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Recent Developments

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RECENT DEVELOPMENTS

ALICE F. HARRIS

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I. INTRODUCTION

The author has attempted to include in this section federal and state court decisions which are expected to have a significant impact on environmental and land use law. Of course, much has already been written about some of these decisions, especially those of the U.S. Supreme Court. In addition, pertinent legislation passed by the Florida Legislature in the 2002 session is discussed, along with recent changes to regulations and procedures that may be important to those interested in environmental and land use matters.

A number of organizations post information on their websites, which serve as a good source of up-to-date information. Among these are government entities, including the Florida Legislature¹, the Florida Department of Environmental Protection², and the Florida Department of Community Affairs³. Private organizations whose websites are of interest include The Florida Bar Environmental and Land Use Law Section⁴ and Business and Legal Reports, Inc., which publishes various materials dealing with environmental compliance and related matters.⁵ Finally are law firm websites, some of which include information on recent developments in the law.⁶

1. <http://www.leg.state.fl.us>.
2. <http://www.dep.state.fl.us>.
3. <http://www.dca.state.fl.us>.
4. <http://www.eluls.org>.
5. <http://www.blr.com>.
6. <http://www.hgss.com>.

II. FEDERAL CASE LAW

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).

Possibly the most widely-publicized environmental case decided by the Supreme Court in 2001 involved a decision which may affect the jurisdiction of the United States Army Corps of Engineers (Corps) over isolated waters, which for many years had been within the dredge-and-fill permitting authority of the Corps.⁷ In 1986, the Corps issued the "Migratory Bird Rule," which extended "to intrastate waters: [w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties; or [w]hich are or would be used as habitat by other migratory birds which cross state lines."⁸ Permitting authority for this was authorized under § 404(a) of the Clean Water Act (CWA). The Supreme Court described two questions presented by the case, writing that it was asked "to decide whether the provisions of § 404(a) may be fairly extended to these waters, and, if so, whether Congress could exercise such authority consistent with the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3."⁹ The second question was not answered because the Court answered the first in the negative.¹⁰ Thus, the applicability of the commerce clause in this matter remains unresolved.

The waters involved here were located on a 533-acre parcel that had been abandoned since about 1960.¹¹ The parcel had previously been used as a sand and gravel pit mining operation by the Chicago Gravel Company.¹² The petitioners, a consortium of 23 suburban cities and villages near Chicago, wanted to use the site for the disposal of non-hazardous solid waste, which would require that some of the permanent and seasonal ponds in the pit be filled.¹³ The Corps never determined that wetlands were present and originally declined to exert jurisdiction over the waters on the site; however, after being made aware that some 121 migratory birds used the site, it decided that the area contained 'waters of the United States' and exerted jurisdiction under the "Migratory Bird Rule."¹⁴ The Corps declined to issue the needed permit to fill these waters and was sued

7. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

8. *Id.* at 164.

9. *Id.* at 162.

10. *Id.*

11. *Id.* at 163.

12. *Id.*

13. *Id.* at 162-63.

14. *Id.* at 164.

in the Northern District of Illinois.¹⁵ The District Court upheld the jurisdiction of the Corps in summary judgment and the petitioners appealed.¹⁶

The Court of Appeals for the Seventh District agreed with the Corps that the Commerce Clause of the U.S. Constitution allows Congress “to regulate such waters based upon ‘the cumulative impact doctrine.’”¹⁷ It also decided that the CWA “reaches as many waters as the Commerce Clause allows and ... followed that the [Corps] ‘Migratory Bird Rule’ was a reasonable interpretation of the Act.”¹⁸

In the narrowest of decisions (5 to 4, with Justices Stevens, Souter, Ginsburg and Breyer dissenting), the Supreme Court disagreed, finding that while Congress intended the CWA to “regulate wetlands ‘inseparably bound up with the “waters” of the United States,” it did not intend to regulate wetlands that are “not adjacent to open water.”¹⁹ The Court determined that even the Corps did not at first interpret the CWA to extend as far as the Migratory Bird Rule allowed, originally confining its jurisdiction to “waters ... subject to the ebb and flow of the tide” and waters “susceptible for use for purposes of interstate or foreign commerce.”²⁰ The Corps argued that when Congress approved its 1977 definition of navigable waters by formally adopting 33 CFR § 323.2(a)(5) (1978), it “charted a new course” and “recognized and accepted a broad definition of ‘navigable waters’ that includes nonnavigable, isolated, intrastate waters.”²¹ The Corps also argued that the rejection by Congress of legislation that would have “overturned the Corps’ 1977 regulations and the extension of jurisdiction in § 404(g) to waters ‘other than’ traditional ‘navigable waters,’” further proved congressional intent.²² However, the Court rejected this argument, pointing out that it has always “recognized congressional acquiescence to administrative interpretations ... with extreme care,”²³ and remained unpersuaded that Congress intended to regulate anything other than navigable waters and wetlands adjacent to them.²⁴

15. *Id.* at 165.

16. *Id.*

17. *Id.* at 166.

18. *Id.*

19. *Id.* at 167-68.

20. *Id.* at 168.

21. *Id.* at 169.

22. *Id.*

23. *Id.*

24. *Id.* at 170-71.

While recognizing that it had previously agreed that the term 'navigable' in § 404 means more than the "classical understanding" of the word, the majority refused to take what it called the "next ineluctable step"²⁵ of including "isolated ponds ... because they serve as habitat for migratory birds."²⁶ To do so, wrote the Court, would not just give the word 'navigable' limited effect, it would "give it no effect whatever."²⁷ The Court was not willing to go there, especially since the administrative interpretation in question "alters the federal-state framework by permitting federal encroachment upon a traditional state power" – regulation of land use.²⁸

The dissenting opinion, written by Justice Stevens, is critical of the majority's decision on several counts, and concludes that "[n]othing in the text, the stated purposes, or the legislative history of the CWA supports the conclusion that in 1972 Congress contemplated – much less commanded – the odd jurisdictional line that the Court has drawn today."²⁹ The dissent is critical of the majority's decision to "reverse course" and ignore its conclusion in *United States v. Riverside Bayview Homes, Inc.*,³⁰ "that the 1977 Congress acquiesced in the very regulations at issue."³¹ The *Riverside Bayview* decision established that § 404(a) extended federal jurisdiction to "nonnavigable wetlands adjacent to open waters."³² The dissenting opinion points out that wetlands are "the most marginal category of 'waters of the United States' potentially covered by the statute" and that the question not answered by *Riverside Bayview* is whether federal jurisdiction properly extends to isolated wetlands, not to isolated waters, which were the subject of contention here.³³

Borden Ranch Partnership v. U.S. Army Corps of Engineers, 261
F. 3d 810 (9th Cir. 2001).

In a case that may significantly affect farming and ranching activities, the Ninth Circuit upheld the finding of the trial court that even on farm and ranch lands that are ordinarily exempt from the requirements of the Clean Water Act (CWA), the activity of "deep ripping," that results in "substantial hydrological alterations" to

25. *Id.* at 171.

26. *Id.* at 171-72.

27. *Id.* 172.

28. *Id.* at 173.

29. *Id.* at 182.

30. 474 U.S. 121 (1985).

31. *Solid Waste*, 531 U.S. at 186.

32. *Id.* at 172.

33. *Id.* at 187 n. 13.

wetlands, requires a permit under the CWA.³⁴ The ranch in the *Borden* case contained several wetlands which the new owners altered by a process called “deep ripping.”³⁵ A clay layer near the surface of the soil in these wetlands normally impedes the downward movement of surface waters, causing water to collect above the clay – near or above the soil’s surface.³⁶ It is the impermeability of this clay layer that causes the wetlands to form.³⁷ To increase the drainage of these wetlands, which would allow them to be planted in vineyards and orchards (and subdivided for residential development) – rather than to remain as wetlands on land used for cattle grazing – the owners used deep ripping.³⁸ In this process, metal prongs are dragged through the soil, breaking up the clay layer and allowing the area to drain more rapidly afterwards.³⁹

The court determined that deep ripping is not subject to the farming exclusion of the CWA, which allows farmers to discharge, without a permit, dredged or fill material into wetlands

from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.⁴⁰

The Court determined that the “deep ripping at issue in this case is governed by the recapture provision,”⁴¹ which provides that

Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.⁴²

34. *Borden Ranch P’ship v. U.S. Army Corps of Eng’rs*, 261 F.3d 810, 815-16 (9th Cir. 2001).

35. *Id.* at 812.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. 33 U.S.C. § 1344(f)(1)(A) (2002).

41. *Borden Ranch*, 261 F.3d at 815

42. 33 U.S.C. § 1344(f)(2).

Under this decision, farming or ranching “activities that require ‘substantial hydrological alterations’ require a permit” from the Corps.⁴³ The Ninth Circuit’s decision is being appealed to the U.S. Supreme Court, which granted certiorari on June 10, 2002. If the Supreme Court upholds the decision, the impunity with which agriculturalists have previously altered and drained wetlands may well be ended.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002).

An important, but narrowly posed, regulatory takings question was answered by the U.S. Supreme Court in another case originating in the Ninth Circuit.⁴⁴ Landowners in the Lake Tahoe basin complained that two development moratoria imposed by the Tahoe Regional Planning Agency (TRPA), lasting a total of 32 months, constituted an unconstitutional taking of their property without just compensation. The Ninth Circuit determined that these moratoria did not constitute such a taking and the Supreme Court agreed in a nine to three decision, the dissenters being Justices Rehnquist, Thomas, and Scalia. The question posed was whether “a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation”⁴⁵ under the Fifth Amendment. The property in question is located in the drainage basin of Lake Tahoe, an exceptional body of water noted for the extreme clarity of its water which is a consequence of an extremely limited supply of nutrients to the lake.⁴⁶ In an attempt to gain control over development and prevent the degradation of Lake Tahoe, which is located on the border between Nevada and California, the two states adopted the Tahoe Regional Planning Compact in 1968.⁴⁷ TPRA created by the compact, developed a Land Use Ordinance for the land in the Basin. However, this ordinance did not “significantly limit the construction of new residential housing.”⁴⁸ As a consequence of California’s desire to provide greater resource protection in the Basin, the original compact was extensively revised in 1980 to provide greater protection for Lake Tahoe and the Compact severely limited new construction until a

43. *Borden Ranch*, 261 F.3d at 815.

44. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 122 S. Ct. 1465 (2002).

45. *Id.* at 1470.

46. *Id.* at 1471.

47. *Id.*

48. *Id.* at 1472.

new regional plan was adopted. Being unable to meet the deadline for adoption of that plan, the TPRA imposed two sequential moratoria on development which totaled 32 months in duration. These are the moratoria that were challenged by affected landowners as takings of their property without just compensation.⁴⁹

The petitioners argued for “a categorical rule requiring compensation whenever the government imposes such a moratorium on development.”⁵⁰ The rather extreme view of the petitioners was that “it is enough that a regulation imposes a temporary deprivation – no matter how brief – of all economically viable use to trigger a *per se* rule that a taking has occurred.”⁵¹ The plaintiffs grounded their argument for this *per se* rule on the Court’s opinions in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*⁵² and *Lucas v. South Carolina Coastal Council*,⁵³ but the Court rejected the idea that these cases support such a rule, stating that “the answer to the abstract question whether a temporary moratorium effects a taking ... depends upon the particular circumstances of the case.”⁵⁴ Both *First English* and *Lucas* were premised on a taking determined to “*have already worked a taking of all use of the property.*”⁵⁵

The Court maintained that it had always made a clear distinction between physical takings (acquisitions of property for public uses) and regulatory ones (regulations prohibiting private uses), pointing out that the Fifth Amendment does not contemplate regulatory takings and that “[t]he Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.”⁵⁶ Furthermore, wrote the court, it is “inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.”⁵⁷

Emphasizing that *Lucas* involved a regulation that permanently deprived the owner of “*all economically beneficial uses*” of his land, the Court rejected the idea that it should “sever a 32 month segment from the remainder of each landowner’s fee simple estate, and then ask whether that segment has been taken in its entirety by the

49. *Id.* at 1473.

50. *Id.* at 1477.

51. *Id.* at 1478.

52. 482 U.S. 304 (1987).

53. 505 U.S. 1003 (1992).

54. *Id.*

55. *Id.* at 1482.

56. *Id.* at 1478.

57. *Id.* at 1479.

moratoria,⁵⁸ pointing out that any “portion of property ... taken ... is always taken in its entirety”⁵⁹ and that “[t]he starting point for the court’s analysis should have been to ask whether there was a total taking of the entire parcel.”⁶⁰

The *Tahoe-Sierra* Court also discussed at some length the widespread use of development moratoria in the land-planning community and their widely-acknowledged usefulness in the promotion of orderly and appropriate development.⁶¹ Also of interest is the Court’s acknowledgment that “there is reason to believe property values often will continue to increase despite a moratorium.”⁶² The majority on the Court concluded that the “familiar *Penn Central* approach” should continue to be used in regulatory takings cases.⁶³

Anderson v. Smithfield Foods, Inc., 209 F. Supp. 2d 1270
(M.D. Fla. 2002).

A novel attempt to use the RICO statutes as a method of enforcing environmental compliance failed when Defendant Smithfield Foods’s 12(b)(6), Federal Rules of Civil Procedure, motion to dismiss was granted by a federal district court.⁶⁴ A group of Florida environmentalists brought a class action lawsuit against Smithfield Foods, Inc., a pork processing company, alleging that the company polluted the environment and engaged in mail and wire fraud, money laundering and violations of the Travel Act.⁶⁵ The plaintiffs alleged that Smithfield violated RICO by violating environmental laws, misrepresenting to the public their compliance with environmental laws, and using proceeds of those illegal activities to carry on the business.⁶⁶ The federal court dismissed the lawsuit, commenting that “[t]he money that Defendants allegedly illegally obtained to violate RICO and environmental laws, and to allegedly commit mail and wire fraud, was money that Defendants legally obtained through the operation of its business.”⁶⁷ With regard to the Plaintiff’s concern for the alleged environmental violations, the court wrote, “RICO is not the proper remedy ...

58. *Id.* at 1483.

59. *Id.*

60. *Id.* at 1483-84.

61. *See id.* at 1487-88.

62. *See id.* at 1489.

63. *Id.*

64. *Anderson v. Smithfield Foods, Inc.*, 209 F. Supp. 2d 1270 (M.D. Fla. 2002).

65. *Id.* at 1272.

66. *Id.*

67. *Id.* at 1275.

Plaintiffs may have remedies available through federal or state agencies, or other causes of action available in federal or state court.⁶⁸

Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc. 300 F.3d 1294 (11th Cir. 2002).

This lawsuit was brought by an environmental organization seeking to enforce the Clean Water Act's requirement that any party discharging pollutants from a "point source" into navigable waters have a National Pollutant Discharge Elimination System (NPDES) permit.⁶⁹ Closter Farms, which grows sugar cane on land leased from the State of Florida located adjacent to Lake Okeechobee, also operates an extensive drainage system which handles water from its farm lands as well as water from the Palm Beach/Glades Airport, the Pahokee Wastewater Treatment Plant, a Palm Beach County park, some vacant land formerly occupied by a tractor sales business, and State Road 715.⁷⁰ This extensive drainage system is needed because all these lands would otherwise be submerged as a part of Lake Okeechobee during parts of the year.⁷¹ Despite the fact that the district court found that Closter Farms was polluting Lake Okeechobee, it decided that it "complied with the established legislative scheme."⁷² The circuit court affirmed the ruling of the district court.⁷³

68. *Id.*

69. *Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1295-96 (11th Cir. 2002).

70. *Id.* at 1296.

71. *Id.*

72. *Id.* at 1297.

73. *Id.* at 1298.

III. FLORIDA CASE LAW

Flo-Sun, Inc. v. Kirk
783 So. 2d 1029 (Fla. 2001).

Former Governor Kirk and other Palm Beach County residents brought a public nuisance lawsuit against various sugar cane growers (United States Sugar Corporation, Sugar Cane Growers Cooperative of Florida, Flo-Sun, Incorporated, Okeelanta Corporation, and A. Duda & Sons Incorporated) and QO Chemicals in a complaint that alleged that the sugar cane growers have maintained a public nuisance “by engaging in the cultivation, harvesting and processing of sugar cane in a manner that annoys the community and injures the health of the community” and that the chemical company is disposing of furfural, a chemical by-product of sugar cane processing, by deep-well injection without a needed permit from the Department of Environmental Protection (DEP).⁷⁴

The trial court determined that the doctrine of primary jurisdiction bars the lawsuit and that “chapter 823 was impliedly superseded by part I of chapter 403, at least as the former relates to air and water pollution ... and because the claims were related to alleged pollution ... Respondents’ public nuisance claim warranted dismissal on this basis as well.”⁷⁵ The Fourth District Court of Appeals reversed the trial court’s decision, which would have allowed the public nuisance suit to go forward, and the Defendants appealed.⁷⁶ The Supreme Court of Florida reversed the District Court’s decision, but agreed with the lower court’s finding that chapter 823 was not impliedly superseded by chapter 403 and that “a cause of action for public nuisance relating to air and water pollution still remains a viable option.”⁷⁷ The Court also agreed with the district court regarding the application of the doctrine of primary jurisdiction, writing that “the doctrine of primary jurisdiction counsels in favor of having an administrative agency with the experience and expertise to deal with the complex issues raised in this case.”⁷⁸ The decision discusses the five situations in which Florida courts have found that parties “need not resort to administrative remedies.”⁷⁹ Finally, the Supreme Court agreed that

74. *Flo-Sun, Inc., v. Kirk*, 783 So. 2d 1029, 1032 (Fla. 2001).

75. *Id.* at 1033.

76. *Id.*

77. *Id.* at 1036.

78. *Id.* at 1041.

79. *Id.* at 1038. These are as follows: “(1) the complaint must demonstrate some compelling reason why the APA (Chapter 120, Florida Statutes) does not avail the complainants in their grievance against the agency; or (2) the complaint must allege a lack

the case should not have been dismissed with prejudice, finding instead that “the court is to suspend consideration of the issues until these have been presented to the appropriate administrative agency.”⁸⁰

Chancellor Media Whiteco Outdoor Corp. v. State,
796 So. 2d 547 (Fla. 1st DCA 2001)

Different results reached on reconsideration by: Chancellor Media Whiteco Outdoor Corp. v. DOT, 2001 Fla. App. LEXIS 14157, 26 Fla. L. Weekly D 2420 (Fla.1st DCA Oct. 9, 2001) Review denied by: Chancellor Media Whiteco Outdoor Corp. v. Fla. DOT, 821 So. 2d 293, 2002 Fla. LEXIS 1225 (Fla. 2002).

In response to the wildfires that raged in Florida during the summer of 1998, the Florida legislature passed a law in 1999 that allowed rebuilding of “buildings, houses, businesses, or other appurtenances to real property” which were destroyed in those fires “unless prohibited by Federal law or regulation.”⁸¹ Unfortunately for the owners of six Brevard County billboards that burned, this state law does not allow rebuilding of grandfathered billboards destroyed by fire. According to the First District Court of Appeal, which upheld the ruling of the administrative law judge who recommended that Chancellor Media be required to remove the signs that it rebuilt adjacent to U.S. Highway 1 and Interstate 95, such would violate the Highway Beautification Act.⁸²

To conform with the federal Highway Beautification Act of 1965,⁸³ – and be eligible for full federal highway funding – Florida entered into an agreement with the United States Department of Transportation regarding “size, lighting, and spacing of signs.”⁸⁴ In general, signs that do not conform to the federal regulations are not allowed; however, state and federal regulations and rules allow non-

of general authority in the agency and, if it is shown, that the APA has no remedy for it; or (3) illegal conduct by the agency must be shown and, if that is the case, that the APA cannot remedy that illegality; or (4) agency ignorance of the law, the facts, or public good must be shown and, if any of that is the case, that the Act provides no remedy; or (5) a claim must be made that the agency ignores or refuses to recognize related or substantial interests and refuses to afford a hearing or otherwise refuses to recognize that the complainants’ grievance is cognizable administratively.” *Id.* (citing *Communities Fin. Corp. v. Florida Dep’t of Env’tl. Regulation*, 416 So. 2d 813, 816 (Fla. 1st DCA 1982).

80. *Id.* at 1041.

81. Act effective June 8, 1999, ch. 99-292, § 24, 1999 Laws of Florida (3221, 3236).

82. *Chancellor Media Whiteco Outdoor Corp. v. State*, 796 So.2d 547, 547-48 (Fla. 1st DCA 2001).

83. 23 U.S.C. § 131 (2002).

84. *Chancellor Media*, 796 So.2d at 548.

conforming signs that were in place before the state-federal agreement to remain in place for the duration of their normal life.⁸⁵ Such signs are “grandfathered” as long as they remain in essentially the same condition as when they became non-conforming.⁸⁶ Another provision of the federal law allows grandfathered signs to be rebuilt if they are destroyed “due to vandalism and other criminal or tortious acts” and state law allows such rebuilding.⁸⁷

In reaching its decision that the rebuilt billboards must be removed, the district court wrote, “[t]he legislature surely did not intend to cast aside these years of effort and imperil the state’s share of future highway funds simply to allow erection of some nonconforming highway billboards.”⁸⁸ The court was persuaded that the legislature intended to authorize post-fire reconstruction “only if erection of the signs would not be contrary to the Highway Beautification Act.”⁸⁹

Davis v. Starling, 799 So. 2d 373 (Fla. 4th DCA 2001).

This case involved a purchase of land with undisclosed environmental contamination in the form of an abandoned underground gasoline storage tank which had been paved over by the previous owner.⁹⁰ The appellant purchased the land for \$285,000 in 1994 after the seller gave assurances that the property was free of environmental contamination.⁹¹ However, the site was contaminated with gasoline that had leaked from the storage tank.⁹² The cost of clean-up was estimated to be from \$38,500 to \$64,500.⁹³ The purchaser sued to recoup the cost of clean-up from the current holder of the mortgage, the daughter of the deceased former owner.⁹⁴ The trial court issued summary judgment for the mortgage holder on the basis that recoupment of these costs are barred by section 733.710, Florida Statutes, the nonclaim statute.⁹⁵

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 549-50.

89. *Id.* at 550.

90. *Davis v. Starling, 799 So.2d 373, 374 (Fla. 4th DCA 2001).*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 375.

95. FLA. STAT. § 733.710 (“Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent’s estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.”).

The appeals court reversed the trial court's decision, pointing out that Florida case law establishes that

the defense of recoupment is available even though an underlying claim based on the same facts may be barred as an independent action by the applicable statute of limitations.... The theory is that the defense should be viable as long as the claim to which it responds is viable.⁹⁶

Thus, the court determined that "recoupment is nonetheless still available defensively to lessen the amount owed on the mortgage debt."⁹⁷

IV. FLORIDA'S 2002 LEGISLATIVE SESSION

The Tallahassee law firm of Hopping, Green & Sams traditionally provides an annual legislative overview. The following section, covering environmental and land use developments, is adapted from the 2002 legislative overview written by that law firm.⁹⁸ More details are included in the Hopping, Green & Sams publication and all recently-enacted legislation is available on the Florida Department of State website.⁹⁹

HB 813 Everglades Funding and Citizen Suits, *Chapter 2002-261*.

What has been described as the most visible environmental legislation of the 2002 session is HB 813, Everglades Funding and Citizen Suits. The bill provides, for the first time, an independent source of funding for the Comprehensive Everglades Restoration Plan (CERP), a goal highly sought by environmentalists. The bill authorizes \$100 million per fiscal year (from 2002-2003 through 2009-2010) in "Everglades restoration bonds." Funds from these bonds are to be used to cover the state's financial commitment to Everglades restoration.

The same bill eliminates the ability of unaffected citizens to initiate an administrative hearing under Chapter 120, Florida Statutes, to contest an environmental permit or license under Chapter 373 or Chapter 403, Florida Statutes. Citizenship alone is not sufficient. Unaffected citizens will still be able to intervene in

96. *Id.* at 376.

97. *Id.* at 377.

98. <http://www.hgss.com/HotNews/2002LegislativeSummary/summary02.pdf>

99. <http://election.dos.state.fl.us/laws/02laws/Shotitle.htm>

a proceeding that has been initiated by an affected person. The bill makes clear that a citizen who uses and enjoys a resource that would be adversely affected by the license or permit does have standing to contest the action and that such a citizen's injury would not have to be different than that of the general public. Legal standing for Florida environmental groups is also clarified by HB 813. Automatic standing is provided for not-for-profit corporations with 25 members or more in the affected county. Additionally, to qualify for automatic standing, the not-for-profit corporation must have been in existence for at least a year. Nothing in HB 813 changes the ability of a person to bring suit in circuit court, but because lawyer's fees are recoverable from the losing party in cases that go to circuit court, this avenue is rarely used.

CS/HB 1285 Miscellaneous Environmental Exemptions, *Chapter 2002-253*.

A variety of exceptions and extensions of deadlines found in Chapters 373 and 403, Florida Statutes, were added to this bill that exempts from permitting the use of floating vessel platforms which are used to keep boats and jet skis out of the water while stored at a traditional wet slip. Floating vessel platforms of 500 square feet or less (200 square feet in Outstanding Florida Waters) are exempt from permitting and the DEP is to develop a general permit by January 1, 2003 for larger floating vessel platforms. Another provision of the bill exempts from environmental resource permitting the paving of existing dirt roads and improvement of bridges within the Northwest Florida Water Management District and requires that DEP investigate and report on the function and impact of this exemption for possible expansion to the entire state. In addition, the deadline for adoption of the uniform functional wetland assessment method is extended for six months (from January 31, 2002 until July 31, 2002). The bill makes clear that this method will be binding on all local governments and that it deals only with the amount of mitigation required, not the appropriateness of that mitigation. Other parts of the bill strengthen the authority of the Southwest Florida Water Management District to grant mining exemptions and extend the life of the citrus processing pilot project enacted two years ago but still not approved by the EPA.

CS/SB 508 Exemptions for the Removal of Muck from Freshwater Rivers or Lakes and for Installation of Floating Vessel Platforms, *Chapter 2002-164.*

This bill also involves environmental exceptions for particular activities. Individual residential property owners will be allowed to remove, without permitting under Chapters 253, 369, 373 and 403, Florida Statutes, organic detrital material (muck) from freshwater rivers or lakes that are not aquatic preserves and that have sand or rocky substrates below the muck. Muck may not be removed from wetlands, no native wetland trees can be removed, muck must be deposited in an upland site, and the removal must include appropriate turbidity controls to prevent water quality violations. Muck removal must extend no farther into the water than 100 feet from the ordinary high water line and must not infringe upon riparian rights. Also, the DEP must be notified in writing of the muck removal at least 30 days before the work begins. The bill also requires the DEP and the Fish and Wildlife Conservation Commission to jointly prepare a report to the Governor and the Legislature by November 1, 2004 on the effects of the muck removal exemption on water quality and aquatic and fish habitat in areas where the exemption has been used.

The second part of the bill allows floating vessel platforms and floating boat lifts to be used without permitting under Chapters 373 and 403, Florida Statutes, and without obtaining permission for use of sovereign submerged lands. Floating vessel platforms must be contained within a previously permitted boat slip or, if at a dock without defined slips, must be no larger than 500 square feet (200 square feet if in an Outstanding Florida Water). They must float in the water for the sole purpose of supporting a vessel out of the water when not in use, must not be used for commercial purposes, and must not substantially impede the flow of water, create a navigation hazard, or unreasonably infringe upon the riparian rights of adjacent property owners. In addition, the DEP is required to adopt a rule creating a general permit for floating vessel platforms that are not exempt under this bill, but which do not cause significant adverse impacts either individually or cumulatively.

CS/HB 1243 Fish and Wildlife Conservation Commission - Saltwater Fisheries and Manatee Protection, *Chapter 2002-264.*

A number of changes relating to marine resources (and strengthening their protection) are included in this bill, including penalizing the use of illegal nets, limiting the purchase of saltwater products taken in violation of the constitutional net ban, changing

the provisions for confiscation, seizing and forfeiting property, and creating criminal penalties for interfering with freshwater fishing gear. Several important changes to the Manatee Sanctuary Act are also made, including requiring local (county) rule review committees to evaluate proposed manatee protection rules, clarifying where manatee protection zones are to be established (local governments will be required to use the same scientific information standards used by the state to establish such zones), requiring 13 "key" counties (identified by the Governor and cabinet in 1989) to adopt manatee protection plans (and requiring that the boating facility siting elements of future manatee protection plans be incorporated into the county comprehensive plan), directing that measurable biological goals for manatee recovery be developed and adopted, and requiring the Fish and Wildlife Conservation Commission (FWCC) to study public compliance with manatee protection rules.

CS/HB 1085 Fish and Wildlife Conservation Commission,
Chapter 2002-46.

This bill is the annual legislative package developed by the FWCC. It includes substantial revisions to the definitions in Chapter 372, Florida Statutes, and changes in the statutes relating to recreational licenses, permits and authorization numbers. The bill also recognizes citizens' rights to hunt, fish, and take game. Among the bill's specifics are a provision that the clerk of court may dismiss a citation for not having a boating safety identification card in his possession when the person brings to the clerk a card that was valid at the time, authorization for the FWCC to accept title to vessels for use in the artificial reef program, limitation on the amount of certain fees that can be spent on administration, provision for credit card purchases of licenses and permits via telephone and internet, and several changes to hunting and fishing licenses and permits.

HB 1601 Electric Utilities Environmental Cost Recovery, *Chapter*
2002-276.

This bill addresses air pollution in the northwestern region of Florida, an area served by Gulf Power Company, which is in danger of becoming a non-attainment zone for ozone. As an inducement for Gulf Power Company to reach an agreement with DEP to implement air pollution measures at its facilities, this bill allows for cost recovery of precautionary pollution control measures. Historically, a power company was not allowed to recover costs through rate increases for implementing precautionary pollution

control measures. A second part of the bill requires the Florida Public Service Commission to study the costs, feasibility and potential implementation schedule for renewable energy in the state and to report to the Legislature by February 1, 2003.

CS/SB 678 Pollution Reduction and Lake Okeechobee Protection, Chapter 2002-165.

Improving water quality in Lake Okeechobee is the focus of this bill. Total maximum daily load (TMDL) law is amended to allow for voluntary development and implementation of interim measures, best management practices and other measures for any water body or segment where a TMDL has not been established. Agencies implementing the Lake Okeechobee Protection Program are authorized to give priority in funding to projects on privately-owned lands that make the best use of certain methods designed to reduce nutrient loadings to the lake. Favored measures include restoring the natural hydrology of the basin, restoring wildlife habitat on impacted wetlands, reducing peak flows after storm events, increasing aquifer recharge, and protecting range and timberland from development. In addition, the bill requires limits be placed on phosphorus concentrations in domestic wastewater in the Lake Okeechobee watershed.

CS/HB 574 Minimum Flows and Levels for Springs, Chapter 2002-15.

The increasing use of Florida springs as a source of bottled water has led the DEP to devote considerable attention to their protection. This bill requires the water management districts to develop a schedule for setting minimum flows and levels for larger (first-magnitude) springs (and smaller springs located on state or federal property), taking into consideration the threat from consumptive uses. The effect of this bill is to tighten the consumptive use criteria applicable to withdrawals in and around the larger springs.

CS/SB 1926 Citrus Canker Treatment, Chapter 2002-11.

The Department of Agriculture and Consumer Services (DACS) is to remove and destroy all citrus trees infected with citrus canker and all trees exposed to infection. Property owners must be given notice of the pending removal and destruction of trees (appealable to the district court of appeal within 10 days after receiving notice), citrus trees within 1,900 feet of an infected tree are exposed to infection and must be destroyed, the sheriff or other chief law

enforcement officer must assist the DACS in removing and destroying trees, and DACS may seek a search warrant to enter property if it suspects a violation of the citrus canker quarantine or to inspect, seize, or destroy infected or exposed trees.

CS/HB 851 Solid Waste Management, *Chapter 2002-291.*

Last year saw the passage of Chapter 2001-224, Laws of Florida, which required DEP, and others, to review the solid waste recycling and reduction provisions in Chapter 403, Florida Statutes, and to make a report with recommendations to the Legislature in October 2001. This bill is the result of that study and report and makes changes in the funding and implementation of the state's solid waste management program that affect state regulatory agencies, local governments, businesses handling tires, and private solid waste management companies. Several changes, including the transfer in some sales tax proceeds from the Solid Waste Management Trust Fund to the Ecosystem Management and Restoration Trust Fund, the elimination of a mandate to counties concerning composting and mulching, and the substitution of "significant portion" for "majority" in the requirement that local governments recover certain recyclable materials, indicate a reduction in emphasis on solid waste and recycling matters.

SB 266 Solid Waste Collection, *Chapter 2002-23.*

This bill provides protection to solid waste collection firms that have contracts in unincorporated areas by requiring that newly formed municipalities must honor existing solid waste contracts in the geographic area subject to incorporation. Existing contracts must be honored for five years or for the remainder of the contract, whichever is less. The bill also exempts from the prohibition against leaving motor vehicles unattended vehicles that are being used for collection of solid waste and recovered materials.

CS/HB 1591 Coastal Zone Management Act Update and Transfer, *Chapter 2002-275.*

This bill moves Coastal Zone Management activities from the Department of Community Affairs (DCA) to the DEP, updates the Coastal Zone Management Act in several ways, authorizes DEP to assist in the study, funding, and preservation of lighthouses on the Florida coast, and provides for DEP to assist state agencies and local governments to develop a uniform system of warning and safety flags and signs along coastal public beaches. Several

technical matters relating to the Coastal Zone Management Act are corrected, legislative intent is clarified and DEP is given the authority to adopt rules establishing the procedures and information it needs to determine consistency with the Coastal Zone Management Program.

**HB 1079 Reenactment of Everglades Agricultural Area
Environmental Protection District, Palm Beach, Hendry and
Glades Counties, *Chapter 2002-378.***

Previous authority relating to the Everglades Agricultural Area is repealed and replaced with this single comprehensive special act which restates the purposes, boundaries and powers granted to the Environmental Protection District, outlines the District Board's composition, meeting requirements, duties and responsibilities, and describes the financial obligations, bonding authority, and special assessment powers granted the District.

CS/SB 1906 & 550 Growth Management, *Section 2002-296.*

Landowners and developers throughout Florida will be impacted by the growth management bill, which covers school facilities and water linkage, as well as comprehensive plan and development-of-regional-impact (DRI) reforms. Among the many changes to growth management in the bill is a new requirement that local planning agencies include a non-voting representative of the school board in meetings where increases in residential density are considered and that each regional planning council include an elected school board member. Another new mandate is that all local comprehensive plans must be coordinated with the regional water supply plan approved by the water management district. Water reuse will also be more strongly encouraged: an applicant must prepare a feasibility study and give significant consideration to reuse if the results of the study indicate that reuse is feasible.

Closer and more consistent coordination between school districts and counties will be required by this bill with interlocal agreements to address matters such as population growth and school enrollment projections; school renovations, construction and closings; determining the need for and timing of on-site and off-site improvements to support school renovation and construction; updating district educational facilities plans; and joint-use facilities. Education facilities benefit districts are authorized for the purpose of financing schools and school districts are required to contract with a third party every five years for a financial management and performance audit of the district's capital outlay activities.

Several changes to DRI laws are included in the bill. A "bright-line" rule is established that any project of less than 100 percent of the numeric threshold is conclusively not a DRI, while a project between 100 and 120 percent of a threshold is rebuttably presumed to be a DRI. DRI reports will be required every 2 years instead of every year and acreage thresholds will no longer be used to determine whether a development is a DRI. "Bright line" rules are established for determining whether a proposed change in land use in an approved DRI is a substantial deviation that requires further review and certain statutory exemptions to DRIs are added. Among things exempted are petroleum storage facilities that are consistent with the local comprehensive plan and a port master plan, marinas in a jurisdiction with a boating facility siting plan or policy that meets statutory criteria, and "any renovation or development within the same land parcel which does not change land use or increase density or intensity of use."

Also included in the bill is language limiting the authority of local governments to deny permits for solid waste management facilities that are permitted by DEP and language that exempts from the definition of "development" construction of electrical facilities in established rights-of-way.

CS/CS/SB 694 Mobile Homes, Condominiums and Multi-Condominiums, *Chapter 2002-27*.

Several changes to the mobile home, mortgage foreclosure and condominium statutes are included in this bill. Mobile home park owners must, upon request, hold a second meeting with home owners when rents are increased and statutory payments associated with eviction of mobile home park residents affected by land use changes are now to be paid to the Relocation Corporation, which is granted an additional 30 days to approve payments to mobile home owners. Liens to secure payments of condominium and cooperative assessments are now included in the definition of "mortgage" and are subject to the provisions of Chapter 702, Florida Statutes, regarding foreclosure of mortgages. Condominium sales no longer require use of the "question and answer" sheet and condominium associations can contract for preparation of the annual financial report and mail it to unit owners within 120 days after the end of fiscal year.

CS/HB 1681 Agriculture and Consumer Services Omnibus Bill,
Chapter 2002-295.

Several matters related to the Department of Agriculture and Consumer Services (DACS) are addressed in this bill. Among the topics are changes in state funding for mosquito control districts; authorization for the department to destroy any animal that is liable to spread a contagious, infectious, or communicable disease if the Governor or Commissioner has declared a state agriculture emergency; creation of a Pest Control Enforcement Advisory Council; provision for enforcement of the "no-gouging" law during a declared emergency by the State Attorney and the Department of Legal Affairs in addition to the DACS, creation of the Off-Highway Vehicle Recreation Advisory Committee and an act relating to those vehicles; and making it a second degree misdemeanor for a person to leave a recreational fire unattended.

CS/HB 715 Transportation, Concurrency and Outdoor Signs,
Chapter 2002-13.

This transportation bill limits the ability of governmental entities to remove any lawfully erected roadside sign without paying just compensation to the owner. In addition, it revises concurrency requirements related to transportation facilities that are part of the Florida Intrastate Highway System. Among other changes, the bill provides that transportation facilities that are part of the Florida Intrastate Highway System and are needed to serve new development are to be in place or under construction not more than five years after issuance of a certificate of occupancy.

CS/HB 1341 Community Redevelopment, *Chapter 2002-294.*

This bill alters the authority of local government to create a community redevelopment agency (CRA) for the purpose of using tax increment financing for implementing redevelopment plans. The bill will also allow the brownfield redevelopment bonus refund program to allow a \$2,500 bonus per job for any qualified target industry business, and certain other businesses, which create jobs in a brownfield area.

CS/HB 489 Land Surveyors and Mappers, *Chapter 2002-41.*

This bill makes several changes to laws relating to land surveyors and mappers. Definitions are added, certification by endorsement is limited and requires all applicants to pass the

Florida law and rules portion of the examination, changes are made in the authorization for entry onto lands of thirds parties, more prohibited acts relating to practice without a license are added, and the liability and duty of care for professional surveyors and mappers relative to agricultural lands is addressed.

CS/SB 460 Special Assessments on RV Parks, Chapter 2002-241.

This bill requires that non-ad valorem special assessments on RV parks be based on the assertion that the RV park is a commercial entity like a hotel or motel. RV parks are not to be considered as being comprised of residential units.

CS/HB 547 Affordable Housing, Chapter 2002-160.

Developers of affordable housing projects who rely upon financing from the Florida Housing Finance Corporation will benefit from this legislation. It may indirectly benefit other developers who rely upon those who specialize in developing low-cost housing to meet various regulatory requirements. The bill directs that "permits for affordable housing projects shall be expedited to a greater degree than other projects" and makes other changes to benefit affordable housing.