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Environmental Protection Through Constitutional Amendment

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ENVIRONMENTAL PROTECTION THROUGH CONSTITUTIONAL AMENDMENT

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I. INTRODUCTION

Since 1968, the Florida Constitution has proclaimed that "[i]t shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise."[1] While much environmental legislation has been enacted in the wake of that declaration, problems persist for which citizens' groups have unsuccessfully sought legislative solutions. This article addresses a proposed amendment offered through the initiative process, called "Clean-Up '84" by its sponsors, a title the passage of time will change. It is our hope that the expression of environmental concern contained in article II, section 7 of the 1968 Florida Constitution will be implemented by the legislature, but if it is not, the constitution should be amended.[2] The narrow interpretation of the single subject requirement of article XI, section 3[3] in *Fine v. Firestone*[4] has made drafting constitutional initiatives difficult.[5] Cluttering the constitution is not the

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1. FLA. CONST. art. II, § 7.

2. In similar circumstances, Governor Reubin Askew's frustration with an unsympathetic legislature to this mandate prompted him to propose the so-called "Sunshine Amendment," which is now article II, section 8 of the Florida Constitution. That provision, like Clean-Up '84, is verbose. In form, it is like a statute, written into the constitution because the people have no effective means to overcome an uncompromising legislature other than by appeals to the voters, the initiative and referendum.

3. FLA. CONST. art XI, § 3 provides in part as follows: The power to propose the revision or amendment of any portion of this constitution by initiative is reserved to the people, provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith.

4. 448 So. 2d 984 (Fla. 1984)(provision of constitution requires that the voting public's attention be focused on only one specific subject at a time in order to protect voters from having to accept multiple proposals to obtain a single desired change).

5. It has become necessary to divorce the guarantee of standing from the remainder of the Clean-Up '84 proposal. The new 1986 proposal, called Clean Up Florida, contains two provisions which would add sections 24 and 25 to Article 1 of the Florida Constitution, as follows:

Section 24. Environmental Rights

Each person has a right to a healthful environment and a duty to provide and to maintain

preferable approach, but may be necessary when it becomes apparent that important safeguards are not likely to come from the legislature.

In the past two legislative sessions, limited steps have been taken to address issues of concern to proponents of a constitutional amendment. A bill granting certain workers a limited right to information about toxic substances with which they come into contact in the workplace was passed by the legislature on June 1, 1984, and signed by Governor Bob Graham on June 18, 1984.[6] This law affords greater protection to the individual and places greater responsibility on employers, but it is limited in scope. Many categories of employers are exempt from the provisions of the new law,[7] and there are various circumstances under which some of the provisions do not apply.[8] Furthermore, the new law does not address the threat of toxic or hazardous substances to the general community outside the workplace.

During the 1985 legislative session, numerous laws were passed in Florida which dealt with environmental issues.[9] A handful of bills were introduced which dealt with the specific concerns of the proponents of Clean-Up '84,[10] but only one became law. In reaction

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a healthful environment for the benefit of this and future generations. Each person has a right to know and a duty to give notice if a healthful environment has been or may be endangered by toxic or other potentially dangerous substances.

Section 25. Enforcement of Environmental Rights

Each person, private or governmental, shall have standing to enforce any environmental or land use law, rule, or ordinance through judicial proceedings.

6. 1984 Fla. Laws 84-223 (codified at FLA. STAT §§ 442.101-.127 (Supp. 1984)).

7. The act excludes the following persons from the definition of "employer": (a) employers of two or fewer employees; (b) employers of domestic workers in private homes; (c) farmers employing 12 or fewer regular employees and 24 or fewer seasonal employees; (d) employers of professional athletes; and (e) employers of employees who are working under a court sentence requiring community service pursuant to § 316.193. FLA. STAT. §§ 442.102(8)(a)-(e) (Supp. 1984).

8. The new law also requires the establishment of a substance list to be derived from various national lists. FLA. STAT. § 442.103(2)(a)-(i) (Supp. 1984). The act applies only to substances on the list. *Id.* at § 442.103(1)(a). Various substances are expressly excluded from the coverage of the act. *Id.* at § 442.103(2) & (6). A "Material Safety Data Sheet" (MSDS), which the act requires a seller of listed substances to provide to purchasers, is not required in certain situations. *Id.* at § 442.106(3)(a)-(c). Information normally required to be included on the MSDS may be excluded if it qualifies as a "trade secret." *Id.* at § 442.111(1)(a)-(d).

9. *See* 1985 Fla. Laws 85-42; 85-55; 85-57; 85-83; 85-146; 85-148; 85-153; 85-154; 85-211; 85-231; 85-234; 85-235; 85-257; 85-269; 85-277; 85-284; 85-292; 85-296; 85-300; 85-302; 85-314; 85-334; 85-345; 85-346; 85-347; 85-353; 85-360; 85-361; 85-363.

10. HB 529 and SB 203 dealt with toxic and hazardous substances in the construction, repair, or maintenance of schools; HB 1190 and SB 1122 dealt with toxic and hazardous chemicals; HB 1420 dealt with the public trust doctrine; and SB 1068 dealt with standing to sue in environmental protection cases.

to the tragic gas leak in Bhopal, India, House Bill 1190 was signed by Governor Graham on June 19, 1985.[11] The new law adds to section 403.021, Florida Statutes, the policy statement that Florida citizens should be protected from the danger of similar accidents involving toxic or hazardous gases and liquids. It also requires the Department of Environmental Regulation (DER) to coordinate the gathering of information about hazardous gases and liquids in the state. The information is to be provided to various governmental agencies, with provisions made for the protection of trade secrets. This new law takes an important step toward greater protection of the public, but because its application is limited to the workplace, it falls short of the demands of those who insist that the people have a right to know of the potentially hazardous substances to which they may be exposed.

Assuming widespread public interest in a solution, this article will discuss Clean-Up '84 as it was proposed to be added to the Florida Constitution[12] and compare the provisions of similar state constitutional amendments. The authors conclude that cluttering the constitution is not a tragedy when legislative inaction leaves no alternative.

II. WHAT THE AMENDMENT PURPORTS TO DO

Clean-Up '84 proposed to add section 24 to the Declaration of Rights, article I of the Florida Constitution and read as follows:

> (a) Each person has a right to a healthful environment and a duty to provide and to maintain a healthful environment for the benefit of this and future generations. Each person has a right to know, and the duty to give notice as shall be provided by law, if a healthful environment has been or may be endangered by toxic or other potentially hazardous substances.
> (b) The natural waters, air and wildlife in the state are public resources that shall be managed as a public trust for the use and benefit of all the people of this and future generations and for the maintenance of the natural ecosystems. Each person as beneficiary of this trust has a right to have the trust purposes fulfilled.
> (c) Each person, governmental or private, shall have standing to enforce the rights granted by this section against all other persons

11. 1985 Fla. Laws 85-277 (to be codified as amended at FLA. STAT. § 403.021(3)).

12. In 1984, Clean-Up '84 failed to receive the requisite number of signatures to be placed on the ballot. However, those signatures which were collected are eligible to be counted toward the requirements for placing the proposed amendment on the 1986 ballot.

through legal proceedings.[13]

A. *Healthful Environment, Notice, Rights, and Duties*

Subsection (a) grants each person a right to a "healthful environment" and imposes a duty on each person "to provide and to maintain a healthful environment for the benefit of this and future generations." This language was taken from similar provisions in the 1970 Illinois Constitution.[14] Professor Mary Lee Leahy, who was a delegate to the Sixth Illinois Constitutional Convention (1969-70), reports that "[i]n debate on the floor it became apparent that 'healthful' was to include both physical and mental health."[15] Illinois courts have determined that noise pollution as well as more conventional pollution is prohibited by article XI of the Illinois Constitution.[16]

Commentary which appears on the reverse side of the Clean-Up '84 petition form indicates that the word "environment" is meant to include "the natural environment as well as the working and living environments."[17] Thus, these provisions may be read to impose additional burdens on employers and landlords to provide and maintain a healthful environment. The Illinois Third District Court of Appeal recently rejected an argument that a tenant of a substandard apartment had a constitutional cause of action against a landlord to recover a security deposit.[18] The court noted that although the language of article XI, sections 1 and 2 was quite broad, it found nothing in the constitutional commentary or earlier case law which indicated an intent to create a private cause of action for tenants against landlords for leased premises alleged to be unhealthful.[19] Indeed, the court observed that the committee which drafted the language specifically stated that the sections were not intended to establish new remedies. The pertinent lan-

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13. A copy of the petition form, including the text and commentary, appears as Appendix A.

14. ILL. CONST. art. XI (1970). Provisions of laws adopted from other jurisdictions are construed in light of judicial interpretation of the state borrowed from. Akey v. Murphy, 238 So. 2d 94 (Fla. 1970) and cases cited therein.

15. Leahy, *Individual Legal Remedies Against Pollution in Illinois*, 3 LOY. U. CHI. L.J. 1, 4 (1972).

16. *See, e.g.*, People v. Pollution Control Board, 83 Ill. App. 3d 802, 404 N.E.2d 352 (1980).

17. *See infra* Appendix A.

18. Morford v. Lensey Corp., 110 Ill. App. 3d 792, 442 N.E.2d 933 (1982).

19. *Id.* at 937.

guage of the report of the Committee on General Government was quoted in the constitutional commentary to article XI, section 2:

> This Section does *not* create any new remedies. The individual will have available to him, if he can prove a violation of his right and if he can establish he is entitled to relief, only the traditional remedies of injunction or declaratory judgment. It does not provide him with compensatory (money) damages without strict proof of economic injury (personal injury).[20]

The court also based its decision in part on the fact that the Illinois constitutional provisions were not self-executing, and the General Assembly had not created such a cause of action.[21]

The Clean-Up '84 commentary likewise asserts that no new remedies are created by the standing provision: "only the traditional remedies of injunction or declaratory judgment will be available. Compensatory or money damages will not be available without strict proof of personal or economic injury."[22] In contrast to the Illinois provisions, this amendment would be almost entirely self-executing. Thus, under the Clean-Up '84 amendment, a tenant would not be able to state a constitutional claim for damages, but might be able to state a constitutional claim for declaratory or injunctive relief against a landlord.

The intended inclusion of the working environment within the scope of the phrase "healthful environment" has great significance to the potential reach of subsection (a): "Each person has the right to know, and the duty to give notice as shall be provided by law, if a healthful environment has been or may be endangered by toxic or other potentially hazardous substances."[23] Movements for worker and community right-to-know legislation have increased throughout the nation in recent years. Worker right-to-know legislation has passed in several states,[24] but few states have extended the right to know of the existence of hazardous substances to the community.[25] The Occupational Safety and Health Administration

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20. ILL. ANN. STAT. art. XI, § 2 at constitutional commentary (Smith-Hurd 1971).
21. 442 N.E.2d at 937.
22. *See infra* Appendix A.
23. *Id.*
24. In 1983, Alaska, Maine, Minnesota, New Hampshire, and Rhode Island passed worker right-to-know legislation. California, Connecticut, Michigan, New York, West Virginia and Wisconsin passed right-to-know legislation prior to 1983. Skinner, *States Act to Protect Citizens from Toxics*, Ways & Means July/August 1983, at 1. Florida passed a worker right-to-know law in 1984. *See supra* note 6 and accompanying text.
25. Connecticut passed a community right-to-know law in 1982; New Jersey passed a

has also issued regulations detailing requirements imposed on a large segment of the nation's employers to give notice to employees of hazardous substances with which they may come into contact.[26] Most recently, Florida has enacted a law dealing with the duty of employers to inform workers of toxic substances in the workplace.[27] Clean-Up '84 is much broader in scope than the new Florida law, since it encompasses all persons whether inside or outside the workplace setting.

The duty to give notice is the only provision of the proposed amendment which is not self-executing, therefore the legislature may determine what notice is required. If the legislature does not prescribe the notice requirement, the requisite notice may be determined by the courts.

B. The Public Trust in Natural Resources

Subsection (b) declares a public trust in "the natural waters, air and wildlife in the state." The public trust doctrine has its origins in Roman law, which held that "by the most basic 'natural law', the 'air, running water, the sea, and consequently the seashore' were 'common to all.' "[28] During the Dark Ages, "[p]ublic ownership of waterways and tidal areas frequently gave way to ownership by local powers and feudatories. . . .The English King's jurisdictional and sovereign claims to tidal areas became confused with a personal private property claim. . . ."[29] The Magna Charta began a trend of restoring the public's right of unhindered access to and use of navigable waters.[30] A public trust theory developed under which a series of easements were reserved to the public. The public held rights in the foreshore which superseded all conflicting private rights, including those held by the King. The King held these rights in trust for the benefit of the public and was not allowed to appropriate them for his personal benefit.[31]

Today, the contours of the public trust doctrine vary greatly from jurisdiction to jurisdiction.[32] In his widely cited article on the

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combined worker and community right-to-know law in 1982. Skinner, *supra* note 24.

26. "Hazard Communication Standard", 29 C.F.R. § 1910.1200 (1985).

27. *See supra* notes 6-8 and accompanying text.

28. Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763 (1970), citing JUSTINIAN, INSTITUTES 2.1.1 (4th ed. J.B. Moyle transl. 1889).

29. *Id.* at 764-65.

30. *Id.* at 765.

31. *Id.* at 768-69.

32. *Id.* at 774.

public trust doctrine,[33] Professor Joseph Sax explains that while it is easy to find statements in the case law implying that the sovereign cannot convey trust property to a private owner or change the use to which the property has been assigned, such statements are dicta and do not limit the authority of the sovereign regarding trust lands.[34] Although the law's development in this area does not define the perimeter of the state's power,[35] it appears settled that "no grant may be made to a private party if that grant is of such amplitude that the state will effectively have given up its authority to govern, but a grant is not illegal solely because it diminishes in some degree the quantum of traditional public uses."[36]

The leading American case on the public trust doctrine is *Illinois Central Railroad Company v. Illinois*.[37] In 1869, the Illinois Legislature granted a fee simple title in submerged lands underlying Lake Michigan, which comprised virtually all of Chicago's commercial waterfront, to the Illinois Central Railroad.[38] Four years later, the legislature repealed the grant and brought suit to quiet title. The Supreme Court found the 1869 grant invalid, holding that a state may not divest itself of authority to exercise its police power in an area which it has responsibility to govern.[39]

Florida's Fifth District Court of Appeal gave the following exposition of the public trust doctrine in *State Department of Natural Resources v. Contemporary Land Sales, Inc.*:[40]

> [W]hen Florida was admitted as a state on March 3, 1845, by virtue of its sovereignty, it became the owner of all the land under navigable bodies of water within the state. These lands are called sovereignty lands. Under common law doctrine the State of Florida in its sovereign capacity holds title to the beds of navigable waters, including the shore or the space between high and low water marks, in trust for the people of the state who have rights of navigation, commerce, fishing, boating and other public uses. Subject to these public rights the Legislature of the State of Florida has control over such sovereign trust lands but, it is said, may sell parts of such lands to private ownership when the public and

33. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).
34. *Id.* at 485-86.
35. *Id.* at 486.
36. *Id.* at 488-89.
37. 146 U.S. 387 (1892).
38. *Id.* at 450-51.
39. Sax, *supra* note 33, at 489; *see* 146 U.S. at 452-62.
40. 400 So. 2d 488 (Fla. 5th DCA 1981).

private rights are not impaired.[41] (citations omitted).

Florida's constitution contains a provision dealing with the public trust doctrine. Article X, section 11 states:

> The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.[42]

The restrictions of article X, section 11 apply only to sovereignty lands.[43] In *Askew v. Sonson*,[44] the Supreme Court of Florida stated that the state is "authorized to deal with [its] lands in any manner not inconsistent with the Florida Constitution."[45] The only provision of the Florida Constitution governing the disposition of state-owned land appears in article X, section 11.[46] The *Sonson* case did not involve sovereignty lands, so the court ruled that article X, section 11 did not apply,[47] and therefore the legislature was not constrained by public trust considerations.

Subsection (b) of Clean-Up '84 would extend the public trust doctrine beyond sovereignty lands and according to the commentary to the petition form, would "hold governmental agencies to a higher standard with respect to their actions or omissions concerning the management of the natural waters, air, and wildlife in the state."[48] The government would be obligated to manage all of these resources "for the use and benefit of all the people of this and future generations and for the maintenance of the natural ecosystems."[49]

Extension of the public trust doctrine was advocated in *A Model Water Code*.[50] Section 1.02 of the Code would provide for the es-

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41. *Id.* at 491.
42. FLA. CONST. art. X, § 11 (1968).
43. *Id. See also* Askew v. Sonson, 409 So. 2d 7 (Fla. 1981).
44. 409 So. 2d 7 (Fla. 1981).
45. *Id.* at 11.
46. *Id.* at 12.
47. *Id.*
48. *See* Appendix A.
49. *Id.*
50. F. MALONEY, R. AUSNESS, & J.S. MORRIS, A MODEL WATER CODE, WITH COMMENTARY (1972).

tablishment of a public trust in all of the waters within the state.[51] "A cogent argument for subjection of nonnavigable water bodies to the public trust is that the waters within these bodies are not static and permanent but will eventually become a part of navigable streams through the hydrologic cycle."[52] By mandating responsible governmental stewardship of all of the water in the state, subsection (b) reduces the possibility that unregulated water will compromise the quality of water traditionally protected under the public trust.

Commentary to the Model Water Code enumerates the pragmatic effects of the provisions of section 1.02:

> First, state agencies can be held to a higher standard with respect to their actions and omissions concerning the trust *res*. The actions of state agents, as fiduciaries of the *res*, could be judicially attacked as not displaying the high standard of care needed to protect the *res*. Second, each citizen would have the standing to demand judicial review of the actions or omissions of private individuals or state agents which affect the quality of water. Since each citizen is a beneficiary of the *res*, the courts could no longer deny him a forum on the ground that he lacked standing. Third, the doctrine would serve as a constant reminder to each citizen that he does not possess riparian water to the extent that he may despoil it for the public as a whole. Last, and perhaps most significant, the public trust could effectively serve as a viable procedure to effectuate antipollution standards against owners of nonnavigable riparian land as well as land overlying ground water reservoirs. Imposition of these standards will not be a compensable taking of their property, but rather a demand that all landowners live up to the same antipollution standards as other citizens of the state.[53]

In 1971, Pennsylvania adopted a constitutional amendment declaring a public trust in the public natural resources of the state.[54] The leading case construing this section is *Payne v. Kassab*.[55]

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51. *Id.* at 81.

52. *Id.* at 83.

53. *Id.* at 84.

54. PA. CONST. art. I, § 27. The section provides: The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

55. 11 Pa. Commw. 14, 312 A.2d 86 (1973), *aff'd* 361 A.2d 263 (Pa. 1976).

Payne established a three-part standard for review of the government's alleged breach of its fiduciary duty under the amendment: first, whether there was compliance with all applicable statutes and regulations regarding the protection of natural resources; second, whether the record demonstrates a reasonable effort to reduce the environmental invasion to a minimum; and third, whether the environmental damage resulting from the challenged decision so clearly outweighs the benefits to be obtained that to proceed would be an abuse of discretion.[56] The court held that although this section was self-executing, it was not absolute. "Section 27 was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania."[57] Other states with public trust constitutional provisions include Hawaii,[58] New York,[59] Rhode Island,[60] and Texas.[61]

Subsection (b) of the Clean-Up '84 amendment would extend the protection of the public trust doctrine to include not only navigable waters and tidelands, but all of the natural waters, air, and wildlife in the state.

C. Standing

Subsection (c) of the Amendment substantially expands the current standing provision by stating: "Each person, governmental or private, shall have standing to enforce the rights granted by this section against all other persons through legal proceedings." This provision would apply to environmental organizations as well as individuals, since under Florida law a non-profit corporation is granted the power to sue and be sued to the same extent as a natural person.[62]

The Florida courts have developed a "special injury" require-

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56. *Id.* at 94.

57. *Id. See also* Borough of Moosic v. Pennsylvania Public Utility Commission, 59 Pa. Commw. 38, 429 A.2d 1237 (1981).

58. HAWAII CONST. art. X.

59. N.Y. CONST. art. XIV.

60. R.I. CONST. amend. XXXVII.

61. TEX. CONST. art. XVI, § 59.

62. FLA. STAT. § 617.021(2) (1983). *See also* Florida Wildlife Federation v. State Dept. of Environmental Regulation, 390 So. 2d 64 (Fla. 1980)(that non-profit corporation is a citizen for standing purposes and a proper plaintiff in suit for injunction under Florida's Environmental Protection Act, § 403.412(2)(a), Florida Statutes).

ment for nuisance, zoning, and certain other types of cases.[63] Where this requirement applies, the plaintiff must show injury which is "different both in kind and degree from that suffered by the public at large" in order to be heard.[64] The courts have carved some exceptions to the special injury requirement,[65] and the legislature has prescribed the standing requirements in a variety of environmental and land use contexts.[66]

Currently, Florida courts divide zoning cases into three categories for standing purposes. Under *Renard v. Dade County*,[67] the standing requirement depends on whether the suit is to (1) enforce a valid zoning ordinance, (2) challenge a validly enacted zoning ordinance as being an unreasonable exercise of legislative power, or (3) challenge a zoning ordinance as being void because not validly enacted.[68] In *Citizens Growth Management Coalition of West Palm Beach, Inc. v. City of West Palm Beach, Inc.*,[69] The Supreme Court of Florida cited *Renard* saying that "under the first category a plaintiff had to prove special damages different in kind from that suffered by the community as a whole, that under the second category a plaintiff needed to have a legally recognizable interest that was adversely affected, and that under the third category an affected resident, citizen or property owner had standing."[70]

Judicial application of the "special injury" requirement for standing to land use litigation, derived from the common law of public nuisance, has been sharply criticized by courts and commentators.[71] In *Save Sand Key, Inc. v. United States Steel Corp.*,[72] Florida's Second District Court of Appeal held that "the 'special injury' concept serves no valid purpose in the present structure of the law and should no longer be a viable expedient to the disposition of these cases. Given *any* right, fundamental justice demands its protection."[73] The Supreme Court of Florida dis-

63. *Florida Wildlife Federation*, 390 So. 2d at 67.

64. *Id.*

65. Renard v. Dade County, 261 So. 2d 832 (Fla. 1972).

66. *See infra* notes 92-106.

67. 261 So. 2d 832 (Fla. 1972).

68. *Id.* at 834.

69. 450 So. 2d 204 (Fla. 1984).

70. *Id.* at 206.

71. *See, e.g.*, Save Sand Key, Inc. v. United States Steel Corp., 281 So. 2d 572 (Fla. 2d DCA 1973), *rev'd* 303 So. 2d 9 (Fla. 1974); Arline, *A Citizen's Standing to Sue in Environmental and Land Use Cases*, 57 FLA. B.J. 496 (1983).

72. 281 So. 2d 572 (Fla. 2d DCA 1973).

73. *Id.* at 575.

agreed with the second district's assessment and reversed.[74] The district court also found that article I, section 21 of the Florida Constitution guaranteed access to courts in this situation, but the supreme court, in quashing, did not cite to that provision.

One writer recently argued that "[i]f the government has acted illegally, relief and accountability should not be denied because every member of the community has shared equally in the harm resulting from the illegal act."[75] This argument applies with equal force to acts of private individuals and organizations. As stated by the United States Supreme Court in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[76] "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion."[77]

Recently, the Supreme Court of Florida denied standing to a citizens' group which challenged a rezoning decision as not having been enacted in conformity with the Local Government Comprehensive Planning Act of 1975 (LGCPA).[78] The court rejected the argument that this case did not fall within any of the *Renard* categories, reasoning that the legislature had not specifically addressed the issue of who has standing to enforce the LGCPA and therefore did not intend to modify the *Renard* standing requirements.[79] Viewing this case as one belonging in the second *Renard* category, the Court rejected the argument that the Act created legally recognizable interests which would be adversely affected by the failure of a zoning ordinance to comply with the Act's requirements.[80] The Court held that the Act "imposes a legal duty upon the governing body but does not create a right of judicial redress in the citizens and residents of the community."[81]

Subsection (c) of Clean-Up '84 is intended to relax the present requirements for standing. Anyone whose rights under the proposed amendment have been abridged or threatened would be able

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74. United States Steel Corp. v. Save Sand Key, Inc., 303 So. 2d 9 (Fla. 1974).

75. Arline, *supra* note 71, at 498.

76. 412 U.S. 669 (1973).

77. *Id.* at 688.

78. Citizens Growth Management Coalition of West Palm Beach, Inc. v. City of West Palm Beach, Inc., 450 So. 2d 204 (Fla. 1984). The LGCPA is codified at FLA. STAT. §§ 163.3161-.3211 (1983).

79. *Id.* at 207. *See supra* notes 67-68 and accompanying text.

80. *Citizens Growth Management Coalition*, 450 So. 2d at 207-08.

81. *Id.* at 208.

to assert those rights in administrative or judicial proceedings.

Florida's Environmental Protection Act[82] contains a provision which allows any citizen of the state to maintain an action for injunction against the government to compel enforcement of "laws, rules, and regulations for the protection of the air, water, and other natural resources of the state"[83] or against any person (including corporate persons) or the government to enjoin violations of such laws.[84] As a condition precedent to such an action, the plaintiff is required to file a verified complaint with the relevant agency "setting forth the facts upon which the complaint is based and the manner in which the complaining party is affected."[85] Use of this Act is severely stifled by a provision *requiring* the losing party to pay the prevailing party's costs and attorney's fees.[86]

In *Florida Wildlife Federation v. State Department of Environmental Regulation*,[87] the Supreme Court of Florida upheld the statute and specifically held that no showing of special injury was required.[88] However, the Court noted that to state a cause of action for injunction, the plaintiff must allege facts establishing irreparable injury,[89] and the plaintiff must have a "bona fide and direct interest in the result."[90]

Florida's Environmental Protection Act further provides that a citizen may intervene in "any administrative, licensing, or other proceedings authorized by law for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction" upon the filing of a verified pleading "asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state."[91]

A citizen's standing to participate in administrative proceedings or in judicial review of an agency's decisions is governed by Florida's Administrative Procedure Act.[92] To be entitled to a hearing

82. FLA. STAT. § 403.412 (1983).
83. FLA. STAT. § 403.412(2)(a)(l) (1983).
84. FLA. STAT. § 403.412(2)(a)(2) (1983).
85. FLA. STAT. § 403.412(2)(c) (1983).
86. FLA. STAT. § 403.412(2)(f) (1983).
87. 390 So. 2d 64 (Fla. 1980).
88. *Id.* at 67.
89. *Id.* at 67-68, citing Brown v. Florida Chautauqua Ass'n, 59 Fla. 447, 52 So. 802 (1910).
90. *Id.* at 68, citing Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194 (1946).
91. FLA. STAT. § 403.412(5) (1983).
92. FLA. STAT. ch. 120 (1983).

under section 120.57 of the Act or to judicial review under section 120.68, a person must qualify as a "party" as defined by section 120.52(11). The Act's definition of a party includes:

> (a) Specifically named persons whose substantial interests are being determined in the proceeding.
> (b) Any other person who. . .is entitled to participate. . .in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.
> (c) Any other person. . .allowed by the agency to intervene or participate in the proceeding as a party.[93]

To have standing for an administrative hearing under section 120.57, the person must also show that he has "substantial interests" which will be determined by the agency.[94] To have standing for judicial review under section 120.68, the petitioner must show that the action sought to be reviewed is final, that he was a party to the action, and that he was adversely affected by the action.[95]

Florida's 1985 Growth Management Act[96] establishes the standing requirements for challenging local comprehensive plans,[97] local development regulations,[98] and development orders.[99] Any "affected person" may challenge a local plan as not complying with sections 163.3177, 163.3178, and 163.3191, Florida Statutes, and rules adopted pursuant to those sections, by petitioning the Department of Community Affairs (DCA) for an administrative hearing if the local plan is found to be in compliance, or by intervening in an administrative proceeding resulting from a finding of noncompliance.[100] An "affected person" as defined by the statute includes "persons owning property or residing or owning or operating a business within the boundaries of the local government whose plan is under review. . .[who] have submitted objections, oral or written, during the local government review and adoption

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93. FLA. STAT. § 120.52(11) (1983).
94. FLA. STAT. § 120.57 (1983).
95. FLA. STAT. § 120.68(1) (1983); Daniels v. Florida Parole and Probation Comm'n, 401 So. 2d 1351, 1353 (Fla. 1st DCA 1981).
96. 1985 Fla. Laws 85-55.
97. 1985 Fla. Laws 85-55 at § 8 (to be codified at FLA. STAT. § 163.3184(5)(a) (1985)).
98. 1985 Fla. Laws 85-55 at § 15 (to be codified at FLA. STAT. § 163.3213(3) (1985)).
99. 1985 Fla. Laws 85-55 at § 18 (to be codified at FLA. STAT. § 163.3215 (1985)).
100. 1985 Fla. Laws 85-55 at § 8 (to be codified at FLA. STAT. §§ 163.3184(5)(a) & .3184(7)(a) (1985)). *See* Pelham, Hyde & Banks, *Managing Florida's Growth: Toward an Integrated State, Regional, and Local Comprehensive Planning Process*, 13 FLA. ST. U.L. REV. 515, 550 (1985).

proceedings."[101]

Section 15 of the Growth Management Act allows "substantially affected persons. . .to maintain administrative actions which assure that land development regulations implement and are consistent with the local comprehensive plan."[102] "Substantially affected person" is defined "as provided pursuant to chapter 120."[103]

Section 18 of the Growth Management Act provides in part:

> Any aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order, as defined in s.163.3164, which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan adopted under this part.[104]

To qualify as an "aggrieved or adversely affected party," a person must be in a position to "suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan."[105] The adverse interest may be common to the community as a whole, so long as the harm suffered by the plaintiff is different in degree from that shared by the general public.[106]

Subsection (c) of Clean-Up '84 is intended to relax the present requirements for standing. Anyone whose rights have been abridged or threatened would be able to assert those rights in administrative or judicial proceedings.

III. ANALYSIS

A. The Proper Role of a State Constitution

1. The Legislative Nature of the Proposed Amendment

One class of objections to the proposed amendment is that what it purports to do is not within the proper role of a state constitution. It is sometimes argued that a state constitution should not impose duties on private individuals and grant private individuals the right to enforce those duties. The regulation of individuals' ac-

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101. 1985 Fla. Laws 85-55, § 8 (to be codified at FLA. STAT. § 163.3184(3)(a) (1985)).

102. 1985 Fla. Laws 85-55, § 15 (to be codified at FLA. STAT. § 163.3213(1) (1985)).

103. 1985 Fla. Laws 85-55 at § 15 (to be codified at FLA. STAT. § 163.3213(2)(a) (1985)). *See supra* notes 90-91 and accompanying text.

104. 1985 Fla. Laws 85-55, § 18 (to be codified at FLA. STAT. § 163.3215(1) (1985)).

105. 1985 Fla. Laws 85-55 at § 18 (to be codified at FLA. STAT. § 163.3215(2) (1985)).

106. 1985 Fla. Laws 85-55.

tions is traditionally the function of the legislature.

While it is true that the primary function of a state constitution is to structure the government and to limit its power over the people, the concept of a constitutional provision directly applicable to the people is not a new one. For example, Florida's constitution guarantees that the right to work shall not be denied or abridged on account of membership or non-membership in a labor organization.[107] This prohibition applies to private persons as well as governmental agencies. Also, the thirteenth amendment to the United States Constitution is a bar against private as well as governmental imposition of slavery or involuntary servitude.[108]

2. Separation of Powers

A related objection to the proposed amendment is that it shifts power from the legislature to the judiciary. It is argued that this would remove power from the people because the formulation of policy would be undertaken by the judiciary rather than by elected representatives. This is not entirely accurate. The legislature may pass laws on any subject as long as the laws are consistent with the state constitution. To the extent that policy is derived from the amendment's provisions, the people are not deprived of a voice in policymaking, because the people themselves will vote to adopt or to reject the amendment. However, in the words of Chief Justice Marshall, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[109] It is the courts which determine the intent of the legislature and of the electorate, and whether an act or law is consistent with that intent.

If the legislature feels that the courts have overly restricted the scope of the rights and duties established by the amendment, it may legislate to broaden those rights and duties. On the other-hand, the courts may construe the amendment too broadly and not give enough consideration to competing interests. If the courts declare the rights encompassed in the amendment to be absolute, any legislative attempt to restrict those rights would be unconstitutional. However, it is not likely that the courts will adopt an unreasonably broad construction of the amendment's provisions. Where a constitutional right is self-executing, overly broad and uncompromising language should be avoided if judicial exaggeration of

107. FLA. CONST. art. I, § 6.
108. U.S. CONST. amend. XIII.
109. Marbury v. Madison, 5 U.S.(1 Cranch) 137 (1803).

those provisions is to be prevented.[110]

Another way to prevent the judiciary from taking the amendment's provisions to unreasonable extremes would be to redraft the amendment so that it is not self-executing. One of the problems with this approach is the belief that adequate implementation by the legislature will not be forthcoming. Florida's constitution presently has an environmental provision at article II, section 7, which establishes "the policy of the state to conserve and protect its natural resources and scenic beauty" and mandates the enactment of legislation for the abatement of pollution.[111] However, the provision is not self-executing. One commentator has concluded that while the mandatory "shall" of article II, section 7, may impose upon the Florida Legislature a moral obligation to conserve and protect the state's natural beauty, it is virtually unenforceable and therefore offers little substantive environmental protection.[112] Although article II, section 7 "has not been completely ineffective. . .the provision has not provided an independent basis on which environmental protection could be advocated in court."[113] The purpose of making Clean-Up '84 a self-executing part of the constitution is to establish the rights contained in its provisions as fundamental and to protect them from future encroachment or inaction by the legislature.

While the power of the people as exercised through the legislature is diminished to the extent that power is shifted from the legislature to the judiciary, the proposed amendment's standing provision vests in the people the power to implement constitutionally-mandated policy through litigation. Several years ago a bill was introduced in the United States Senate which would have granted certain environmental rights to the people.[114] It included a provision allowing individuals to assert those rights in court. Colorado Senator Gary Hart, a co-author of the bill, asserted that the issue was more fundamental than the protection of the environment: "What is really at issue here is the broadening of participation by citizens in the resolution of problems which directly affect

110. This is one reason why "healthful" is a safer term to use than "pure" or "clean," because these terms are more susceptible of interpretation as absolute.

111. FLA. CONST. art. II, § 7.

112. Note, *A Proposal for Revision of the Florida Constitution: Environmental Rights for Florida Citizens*, 5 FLA. ST. U.L. REV. 809, 810 (1977).

113. *Id.* at 811-12

114. S. 1032, 92 Cong., 1 Sess., 117 CONG. REC. 4392 (1971).

them."[115]

One of the objections to the transfer of environmental decision-making to the courts is that private litigants, unlike the legislature, are not accountable to the public. While many private litigants would sue to protect the public interest, the motives of some may conflict with the public interest, and some litigants may lack the resources to adequately represent the public interest.

Although the standing provision affords access to the courts, it is the judges who render the decisions. These judges are sworn to uphold the constitution and to faithfully perform the duties of their offices.[116] Other interested parties may join a suit to assert their interests,[117] and any issue not raised in a proceeding may be raised in a subsequent proceeding by another party. Thus the risk of bad precedent is minimized.

While the legislature is accountable to the people, the political reality is that the legislature must be made to feel a significant push from the electorate before the people's interests will adequately be met, at least where there is a substantial resistance by special interest groups. The public interest in a healthful environment is common to all, but is diffuse when compared to the acute and substantial economic interests of certain industries in resisting environmental legislation.[118] In defining environmental rights enunciated in the constitution, courts would be less susceptible to the special interest pressures than the legislature.

However, some skepticism has been expressed concerning the wisdom of judicial determination of the scope of environmental rights.[119] Case by case resolution of the issues is believed to be slow, costly, and piecemeal, while legislative enactments are more efficient and comprehensive. The problem with relying on the legislative approach is that the legislature is widely viewed as having failed to enact an adequate comprehensive policy. The fact that Clean-Up '84 progressed as far as it did is evidence of widespread dissatisfaction with the legislature's handling of environmental problems. Whether the spurt of activity at the close of the 1984

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115. *Id.*

116. FLA. CONST. art. II, § 5.

117. Fla. R. Civ. P. 1.230.

118. Skinner, *supra* note 24, at 6, reports that although many state legislatures considered community right-to-know bills in 1983, "the strong industry opposition, particularly their argument that such legislation would divulge trade secrets, prevented most legislatures from passing them."

119. *See, e.g.*, Whalen & Wolff, *Constitutional Law: The Prudence of Judicial Restraint Under the New Illinois Constitution*, 22 DE PAUL L. REV. 63, 76-77 (1972).

session and during the whole of the 1985 session has pacified the discontented remains to be seen. The prospect of judicial definition of policy, although slow, expensive, and piecemeal, is progress nonetheless. Nobody desires the delay or expense, but many would accept it as the price of environmental protection. Furthermore, the sponsors of the proposed amendment would argue that the legislature is not precluded from enacting comprehensive environmental legislation.

B. Objections to Particular Language of the Amendment

1. Judicial Definition and Application of "Healthful Environment"

Another class of objections to the proposed amendment deals with the specific language chosen. For example, "healthful environment" is criticized both as being overly broad and amorphous as well as being overly technical and scientific.[120] Professor Leahy explains that the General Government Committee of the Sixth Illinois Constitutional Convention rejected the words pleasant, aesthetic, pure, and clean as incapable of judicial application, and approved healthful because it was capable of proof and subject to change as medical science further determines what does and does not affect health.[121] Commentary to article XI, section 1 of the Illinois Constitution of 1970 quotes the Committee on General Government as follows:

> The Committee selects the word 'healthful' as best describing the kind of environment which ought to obtain. 'Healthful' is chosen rather than 'clean,' 'free of dirt, noise, noxious and toxic materials' and other suggested adjectives because 'healthful' describes the environment in terms of its direct effect on human life while the other suggestions describe the environment more in terms of its physical characteristics. A description in terms of physical characteristics may not be flexible enough to apply to new kinds of pollutants which may be discovered in the future.[122]

Courts deal with highly technical and often voluminous scientific data on a regular basis, particularly in the area of environmental law. It is inevitable that cases interpreting the proposed amend-

120. *Id.* at 76.
121. Leahy, *supra* note 15, at 4.
122. ILL. ANN. STAT. art. XI, § 1 at constitutional commentary (Smith-Hurd 1971).

ment would involve complex scientific data whether "healthful environment" or some other standard was considered. Courts are well accustomed to dealing with vague or amorphous concepts such as "public interest," "due process," and "equal protection." Such terms of general application are necessarily broad. The courts will manage.

2. Conflict with Other Established Rights

The statement in subsection (a) that "[e]ach person has a right to a healthful environment" has been criticized as being too absolute by not allowing for the balancing of competing interests. In 1977, the Florida Constitution Revision Commission debated an environmental rights amendment proposed by Commissioner Jon Moyle, which was almost identical to the environmental rights provision of the 1970 Illinois Constitution and contained the above-quoted statement.[123] During the debate:

> Several commissioners were concerned with the extent to which Moyle's amendment might authorize not only governmental but private interference with personal liberty. They raised the specter of a person with habits that another found obnoxious (such as cigar smoking, screaming, or expectorating tobacco juice), who would be liable to suit for failing to meet the affirmative duties specified.[124]

Interference with the use of property was another concern raised within the commission.[125]

Three responses exist to the concern that the language of the proposed amendment precludes any balancing of competing liberty and property interests. First, while the right to a healthful environment is stated in unqualified terms, courts will not ignore all other values. Courts are unlikely to adopt an overly technical construction where to do so would be contrary to public policy. Other rights guaranteed by Florida's constitution in unqualified terms, such as the right to peaceably assemble, have been interpreted to be subject to reasonable restriction.[126] The Supreme Court of Flor-

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123. Dore, *Of Rights Lost and Gained*, 6 FLA. ST. U.L. REV. 610, 620 (1978).

124. *Id.* at 622 (citing Transcript of Fla. C.R.C. proceedings 20-21 (Jan. 10, 1978)(remarks of John Mathews & Don Reed)).

125. DORE, *supra* note 123, at n.76 (citing Transcript of Fla. C.R.C. proceedings 25-26 (Jan. 10, 1978)(remarks of Elliott Messer)).

126. *See, e.g.*, Satan Fraternity v. Board of Public Instruction, 22 So. 2d 892 (Fla. 1945).

ida has stated that "none of our liberties are absolutes; all of them may be limited when the common good or common decency requires."[127]

Second, the expression "healthful environment" does not indicate an absolute, all-or-nothing concept. No one contends that all automobiles must stop and that all impurities must be eliminated from the environment. Pollution must be reduced to a healthful level. Thus the "obnoxious habits" mentioned above would not be put in serious jeopardy by the passage of this amendment.

Third, it is clear that the proposed amendment would place at least some additional restrictions on personal privacy and property rights. The commentary accompanying the Clean-Up '84 petitions states that the language imposing a duty to provide and maintain a healthful environment is "meant to emphasize that the right to use property as one sees fit is limited at least to the extent of the obligation to provide and to maintain a healthful environment."[128]

Illinois courts have held that private property rights are subordinate to the state's police power to protect the public welfare, which includes the public's right to a healthful environment.[129] The subordination of privacy and property rights to the state's police power is not a novel idea. Zoning, eminent domain, health codes, building codes, licensing for the practice of various professions, and licensing for the operation of automobiles and aircraft are just a few examples of the state's exercise of its police power restricting individuals' property and privacy interests. The subordination of private interests is particularly compelling where the public health is concerned.

3. Potential for Harassment Suits and a Flood of Litigation

The language of subsection (c), granting standing to "each person," also has been criticized as being too all-inclusive. Some fear the subsection not only eliminates the "special injury" requirement, but eliminates the requirement of a personal stake in the outcome of the suit and will result in more harassment suits and a general flood of litigation. It is further contended that under the standing and public trust provisions, "practically anyone dis-

127. *Id.* at 894.

128. *See* Appendix A.

129. Cobin v. Pollution Control Board, 16 Ill. App. 3d 958, 307 N.E.2d 191 (1974); Central Illinois Public Service Co. v. Pollution Control Bd., 36 Ill. App. 3d 397, 344 N.E.2d 229 (1976).

enchanted with current management of any waters, air or wildlife in the State could insist that the courts determine whether this management is being done in the most socially beneficial manner."[130] Thus the judiciary would be converted into an environmental superagency. However, the courts would not make a de novo determination of the wisest governmental policy; rather, they would determine whether the challenged decision was an abuse of discretion by the decision maker. While public policy considerations would be addressed by the court, governmental decisions would rarely be overturned.

The possibility of harassment is a risk that is always presented when access to the courts is granted. It is countered, in part, by the costs of litigation. To further minimize that risk, several deterrents have been developed. One such deterrent is the award of attorney's fees against a litigant who has brought a frivolous suit.[131] Remedies for malicious prosecution and abuse of process are also available.

Certain people would have considerable incentive to assert other people's rights under the amendment. For example, the owner of company *A* may wish to sue the owner of company *B* to assert the rights of the employees of company *B*. Company *A* may perceive a benefit not only in the possibility of increasing the cost of operation or shutting down of company *B*, but also in subjecting company *B* to the cost, turmoil, and publicity of a lawsuit. The wider the scope of the standing provision, the greater the risk of harassment suits.

A related concern is that granting standing to "each person" will overburden the courts with a flood of litigation. As in harassment suits, the cost of litigation is at least a partial deterrent. In *Scenic Hudson Preservation Conference v. Federal Power Commission*,[132] the Second Circuit Court of Appeals rejected a claim that granting standing would lead to a flood of litigation, averring that "experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken."[133]

Florida's Second District Court of Appeal expressed a similar

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130. Hopping, Boyd, Green & Sams, *An Analysis of the Proposed Environmental Rights Amendment*, 6 THE FLA. B. LOCAL GOV'T L. SEC. NEWSLETTER 4 (February 1984). For a contrasting view, *see* Harkinson & Ruhl, *Public Responsibility for Public Resources - Removing Barriers to Citizens' Actions on Behalf of the Environment*, 59 FLA. B. J. 72 (1985).

131. FLA. STAT. § 57.105 (1983).

132. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

133. *Id.* at 617.

sentiment in *Save Sand Key Inc. v. United States Steel Corp.*:[134]

> We fear not multipliciousness, as did the earlier courts, because such fear ignores both the deterring economic influences flowing from the great expense of litigation these days and the precedential value of a prior decided case on a given point. Furthermore, the increasing number of well-tried class actions tend to further limit litigation because of the principles which inhere within the doctrine of res judicata. Finally, we observe, 'spite suits' or harassment will not be tolerated any more in this type of suit than in any other. In a word, the 'multiplicity' argument is no longer there.[135] (Citations omitted)

In a footnote, the court reviewed arguments in cases and commentaries to the effect that where the doors to the federal courts have been opened, a flood of litigation has not ensued.[136]

In addition to the above restraints on litigation, Professor Leahy explains that the potential flood of litigation is further inhibited by the imposition on the plaintiff of a "double burden of proof [requirement]: 1) that the defendant pollutes; 2) that that particular pollution causes damage to health."[137] The difficulty of establishing causation would presumably tend to deter litigation.

Causation was one of the hurdles that the plaintiff failed to clear in *Scattering Fork Drainage District, County of Douglas v. Ogilvie*,[138] a suit brought to enjoin state officials from executing an agreement with the federal government to construct a reservoir. The plaintiff claimed both a general right as a citizen to a healthful environment, which included the preservation of the Embarass River in its pristine state, and a particular right as a hunter to the preservation of wildlife, the availability of which depended entirely on the continued existence of the river.[139] The court held that the causal connection between the destruction of the habitat of the game and wildlife and the right to a healthful environment was too tenuous to warrant the relief requested.[140]

The standing provision of the proposed amendment does open the courthouse doors to more people, and consequently does in-

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134. 281 So. 2d 572 (Fla. 2d DCA 1973).
135. *Id.* at 575.
136. *Id.*, n.18.
137. Leahy, *supra* note 15, at 6.
138. 19 Ill. App. 3d 386, 311 N.E.2d 203 (1974).
139. *Id.* at 210.
140. *Id.*

crease the risks of harassment suits and more litigation. However, the adoption of the proposed amendment could be interpreted as a decision on the part of the people of this state that "the need to grant standing . . . [is] more important, and in fact, transcend[s] the possibility of unwarranted litigation."[141] As the district court in *Save Sand Key* succinctly stated, "it is anathema to any true system of justice to proclaim that a right may be enjoyed by all yet none may protect it."[142]

The discussion thus far has assumed the broadest interpretation of subsection (c). It is possible that the courts would interpret the standing provision as eliminating any requirement of a personal stake in the outcome of the suit. However, the drafter's own commentary indicates that such a result was not intended. The commentary explains that "every person *whose environment is rendered unhealthful* because of polluting activities of others will have 'standing' to enforce the right to a healthful environment; the right to notice may be enforced by any person *whose healthful environment is endangered* by toxic or other potentially hazardous substances."[143] One Clean-Up '84 advertisement[144] asserts that it "makes sense to allow individuals or groups of citizens into court to guarantee *their right* to a healthful environment or *their right* to be informed."[145] With respect to subsection (b), the Clean-Up '84 commentary states that "any person will have 'standing' to seek judicial review of acts or omissions of governmental agencies that are contrary to the trust purposes."[146] Presumably this is because by definition every member of the public is a beneficiary under the trust. The commentary further explains that the language of subsection (c) is "designed to abrogate the judicially imposed requirement that a person must have suffered 'special injury' before a lawsuit can be brought."[147]

Under the heading "Not just the facts, some opinion too," a

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141. Arline, *supra* note 71, at 497, discussing Department of Administration v. Horne, 269 So. 2d 659 (Fla. 1972). "This case demonstrates that the concept of standing is not a constitutional principle, but one created by the courts for their own internal administration. When the need is great, the courts can open the door to a citizen and consider the merits of his claim against the government." Arline, *supra* at 498, n.17.

142. *Save Sand Key*, 281 So. 2d at 574.

143. *See* Appendix A (emphasis added).

144. *See* Appendix B.

145. *Id.* (emphasis added).

146. *See* Appendix A.

147. *Id.*

Clean-Up '84 advertisement[148] states: "Clean-Up '84 creates a right to a healthful environment . . . which can be enforced by any citizen or group of citizens." This could be construed to indicate that a broader reading of the standing provision may have been intended. But this statement must be read in the context in which it appears. It is grouped with other assertions which are clearly overgeneralizations and oversimplifications, such as "Clean-Up '84 will protect our children and their children from the ravages of environmental disease."[149] The statements on that page give the public a general overview of the amendment's benefits and do not enumerate the relevant exceptions or limitations.

Courts and commentators who have argued against the requirement of a special injury have generally endorsed restricting standing to parties who have a sufficient stake in the controversy so as to assure concrete adverseness.[150] In *Florida Wildlife Federation v. State Department of Environmental Regulation*,[151] the Supreme Court of Florida briefly reviewed the history of the special injury requirement in Florida and concluded that it did not apply to citizens bringing suits under section 403.412(2)(a) of Florida's Environmental Protection Act.[152] The court did require that "it must appear that the question raised is real and not merely theoretical and that the plaintiff has a bona fide and direct interest in the result."[153]

In construing a constitutional provision, courts look to the intent of the framers and adopters.[154] In *Plante v. Smathers*,[155] the Supreme Court of Florida enunciated the following guidelines:

> In construing [a constitutional amendment], it is our duty to discern and effectuate the intent and objective of the people. The spirit of the constitution is as obligatory as the written word. The objective to be accomplished and the evils to be remedied by the constitutional provision must be constantly kept in view, and the

148. *See* Appendix B.

149. *Id.*

150. *See* Arline, *supra* note 71; *Save Sand Key*, *supra* note 70. *See also* Baker v. Carr, 369 U.S. 186 (1962). Note that federal court jurisdiction, unlike that of state courts, is expressly predicated on an actual "case or controversy." U.S. CONST. art. III, § 2.

151. 390 So. 2d 64 (Fla. 1980).

152. *Id.* at 67.

153. *Id.* at 68, citing Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194 (Fla. 1946).

154. State *ex rel.* Dade County v. Dickinson, 230 So. 2d 130 (Fla. 1969); Metropolitan Dade County v. City of Miami, 396 So. 2d 144 (Fla. 1980).

155. 372 So. 2d 933 (Fla. 1979).

> provision must be interpreted to accomplish rather than defeat them . . . .
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> . . . .
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> We may glean light for discerning the people's intent from historical precedent, from the present facts, from common sense, and from an examination of the purpose the provision was intended to accomplish and the evils sought to be prevented. Furthermore, we may look to the explanatory materials available to the people as a predicate for their decision as persuasive of their intent. Further, an interpretation of a constitutional provision which will lead to an absurd result will not be adopted when the provision is fairly subject to another construction which will accomplish the manifest intent and purpose of the people.[156] (citations omitted)

Given the intent of the proponents of Clean-Up '84 and the general consensus that some restrictions on standing should be retained to help maintain a healthy separation of powers, the perceived danger that subsection (c) will be interpreted as allowing anyone to sue on any issue arising under the proposed amendment appears remote.

Under article XI of the Illinois Constitution, citizens are granted standing "subject to reasonable limitation and regulation as the General Assembly may provide by law."[157] Professor Leahy reports that "[m]any delegates to the [Constitutional] Convention believed this language to be unnecessary, for it simply stated the inherent power of the General Assembly to regulate judicial procedure. In addition, this limitation or regulation must be 'reasonable.' "[158] The Constitutional Commentary following article XI, section 2 in Illinois Annotated Statutes indicates that the qualifying language quoted above was intended to emphasize the Assembly's leadership role and the power of the General Assembly to impose procedural requirements such as the filing of claims with the Attorney General and allowing private plaintiffs to proceed in the courts only if the Attorney General has failed to act within a specified time.[159] The Commentary states that this power of the General Assembly "could not be exercised so as to effectively deprive the individual of his standing."[160]

It may be argued that the absence of such qualifying language

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156. *Id.* at 936.
157. ILL. CONST. art. XI, § 2.
158. Leahy, *supra* note 15, at 7.
159. ILL. ANN. STAT. art. XI, § 2 at constitutional commentary (Smith-Hurd 1971).
160. *Id.*

from the proposed amendment has no substantial significance. However, it is possible that the phrase "each person" will be interpreted to be a "plain and unambiguous" indication that literally anyone has standing to enforce any provision of the amendment, and that therefore the courts would be precluded from construing the phrase.[161]

Thus, academically at least, it would be better for subsection (c) to state more precisely what is intended. For example: "Each person, governmental or private, *whose rights under this subsection are affected,* shall have standing . . ." or "each *affected* person . . ." or ". . . standing to enforce the rights granted *to such person* under this section. . . ." Any of these revisions would eliminate the risk that the standing provision would be interpreted as granting standing to literally every person, and would not weaken the amendment. Realistically, however, it seems unlikely that the amendment as it is currently written would be so construed.

4. Judicial Intervention in Administrative Proceedings

Assuming that under subsection (c) of the proposed amendment a potential litigant will have to establish that his or her own rights have been jeopardized, the objection may still be made that a person who is dissatisfied with environmentally-related agency proceedings may opt out of those proceedings at any point and seek judicial review. This can be avoided simply by requiring a litigant to exhaust administrative remedies before seeking judicial review. This is the approach that has been taken in Illinois. In *Parsons v. Walker,*[162] the dismissal of a constitutional claim in a suit to enjoin a contract to build a reservoir was upheld because the plaintiffs failed to show that "other remedies such as the Environmental Protection Act procedures were exhausted or unavailable."[163]

C. The Necessity of a Constitutional Amendment

Another objection to the proposed amendment is that it is unnecessary since the policies sought to be established by the amendment can be established by the legislature. The Illinois Environmental Protection Act was adopted shortly after the constitutional

161. *See* City of Jacksonville v. Continental Can Co., 113 Fla. 168, 151 So. 488 (1933).

162. 28 Ill. App. 3d 517, 328 N.E.2d 920 (1975).

163. *Id.* at 925. *See also* Village of South Elgin v. Waste Management of Illinois, Inc., 62 Ill. App. 3d 523, 379 N.E.2d 349 (1978); White Fence Farm, Inc. v. Land & Lakes Co., 99 Ill. App. 3d 234, 424 N.E.2d 1370 (1981).

convention convened. "Although this Act completely restructured State pollution agencies and provided each person with the right to file a complaint, the Convention delegates were aware that the individual's ability to act had been strongly opposed in the General Assembly and could be abolished by future amendment to the Act."[164] A constitutional amendment is thus more durable than a statute. The delegates to the convention "believed that the right to a 'healthful environment' was so compelling that the right should be constitutionally protected from abridgement by the General Assembly."[165] When Florida's Constitution Revision Commission considered Commissioner Moyle's proposal,[166] the proposal failed, according to one commentator, because it was considered unnecessary.[167] Commissioner Nathaniel Reed applauded the legislature's track record and stated he "believe[d] in staying with the winning team."[168]

Those who propose to amend the constitution would not agree that the legislature's track record is good enough. In addition, a constitutional amendment has the advantage of being far less susceptible to change than a legislative act. In the context of Florida's present and projected population, the problem becomes acute. Florida is one of the fastest growing states in the nation. Its fresh water supply is close to the surface of the ground and is particularly sensitive. The legislature's continued failure to adequately protect the environment could be particularly devastating in the not so distant future.

The counterargument is that as the severity of the risk to the environment and the people's concern increase, the likelihood of legislation detrimental to the environment will decrease. The question of whether our environment needs to be constitutionally protected thus seems to boil down to a question of trust in the legislature's responsiveness to environmental concerns, the capacity and inclination of the public to take an informed and active role in the making of policy, and the role of special interest groups. While the legislature is empowered to enact statutes encompassing the provisions proposed by Clean-Up '84, it has thus far failed to fully

164. Leahy, *supra* note 15, at 3.

165. Whalen & Wolff, *supra* note 119, at 76.

166. *See supra* notes 123-25 and accompanying text.

167. Dore, *supra* note 123, at 623 (citing Transcript of Fla. C.R.C. proceedings 39 (Jan. 10, 1978)(remarks of Nathaniel Reed)).

168. *Id.*

address the concerns of the proponents of the amendment.[169]

D. *The Feasibility of the Amendment*

1. Unattainable Ideals.

A final objection to the amendment is that it cannot accomplish its purposes. In a recent debate on the amendment,[170] an opponent asserted that although it has an "apple pie flavor" it is a "pie in the sky" proposal and is beyond the power of the state to enforce.[171] When Commissioner Moyle's proposed environmental rights amendment was debated in 1978, this same point was made by Commissioner Mathews who offered, and later withdrew, the proposal that "[e]veryone has a right to all the rights of Utopia."[172]

It is true that the state cannot guarantee that the ideals expressed in the amendment will ever be fully realized, but the amendment is not so vague and overly broad as to be completely meaningless or unenforceable. The adoption of the amendment would help to attain those ideals. One commentator has suggested the following effects of expressing a right to a healthful environment in a state constitution:

> It might result in a broader definition of what constitutes a nuisance, private or public. Moreover, the existence of a constitutional right could alter the balancing technique which courts use in nuisance cases to weigh the social and economic benefits of the defendant's activity against the harm which that activity is doing to the plaintiff. It is one thing to balance the value of the complained-of activity against private harm; it is quite another to make that balancing judgment when a constitutional right is involved. . . .[173]

One of the effects of enshrining a right to a healthful environment in a state constitution was demonstrated in the Illinois case *Village of Glencoe v. Metropolitan Sanitary District of Greater Chicago*.[174] The district court acknowledged that it must defer to legislative intent when construing a statute. Recognizing that pub-

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169. *See supra* notes 6-10 and accompanying text.

170. *Environmental Rights Amendment, Panacea or Pandora's Box?* debate sponsored by the Univ. of Fla. Envtl. Law Soc'y, Gainesville, Florida (Feb. 15, 1984).

171. *Id.* (remarks of Steve Medina).

172. Dore, *supra* note 123, at 622 (citing Transcript of Fla. C.R.C. proceedings 15 (Jan. 10, 1978)(remarks of John Mathews)).

173. Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 203 (1972).

174. 23 Ill. App. 3d 868, 320 N.E.2d 524 (1974).

lic concern with pollution had been "elevated to the level of constitutional dignity" by the adoption of article XI of the Illinois Constitution, the court inferred a legislative intent to grant broad powers to the Sanitary District to ban the discharge of waste, regardless of whether it constituted pollution.[175]

The Supreme Court of Illinois further demonstrated the effect of a constitutional right to a healthful environment as it related to the state's common law of public trust in *People ex rel. Scott v. Chicago Park District*.[176] The court, noting that the public trust doctrine must consider the changing conditions and needs of the public, interpreted article XI of the Illinois Constitution as manifesting a high level of public concern in the environment. In light of this constitutional provision, a private interest litigant had to demonstrate more of a public benefit than a potential increase in employment and a boost to the local economy which were merely incidental to the private interest involved in order to justify a grant of public trust land.[177]

2. Federal Preemption

Federal law will probably preempt the application of the amendment in some contexts. The United States Supreme Court has held that the federal government has preempted the field of nuclear safety concerns, except for a few limited powers delegated to the states.[178] Some courts have interpreted the Court's decisions in *Milwaukee I*[179] and *Milwaukee II*[180] as indicating that the Federal Water Pollution Control Act[181]preempts state law remedies against out-of-state polluters.[182] It has been recently argued that the Occupational Safety and Health Administration's (OSHA) regulations dealing with a worker's right to know[183] probably preempt most state provisions on the subject.[184] In *New Jersey State Chamber of*

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175. *Id.* at 527-28.

176. 66 Ill. App. 2d 65, 360 N.E.2d 773 (1976).

177. *Id.* at 780-81.

178. Pacific Gas and Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983). *See also* Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984).

179. Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

180. City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981).

181. 33 U.S.C. § 1251 (1982).

182. *See, e.g.*, Chicago Park District v. Sanitary Dist., 530 F. Supp. 291 (N.D. Ill., E.D. 1981).

183. "Hazard Communication Standard," 29 C.F.R. § 1910.1200(a)(2) (1985).

184. Legal Times, December 12, 1983, at 12.

Commerce v. Hughey,[185] the United States District Court for the District of New Jersey held that this new OSHA rule is a "standard" under section 6 of the Occupational Safety and Health (OSH) Act[186] rather than a "regulation" under section 8 of the OSH Act, and therefore the preemption provisions of section 18 of the OSH Act apply.[187] The court held that the scope of preemption is limited, since the OSHA Hazard Communication Standard deals only with certain employers in the manufacturing sector.[188] New Jersey is free to regulate employers who do not come within the reach of the OSHA rule. It was argued that those provisions of the New Jersey Right-to-Know Act which were necessary to carry out the non-workplace purposes of the Act should not be preempted, even where they applied to employers who are covered by the OSHA rule. The court ruled that under New Jersey's Act, "[t]he workplace and non-workplace regulatory schemes are inextricably intertwined. The fact that this regulatory base also serves other ends does not save it from preemption."[189] Labor unions, citizen's groups, and the states of Connecticut, New Jersey, and New York all filed petitions in the United States Court of Appeals for the Third Circuit challenging the validity of the OSHA Hazard Communication Standard.[190]

The fact that the operation of the amendment may be displaced somewhat by federal preemption may be one of its weaknesses, but it is certainly not a reason to abandon the amendment. The scope of federal law is often uncertain and changes frequently. Furthermore, federal law would not preempt the entire scope of issues covered by the amendment. In many instances, the amendment would still apply.

3. Application of the Public Trust Doctrine

The public trust doctrine also has been criticized as presenting problems in its application. One commentator lists ten different categories of interests which have claimed protection under a the-

185. 600 F. Supp. 606 (D.N.J. 1985).

186. 29 U.S.C. ch. 15 (1982).

187. *But cf.*, Louisiana Chemical Ass'n. v. Bingham, 657 F.2d 777 (5th Cir. 1981), applying a more stringent test of what may properly be designated a "standard" under the OSH Act.

188. Only those employers included in Standard Industrial Classification codes 20-39 are affected. *Hughey*, 600 F. Supp. at 617.

189. *Id.* at 622.

190. United Steelworkers of America v. Auchter, 763 F.2d 728 (3d Cir. 1985).

ory of public trust in water.[191] These are navigation, ports, free passage, commerce, fishing, sand and stones, seaweed and shells, recreation, conservation and aesthetics, and the "public interest."[192] It has been suggested that the "[p]ublic trust theory characterizes a given right either as being fully protected or as not being protected at all."[193] Conflicts are likely to arise between these competing interests and may lead to confusion.

While some difficulty in decisionmaking may result from the public trust doctrine's assertion of competing interests, it is the purpose of the doctrine to insure that these competing interests be carefully considered when policy is being made.[194] It is not doubted that decisionmaking would be easier if fewer interests needed to be considered. The rationale behind the public trust doctrine, as stated in the Clean-Up '84 commentary, is to "hold governmental agencies to a higher standard with respect to their actions or omissions concerning the management of the natural waters, air and wildlife in the state."[195]

IV. CONCLUSION

Clean-Up '84 was drafted in response to a perception that greater protection of Florida's sensitive environment is needed in the face of the state's rapid rate of growth. Present laws are criticized as inadequate in both scope and enforcement, and for denying citizens access to courts where the legislative and administrative processes have failed.

Objections to the amendment have been made on many grounds, most of which are mistaken, easily remedied, or outweighed by other policy considerations. Placing these provisions in the Florida Constitution would have the advantages of greater durability, and perhaps greater impact, than would be afforded by their enactment by the legislature. This would not result in the judiciary being given exclusive power over environmental decisionmaking.

The judiciary is quite capable of dealing with concepts such as "healthful environment" or "due process" which are not readily defined. Courts are also accustomed to dealing with complex, scientific evidence and will continue to consider such evidence re-

191. Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970).

192. *Id.* at 777-78.

193. *Id.* at 778.

194. *See also* A MODEL WATER CODE, *supra* note 50, commentary to Section 102.

195. *See* Appendix A.

gardless of the status of the amendment.

It is extremely unlikely that the courts will interpret the right to a healthful environment so broadly as to supersede all other social interests. The amendment would place restrictions on competing interests, which is the intended result. Increasing the relative weight of environmental concerns is one of the primary purposes of the amendment.

The other primary purpose of the amendment is to increase the enforceability of these environmental concerns. While in terms of academic purity it would be better to have a standing provision which more carefully articulates the intention to grant standing to each person whose rights under the amendment may be affected, this point is of no real consequence since the risk is remote that the courts will misconstrue the present language of subsection (c). Properly interpreted, the section will eliminate the injustice of the present law regarding standing without creating an unreasonable risk of unwarranted litigation.

Lastly, while the proposed amendment is not a panacea for Florida's environmental problems, it can go a long way toward strengthening the state's environmental policies.

APPENDIX A

Constitutional Amendment Petition Form

Ballot Title and Summary:

Environmental Rights

Establishes a right to a healthful environment and the right to know if that healthful environment has been endangered. Establishes natural water, air and wildlife as a public trust. Grants standing in legal proceedings for enforcement of these rights.

The following new section is added to Article I of the Florida Constitution:

Section 24. Environmental Rights

(a) Each person has a right to a healthful environment and a duty to provide and to maintain a healthful environment for the benefit of this and future generations. Each person has a right to know, and the duty to give notice as shall be provided by law, if a healthful environment has been or may be endangered by toxic or other potentially hazardous substances.

(b) The natural waters, air and wildlife in the state are public resources that shall be managed as a public trust for the use and benefit of all the people of this and future generations and for the maintenance of the natural ecosystems. Each person as beneficiary of this trust has a right to have the trust purposes fulfilled.

(c) Each person, governmental or private, shall have standing to enforce the rights granted by this section against all other persons through legal proceedings.

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election to be held more than ninety days after this petition is filed.

Signature_____

(Please sign name as it appears on voting roll.)

Name_____

Address_____

City_____ Zip_____

County_____

Precinct_____

Congressional District_____

Date Signed_____

Note: 104.185 (Election Code) It is unlawful to knowingly sign a petition more than one time.

Paid Political Advertisement - Paid for by and return to:
CLEAN-UP '84 - P.O. Box 22626 - Tampa, Florida 33622
George Sheldon, Treasurer

Commentary

This initiative petition proposes the creation of a new section in Article I of the Florida Consitution entitled "Environmental Rights."

The first sentence of subsection (a) and the language of subsection (c) are drawn in large part from a similar provision in the 1970 Illinois Constitution (Article XI, Sections 1 and 2). The drafters of this proposal to amend the Florida Constitution intend the following consequences to result if the proposal is approved by the people and becomes a part of the Florida Constitution.

1. Each person has a right to a healthful environment. The word "healthful" is meant to describe the quality of physical environment that a reasonable person would select were a free choice available. The word "environment" means the aggregate of all conditions affecting the existence, growth, and welfare of organisms and includes the natural environment as well as the working and living environments.

2. Each person has a duty to provide and to maintain a healthful environment for the benefit of this and future generations. The duty extends to all persons, natural or corporate, and to all governmental units. The duty corresponds to each person's right to a healthful environment. The language is meant to emphasize that the right to use property as one sees fit is limited at least to the extent of the obligation to provide and to maintain a healthful environment.

3. Each person has a right to know if a healthful environment has been or may be endangered by toxic or other potentially hazardous substances. The language is designed to give each person a right to know if a healthful environment is or may be compromised because of the presence of toxic or other potentially hazardous substances.

4. Each person has a duty to give notice if a healthful environment has been or may be endangered by toxic or other potentially

hazardous substances. This language is meant to emphasize that any person who has knowledge or who should have knowledge of the presence of toxic or other potentially hazardous substances that might endanger the right to a healthful environment has a duty to inform those who might be affected. The nature of the notice that will satisfy the duty to inform must be specified by the legislature, or by the courts if the legislature fails to enact the necessary legislation.

5. The natural waters, air, and wildlife in the state are public resources that shall be managed as a public trust for the use and benefit of all the people of this and future generations and for the maintenance of the natural ecosystems. "The natural waters in the state" means any and all water naturally on or beneath the surface of the ground or in the atmosphere, including natural watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground and all coastal waters within the jurisdiction of the state. "Wildlife" means living things that are neither human nor domesticated, including mammals, reptiles, birds, and fishes. The language is intended to hold governmental agencies to a higher standard with respect to their actions or omissions concerning the management of the natural waters, air, and wildlife in the state. The public interest recognized by the provision is the management of the resources in a manner consistent with the articulated purposes: the use and benefit of all the people of this and future generations and the maintenance of the natural ecosystems. The provision is not intended to abrogate the state's trespass laws or to confer on any individual person a right to claim a personal or pro rata share of the public resources.

6. Each person, governmental or private, shall have standing to enforce the rights granted against all other persons through legal proceedings. This language is drawn from the Illinois Constitution and is intended to have the same effect as to the rights granted in subsection (a). That is, every person whose environment is rendered unhealthful because of polluting activities of others will have "standing" to enforce the right to a healthful environment; the right to notice may be enforced by any person whose healthful environment is endangered by toxic and other potentially hazardous substances. With respect to the rights granted in subsection (b), any person will have "standing" to seek judicial review of actions or omissions of governmental agencies that are contrary to the trust pruposes. The language is designed to abrogate the judicially

imposed requirement that a person must have suffered "special injury" before a lawsuit can be brought. The language will allow a person an opportunity to prove a violation of the rights granted even though that violation may be a public wrong, or one common to the public generally. The language does not create any new remedies. If a person successfully proves a violation of any of the rights granted by this section, only the traditional remedies of injunction or declaratory judgment will be available. Compensatory or money damages will not be available without strict proof of personal or economic injury.

7. Subsection (a) requires the legislature to enact laws specifying the nature of the notice that must be given to satisfy the duty to inform. If the legislature fails to act, the courts will develop the specifics of the notice requirement. All other aspects of the provision are intended to be self-executing; no other legislative action is necessary to implement this section.

APPENDIX B

TOWARD A CLEAN AND HEALTHFUL ENVIRONMENT

"There is looming the tragic possibility that the Florida public will become an effective, organized force at just about the same time that we have irretrievably lost the environmental assets that we cherish."

When Joe Penford spoke these words in 1967, Florida's conservation movement was just gearing up for the important battles of the 1970's to protect the natural environment and public health from growing threats of destruction and pollution.

While we count the victories of the past decade and even the past legislative session, we must recognize two glaring inadequacies with current conservation efforts. Public support for strong, protective environmental legislation is as high as it has ever been. However, that support is diffuse and unfocused. Policy and law flows not from precincts and districts but from instances of farsighted leadership by Florida's elected and appointed public officials. Legislative victories, like leadership itself, have to be viewed in a temporal context. What is perceived as urgent today may fall by the wayside as decisions on funding and enforcement face overwhelming special interest opposition.

Add to this the recognition of a fundamental flaw in our basic document of government, the Florida Constitution, and it can be seen that some more permanent solutions to the problem of protecting the environment and the public's health are in order.

With this in mind, a group of legal scholars and public interest and environmental leaders took on the task of amending the Florida Constitution to add a section on environmental rights. A review of the laws of Florida, the constitution and laws of other states, and environmental legislation and legal activity revealed several areas in which the Florida Constitution could be strengthened.

RIGHT TO A HEALTHFUL ENVIRONMENT

We are facing in Florida, along with the rest of the nation, the frightening prospect of epidemic levels of cancer, birth defects, declining fertility, and other environmental diseases. Much of this can be attributed to the massive quantities of toxic, carcinogenic and mutagenic substances introduced into the environment every year. While exposure to these substances has much to do with lifestyle, the public as a whole and individuals have little knowl-

edge or recourse when their health is endangered by hazardous substances.

CLEAN-UP '84 proposes a constitutionally guaranteed right to a healthful environment as well as a duty to maintain a healthful environment for future generations.

RIGHT TO BE INFORMED

There have been countless recent episodes of citizens who have been unknowingly exposed to toxic substances. Pesticide contamination of drinking water, seepage of leachate from hazardous waste sites, uninformed workers poisoned by unknown substances, and industrial discharge into streams and rivers are a few of the more commonly heard of incidents. What characterizes all of these situations is the absolute lack of knowledge by those most directly affected. Without the knowledge of danger people cannot act to protect themselves.

CLEAN-UP '84 proposes a constitutionally guaranteed right to be informed if a healthful environment is endangered by toxic or other potentially hazardous substances.

PUBLIC TRUST OF WATER, AIR AND WILDLIFE

Florida has the unique situation of having vast reservoirs of water beneath the ground. Huge areas of the state are covered with natural bodies of water. As a peninsula Florida has a long stretch of coastline, much of it estuaries, bays and coastal wetlands. It is easily understood that these bodies of water are interrelated. Water knows no political or private property boundaries.

Although some efforts have been made recently to protect the state's precious water supplies and to maintain quality of ground and surface waters, much more could be done if water were considered, as air and wildlife already are, a public resource.

CLEAN-UP '84 proposes that the natural waters, air and wildlife in the state be public resources to be managed as a public trust for the use and benefit of the people of this and future generations who would be the beneficiaries of the trust.

STANDING

The most common problem of individuals and groups of citizens trying to prevent or correct some environmental or health damage is getting into Florida courts. These cases are routinely dismissed for lack of "standing". The courts have historically required that a complainant show that "special damages" have been suffered

before an action can be brought against a polluting activity or person in order to protect the environment.

To illustrate what this means, assume that an individual lives in an area near a chemical plant. The plant stores waste from its operation in lagoons on its own property. When it rains, the lagoons overflow spilling toxic chemicals over an area bordering a residential neighborhood. The individual attempts to file suit to enjoin the chemical plant for remedial action or even for a description of the substances stored in the lagoons. The case would likely be dismissed because the individual would not be able to prove that he/she had suffered special injury or had suffered damages different from the rest of the residents of the area.

The concept of allowing individuals to assert claims for public wrongs is not unheard of and is a growing concept throughout the country. Certainly, with the increasing incidence of threats to the environment and to the public's health, it makes sense to allow individuals or groups of citizens into court to guarantee their right to a healthful environment or their right to be informed.

It is important to point out that granting standing does not create any new remedies and only carries with it the right to injunctive relief and not to receipt of damages. Allowing standing in order to assert an environmental claim does not assume proof of that claim. It merely affords the opportunity for an individual to convince a court or administrative body that injunctive relief is entitled.

CLEAN-UP '84 proposes that each person be allowed standing to enforce the rights to a healthful environment, right to be informed if that healthful environment is threatened, and the right to have the water, air and wildlife managed as a public trust.

CLEAN-UP '84 FACT SHEET

Not just the facts, some opinion too.

As an amendment to the Florida Constitution:

CLEAN-UP '84 creates a right to a healthful environment which can be enforced against another person, a corporation or a governmental body by any citizen or group of citizens.

CLEAN-UP '84 creates a right to be informed of the presence of toxics or hazardous materials in the workplace or in the general community.

CLEAN-UP '84 requires individuals or companies using toxics or hazardous materials to inform workers or citizens of the presence of those substances.

CLEAN-UP '84 establishes a right to enjoin a polluting industry's activity or other unhealthful activity from taking place.

CLEAN-UP '84 establishes natural water, including wetlands, navigable waters, and ground water, air and wildlife as public resources to be managed by the state in such a way as to assure a protection of the natural ecosystems and a preservation of those resources for future generations.

CLEAN-UP '84 is self-executing and would not require the legislature to act except as it relates to the details of the notice requirement as it relates to the presence of toxics or hazardous materials.

CLEAN-UP '84 establishes legal standing for the enforcement of environmental and health protection rights.

As a campaign:

CLEAN-UP '84 is a statewide grassroots petition drive, to amend the Florida Constitution, by members of organizations with consumer, health, public interest and environmental concerns.

CLEAN-UP '84 is based on six-months of research by some of the most respected legal scholars and attorney's in Florida.

CLEAN-UP '84 is the result of careful study of analysis of political and demographic trends in Florida.

CLEAN-UP '84 is a statewide effort to focus attention of public interest organizations, industry, labor and governmental bodies on the urgent task or protection of natural resources and a healthful environment.

CLEAN-UP '84 will likely be endorsed and supported by most of Florida's elected and appointed officials.

CLEAN-UP '84 provides an opportunity for business and industry to pledge a commitment to a clean and healthful environment.

CLEAN-UP '84 will be proposed to the Florida Legislature during the 1984 session.

CLEAN-UP '84 is being financed through grassroots fundraising, business, labor and public interest organization funds.

CLEAN-UP '84 will provide an impetus to the Florida Legislature to pass wetlands protection, growth management, and right to know legislation.

As a tool for a clean and healthful environment:

CLEAN-UP '84 will help the effort to clean up the hundreds of hazardous waste sites in Florida.

CLEAN-UP '84 will allow individuals to know when they are exposed to toxic substances.

CLEAN-UP '84 will reduce the dangers of thousands of uncon-

trolled pesticides in use in Florida and will allow citizens to act to demand information and removal of substances like Temik and EDB.

CLEAN-UP '84 is a step in reducing the enormous rate of increase of cancer and other environmental diseases.

CLEAN-UP '84 will help restore rights of workers to know of and understand toxic chemicals in use in workplaces.

CLEAN-UP '84 will help protect the investment Florida's citizens have made by protecting quality of life in our state.

CLEAN-UP '84 will protect our children and their children from the ravages of environmental disease.

CLEAN-UP '84 will help help protect the economic interest of the fishing and tourism industries.

CLEAN-UP '84 will help create jobs through installation of pollution control equipment such as sewage plants, scrubbers on coal-fired power plants, and resource recovery operations.