFWMD v. Montalvo*, 84 F.3d 402, 407 (11th Cir. 1996) (holding that landowners are not liable because the landowners "did not assist the Sprayers in loading the planes or rinsing out the applying tanks"). There is an exemption from the liability for response cost or damages resulting from the application of registered pesticides. 42 U.S.C. § 9607(i) (2000). Poultry processors have been adjudicated responsible under CERCLA because their application of poultry litter to the land caused pollution of a municipal water supply. *City of Tulsa v. Tyson Foods*, 258 F. Supp.2d 1263 (N.D. Okla. 2003). Railroads have been held liable for the release of fertilizer leaking on railroad property. *United States v. Atchison, Topeka, & Santa Fe Ry.*, 2002 U.S. Dist. LEXIS 26495 (E.D. Cal. 2002).

³³⁰ See Fla. const., art. II, § 7(b) ("Those in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area or the Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution."); Advisory Opinion to the Governor—1996 Amendment 5 (Everglades), 706 So.2d 278 (Fla. 1997) (stating that polluter pays provision not self-executing and requires implementing action of the state legislature). See also *Fumero & Rizzardi*, *supra* note 1, at 682-83.

³³¹ 42 U.S.C. § 9607(a)(4)(A) (2000).

³³² See, e.g., *United States v. Findett Corp.*, 220 F.3d 842, 849-50 (8th Cir. 2000) (absent a showing that failure to comply with internal agency rules somehow resulted in expenditures for actions that were inconsistent with NCP, costs are recoverable); *United States v. Burlington Northern RR Co.*, 200 F.3d 679, 694-95 (10th Cir. 1999) (holding that defendant must demonstrate that the arbitrary and capricious actions resulted in avoidable and unnecessary costs); *Pub. Serv. Co. of Colo. v. Gates Rubber Co.*, 175 F.3d 1177, 1183 (10th Cir. 1999); *United States v. Chromalloy Amer. Corp.* 158 F.3d 345, 352-53 (5th Cir. 1998) (holding that the "arbitrary and capricious" standard under consent decree applied with burden of proof on defendant); *Minnesota v. Kalman W. Abrams Metals, Inc.* 155 F.3d 1019, 1023-25 (8th Cir. 1998) (holding that the arbitrary and capricious nature of state's site cleanup plan did not preclude the state from recovering under CERCLA any costs that were not inconsistent with NCP); *United States v. N.E. Pharmaceutical & Chem. Co.*, 810 F.2d 726, 747 (8th Cir. 1986) (all costs incurred by the government that are not inconsistent with NCP are conclusively presumed to be reasonable); *United States v. Alcan Aluminum Corp.*, 97 F. Supp.2d 248, 272 (S.D.N.Y. 2000); *Massachusetts v. Blackstone Valley Elec. Co.*, 867 F. Supp. 78, 80 (D. Mass. 1994) ("Under CERCLA when the federal government or a state sues to recover response costs, the burden is on the defendant to establish that the expenditures were inconsistent with the NCP."); *United States v. Atlas Minerals and Chems.*, 797 F. Supp. 411, 417-18 (E.D. Pa. 1992) (holding that even if defendant demonstrates inconsistency of certain costs, defendant remains liable for all other cleanup costs).

³³³ See, e.g., *Union Pac. RR Co. v. Réilly Indus.*, 215 F.3d 830, 835-47 (8th Cir. 2000) (denying cost recovery where plaintiff did not inform public of remedial action plan prior to implementation); *Wash. State Dept. of Transp. v. Wash. Natural Gas Co.*, 59 F.3d 793,

Eleventh Amendment immunity from suit, nor could it.³³⁴ Thus, to the extent a state is undertaking action pursuant to CERCLA authority (e.g. under a cooperative agreement or contract with the federal government), there are constitutional as well as statutory reasons why it may be immune from suit over the response action unless and until the United States or the state decides to bring a cost recovery claim.³³⁵

Probably more important, however, the CERCLA experience suggests that attempts to recover restoration costs through a statutory liability regime may not be very cost-effective. In 1994, the General Accounting Office reported that EPA efforts to recover costs it had incurred from the Superfund from responsible parties when the agency had cleaned up a site had met with limited success; it had recovered on \$1.2 billion of the \$8.7 billion that it had spent on the Superfund program.³³⁶ Success in the CERCLA enforcement program has come primarily in the Agency's use of authorities to compel or entreat potentially responsible parties to conduct cleanups themselves.³³⁷ Though the Hazardous Substances Superfund originally was envisioned as a revolving fund with initial funds being replenished through cost recovery, decline in revenues to the trust fund has led the Superfund program to rely increasingly on revenues from the general fund as the balance in the Trust Fund declined to the extent that the entire CERCLA appropriation of \$1.257 billion in 2004 came from the General Fund.³³⁸ Despite the EPA and the Justice Department's extremely successful campaign to expand the pool of PRPs and the extent of their liability, the Fund became completely depleted without extension of any of the special Superfund taxes upon which it was built originally.³³⁹ Part of the story, of course, is the comparatively high transaction costs associated with Superfund litigation.³⁴⁰

The existence of a dedicated source of revenue such as the special taxes for Hazardous Substances Superfund did not avoid the Congressional appropriations process. Expenditures from the Superfund, when it existed for CERCLA program expenses, could be made only after an appropriation from the Fund. The existence of the dedicated source of revenues, however, probably made appropriations politically easier for hazardous waste cleanup purposes.

Senator Bob Graham, while in office, perennially called for a "permanent source of federal and state funding" for Everglades restoration, claiming that "[w]ithout this, we risk leaving the 68 projects that make up Everglades restoration exposed to the fickle and sometimes unpredictable political winds." Graham opined at the 2002 meeting of the Everglades Coalition.³⁴¹ For example, it has been suggested that one logical source of conservation funding is revenue from federal outer continental shelf oil and gas leases.³⁴² The history of

802-05 (9th Cir. 1995) (holding failure to assess accurately both nature and extent of threat and failure to provide opportunity for public comment inconsistent with NCP).

³³⁴ *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996) (overruling *Pennsylvania v. Union Gas Corp.*, 491 U.S. 1 (1989)).

³³⁵ The United States argues that no potentially responsible party (presumably including a state operating a site) may bring an action under CERCLA until the Government has sued or settled with the party making the claim. The United States Supreme Court is presently considering the validity of this argument. See Alfred R. Light, *CERCLA's Snark: Contribution Prot., Review Preclusion, and the Gov't Defendant*, 19 TOXICS L. REP. (BNA) 538 (June 10, 2004) (discussing *Cooper Indus. v. Aviall Serv., Inc.*, 124 S.Ct. 981, cert. granted, 72 U.S.L.W. 3346 (U.S. Jan. 9, 2004) (No. 02-1192)).

³³⁶ GAO, GAO/RCED-94-196, SUPERFUND: EPA HAS OPPORTUNITIES TO INCREASE RECOVERIES OF COSTS 2 (1994), available at <http://161.203.16.4/t2pbat2/152804.pdf>.

³³⁷ *Id.* at 1.

³³⁸ Letter from John B. Stephenson, Director, Natural Res. and Env't, GAO, to Sen. James M. Jeffords, Ranking Minority Member, Comm. on Env't and Pub. Works, at 1 (Feb. 18, 2004), available at <http://www.gao.gov/new.items/d04475r.pdf>.

³³⁹ All Superfund taxing authority expired at the end of fiscal year 1995. See 26 U.S.C. § 59A (2000) (corporate income tax tied to crude oil tax expired 1995), § 4611 (crude oil tax expired 1995), § 4661 (chemical tax expired 1985), § 4671 (imports tax tied to chemicals taxes), § 9507 (creating Hazardous Substances Superfund);

³⁴⁰ GAO, GAO/RCED-94-90, SUPERFUND: FURTHER EPA MANAGEMENT ACTION IS NEEDED TO REDUCE LEGAL EXPENSES (1994), available at <http://161.203.16.4/t2pbat4/150591.pdf>.

³⁴¹ See Betsy Clinton, *Florida's National Treasure at Risk*, THE NEWS-PRESS, FORT MEYERS, Sept. 1, 2003, available at http://www.saveoureverglades.org/news/articles/news_atrisk.html.

³⁴² See *Washington Watch*, Fla. Wildlife Fed'n, available at <http://www.flawildlife.org/pubs/fwn-4-99/washwatch.htm> (last visited

Superfund appropriations does appear to confirm Senator Graham's instinct. The devising of an appropriate dedicated source of revenue for Everglades restoration is, however, beyond the scope of this paper.³⁴³

VI. CERCLA LESSONS FOR CERP

Whether or not the CERCLA framework can be adapted to apply directly to Everglades restoration, a comparison of the CERCLA and CERP regimes reveals several parallels. Both regimes envision Government acting as a force to remediate environmental damage rather than restraining or preventing ongoing or future pollution. Thus, there is a similar uneasy relationship between these regimes and environmental regulatory regimes under other statutes. The National Environmental Policy Act requires environmental impact analysis when a federal agency undertakes "a major federal action." But in 1969 when NEPA was enacted government action for the most part did not include environmental restoration. The EPA and the Corps devised different approaches for accommodating NEPA and their remedial programs. To the extent that both the Superfund and Everglades restoration enterprises are directed to restoration goals, NEPA is largely duplicative of the remedial decision-making processes under their enabling acts, CERCLA or WRDA 2000 respectively. At a theoretical level, there is no need to apply NEPA, and the EPA generally persuaded the courts that this is also true as a matter of law.³⁴⁴ The Corps, however, simply decided to "integrate" the NEPA process into its CERP decision-making, requiring a few separate procedural hoops, which in practice meant incorporating NEPA practices and documents into the CERP process.³⁴⁵ For example, public meetings assessing Project Implementation Reports or Pilot Project Design Reports also provide concurrent notice and an opportunity to comment on NEPA Environmental Impact Statements.³⁴⁶ The philosophical difference between the EPA and the Corps thus appears to be more symbolic than of practical consequence.

The same cannot be said, however, of the differing approaches of CERCLA and CERP to environmental regulatory statutes such as the Safe Drinking Water Act or the Clean Water Act. From its genesis in 1980, the EPA viewed the role of these other statutes in environmental remediation with some skepticism. The Reagan and first Bush Administrations both emphasized the need for case-by-case assessment of the appropriate response action, looking to other environmental laws for guidance only as to "relevant and appropriate" standards or requirements while resisting the notion that regulatory standards were "legally applicable" except in the most obvious cases.³⁴⁷ Though some environmentalists may have sought an express statutory cleanup standard automatically incorporating regulatory standards from other laws, the SARA amendments adopted a compromise approach, initially unveiled in the EPA's 1985 NCP, in which CERCLA decision-makers consider such standards but, where necessary, have authority to "waive," i.e., to ignore, them.³⁴⁸ As important, for "onsite" remedies, SARA establishes federal authority to avoid permitting procedures under other federal or state laws.³⁴⁹ Once the EPA or another CERCLA decision-maker selects a remedy, the matter is finally determined, essentially preempting other environmental authorities. The only "enforcement" available is enforcement of the remedial action plan selected.³⁵⁰

Feb. 10, 2005).

³⁴³ For a thoughtful survey of potential state-level revenue sources for Everglades restoration, see Stuart Turille, *The Comprehensive Everglades Restoration Plan: Can the Everglades be Saved at Current Funding Levels?* (Aug. 2001), at www.paga.fsu.edu/actionreports/su01/STurille.pdf.

³⁴⁴ See *supra* notes 45-55 and accompanying text.

³⁴⁵ See *supra* notes 40-44 and accompanying text.

³⁴⁶ See *supra* notes 11-15 and accompanying text.

³⁴⁷ See *supra* notes 61-136 and accompanying text.

³⁴⁸ See *supra* notes 137-156 and accompanying text.

³⁴⁹ See *supra* notes 292-299 and accompanying text.

³⁵⁰ See *supra* notes 300-302 and accompanying text.

CERP adopts a different, far more deferential, approach regarding other environmental laws. Following the pattern set in the original Everglades Ecosystem settlement, CERP managers must obtain permits under other laws. Generally, the “non-Federal partner,” usually the SFWMD, must obtain these state permits from another state agency, usually the Florida Department of Environmental Protection.³⁵¹ DEP approval of the SFWMD’s permit applications are subject to challenge by interested persons or environmentalists under Florida’s Administrative Procedure Act, which includes judicial review.³⁵² The Florida legislature has streamlined and tailored the CERP permitting process somewhat, for example the act now require the use of “summary” hearings.³⁵³ However, the Corps, consistent with the governing federal law WRDA 2000, simply “integrates” state permitting processes into its federal decision-making, similar to its approach to NEPA.³⁵⁴ Commentators have called this a “consensus-based” approach.³⁵⁵

Perhaps the most important contrast between the CERCLA and CERP regimes is their varying perspectives on the role of judicial review. From its genesis, the CERCLA legal regime proceeded on a “response action” model in which the need for prompt cleanup eclipses the value of lengthier consideration and independent judicial review.³⁵⁶ Though the most troublesome engineering problems actually addressed under CERCLA involve gradual long-term environmental damage of groundwater, the philosophy of “shovels first, lawyers later” prevailed, as courts interpreting the statute, and Congress in the SARA amendments, evolved a regime in which the role of litigation in selecting a remedy is limited and channeled through an unusual statutory settlement process.³⁵⁷ Judicial review is on a properly-prepared “administrative record” under a deferential “arbitrary and capricious” standard, and, in the absence of a suit by those undertaking the remedial action, occurs only after the remedial action has been “taken or secured,” frequently only after completion of construction.³⁵⁸ Judicial review is available only in federal district court.³⁵⁹

CERP’s managers at both the federal and state levels have been sensitive to the potential of litigation to slow or thwart Everglades restoration in the absence of the universal consensus which CERP’s processes contemplate. Litigation over pre-CERP Everglades restoration projects and the *Miccosukee* Supreme Court decision relating to the S-9 pumping station in Broward County highlights the potential for delays and additional expenses associated with Florida’s separate permitting processes.³⁶⁰ Florida’s APA provides opportunities for judicial review by any interested party who is dissatisfied with a permitting outcome.³⁶¹ Curiously, the new federal judge supposedly administering the Everglades Ecosystem Settlement recently “closed” the case, seemingly ceding federal judicial authority over CERP to his special master monitoring the SFWMD’s technical decisions.³⁶² While CERCLA channels judicial review of EPA remedial actions into federal court, CERP in effect channels judicial review of CERP Everglades restoration decisions into state court. This proved problematic prior to CERP and may prove so again.

The most important CERCLA lessons for CERP probably have to do less with the legal and regulatory matters addressed here than the fiscal matters largely beyond the scope of this paper. The CERCLA experience suggests that reliance on civil litigation to reimburse government expenditures from “potentially responsible

³⁵¹ See *supra* notes 188-192 and accompanying text.

³⁵² See *supra* notes 232-267 and accompanying text.

³⁵³ See *supra* notes 268-270 and accompanying text.

³⁵⁴ See *supra* notes 271-276 and accompanying text.

³⁵⁵ See *supra* note 330 and accompanying text.

³⁵⁶ See *supra* notes 277-302 and accompanying text.

³⁵⁷ See *supra* notes 284-285 and accompanying text.

³⁵⁸ See *supra* notes 286-291 and accompanying text.

³⁵⁹ See *supra* note 285 and accompanying text.

³⁶⁰ See *supra* notes 303-309 and accompanying text.

³⁶¹ See *supra* notes 310-313 and accompanying text.

³⁶² See *supra* notes 24-25 and accompanying text.

parties” is problematic given the small percentage of costs recovered and the high transaction costs.³⁶³ As the Bush Administration runs huge deficits in the context of a stagnant domestic economy, and an intransigent global terrorism threat, assuring the availability of timely adequate funding of federal and state restoration expenses may turn out to be the toughest of all the Everglades restoration problems.

Nonetheless, the CERCLA legal experience suggests at least two fairly important legal reforms that would improve prospects for Everglades restoration. First, CERP could use a federal “waiver” authority similar to CERCLA Section 121(f) for situations in which it becomes too irrational, inefficient or costly for a restoration project to accommodate regulatory standards devised for other purposes. Sometimes, society must stop trying to fit the square peg into the round hole.³⁶⁴ Second, CERP would benefit from federal control of court jurisdiction, similar to CERCLA Section 113(h), to rationalize judicial review of agency decisions and to insure that litigation does not unreasonably delay restoration projects.³⁶⁵ Those who forego early participation in the CERP decision-making process leading to Project Implementation Reports should be precluded from challenging the results of that process in state permitting or judicial review processes devised for other purposes. Recalcitrants lying in the weeds ought to be required to remain there.³⁶⁶

³⁶³ See *supra* notes 314-43 and accompanying text.

³⁶⁴ See *supra* note 66 and accompanying text.

³⁶⁵ See *supra* note 301 and accompanying text.

³⁶⁶ See *supra* note 327 and accompanying text.