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BEYOND THE MYTH OF EVERGLADES SETTLEMENT: THE NEED FOR A SUSTAINABILITY JURISPRUDENCE

Alfred R. Light*

The absence of a jurisprudential dimension is handicapping the quest for sustainability. Disputes about legal concerns divorced from the environmental context in which the litigation is embedded preoccupy environmental litigation. This Article shows the disconnect between an emerging sustainability philosophy and existing environmental law in the context of Everglades Restoration. While federal and state water managers developed an elaborate model of Adaptive Ecosystem Management for Everglades Restoration, that model fails to focus sufficiently on a durable dispute resolution process—one that allows Adaptive Management to thrive but also is compatible with basic legal baselines for public participation and judicial review. Lawyers seek leverage in settlement that may promote or oppose sustainability objectives without overt or direct reference to those objectives in court. Judges deciding Everglades cases thus consider environmental and economic stakes as an afterthought, if substance is considered at all. The absence of a sustainability jurisprudence means that lawyers serve as outside kibitzers rather than as full participants in decision-making within a coherent adaptive ecosystem management model.

“Would you tell me, please, which way I ought to go from here?” asked Alice. “That depends a good deal on where you want to get to,” said the Cat. “I don’t care where—” said Alice. “Then it doesn’t matter which way you go,” said the Cat. “—so long as I get *somewhere*,” Alice added as an explanation. “Oh, you’re sure to do that,” said the Cat, “if you only walk long enough.”¹

In his recent book entitled, “Sustainability: A Philosophy of Adaptive Ecosystem Management,” Georgia Tech’s Bryan G. Norton examines the many assumptions in environmental debates.² A philosopher of language and of science, he sets out to remedy

* Professor of Law, St. Thomas University School of Law, Miami Gardens, Florida. The author would like to thank Dr. Bryan Norton and Professors John Dernbach, J.B. Ruhl, and Irma S. Russell for comments on a previous version of this article. All errors and omissions, however, are of course the author’s alone.

1. Lewis Carroll, *Alice’s Adventures in Wonderland* 57–58 (Sterling Publ. Co. 2005) (emphasis in original); *accord* Wikipedia, *Cheshire Cat*, http://en.wikipedia.org/wiki/Cheshire_Cat (last modified Apr. 2, 2009).

2. Bryan G. Norton, *Sustainability: A Philosophy of Adaptive Ecosystem Management* xi (U. Chi. Press, 2005). “Sustainability . . . is a function of the degree to which members of a future community experience no diminution of opportunity freedom in comparison to the opportunities open in earlier generations.” *Id.* at 516. *See also id.* at 40 (“Sustainability . . . both refers to systemic physical dynamics that will change the world humans encounter in the future and evokes a commitment to consider the important normative relationships that can develop in these dynamics, which today involve multigenerational impacts.”) (emphasis in original);

“confusions and ambiguities that beset environmental policy discussions . . . by analyzing the causes of communicative failure and . . . proposing an alternative vocabulary” to avoid these problems.³ His alternative vocabulary begins with the well-traveled concept in decision-making of adaptive management, the notion that “actions to correct environmental problems must simultaneously be actions that reduce uncertainty in the future, allowing correction of our uncertain course in later decisions.”⁴ Norton’s contribution is to expand these methods to address not only scientific questions of fact but also norms and environmental values.⁵ These goals should be held up to the standard of experience and adjusted no less than our understanding of ecological processes.⁶

This article’s central thesis is that this new vocabulary of sustainability and adaptive ecosystem management needs a jurisprudential dimension.⁷ While it may be possible for planners and administrators to disconnect “rational” environmental policy from the hurly-burly of interest group pluralism that often appears to drive real-world environmental politics,⁸ adaptive ecosystem management suffers from its relative isolation in “administratively-led policy initiatives.”⁹ Because these initiatives occur within a legal framework that does not include comprehensive ecosystem management legislation, they “can only go so far before the connection between the text of the statutes involved and explicit policy adoption of ecosystem management goals becomes too tenuous to withstand challenge.”¹⁰ For a model of adaptive ecosystem management to

see generally UN Env. Programme, *Global Environment Outlook 4: Environment for Development* 6–36 (UN Env. Programme 2007) (available at http://www.unep.org/geo/geo4/report/GEO-4_Report_Full_en.pdf).

3. Norton, *supra* n. 2, at xii.

4. *Id.*; see also *id.* at 88–129.

5. *Id.* at xii.

6. *Id.* at xiii. Norton has “steered clear of . . . political and economic power relationships, which often limit attempts to achieve a rational environmental policy.” *Id.* at xiv. Norton’s approach thus contrasts with public choice theory, which “attempts to understand the ways in which individuals and corporations use government, and particularly legislatures, to further their own ends.” John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 Case W. Res. L. Rev. 1, 97 (1998) (footnote omitted); see also e.g. Denise Scheberle, *Federalism and Environmental Policy: Trust and the Politics of Implementation* 42–52 (2d rev. ed., Geo. U. Press 2004) (political science research modeling policy implementation).

7. The focus here is environmental sustainability. J.B. Ruhl, *Thinking of Environmental Law as a Complex Adaptive System: How to Clean Up the Environment by Making a Mess of Environmental Law*, 34 Hous. L. Rev. 933, 993 (1997) (“A policy principle is needed that transcends the preservationism-resourceism dichotomy to address such complicated problems in an adaptive manner. The theme that is emerging, known as sustainable development, holds much promise in that respect.” (footnote omitted)). It is not about how or why the legal process itself can and must adapt in order to be self-sustainable. E.g. William H. Rodgers, Jr., *Defeating Environmental Law: The Geology of Legal Advantage*, 19 Pace Env’tl. L. Rev. 687 (2002); William H. Rodgers, Jr., *Where Environmental Law and Biology Meet: Of Pandas’ Thumbs, Statutory Sleepers, and Effective Law*, 65 U. Colo. L. Rev. 25 (1993); J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 Vand. L. Rev. 1407 (1996).

8. See Andrew Light & Avner de-Shalit, *Introduction: Environmental Ethics—Whose Philosophy? Which Practice?* in *Moral and Political Reasoning in Environmental Practice* 1, 1–2 (Andrew Light & Avner de-Shalit eds., MIT Press 2003). “Philosophers who work in ethics or political philosophy should only work through the question of whether some view, X, is right. Once they have concluded that X is right then *perhaps*, depending on their views on the role and importance of an understanding of moral psychology in moral reasoning, they should turn to the question of how to persuade others that X is right.” *Id.* at 3 (emphasis in original) (footnote omitted).

9. John Copeland Nagle & J.B. Ruhl, *The Law of Biodiversity and Ecosystem Management* 375 (Found. Press 2002).

10. *Id.* Everglades restoration, in part, rests on special legislation. However, because this legislation tries to accommodate existing regulation rather than substituting new environmental regulation to fit ecosystem

succeed, lawyers need to be an integral part of the model rather than exogenous constraints.¹¹ Principles must develop to rationalize this integration—a jurisprudence rooted in sustainability law rather than partisan politics, economic clout, or green ideology.¹²

This Article lays the predicate for a sustainability jurisprudence by describing the disconnect between legal disputes and underlying substantive concerns in the restoration of Florida's Everglades. Part I briefly outlines the background of this great experiment in adaptive ecosystem management.¹³ The Comprehensive Everglades Restoration Plan (CERP) and its state offshoot Acceler8 include diverse water management projects throughout South Florida intended to restore the natural system while providing water supply for a growing population and preserving flood control.¹⁴ Unfortunately, managers within the Army Corps of Engineers (the Corps) have developed an adaptive management strategy for decision-making with respect to these projects which externalizes the judicial.¹⁵ Part II describes ongoing legal challenges impacting restoration projects around Lake Okeechobee, the so-called "liquid heart" of the Everglades.¹⁶ Legal issues in these suits do not reflect the underlying stakes for environmental sustainability. Instead, attorneys use legal arguments as weapons without reference to sustainability.¹⁷ At best, this type of litigation promotes results favorable to

restoration, it is not comprehensive ecosystem legislation. See Alfred R. Light, *Of Square Pegs, Round Holes and Recalcitrants Lying in the Weeds: Superfund's Legal Lessons for Everglades Restoration*, 12 Mo. Env'tl. L. & Policy Rev. 91, 96–97, 116–19, 127–29 (2005).

11. In Norton's critique of other disciplines (e.g. biologists, economists, ethicists), participants speak only among themselves about disciplinary concerns using specialized jargons, and as a result "little or no learning takes place." Norton, *supra* n. 2, at 41 (emphasis omitted). The legal profession exhibits similar tendencies. "Disciplinary" concerns of the legal profession include such matters as the scope of the Commerce Power and the related definition of "waters of the United States" under the Clean Water Act, the concept of necessary party under Fed. R. Civ. P. 19, Eleventh Amendment immunity of the States, the *Chevron* deference doctrine, and preemption, all of which are discussed below in the context of ongoing Everglades ecosystem litigation. See *infra* nn. 89–112, 139–47, and accompanying text. *But see* Norton, *supra* n. 2, at 340–42, 499–502 (Dr. Norton's analogies to the law of trusts and constitutional law in a general justification for intergenerational obligations).

12. "Sustainability jurisprudence" travels under various monikers. Nagle and Ruhl write of "[e]cosystem [m]anagement [l]aw." Nagle & Ruhl, *supra* n. 9, at 339–79. Bill Futrell calls for the evolution of "sustainable development law." J. William Futrell, *Defining Sustainable Development Law 1* (ALI-ABA Course of Study Materials, Intl. Env'tl. L., Course No. SK046, May 2005) (available at Lexis, CLE Library). A holistic emerging term is "Earth jurisprudence." Gaia Found., *Earth Jurisprudence*, <http://www.earthjurisprudence.org/> (last accessed Apr. 3, 2009) ("Earth jurisprudence means looking at the actual philosophy and value systems that underpin most legal and governance systems, and making sure that they support, rather than undermine, the integrity and health of the Earth."); Judith E. Koons, *Earth Jurisprudence: The Future of Law and the Planet*, <http://www.abanet.org/yld/tyl/july08/koons.html> (last accessed Apr. 3, 2009). This is to be contrasted with green ideology, which has been rightly criticized as "thin-centered"—lacking the full morphology found in traditional ideologies such as liberalism or socialism. Michael Freedon, *Political Theory and the Environment: Nurturing a Sustainable Relationship*, in *Moral and Political Reasoning in Environmental Practice*, *supra* n. 8, at 42–43. Norton explains, "[o]ne problem with ideological environmentalism is that it begins by dividing people according to their preconceptions, rather than their experiences. . . . In a community, each preconception-colored language will act as a barrier blocking communication with others who do not have the same preconception." Norton, *supra* n. 2, at 507. Norton wishes to shift from a dialogue about disagreements about ultimate values to a pragmatic dialogue about what to do which assumes a pluralism of values within a community. *Id.* at 453.

13. See *infra* nn. 21–41 and accompanying text.

14. See *infra* nn. 57–60 and accompanying text.

15. See *infra* nn. 32–41 and accompanying text.

16. See *infra* nn. 42–147 and accompanying text.

17. See *supra* n. 1 and accompanying text.

the winning party for reasons unrelated to the merits. At worst, the litigation produces only chaos of ultimate service to no party—*Jarndyce and Jarndyce* in modern garb.¹⁸ Part III steps back from these Everglades case studies to reflect upon the role of lawyers and the courts.¹⁹ The call is to integrate legal discourse into adaptive ecosystem management for the sake of sustainability.²⁰

I. EVERGLADES ADAPTIVE ECOSYSTEM MANAGEMENT²¹

“Keep on the lookout for novel ideas that others have used successfully. Your idea has to be original only in its adaptation to the problem you’re working on. . . . Why, man, I have gotten a lot of results. I know several thousand things that won’t work.”²²

“From the perspective of our brain, learning and doing are just two different verbs that refer to the same mental process.”²³

CERP’s Adaptive Management Strategy, released in April 2006, provides the following definition:

Adaptive management is a science- and performance-based approach to ecosystem management in situations where predicted outcomes have a high level of uncertainty. Under such conditions, management anticipates actions to be taken as testable explanations, or propositions so the best course of action can be discerned through rigorous monitoring, integrative assessment, and synthesis. Adaptive management advances desired goals by reducing uncertainty, incorporating robustness into project design, and incorporating new information about ecosystem interactions and processes as our understanding of these relationships is augmented and refined. Overall system performance is enhanced as AM reconciles project-level actions within the context of ecosystem-level responses.²⁴

At least since Congress mandated the Central and Southern Florida Project (C&SF) to control flooding in the 1940’s, the basic understanding has been that South Florida’s water management system is to operate as a comprehensive whole. For example, the Report of the Chief of Engineers in 1948 envisions that the area including Lake Okeechobee and all Everglades areas to the south “constitute, for all practical purposes, a single watershed as in most cases their waters intermingle during periods of

18. See Charles Dickens, *Bleak House* 38 (Dell Publ. Co.1965) (“Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises.”).

19. See *infra* nn. 148–71 and accompanying text.

20. See *infra* nn. 172–80 and accompanying text.

21. This overview of CERP’s version of AM is elaborated in Alfred R. Light, *Tales of the Tamiami Trail: Implementing Adaptive Management in Everglades Restoration*, 22 J. Land Use & Envtl. L. 59, 64–69 (2006); see also Deborah M. Hussey Freeland, *Maieusis through a Gated Membrane: “Getting the Science Right” in Public Decisionmaking*, 26 Stan. Envtl. L.J. 373, 401–51 (2007).

22. *NMR Miscellaneous*, <http://nmr.ioc.ac.ru/Staff/AnanikovVP/nmr-misc/nmr-misc.htm> (last accessed Apr. 3, 2009) (quote attributed to Thomas Edison).

23. Jonah Lehrer, *How We Know: What Do an Algebra Teacher, Toyota and a Classical Musician Have in Common?* http://www.seedmagazine.com/news/2006/07/how_we_know.php?page=all&p=y (July 19, 2006); cf. Norton, *supra* n. 2, at 76–82 (discussing environmental pragmatism through the lens of educational philosopher John Dewey).

24. REstoration, COrdination & VERification (RECOVER), *Comprehensive Everglades Restoration Plan Adaptive Management Strategy 1* (Apr. 2006) (available at http://conference.ifas.ufl.edu/GEER2006/AM_Strategy.pdf).

heavy rainfall and their problems of water control and use, as well as their economic problems, are closely interrelated.”²⁵ Indeed, the construction of the earthen dike around Lake Okeechobee and the pumping stations in that dike early in the twentieth century were part of a comprehensive plan “closely interrelated from an engineering standpoint” intended to “produce benefits extending beyond immediate location of the works.”²⁶ The Water Resources Development Act of 1996 subsequently required the Secretary of the Army to develop a “comprehensive plan for the purpose of restoring, preserving, and protecting the South Florida ecosystem.”²⁷ The Water Resources Development Act of 2000 required that the Corps establish a process to ensure that new information resulting from changed or unforeseen circumstances, new scientific or technical information, or information developed through AM be integrated into implementation of the Plan. The Senate Committee on Environment and Public Works described the expectation:

The committee does not expect rigid adherence to the Plan as it was submitted to Congress. This result would be inconsistent with the adaptive assessment principles in the Plan. Restoration of the Everglades is the goal, not adherence to the modeling on which the April, 1999 Plan was based. Instead, the committee expects that the agencies responsible for project implementation report formulation and Plan implementation will seek continuous improvement of the Plan based upon new information, improved modeling, new technology and changed circumstances.²⁸

The Corps’ Programmatic Regulations, promulgated in 2003, directed the Corps and the South Florida Water Management District (the District) to develop the CERP AM Program.²⁹ This program was to include a monitoring and assessment program to be developed by CERP’s scientific advisory board [REstoration, COordination, and VERification (RECOVER)], periodic technical assessments by RECOVER, periodic assessments of CERP performance, re-evaluation and updates to the Plan to be conducted by the Corps and the District, and a mechanism to modify the Plan through Comprehensive Plan Modification Reports.³⁰ Mimicking the Senate Report, the regulations defined AM for CERP as

[T]he continuous process of seeking a better understanding of the natural system and human environment in the South Florida ecosystem, and seeking continuous refinement in and improvements to the Plan to respond to new information . . . new or updated modeling; information developed though the assessment principles contained in the Plan; and future authorized changes to the Plan in order to ensure that the goals and purposes of the Plan are fulfilled.³¹

Of particular relevance to the focus here is the CERP AM Strategy’s treatment of public participation. The Strategy touts, “[t]wo fundamental components of AM are collaboration and conflict resolution.”³² The Strategy advocates “an approach that

25. H.R. Doc. 643 at 15 (May 6, 1948).

26. *Id.* at 3.

27. Pub. L. No. 104-303, § 528(b)(1)(A)(i), 110 Stat. 3767 (1996).

28. Sen. Rpt. 106-362 (July 27, 2000).

29. 33 C.F.R. § 385.31 (2008).

30. *Id.*

31. *Id.* at § 385.3.

32. RECOVER, *supra* n. 24, at 2.

incorporates openness, transparency, and accountability.”³³ The document recognizes the need for “building collaborative working relationships through the use of incentives and trust building, and minimizing conflict with the inclusion of a dispute resolution process.”³⁴ Thus, “managers, scientists, and stakeholders will be most involved in negotiating competing interests and considerations to determine the best path forward for improved CERP performance.”³⁵

Despite these high sounding statements of principle supporting collaboration and partnership with the public, the AM Strategy appears to envision only a “review of, and comments on” role and responsibility of stakeholders and the public in CERP’s processes.³⁶ The Strategy simply states, “[s]takeholders and the public have an opportunity to provide input and review planning and decision documents in each of the boxes of the AM Framework.”³⁷ The Strategy contains no discussion of any particular dispute resolution process involving stakeholders or the public.³⁸ Nor is there any discussion of the role of litigation or judicial review.³⁹ While Everglades litigation at times appears to the public more important than it really has been, it also has the potential to disrupt restoration efforts.⁴⁰ The failure of CERP’s AM model to incorporate these features of decision-making is not a good thing.⁴¹

II. EVERGLADES ECOSYSTEM LITIGATION

A biologist, engineer, and attorney were debating which was the oldest profession. The biologist claimed the title, based on the fact that in the beginning, God made man (whether by evolution or divine creation) and this was biology. The engineer countered, “in the beginning, out of chaos, God created light and the universe.” Clearly, engineering was the oldest profession.” The attorney smiled confidently and claimed the title: “who do you think was responsible for all of that chaos?”

A Florida myth about Everglades restoration is that the change in direction away from destruction and towards restoration grew out of a lawsuit.⁴² On October 10, 1988, Interim United States Attorney Dexter Lehtinen filed a lawsuit on behalf of the United States to force Everglades restoration.⁴³ The United States complained that water managed by the District had polluted the Everglades and “resulted in the destruction of lower forms of aquatic life essential to the preservation of the sensitive ecosystems in the

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 7.

37. RECOVER, *supra* n. 24, at 6.

38. There have been some important alternative dispute resolution exercises in connection with Everglades litigation, which have previously been described elsewhere. *E.g.* Light, *supra* n. 21, at 79–81 (discussing the CSOP Advisory Committee).

39. The Miccosukee Tribe once demanded that a comment stating “[l]itigation may prove to be time consuming, costly, and uncertain, and it may divert resources from restoration efforts” be deleted from a progress report on CERP. Light, *supra* n. 10, at 116 (footnote omitted).

40. *See infra* nn. 42–147 and accompanying text.

41. *See infra* nn. 148–80 and accompanying text.

42. Alfred R. Light, *The Myth of Everglades Settlement*, 11 St. Thomas L. Rev. 55, 56–60 (1998).

43. *Id.* at 56.

[Everglades National] Park and [the Loxahatchee Wildlife] Refuge.”⁴⁴ Taxpayers paid the fees of lawyers on both sides of the case in what the Eleventh Circuit called “years of lengthy, complex, and acrimonious litigation.”⁴⁵ Former Florida Governor Lawton Chiles famously decided to “surrender” on behalf of the state in 1991.⁴⁶

The complaint had alleged violations of the previous narrative state standard for nutrients, which prohibits pollution causing “an imbalance in natural populations of aquatic flora or fauna.”⁴⁷ The consent decree settling this case, which was followed by Florida’s passage of the Florida Forever Act, contemplated that Florida would promulgate and comply with a numerical state water quality standard for phosphorus. If the state defaulted, the statute mandated that a 10 ppb criterion would become effective.⁴⁸ The decree precipitated the District’s construction of storm water treatment areas (STAs) that use native plants to extract phosphorus from Everglades water and implemented changes in agricultural practices in the Everglades Agricultural Areas (EAA), called mandatory Best Management Practices (BMPs).⁴⁹ But Judge Moreno found in 2005 that two high phosphorus readings in Loxahatchee Wildlife Refuge put the state in violation of the consent decree and ordered a hearing on remedies.⁵⁰ The state parties wished to proceed with its planned water projects without the entry of a judicial order while the Miccosukee Tribe and interveners insisted that the additional remedies be embodied in such an order.⁵¹ At this writing three years later, the parties were still in dispute over resolution procedures under the decree and had not concluded what to do about the violations.⁵²

Within the framework of ecosystem restoration, the 1988 lawsuit has proven to be of less “real world” significance than was suggested by the suit’s original public pretensions.⁵³ The preoccupation with water quality marginalizes the concurrent issues of water quantity, allocation, and flood control at the heart of ecosystem restoration.⁵⁴

44. *U.S. v. S. Fla. Water Mgt. Dist.*, 28 F.3d 1563, 1568 (11th Cir. 1994).

45. *Id.*

46. Robert McClure, ‘Glades Water Suit Valid, Chiles Admits, Sun-Sentinel (Ft. Lauderdale, Fla.) 1A (May 21, 1991); accord *Chiles Admits Everglades Polluted*, St. Petersburg Times 5B (May 21, 1991) (“I’m here with my sword,” the governor said after the pretrial hearing. “I want to give that sword to someone, I want to surrender.”).

47. Fla. Admin. Code r. 62-302.530(47)(b) (2006).

48. Fla. Stat. § 373.4592(4)(e)(2) (2008).

49. See Kathleen Pietro et al., *Chapter 4: STA Performance, Compliance and Optimization*, in *2006 South Florida Environmental Report 4-1* (2006) (available at https://my.sfwmd.gov/pls/portal/docs/PAGE/PG_GRP_SFWMD_SFER/PORTLET_PREVREPORT/2006_SFER/VOLUME1/chapters/v1_ch_4.pdf). By 2006, STAs constructed to improve water quality on average have reduced phosphorus concentrations from 147ppb to about 41ppb (about 71 percent). *Id.*

50. *U.S. v. S. Fla. Water Mgt. Dist.*, 373 F. Supp. 2d 1338, 1348 (S.D. Fla. 2005).

51. Cynthia A. Drew, *Storm Water and the Consent Decree: The Life or Death of the Everglades*, 21 Nat. Resources & Env. 30, 35 (Spring 2007).

52. Keith W. Rizzardi, CLE Presentation, *Making New Law in the Courts: The Big Federal and State Cases* (Ft. Lauderdale, Fla., Apr. 25, 2008) (copy on file with the Florida Bar). Separately, the Miccosukee Tribe sued EPA because of EPA’s approval of the state’s phosphorus rule, precipitating a hundred-page order remanding the rule to EPA to reconsider its approval, in accordance with that district court’s interpretation of the Clean Water Act. See Or. Granting S.J.; Closing Case, *Miccosukee Tribe of Indians of Fla. v. U.S.*, No. 04-21448 (S.D. Fla. July 29, 2008) (available 2008 WL 2967654. This could affect Judge Moreno’s enforcement of the consent decree, or, it might not, depending on what EPA does in response to the decision.

53. See Light, *supra* n. 42, at 60–66.

54. See Hussey Freeland, *supra* n. 21, at 429–31 (contrasting ecological and regulatory definitions of

Although the suit drove the early Everglades Construction Project creating STAs, the decree's coordinating role for Everglades restoration now has been largely eclipsed by CERP, which addresses quantity, timing, and distribution of Everglades water, as well as water quality.⁵⁵ Nonetheless, some still find Judge Moreno's authority over Everglades restoration to be important.⁵⁶

In fact, as a historical matter, CERP emerged in the late 1990's not so much from Lehtinen's lawsuit as from Governor Chiles's consensus-building Commission for a Sustainable South Florida.⁵⁷ The Commission envisioned Everglades restoration in the larger context of supporting a "sustainable South Florida economy and quality communities."⁵⁸ CERP, approved by Congress in the Water Resources Development Act of 2000, outlined 60 elements covering 16 counties over an 18,000 square mile area to be completed over a 20-year period and initially estimated to cost \$7.8 billion.⁵⁹ Acceler8, Florida's effort begun in 2004 to accelerate the construction of various CERP components, moved forward largely without judicial involvement or approval.⁶⁰

The success of Acceler8 in moving the selected CERP components into construction has brought to a head the inevitable conflicts over land, resources, and policy "on the ground" in various parts of South Florida.⁶¹ South Florida is now in the midst of multiple lawsuits affected by and affecting CERP projects, which will be critical to ecosystem restoration and a sustainable South Florida. Many of these projects are being shaped by ongoing litigation other than enforcement of the 1988 lawsuit's consent decree.⁶² Governor Chiles' hope when he "surrendered" to the United States in 1991 was that all interests would put litigation aside and get on with the consensus-building comprehensive effort that was needed.⁶³ But in this grander sense, "[t]he Everglades

Everglades restoration).

55. For a more thorough description of CERP, see Alfred R. Light, *Ecosystem Management in the Everglades*, 14 Nat. Resources & Env. 166, 169–72 (Summer 1999).

56. *E.g. Don't Eliminate Everglades Guardian*, Tampa Trib. 10 (Mar. 18, 2006) ("The future of Everglades restoration is far from assured. Without the consent decree, special interests, with their flood of lobbyists, would swamp the safeguards, just as they did before Lehtinen stepped in."); Alan Farago, *Spin Machine Busts Gasket*, Orlando Sentinel A27 (June 7, 2005).

57. Gov.'s Commn. for a Sustainable S. Fla., *Initial Report*, <http://dlis.dos.state.fl.us/fgils/agencies/sust/tocs.html> (last modified Mar. 12, 2001).

58. See generally Alfred R. Light, *The Waiter at the Party: A Parable of Ecosystem Management in the Everglades*, 36 *Envtl. L. Rpt.* 10771, 10774–75 (2006) (footnote omitted). There is a new similar statewide effort today called the Century Commission for a Sustainable Florida. Cent. Commn. for a Sustainable Fla., *Visioning Florida's Future*, <http://www.centurycommission.org/home.asp> (last accessed Apr. 3, 2009); accord Fla. Stat. § 163.3247 (2007).

59. Comprehensive Everglades Restoration Plan, *About CERP: A Brief Overview*, http://www.evergladesplan.org/about/about_cerp_brief.aspx (last accessed Apr. 3, 2009).

60. See generally Alfred R. Light, *Spark Plugs of Policy Implementation: Intergovernmental Relations and Public Participation in Florida's Acceler8 Initiative to Speed Everglades Restoration*, 30 *Vt. L. Rev.* 939, 953–961 (2006).

61. See Light, *supra* n. 21, at 69–81 (discussing conflicts over 8½ Square Mile Area, Tamiami Trail Component, and Combined Structural and Operating Plan aspects of Modified Waters Delivery Project).

62. Panels at annual conferences of the Florida Bar's Section on Environmental and Land Use Law frequently are devoted to summarizing and updating developments in this litigation. *E.g.* Richard Hamann, CLE Presentation, *Hot Topics in the Old Swamp: The Role of Public Interest Litigation in Everglades Restoration* 4.8–4.17 (Hollywood, Fla., Mar. 31, 2006) (copy on file with the Florida Bar); see also Rizzardi, *supra* n. 52, at 8.1–8.8.

63. See Laura Parker, *Candor by Gov. Chiles Aids Everglades Cleanup: Concession Made in Federal Suit on Pollution*, Wash. Post A4 (May 31, 1991); see also Jonathan King, Neil Santaniello & David Flesher, *Growth and Consequences—To Protect the Environment or Grow. That Has Been the Question for South*

Ecosystem Settlement is a myth.”⁶⁴ The proliferation of litigation over various other aspects of Everglades restoration led one commentator in 2006 to muse, “[s]ometimes it seems as though no final decision can be made on any important decision in South Florida without passing through a federal, state or administrative court.”⁶⁵

A. *Lake Okeechobee and the “Northern Everglades”*

Let me provide two examples of ongoing Everglades litigation in the environs of Lake Okeechobee.⁶⁶ The Lake is directly linked to water supply for the rapidly growing regions of South Florida.⁶⁷ As important, lake levels must be managed carefully to accommodate the regular storms that plague South Florida during hurricane season.⁶⁸ The Corps must manage Lake levels now—balancing these competing goals and adapting the plan as CERP restoration projects become operational.⁶⁹ This past April, the Corps approved its 2008 Lake Okeechobee Regulation Schedule “to best balance and meet the needs for all the water resource purposes that Lake Okeechobee serves.”⁷⁰

1. Ecosystem Restoration and the Lake

One of CERP’s most beneficial objectives, when various Okeechobee area projects are in place, may be to decrease reliance on the Lake to store water, with the associated risk of unscheduled discharges out of the Lake in emergency situations.⁷¹ At the Lake, the many objectives of water management intersect—restoration, urban water supply, agriculture, navigation, and public safety (flood control).⁷² Florida’s Lake Okeechobee Protection Act (LOPA), enacted in 2000, committed the state to restore and protect the Lake.⁷³ LOPA attempts a watershed-based, phased approach to achieve compliance with state water quality standards.⁷⁴ Section 303(d) of the Clean Water Act requires states to submit lists of surface waters that do not meet applicable water quality standards

Florida Throughout the Century, Sun-Sentinel (Ft. Lauderdale, Fla.) 1H (Nov. 14, 1999) (putting Gov. Chiles’ surrender in historical context).

64. Light, *supra* n. 42, at 68; see William H. Rodgers, Jr., *The Miccosukee Indians and Environmental Law: A Confederacy of Hope*, 31 *Envtl. L. Rptr.* 10918, 10924 (2001).

65. Hamann, *supra* n. 62, at 4.8–4.27. The many opportunities to challenge Everglades restoration projects in federal and state court are surveyed in Light, *supra* n. 10, at 116–19.

66. All important Everglades litigation seems to be ongoing. *Cf. supra* n. 18 and accompanying text.

67. See generally Cynthia Barnett, *Mirage: Florida and the Vanishing Water of the Eastern U.S.* (U. Mich. Press 2007).

68. Three-quarters of the average 50 to 60 inches of annual rainfall in South Florida comes in the six month period of May through October. Thomas E. Lodge, *The Everglades Handbook: Understanding the Ecosystem* 16 (2d ed., CRC Press 2005). “In an average year, about 60% of the rainfall falls in the four-month summer period of June through September . . . and only 25% falls in the six-month dry season of November through April.” *Id.* (footnote omitted).

69. See *supra* n. 55 and accompanying text.

70. Press Release, U.S. Army Corps of Engrs., Jacksonville Dist., *Corps Approves 2008 Lake Okeechobee Regulation Schedule* (Apr. 30, 2008) (available at <http://www.saj.usace.army.mil/Documents/NewsReleases/archive/2008/NR0831.pdf>).

71. See Beth Williams, *Chapter 7A: Comprehensive Everglades Restoration Plan Annual Report, in 2008 South Florida Environmental Report 7A-6* (available at https://my.sfwmd.gov/pls/portal/docs/PAGE/PAGE_GRP_SFWMDFER/PORTLET_SFER/TAB2236041/VOLUME1/chapters/v1_ch_7a.pdf).

72. See *supra* n. 53–55 and accompanying text.

73. See Fla. Stat. § 373.4595 (2008); Fla. Dept. of Env’tl. Protec., *Lake Okeechobee Protection Program*, http://www.dep.state.fl.us/water/wqssp/lakeo_pplan.htm (last updated June 10, 2008).

74. Fla. Stat. § 373.4595(3) (2008).

after application of technology-based effluent limitations and to establish total maximum daily loads (TMDLs) for these waters on a schedule.⁷⁵ LOPA envisions a long-term solution for the Lake based upon a TMDL.⁷⁶ “LOPA also requires aggressive programs to control exotic plants and a long-term program of water quality and ecological assessment, research, and predictive model development.”⁷⁷ The District, in cooperation with the Florida Department of Environmental Protection (DEP) and the Florida Department of Agricultural and Consumer Services (FDACS) submitted a Lake Okeechobee Protection Plan (LOPP) to the Florida Legislature on January 1, 2004, laying out how water quality standards would be achieved on a statutory timetable.⁷⁸

Later, former Florida Governor Jeb Bush established the Lake Okeechobee Estuary Recovery Plan (LOER), which identified five construction projects north of the Lake designed for water quality improvement—the Lake Okeechobee Fast Track Project (LOFT).⁷⁹ For example, the District received funding for a 2,700 acre Lakeside Ranch STA to improve the Lake’s phosphorous levels.⁸⁰ The District also received additional funds for a 1,800 acre STA on Brady Ranch.⁸¹ Furthermore, LOER includes acceleration of TMDL projects for Lake Okeechobee tributaries, implementation of mandatory fertilizer Best Management Practices (BMPs) in the Lake Okeechobee, St. Lucie, and Caloosahatchee Estuary watersheds, implementation of revised Environmental Resource Permit criteria for new development, implementation of growth management programs encouraging innovative land use, elimination of land application of wastewater treatment residuals, and full implementation of LOPP.⁸²

Closely related to all this state activity in the “Northern Everglades”⁸³ are federal CERP projects which include new STAs and surface reservoirs on tributaries and canals of Lake Okeechobee, aquifer storage and recovery pilot projects, pumping stations and conveyances to redirect flows along historic pathways, and wetlands restoration from Palm Beach County on the east coast to Collier County on the west.⁸⁴ The first CERP project to be submitted to Congress for appropriations is a good example of a CERP

75. 33 U.S.C. §§ 1313(d)(1)(a), (c), (d)(2) (2006).

76. “This TMDL is a long-term (five-year) rolling average of 140 metric tons (mt) of total phosphorous (TP) to be attained by 2015.” R. Thomas James & Joyce Zhang, *Chapter 10: Lake Okeechobee Protection Program—State of the Lake and Watershed*, in *2008 South Florida Environmental Report*, *supra* n. 71, 10-1, 10-7 (available at https://my.sfwmd.gov/pls/portal/docs/PAGE/PG_GRP_SFWMD_SFER/PORTLET_SFER/TAB2236041/VOLUME1/chapters/v1_ch_10.pdf).

77. *Id.*

78. See S. Fla. Water Mgt. Dist., Fla. Dept. Env. Protec. & Fla. Dept. Agric. & Consumer Servs., *Lake Okeechobee Protection Program: Lake Okeechobee Protection Plan 1* (Jan. 1, 2004) (copy available on file with author).

79. James & Zhang, *supra* n. 76, at 10-7.

80. *Id.*

81. *Id.*

82. *Id.*; see also Fla. Dept. of Env'tl. Protec., *Governor Bush Unveils Comprehensive Plan to Restore Lake Okeechobee and Coastal Estuaries*, http://www.dep.state.fl.us/secretary/news/2005/10/1010_01.htm (Oct. 10, 2005).

83. See S. Fla. Water Mgt. Dist., *Northern Everglades*, http://www.sfwmd.gov/portal/page?_pageid=2814,19868551,2814_19868565&_dad=portal&_schema=PORTAL (last accessed Apr. 10, 2009).

84. See S. Fla. Water Mgt. Dist., *Comprehensive Everglades Restoration Plan (CERP) and Expedited Everglades Restoration Projects*, http://www.sfwmd.gov/portal/page?_pageid=2814,19868551,2814_19868702&_dad=portal&_schema=PORTAL (last accessed Apr. 10, 2009).

project related to the Lake.⁸⁵ The Indian River Lagoon—South Project (IRL) looks forward to the restoration of oyster beds, a living St. Lucie River, and elimination of fishkills associated with freshwater discharges from Lake Okeechobee during Florida’s wet season.⁸⁶ Water quality issues in this project include salinity as well as nutrient enrichment.⁸⁷ The Indian River Lagoon is connected by the St. Lucie Canal to Lake Okeechobee and is adversely affected by discharges from the Lake. However the reservoirs in the project only address drainage into the lagoon from the basin, not from the Lake, because of the Corps’ need to carefully integrate its IRL plan with state and federal activities regulating the Lake described above.⁸⁸

2. Lake Okeechobee (S-2, S-3, S-4) Litigation: *Friends of the Everglades, Inc. v. South Florida Water Management District*⁸⁹

Litigants have pushed interpretations of the federal Clean Water Act that undermine fundamental assumptions about the relevant state and federal legal roles in managing and regulating Everglades waters upon which the Lake Okeechobee and Everglades restoration plans described above are based. In our first example, *Friends of the Everglades*, environmentalist plaintiffs persuaded a federal district judge that the Clean Water Act requires NPDES permits for three pump stations on the borders of Lake Okeechobee, S-2, S-3, and S-4.⁹⁰ Under its ruling, the District would be required to obtain permits from FDEP, to which the United States Environmental Protection Agency (EPA) has delegated its NPDES permitting authority.⁹¹ After a lengthy trial and an in-depth discussion of the factual context of the dispute, Judge Altonaga’s decision failed to lay out what needed to happen after she found for the plaintiffs that NPDES permits were required. Her opinion simply states, “[a]t the close of the trial, it remained unclear exactly what the nature of any prospective relief, if granted to Plaintiffs, and the scope of any obligations impose upon Defendants, should be.”⁹² Because it had been the EPA’s practice for over thirty years not to require NPDES permits for water transfers, obviously neither the EPA nor DEP had any regulations or procedures in place concerning

85. See Light, *supra* n. 60, at 951–52.

86. See Comprehensive Everglades Restoration Plan, *Indian River Lagoon—South*, http://www.evergladesplan.org/pm/projects/proj_07_irl_south.aspx (last accessed Apr. 10, 2009) (providing project description).

87. *Id.*

88. The PIR for the project identifies “unresolved water quality issues” to include “the establishment of Total Maximum Daily Load (TMDL) targets that may preclude inter-basin transfers” as the reason for not allowing diversion of waters to the Lake. U.S. Army Corps of Engrs., Jacksonville Dist. & S. Fla. Water Mgt. Dist., *Central and Southern Florida Project Indian River Lagoon—South: Final Integrated Project Implementation Report and Environmental Impact Statement* S-xvi (Mar. 2004) (available at http://www.evergladesplan.org/pm/studies/study_docs/irl_south/pir_2004/00Summary.pdf).

89. 2006 U.S. Dist. Lexis 89450 (S.D. Fla. Dec. 11, 2006), *appeal filed*, No. 07-13829-HH, (11th Cir. 2007).

90. On March 28, 2007, the district court stayed its consideration of the NPDES permit requirement in the remand of *S. Fla. Water Mgt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), known as the S-9 case, pending the appeal of the *Friends of the Everglades* judgment discussed in the text above. The *Miccosukee* Plaintiffs challenged the stay by petition for a writ of mandamus from and appeal to the 11th Circuit under the “collateral order” doctrine. The 11th Circuit denied the mandamus petition and reserved judgment on the question of its appellate jurisdiction. On the S-9 case’s significance, see Light, *supra* n. 10, at 122–23.

91. See Fla. Stat. § 403.0885 (2008); 60 Fed. Reg. 25716 (May 12, 1995).

92. *Friends of the Everglades*, 2006 U.S. Dist. Lexis 89450 at *188.

permitting of water transfers.

Moreover, Florida's NPDES program, in accordance with EPA's required standards for delegation, includes extensive public notice requirements,⁹³ allows "any interested person [to] submit written comments on the draft permit,"⁹⁴ requires a "public meeting . . . whenever [there is] a significant degree of public interest,"⁹⁵ and calls for DEP to prepare a "fact sheet or statement of basis" and respond to any "significant public comments."⁹⁶ Such persons also have an opportunity to request an administrative hearing and, where disputed issues of material fact exist, "present evidence and argument on all issues involved . . ."⁹⁷ Parties aggrieved by FDEP's final permitting action are "entitled to judicial review" in a Florida district court of appeals.⁹⁸ How any federal court injunction might relate to these yet-to-be-used state administrative processes also had not been briefed or considered when she wrote her opinion in December 2006.

The court's shaping of injunctive relief in the case was complicated by the fact that the permitting agency (FDEP) was not a party and presumably would not be bound by any judgment the court entered.⁹⁹ Plaintiffs also had not sued the federal agency that oversees state NPDES permitting (the EPA), or the federal agency that manages Lake Okeechobee (the Corps). The United States did choose to intervene in the case on the side of the District. However, it argued the court's jurisdiction over it was quite limited. This position rested on the fact that the only basis for jurisdiction asserted by plaintiffs in the case was the Clean Water Act's citizen suit provision.¹⁰⁰ Moreover, plaintiffs had only invoked the section of this provision permitting citizens to enforce "an effluent standard or limitation."¹⁰¹ In her opinion, Judge Altonaga thus assumed that "any injunction would be directed to [the District's] executive director."¹⁰² To the extent the

93. Fla. Admin. Code Ann. r. 62-620.550 (2000).

94. Fla. Admin. Code Ann. r. 62-620.555(1) (1994).

95. *Id.* at 62-620.555(4) (1994).

96. Fla. Dept. of Envtl. Protec., *Guide to Permitting Wastewater Facilities or Activities under Chapter 62-620, F.A.C. 24* (June 1, 2001) (available at <http://www.dep.state.fl.us/water/wastewater/dom/docs/wguide.pdf>); Fla. Admin. Code Ann. r. 62-620.100(3) (2007) (adopting and incorporating the Guide by reference).

97. Fla. Stat. § 120.57(1)(b) (2008); *see also* Fla. Stat. § 120.52(13)(b) (2008) (defining "party" to include any person "whose substantial interests will be affected by proposed agency action . . ."); Fla. Stat. § 120.569(1), (2)(a)-(b) (2008) (hearing procedures); *Save Anna Maria, Inc. v. Dept. of Transp.*, 700 So. 2d 113 (Fla. 2d Dist. App. 1997).

98. Fla. Stat. § 120.68(1) (2008).

99. *See Nev. v. U.S.*, 463 U.S. 110 (1983) As the court in *Nev* stated

Simply put, the doctrine of res judicata provides that when a final judgment has been entered on the merits of a case, "[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Id. at 129-30 (citation omitted).

100. *See generally* 33 U.S.C. § 1365 (2006).

101. *Id.* at § 1365(a)(1)(ii)(A). The EPA itself was not alleged to have violated this provision, only the District. Plaintiffs did not invoke the other section of the citizen provision permitting suit against EPA for an alleged failure to perform a non-discretionary duty. 33 U.S.C. § 1365(a)(2). Accordingly, they never provided notice to EPA of any such allegation in advance of suit, a jurisdictional requirement of the Act. *Id.* at § 1365(b)(2).

102. *Friends of the Everglades*, 2006 U.S. Dist. LEXIS 89450 at *190 n. 69. Moreover, had the plaintiffs invoked the non-discretionary duty provision, perhaps to force EPA to oversee or veto future permitting decisions made by FDEP, the exercise probably would also have proved unsuccessful in light of the

district court might have been tempted to issue an order to EPA to provide for rules regarding water transfers, its jurisdiction would have been even more problematic since only a United States court of appeals can review final action agency regarding rules under the Clean Water Act, not a district court.¹⁰³

In some ways, the posture of the Secretary of FDEP, Mike Sole, in the *Friends of the Everglades* case, is even more interesting. Unlike the United States, Mr. Sole and his agency did not seek to intervene in the case and was never a party. After the trial ended and the court entered its controversial December 2006 order, plaintiffs moved to join him as an “involuntary plaintiff” under Fed. R. Civ. P. 19 for the remedy phase of the case.¹⁰⁴ Whether the district court would have subject matter jurisdiction over Mr. Sole is a nice question. The entity FDEP, like the District, as an arm of the State, is outside the federal court’s jurisdiction because of the state’s Eleventh Amendment immunity.¹⁰⁵ The Secretary of FDEP, however, like the District’s Executive Director, may not have blanket Eleventh Amendment immunity with respect to prospective injunctive relief because of the exception set forth in *Ex parte Young*.¹⁰⁶

It is far from clear, though, that Mr. Sole would have been subject to suit under the *Ex parte Young* exception either. An NPDES permit application in Florida is entirely a matter of state law. The Clean Water Act provides no point of entry to challenge a state permit in federal court.¹⁰⁷ To the extent that plaintiffs might have been trying to assert supplemental jurisdiction over state law claims challenging such permits, there is United States Supreme Court precedent indicating that the Eleventh Amendment bars state law

discretionary nature of its exercise of that authority. See 33 U.S.C. § 1342(d)(2) (2006); *Mianus River Preservation Comm. v. Adminstr., EPA*, 541 F.2d 899, 909 (2d Cir. 1976) (“Such inaction [by EPA] . . . can hardly be described as ‘Administrator’s action . . . in issuing . . . a permit’ within the ambit of judicial review contemplated by [CWA] § 509(b)(1)(F).”); *Save the Bay, Inc. v. Adminstr. of EPA*, 556 F.2d 1282, 1295 (5th Cir. 1977) (“[T]he Administrator’s conclusion not to veto an individual permit is itself immune to judicial review.”); *D.C. v. Schramm*, 631 F.2d 854, 860 (D.C. Cir. 1980) (“[T]he Agency’s decision not to veto a state NPDES permit is not reviewable in federal district court.”).

103. 33 U.S.C. § 1369(b)(1) (2006); see *Nat. Resources Def. Council v. EPA*, 966 F.2d 1292, 1296–97 (9th Cir. 1992); *Nat. Resources Def. Council v. EPA*, 673 F.2d 400, 403–06 (D.C. Cir. 1982). In any event, the fact that plaintiffs did not assert claims against EPA at the outset of the litigation is pretty damning in itself since none of the pleadings in the case before trial ever purported to allege claims for relief against the United States or any of its agencies.

104. Technically, the plaintiffs’ denomination of the motion for joinder under Rule 19 as a motion to join an “involuntary plaintiff” is incorrect. Under Rule 19(a)(2), once FDEP “refuses to join as a plaintiff” the party usually would be “made . . . a defendant . . .” and then, possibly, realigned as a plaintiff. Fed. R. Civ. P. 19(a)(2); James WM. Moore, *Moore’s Federal Practice* vol. 4, § 19.04[4][b] (Daniel Coquillette et al. eds., 3d ed., Lexis 2008); see also *Babcock v. Maple Leaf, Inc.*, 424 F. Supp. 428, 431 (E.D. Tenn. 1976) (allowing period of time for U.S. to join as plaintiff and once time expired allowing defendant to add U.S. as a defendant). The circumstances in which it is a “proper case” to join a party as an “involuntary plaintiff” do not apply. Fed. R. Civ. P. 19(a)(2); Moore, *supra*, n. 104, at § 19.04[4][b] (“The involuntary plaintiff doctrine applies only when there is a relationship between the plaintiff and the absentee such that the absentee must allow the use of its name as plaintiff to enable the extant plaintiff to secure relief.”). In other words, if FDEP were subject to service of process and a necessary party within the meaning of Rule 19(a)(1), it would be joined as a *defendant* and then realigned. If it is not subject to the jurisdiction of the district court, it simply cannot be joined.

105. See *Friends of the Everglades*, 2006 U.S. Dist. LEXIS 89450 at **159–87; *Grimshaw v. S. Fla. Water Mgt. Dist.*, 195 F. Supp. 2d 1358, 1370–71 (S.D. Fla. 2002); *Miccosukee Tribe of Indians of Fla. v. U.S.*, 980 F. Supp. 448, 460 (S.D. Fla. 1997); *Bensch v. Metro. Dade Co.*, 952 F. Supp. 790, 797 (S.D. Fla. 1996); see also *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 72–73 (1996).

106. 209 U.S. 123, 167 (1908); see *Friends of the Everglades*, 2006 U.S. Dist. LEXIS 89450 at *159 n. 62.

107. See *Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 875 (7th Cir. 1989); *D.C. v. Schramm*, 631 F.2d at 861; *Leg. Envtl. Assistance Found., Inc. v. Pegues*, 717 F. Supp. 784, 788–89 (M.D. Ala. 1989).

claims in federal court against state officials.¹⁰⁸ Neither does the Clean Water Act separately provide for claims against the state acting in its regulatory capacity.¹⁰⁹ Where the constitutional basis of a federal law is the Commerce Clause, moreover, as it is under environmental regulatory statutes such as the Clean Water Act, Congress may not abrogate the State's Eleventh Amendment immunity against a state official acting in his regulatory capacity.¹¹⁰ In fact, the only plausible basis for federal jurisdiction over Secretary Sole probably would be the All Writs Act.¹¹¹ In light of the complex scheme for judicial review under the Clean Water Act, the use of the extraordinary writ of mandamus to circumvent the statutory scheme likewise seems problematic.¹¹²

In the end, the district court avoided these sticky jurisdictional issues in its final judgment by only ordering the District to apply for permits, refusing to require any further remedy such as interim operational changes that might require the cooperation or acquiescence of FDEP, EPA, or the Corps.¹¹³ Carol Wehle, the District's Executive Director, did apply for permits but, along with the United States, also appealed the ruling regarding Clean Water Act liability to the Eleventh Circuit.¹¹⁴ In response, the EPA subsequently promulgated a rule clarifying that water transfers are not subject to NPDES regulation.¹¹⁵ In any event, to use Judge Altonaga's phrase, other than psychic satisfaction, it is "far from clear" what good a plaintiffs' victory in the Eleventh Circuit would do anyone.¹¹⁶

108. See *Pennhurst St. Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120–21 (1984). According to the Supreme Court, sovereign immunity precludes injunctive relief "against state officials for failing to carry out their duties under state statutes." *Id.* at 109.

109. See 33 U.S.C. § 1365(a) (providing only for claims against a State for violations of effluent standards or limitations and orders with respect to them and against EPA only for failure to perform nondiscretionary duties).

110. See *Leg. Envtl. Assistance Found., Inc. v. Pegues*, 717 F. Supp. at 787–88; *Ringbolt Farms Homeowners Assn. v. Town of Hull*, 714 F. Supp. 1246, 1252–57 (D. Mass. 1989); *Natl. Wildlife Fedn. v. Ruckelshaus*, 1983 U.S. Dist. LEXIS 14716 at **16–18 (D.N.J. 1983).

111. 28 U.S.C. § 1651 (2006); *Catskill Mts. Ch. of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 55 (N.D.N.Y. 2003).

112. See generally *Seminole Tribe of Fla. v. Fla.*, 517 U.S. at 74 ("[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based on *Ex parte Young*.").

113. *Friends of the Everglades*, 2006 US Dist. LEXIS 89450 at *189. If the relief is simply to require the District to apply for a permit, it is doubtful that the state permitting agency or its secretary would be a necessary party within the meaning of Rule 19. *Assn. to Protect Hammersley, Eld and Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007, 1014–15 (9th Cir. 2002) (state agency not needed since court can enjoin activities of defendant in absence of a necessary permit or if no permit needed).

114. *Friends of the Everglades, Inc.*, 2006 US Dist. LEXIS 89450.

115. 73 Fed. Reg. 33697 (June 13, 2008). As mentioned above, this rule embodying this interpretation, once final, arguably would supersede Judge Altonaga's opinion because the appellate courts, not the district courts, have exclusive jurisdiction over challenges to the rule. See *supra* n. 103 and accompanying text.

116. At oral argument in the S-9 case, the Supreme Court quizzed Dexter Lehtinen, representing the Miccosukee Tribe, about this, at one point, asking, "[w]hat is—what is then the—the reason for this litigation? I mean, you—you say you're just trying to get them to do what they have already said they are doing?" Lehtinen responded, "[y]es." Transcr. 44, *S. Fla. Water Mgt. Dist. v. Miccosukee Tribe of Indians*, 541 US 95 (available at 2004 U.S. Trans LEXIS 5). Lehtinen even acknowledged that the permitting agency could issue a statewide "general permit" for water transfers that individual permittees would not have to apply for. *Id.* at 48–49; see Light, *supra* n. 10, at 122–23.

B. Everglades Agricultural Area (EAA) Reservoir

To the extent that there are components of CERP already under construction in Florida, the reason is, for the most part, Acceler8.¹¹⁷ Originating with innovative public servants at FDEP, the District, and the Corps, Governor Jeb Bush envisioned the program in the fall of 2004 to use lands the state was already acquiring to build projects planned as part of CERP.¹¹⁸ Like many ecosystem management projects, the program was administratively led and did not include statutory amendments or new regulations. Because of this genesis, the Corps and the District initially had to devote considerable effort to integrating the Corps' Project Implementation Report (PIR) process, which had been elaborated in the Corps' Programmatic Regulations, with the District's new Acceler8 planning and procurement processes. "The BODR [District's Basis of Design Report] serves as the basis for development of the project's preliminary design, which the Corps committed to approve as its own tentatively selected plan (TSP) for the project within the [Corps'] PIR process."¹¹⁹ "Under [an] agreement [between the Corps and the District,] the District can only go forward with 30% of its design until the Corps approves the TSP."¹²⁰ If the District does not comply with this requirement, it does not receive "credit" under CERP toward the state's 50% cost-share on all CERP projects.¹²¹

From a regulatory point of view, Acceler8 projects are not part of CERP. Thus, portions of Florida's special Comprehensive Everglades Restoration Plan Regulatory Act (CERPRA) do not apply. For example, CERPRA § 1501 requires the State to prepare a report finding that a CERP project would comply with all state regulatory requirements.¹²² The report is prepared as precondition of the submission of the Corps' PIR to Congress for an appropriation.¹²³ Once federal funds are appropriated, the state is to follow through with the issuance of permits under CERPRA § 1502.¹²⁴ "For Acceler8 projects, however, materials that the state DEP would typically prepare [for this second step], such as certification that a project is consistent with state water quality standards . . . , [are] prepared in connection with the District's application" to the Corps for a Clean Water Act § 404 permit.¹²⁵

Because "Acceler8 funnels 'public' input into the CWA §404 regulatory process," it resembles the administrative process which the two agencies used for the Everglades Construction Project under which STAs had been built to implement the consent decree growing out the 1988 suit.¹²⁶ Those earlier projects obviously did not have to be integrated or harmonized with CERP, which did not then exist. "Although the Corps'

117. The only two CERP projects under construction are the IRL-South and Picayune Strand authorized in WRDA 2007. See Comprehensive Everglades Restoration Plan, *Picayune Strand (Southern Golden Gate Estates) Hydrologic Restoration*, http://www.evergladesplan.org/pm/projects/proj_30_sgge.aspx (last accessed Apr. 10, 2009).

118. See generally Light, *supra* n. 60.

119. Light, *supra* n. 58, at 10775.

120. *Id.*

121. *Id.*

122. Fla. Stat. § 373.1501(c) (2008).

123. *Id.*

124. Fla. Stat. § 373.1502 (2008).

125. See Light, *supra* n.58, at 10776.

126. *Id.*

PIR and related processes are supposed to have passed the public comment stage by the time the Corp would issue the §404 permit, the precise links between the District's Acceler8 decisionmaking and the Corps' parallel PIR process continue to evolve."¹²⁷ And the situation has produced a new brand of Everglades litigation.

1. The EAA Reservoir Project—CERP and Acceler8

One of the sixty components comprising CERP is a large Everglades Agricultural Area surface reservoir to be located in “western Palm Beach County and Hendry County on lands purchased with Department of Interior Farm Bill funds, with [District] funds, and on lands gained through a series of exchanges for lands being purchased with these funds.”¹²⁸ The location “presently consists of land that is mostly under sugar cane cultivation.”¹²⁹ Phase one of the federal project was envisioned to “provide 360,000 acre-feet of above-ground storage volume, and consists of two cells (Cell 1 and Cell 2, approximately 17,000 and 14,000 acres in size, respectively) each with a 12 foot storage depth.”¹³⁰ The federal plan includes “reservoirs with associated embankments, canals, pump stations, water control structures, and environmentally responsible design features to provide fish and wildlife habitat such as buffer area, littoral area, and deep-water [refuge].”¹³¹ It also “includes canal conveyance improvements for the existing Miami, North New River, and the Bolles and Cross Canals of the C&SF project and a stormwater treatment area (STA).”¹³²

The District decided to carve out a portion of this reservoir for inclusion in the state's Acceler8 program. The state's smaller project would create a storage reservoir with 190,000 acre-feet (about 62 billion gallons) at a depth of 12.5 feet.¹³³ The Acceler8 project would be constructed on a 16,700 acre parcel between the Miami and New River canals.¹³⁴ The final BODR for this project was approved in January 2006, and it is currently under construction.¹³⁵ A related expansion of STAs designed to improve water quality in the environs of the reservoir is also part of Acceler8.¹³⁶ STAs, however, are not a part of the Acceler8 EAA Reservoir project itself.

2. EAA Litigation—*Natural Resources Defense Council, Inc. v. U.S. Army Corps of Engineers and Geren*¹³⁷

Frequently, the Corps and the District encounter “stakeholders” with a water

127. Light, *supra* n.58, at 10776–77.

128. See Comprehensive Everglades Restoration Plan, *Everglades Agricultural Area Storage Reservoirs—Phase 1*, http://www.evergladesplan.org/pm/projects/proj_08_eaa_phase_1.aspx (last accessed Apr. 10, 2009).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. S. Fla. Water Mgt. Dist., *Acceler8: Everglades Agricultural Area Reservoir A-1* 1 (July 16, 2006) (available at https://my.sfwmd.gov/pls/portal/docs/PAGE/PG_GRP_ACCELER8_V2/PORTLET_RIGHT_PROJ_EAAFEASIBILITY/EAAR.PDF).

134. *Id.*

135. *Id.*

136. *Id.*

137. No. 07-80444-CIV-MIDDLEBROOKS (S.D. Fla. filed May 24, 2007).

quality interest in the context of CERP projects that do not have a water quality focus. This was the case for the EAA Reservoir. In a public meeting on the federal project in 2006, environmentalists characterized the reservoir as the “dirty bathtub” and complained about the absence of an STA in the Corps’ preliminary plans.¹³⁸ Previously, EPA’s representative objected to the C-43 reservoir on the Caloosahatchee River because no STA was included in that project’s design either.¹³⁹ After the District proceeded with the Acceler8 portion of the EAA Reservoir without an STA, the Natural Resources Defense Council, National Wildlife Federation, and the Sierra Club sued the Corps over the project.¹⁴⁰ In essence, the plaintiffs challenge the legality of the Acceler8 regulatory process.

Plaintiffs assert that because the EAA Reservoir is part of CERP, the administrative process for the project must follow the procedures outlined in WRDA 2000 and in the Corps’ Programmatic Regulations, including the PIR and other state assurances such as those Florida provides pursuant to CERPRA.¹⁴¹ In their view, the District may not proceed with its Acceler8 project until those procedures are completed. A second count in the complaint challenges the sufficiency of the Environmental Impact Statement under NEPA, which the Corps prepared in connection with its § 404 permit for the project.¹⁴² A third count references the federal Administrative Procedure Act.¹⁴³ The District has intervened in the case.¹⁴⁴ If the plaintiffs are successful on the first count, it would seem that the state would be precluded from obtaining a § 404 permit for independently undertaking a project related to a project originally approved in concept in WRDA 2000. The District argues that the State has independent authority that was not preempted by WRDA.¹⁴⁵

As with the *Friends of the Everglades* suit, just what good can be achieved from these complaints over procedure is far from clear.¹⁴⁶ CERP’s programmatic regulations require the Corps to “[c]omply with all applicable Federal, State, and Tribal laws” in a PIR.¹⁴⁷ CERPRA, under Florida law, requires that the District “[d]etermine with

138. Light, *supra* n.58, at 10777 (footnote omitted).

139. *Id.* at 10776.

140. See Rizzardi, *supra* n.52, at 8.6.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Rizzardi, *supra* n. 52, at 8.6. At this writing, these matters had been fully briefed and oral argument held. In May, the District found it “prudent to resolve these outstanding legal issues before proceeding with the next construction phase” and halted construction for up to six months at the cost of a \$1.9 million. Eric Buermann, *Prudent to Stop Project until Suit Resolved*, Sun Sentinel (Ft. Lauderdale, Fla.) 11A (June 3, 2008) (Buermann is Chairman of the South Florida Water Management District).

146. In late June, after Florida Governor Charlie Crist announced a multi-million dollar land deal to acquire U.S. Sugar Corporation, including EAA lands adjacent to the proposed reservoir, the local press tried to connect the halt of the reservoir project to the land deal by claiming that the project “could become obsolete before it’s finished.” Andy Reid, *\$250 Million of Work in ‘Glades Put on Hold—Cost of Keeping Contractors on Standby*, Sun Sentinel (Ft. Lauderdale, Fla.) 1A (June 26, 2008). Environmentalists who filed the EAA lawsuit, interviewed at that time, expressed surprise that the District had temporarily halted the project. *Id.* (“‘We were just floored about why they would want to shut down a reservoir nobody wanted shut down,’ said Brad Sewell, attorney for the environmental group. The U.S. Sugar deal ‘would certainly seem to have to have [sic] played a role in the decision.’”). The District, however, “maintain[ed] that the lawsuit—not the land deal—stopped construction.” *Id.*

147. 33 C.F.R. § 385.26(a)(3)(iii) (2008).

reasonable certainty that all project components are consistent with applicable law and regulations, and can be permitted and operated as proposed.”¹⁴⁸ Although the Corps’ public participation procedures under CERP may be somewhat more elaborate than the District’s under Acceler8, DEP requires that the District comply with the same substantive environmental regulatory standards under CERPRA whether the project was funded under CERP or Acceler8. Whether a project is CERP or Acceler8, the same state permitting requirements and avenues for judicial review are available.¹⁴⁹ If a federal court is asked to join DEP or EPA into the suit in the shaping of injunctive relief, the same Eleventh Amendment and sovereign immunity problems exist.¹⁵⁰ Chaos, anyone?

III. THE NEED FOR A SUSTAINABILITY JURISPRUDENCE

An engineer, a physicist, and a lawyer were being interviewed for a position as chief executive officer of a large corporation. The engineer was interviewed first and was asked a long list of questions, ending with “how much is two plus two?” The engineer excused himself and made a series of measurements and calculations before returning to the boardroom and announcing, “four.” The physicist was next interviewed, and was asked the same questions. Again, the last question was, “how much is two plus two?” Before answering the last question, he excused himself, made for the library, and did a great deal of research. After a consultation with the United States Bureau of Standards and many calculations, he also announced, “four.” The lawyer was interviewed last, and again the final question was, “how much is two plus two?” The lawyer drew all the shades in the room, looked outside to see if anyone was there, checked the telephone for listening devices, and then whispered, “how much do you want it to be?”

Demand modelers use the technique of jumping forward in time to envision desired futures in a process they call “backcasting.”¹⁵¹ In a Canadian study, John Robinson describes backcasting as

“[A] method of analyzing alternative futures. Its major distinguishing characteristic is a concern with how desirable futures can be attained. It is thus explicitly normative, involving working backward from a desired future endpoint or set of goals to the present, in order to determine the physical feasibility of that future and the policy measures that would be necessary to reach that point.”¹⁵²

In other words, start with “four” and work back to “two plus two” as a way to produce that desired result.

After the lengthy trial of the *Friends of the Everglades* case, Judge Altonaga acknowledged that “it remained unclear exactly what the nature of any prospective relief, if granted to Plaintiffs, and the scope of any obligations imposed upon Defendants, should be.”¹⁵³ Even if lawyers may have learned Plaintiffs’ goals, apparently they did

148. Fla. Stat. § 373.1501(5)(c)(1) (2008).

149. See *Light*, *supra* n. 10, at 116–19 (describing Florida APA review of CERP decisions).

150. See *supra* nn. 105–16 and accompanying text.

151. See Norton, *supra* n. 2, at 469–72.

152. *Id.* at 471 (footnote omitted).

153. *Friends of the Everglades*, 2006 U.S. Dist. LEXIS 89450 at *188.

not disclose them to the judge during the trial. Her fifty page decision works the “math” of the Clean Water Act without knowing how that math might affect Everglades restoration (or any other dimension of the “public interest” for that matter).¹⁵⁴ The focus of her opinion therefore is entirely on procedure—such as asking whether there are permits required—rather than what equitable relief is needed because of the failure to obtain the required permit. It is also unclear from the pleadings just what Plaintiffs in the EAA Reservoir litigation are trying to achieve.¹⁵⁵ Again, the focus is entirely procedural—must the Corps refrain from permitting Acceler8 projects until all procedural requirements of the CERP program are met? The pleadings do not indicate what value this will serve.¹⁵⁶ How can one work back to “two plus two” if no one envisions “four”?

More critically, it sometimes seems that existing jurisprudence is not conducive to backcasting. Consider another piece of complex Everglades litigation now back at the Southern District of Florida after remand from the Eleventh Circuit. In *Sierra Club v. Flowers*,¹⁵⁷ the district court made a heroic effort to evaluate thoroughly the Sierra Club’s challenge of the Corps’ issuance of permits under the Clean Water Act to expand limestone mining in the “Lake Belt” area just west of Miami.¹⁵⁸ In a Summary Judgment Order and a Supplemental Remedies Order which “together span 363 pages containing 617 footnotes,”¹⁵⁹ Judge Hoeveler determined that “the permits must be vacated, but stayed the vacatur of some permits pending the Corps’s release of its SEIS [Supplemental Environmental Impact Statement].¹⁶⁰ Like Judge Aldonado, Judge Hoeveler at the summary judgment stage had “not yet determined an appropriate remedy” and struggled with the “difficult decision: to balance the rights and interests of these particular mining companies with the rights and welfare of the public.”¹⁶¹

Rather than appeal, the Corps chose to comply with Judge Hoeveler’s order and set

154. The traditional four-factor test applied by courts of equity in deciding whether to grant a permanent injunction requires a plaintiff to “demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *Ebay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

155. *Cf. supra* n. 116 (discussing the oral argument in the Supreme Court’s S-9 case).

156. An NRDC spokesman claimed in a newspaper interview in June 2008 that plaintiffs had “filed suit to guarantee the reservoir water went to the Everglades, not to stop construction.” *Reid, supra* n. 146. This suggests that the EAA plaintiffs want Florida to allocate water stored in the Reservoir to the “environment” under state water allocation law rather than to permit it to be used as water supply for urban areas of South Florida or agriculture. There is nothing in the pleadings to indicate such a motivation, however, and the plaintiffs chose to sue only the Corps. Though this type of authority has existed under Florida law since the 1970s under Fla. Stat. § 373.223(4) (2008), it has not been used in South Florida. *See Light, supra* n.58, at 10774.

157. 423 F. Supp. 2d 1273 (S.D. Fla. 2006), *vacated sub nom.*, *Sierra Club v. Van Antwerp*, 526 F.3d 1353 (11th Cir. 2008) [hereinafter *Sierra Club I*].

158. CERP includes projects to use the Lake Belt area from which limestone had been mined as a surface water reservoir. The project includes a number of complex technological challenges and is not among the projects that the state has chosen to accelerate. Comprehensive Everglades Restoration Plan, *Lake Belt In-Ground Reservoir Technology Pilot*, http://www.evergladesplan.org/pm/projects/proj_35_lake_belt_pilot.aspx (last accessed Apr. 10, 2009); Comprehensive Everglades Restoration Plan, *Central Lake Belt Storage Area*, http://www.evergladesplan.org/pm/projects/proj_26_central_lake_belt.aspx (last accessed Apr. 10, 2009).

159. *Sierra Club v. Van Antwerp*, 526 F.3d at 1359 [hereinafter *Sierra Club II*].

160. *Id.* at 1358.

161. *Sierra Club I*, 423 F. Supp.2d at 1380.

about doing what it was told.¹⁶² Upon appeal by the mining company permit holders, however, the Eleventh Circuit vacated the injunction on the ground that Judge Hoeveler had not applied the proper degree of deference to the Corps' findings and determinations. Significantly, the Eleventh Circuit emphasized that "NEPA is procedural, setting forth no substantive limits on agency decision-making"¹⁶³ and chastised the district court for evaluating "the adequacy of the mitigation measures on which the Corps conditioned the permits."¹⁶⁴ Similarly, it found that the "same pervasive lack of deference infects the district court's APA-CWA [Administrative Procedure Act-Clean Water Act] analysis" such that the court had "predetermined" that permits should not have been issued, a decision "first given to federal agencies, not federal courts."¹⁶⁵

The promise of Lehtinen's original suit and Chiles' "surrender"—the grand accommodation of the vested interests in a consensus-based Comprehensive Everglades Restoration Plan intended to produce a sustainable South Florida—remains largely a myth.¹⁶⁶ The subsequent multiplicity of lawsuits such as the ones described here have challenged procedural niceties without disclosure of the underlying objectives of their instigators or of the substantive relief they desire.¹⁶⁷ To the scientists and engineers struggling to find pragmatic improvements to the ongoing system, the courts' rulings appear as an artificial and contrived *deus ex machina*, which at best may be accommodated or avoided but at worst will disrupt.¹⁶⁸ Because of the disconnect between legal (appearing to non-lawyers as metaphysical) judgments (e.g. divisions among the "waters of the United States" or Eleventh Amendment immunity) and practical problems (e.g. avoiding floods, supplying drinking water, and protecting deteriorating biodiversity), the courts seem to be more tools of ideological politics than pragmatic problem solvers.¹⁶⁹ Debates over statutory grammar and the protection of procedural niceties substitute for the needed protection of substantial rationality.¹⁷⁰

Florida's citizens—and America's Everglades—deserve more from their courts, their lawyers, and their public servants. Instead of thinking like professors of civil procedure, we need these citizens, in Leopold's fabled simile, to be "[t]hinking [l]ike a [m]ountain."¹⁷¹ We need law that authorizes, indeed encourages, such thinking. The

162. Several of the plaintiffs' essentially procedural claims, for example that the Corps had not undertaken formal Endangered Species Act consultation with the Fish and Wildlife Service, were mooted by the Corps' compliance by the time of the appeal. *Sierra Club II*, 526 F.3d at 1359. The Government participated in the Eleventh Circuit appeal as an *amicus curiae*. *Id.* at 1356.

163. *Id.* at 1361.

164. *Id.* at 1362.

165. *Id.* at 1363 (footnote omitted). The Eleventh Circuit's decision reminds me of Professor Houck's caricature of "Chief Justice Rehnquist's" secret opinion in *Calvert Cliffs*. Oliver A. Houck, *The Secret Opinions of the United States Supreme Court on Leading Cases in Environmental Law, Never Before Published!* 65 U. Colo. L. Rev. 459, 472–73 (1994).

166. See *supra* nn. 42–65 and accompanying text. Ironically, for many years Judge Hoeveler was the South Florida judge assigned to oversee the consent decree, until 2003, when he decided to withdraw from the case after being accused of bias by Big Sugar interests. See Fuchsia, *A Sour Taste—Our Position: Big Sugar's Success in Judge-Shopping is a Big Loss for the Everglades*, Orlando Sentinel A22 (Sept. 25, 2003).

167. See *supra* nn. 89–116, 136, 138–48 and accompanying text.

168. See Light, *supra* n. 58, at 10781.

169. See *supra* n. 12 and accompanying text.

170. See *supra* nn. 155–63 and accompanying text.

171. Aldo Leopold, *A Sand County Almanac and Sketches Here and There* 129 (Special Commemorative ed., Oxford U. Press 1989); see Norton, *supra* n. 2, at 40, 222.

concept of *sustainability* “includes both a description (it says something about what will be left for people of the future) and an evaluative component (it expresses moral concern about whether our legacy is fair to future people).”¹⁷² A judge, an environmentalist, or a bureaucrat may not know what sustainability means in the context of the Everglades challenge.¹⁷³ The more serious problem, though, is that these relevant questions often do not even come up in legal discourse.¹⁷⁴

The central diagnosis here is what Norton calls “towering.”¹⁷⁵ From the outside, the law seems uncaring because of its preoccupation with disciplinary matters and its failure to speak to matters of substance.¹⁷⁶ Adaptive management requires learning, and learning requires relevant substantive communication.¹⁷⁷ Adaptive management also posits that communication is better where it is explicit and open rather than indirect or secret.¹⁷⁸ Lawyers need to move to a substantive integration of sustainability into their public decision-making, that is, into their jurisprudence.¹⁷⁹ Water managers need to make lawyers part of their adaptive management model rather than outsider kibitzers.¹⁸⁰

172. Norton, *supra* n. 2, at 40.

173. Professor J.B. Ruhl accuses some courts as having the propensity to avoid trying to identify “when the lawyers or the scientists have broken the law-science process rules” and to “have opted out of digging into this problem” by “hiding behind the ‘judicial deference’ doctrine.” J.B. Ruhl, *Reconstructing the Wall of Virtue: Maxims for the Co-Evolution of Environmental Law and Environmental Science*, 37 *Envtl. L.* 1063, 1076 (2007). Ironically, the Everglades litigation discussed here indicates that the environmentalist plaintiff’s focus on procedural imperfections has the same effect, to direct courts away from consideration of underlying substantive issues by exclusive emphasis on the “legal” rather than on “science.”

174. *See supra* nn. 149–59 and accompanying text.

175. Norton, *supra* n. 2, at 23 (explaining that “[t]owering occurs when bureaucrats and policymakers develop narrowly defined interest areas, respond only to other participants who share their own views and vocabularies for discussing those views, and insulate policy processes from open debate and challenges from critics.”). Within Norton’s framework, my hypothesis is that *law* has become a “tower” in which its inhabitants, lawyers, have insulated their vocabularies from cross-disciplinary communication.

176. Norton recommends that such cross-disciplinary communication should be conducted in the language of ordinary people. Norton, *supra* n. 2, at 441. As Norton explains

[t]he language of management science, because it is a language of public deliberation, must be the inclusive language of common discourse. Public debate among individuals and groups with different experience and no shared disciplinary language must ultimately be engaged and resolved in the common, ambient discourse of the shared, public language.

Id.

177. As Norton believes

[t]he characteristics of such [an adaptive management] model . . . are that it must be embedded in a democratic process of adaptive management, it must be iterative, it must be open to all voices in the community, and it must be receptive to multiple values and varied formulations of those values.

Id. at 273.

178. Marginalizing non-litigants’ participation mocks the adaptive management philosophy, which envisions better decisions where information flows more freely across disciplines.

Provided experts and scientists are committed to transparency in the use of science, peer review will be supplemented with review by participants trained in multiple disciplines, as well as by participants with varied other interests and concerns. . . . The question of bias is thus internalized into adaptive management because, when embedded in an open and inclusive process of participation, all claims, even scientific claims, can be disputed by the test of experience.

Id. at 472.

179. *See* John C. Dernbach, *Achieving Sustainable Development: The Centrality and Multiple Facets of Integrated Decisionmaking*, 10 *Ind. J. Global Leg. Stud.* 247, 282 (2003) (“This movement from procedural to substantive integration is likely to reduce the negative impacts of tradeoffs over time.”).

180. *See supra* nn. 32–41 and accompanying text.

Only then can the trial judge precipitate backcasting in a backpumping case.¹⁸¹ Only then might the Eleventh Circuit come to value Judge Hoeveler's look "directly into the future of fifty years of mining" in the Lake Belt area.¹⁸² Without substantive integration of sustainability into contemporary legal discourse those of us in South Florida may well end up "someplace else."¹⁸³

181. See *supra* nn. 149–52 and accompanying text; Dernbach, *supra* n. 179, at 276 ("From a law and policy perspective, the transition to sustainability will require the design and implementation of policies with much longer time frames than are used in most other decisionmaking.").

182. *Sierra Club I*, 423 F. Supp.2d at 1380. If Judge Hoeveler is to be fairly criticized, it is that the "excruciating levels of detail" into which he goes with respect to the history of the Corps' decision to grant the Lake-Belt mining permits lacks any independent substantive "peer review" (e.g. perhaps by a special master or a court of appeals with scientific training). Cf. Ruhl, *supra* n. 173, at 1076–77. The scattergun nature of the many "holdings" in his decision favoring the environmentalists intimates overstatement of "the support the relevant body of science provides for the policy decision" he reaches. *Id.* at 1077. If this is so, in Ruhl's terms the Eleventh Circuit's reversal substitutes a "Science? What Science?" law-science process violation for a "The Science Made Us Do It" law-science process violation. *Id.* (emphasis in original). The call here is simply for a "transparent and legitimate" process for evaluating an agency's or a court's use of law or science in reaching a policy decision. The integrative (and integrity promoting) principle is the concept of sustainability. See *supra* n. 2 and accompanying text.

183. See generally David Campbell, *If You Don't Know Where You're Going, You'll Probably End up Somewhere Else* (Tabor Publg. 1974); William Grunkenmeyer & Myra Moss, *Key Concepts in Sustainable Development*, <http://www.rri.wvu.edu/WebBook/Grunkenmeyer-Moss/sustainable.htm> (last accessed Apr. 10, 2009). Norton uses the Dutch system as his principal example of "a concerted attempt to create a more rational and integrated process for addressing environmental problems as they emerge," which avoids towering. Norton, *supra* n. 2, at 484. In this final note, I suppose I should note that I have observed that the District's engineers and their lawyers seem to have been making a lot of trips to the Netherlands recently in anticipation of having to address the implications of sea-level rise for South Florida.