Florida Law Review

Volume 23 | Issue 2 Article 11

January 1971

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Recommended Citation

David Brennan, *Jetport: Stimulus for Solving New Problems in Environmental Control*, 23 Fla. L. Rev. 376 (1971).
Available at: https://scholarship.law.ufl.edu/flr/vol23/iss2/11

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JETPORT: STIMULUS FOR SOLVING NEW PROBLEMS IN ENVIRONMENTAL CONTROL

Expanding population, rapid economic growth, and a national propensity to travel have all contributed to the weakening of the Nation's environmental structure. Environmental problems in Florida are diverse and possibly more acute than in many other parts of the country because of a high rate of population growth, a booming tourist industry, and increasing economic development.[1] The operative consequences of these factors are dramatically illustrated by the Miami jetport controversy, which attracted nationwide attention.

The south Florida area stood to gain considerably from the construction of a new airport; yet conservation groups, and later the general public, vigorously opposed the plan[2] because of the possibility of a wide variety of environmental damage.[3] The jetport case is representative of a wide range of ecological problems;[4] it involves questions of air and water pollution, protection of wildlife, and preservation of wilderness areas. Therefore, the lessons of the jetport should be useful in planning future environmental control action. This note will trace the development and resolution of the jetport controversy and survey the present means to combat such problems, recommending improvements in existing procedure where appropriate.

JETPORT: CASE HISTORY

Cities have found it necessary to expand airport facilities to accommodate increased passenger and cargo loads and to improve their economic positions.[5] As urban populations have increased, suburban areas have often grown up around airport facilities, which have traditionally been centered near, but not in, major metropolitan areas. As a result, airport expansion has been effectively prevented. Suburban residents have been exposed to serious pollution caused by noise and chemical emissions. The directors of the Miami International Airport proposed to avoid this dilemma by moving at least some air traffic to a new location that was proximate to, and yet safely away from, populated areas.[6]

The present Miami International Airport is rapidly reaching the point

1. *See* FLORIDA TREND, Oct. 1969, at 46, 53; *cf. Hearings on the Water Supply, the Environmental, and Jet Airport Problems of Everglades National Park Before the Senate Comm. on Interior and Insular Affairs,* 91st Cong., 1st Sess. at 1 (1969) [hereinafter cited as *Jetport Hearings*].

2. FLORIDA TREND, *supra* note 1, at 46-47; Lawrence, *Protest Mail Outnumbers Jetport Backers 50 to 1,* Orlando Sentinel, Sept. 10, 1969, §A at 2, col. 2.

3. *See* FLORIDA TREND, *supra* note 1, at 47.

4. Senator Henry Jackson (Washington) referred to the conflict as a "classic case history of what is happening all across the nation." *Jetport Hearings, supra* note 1, at 1.

5. For an account of the expansion needs of the Miami area, see DADE COUNTY PORT AUTHORITY, THE DADE COLLIER AIRPORT STORY 6, 7 (1969) [hereinafter cited as DCPA BOOKLET].

6. *Id.* at 4.

of saturation usage.[7] Consequently, the Dade County Port Authority (DCPA)[8] planned a three-stage transfer of air operations to a site removed from the present airport location.[9] Stage one involved the transfer of all training flights from Miami International Airport to a new location, thus reducing air traffic by roughly twenty-five per cent.[10] Stage two called for the removal of air cargo flights to the new site. The final stage, anticipating future needs, called for the use of the new facility as the major air terminal for the entire south Florida area.[11] Stages two and three were long-range plans and, apparently, speculative from the start.[12]

After considering several existing airports and other areas as potential sites, the DCPA decided on a location thrity-three miles west of the present Miami International Airport. The site consisted of thirty-nine square miles straddling the boundary separating Dade and Collier Counties. The acquisition and development of this property was financed by a $52.5 million bond issue sold by the Port Authority.[13] Construction of the training runway began at the Everglades location in September 1968.[14] The DCPA had found what it considered to be "an acceptable interface between the productive environment and protective environment of South Florida."[15] At the time construction began, however, the DCPA had not studied the possible environmental consequences.[16] Moreover, while state conservation agencies had been notified of the project, they were not fully informed and apparently did not entirely comprehend the potential dangers involved.[17]

Primarily because of an early lack of publicity, opposition to the jetport was slow to form.[18] Few people knew of the long-range plans for the jetport

7. *Id.* at 6. "Saturation usage" means the maximum level of safe, efficient usage. Miami International Airport (MIA) is already beyond its practical capacity of annual operations (437,000), and the forecast for 1975 is 663,000 operations. In addition to general increases in passenger and cargo loads, Miami International's unique position as an "end of the line" airport has caused many airlines to use it for maintenance work and training flights. *Id.* at 7.

8. The Dade County Port Authority (DCPA) regulates airport facilities in Dade County and is composed of the county commissioners. It is administered by a professional staff headed by Director Alan Stewart.

9. DCPA BOOKLET, *supra* note 5, at 2.

10. *Id.* at 2, 7.

11. *Id.* at 2.

12. *Id.* at 2, 11.

13. *Jetport Hearings, supra* note 1, at 107. Only a small portion of the proceeds were used for the jetport. Most of the money was spent on improvements of Miami International. *Id.* at 7.

14. DCPA BOOKLET, *supra* note 5, at 1.

15. *Id.* at 5. The phraseology used here was after the fact. *i.e.*, after the attacks on the project began. It is probable that the Port Authority did not make its selection on the basis of a balance of interest.

16. Letter from Richard Judy, Deputy Director of DCPA to David C. Brennan, Oct. 10, 1969.

17. *See* Letter from Larry Shanks, Florida Game and Fresh Water Fish Commission, Project Leader, to David C. Brennan, Nov. 19, 1969. *See also Jetport Hearings, supra* note 1, at 55.

18. *See* Kennedy, *Jetport a Runway to Progress or Death Knell of Everglades?*, Miami Herald, June 22, 1969, §A at 20, col. 1; FLORIDA TREND, *supra* note 1, at 47.

and its potential environmental implications.[19] As news coverage increased,[20] conservation groups[21] began to study the situation and voice concern over the possibility of air and water pollution from jet fuel emission.[22] They further predicted that noise and stoppage of the vital water flow from the Big Cypress Swamp (north of the jetport) to the Everglades National Park (south of the jetport) would disrupt the area's ecological balance.[23]

Although the project was originally well received, public support declined rapidly. The jetport controversy served as a focal point for action by conservation groups, which were becoming increasingly concerned with pollution and environmental waste.[24] Several land use studies by government agencies reported a serious danger of ecological damage.[25] The net result was a reappraisal of the jetport program. In the interim, the first runway had been completed and training flights had begun.[26] Finally, in January 1970, an agreement was reached whereby construction at the Everglades site was halted, and the DCPA began to search for another location.[27]

After months of controversy the Miami jetport problem was apparently solved.[28] Although the means of solution were primarily administrative, many legal remedies were proposed and evaluated. The legal problems encountered in the jetport controversy are typical of environmental law problems generally,

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19. FLORIDA TREND, *supra* note 1, at 47.

20. For an example of the early informative newspaper articles, see George Kennedy's account in the Miami Herald, June 22, 1969, §A at 1, col. 1.

21. Every major conservation group in the country except the Isaak Walton League voiced opposition to the proposed jetport. Letter from George Kennedy, Miami Herald columnist, to David C. Brennan, Sept. 5, 1969. The Walton League's endorsement was limited, however; it assumed there would be adequate environmental safeguards. *Jetport Hearings, supra* note 1, at 175-77.

22. *Jetport Hearings, supra* note 1, at 35.

23. *Id.* at 2, 116, 142-48. It was felt that since much of the water supply for western Everglades National Park flowed from the Big Cypress Swamp an obstruction of that flow would compound drought conditions in the Park thereby killing many species of fish and animals and altering the area's life cycle.

24. FLORIDA TREND, *supra* note 1, at 46-47.

25. A regional planning council was formed to investigate regional conditions and develop a land use plan for the area. *Jetport Hearings, supra* note 1, at 81. The DCPA also began work on an extensive environmental control program for its project. DCPA BOOKLET, *supra* note 5, at 1. The most publicized study was contained in the "Leopold Report" compiled by a government task force. The report cited the proposed airport as a threat to the ecological balance of the area and condemned both the full-scale project and the training facility. U.S. DEP'T of the Interior News Release, LEOPOLD REPORT SUMMARY (Sept. 18, 1969) [hereinafter cited as LEOPOLD REPORT].

26. The first aircraft landing at the Everglades site occurred on Nov. 15, 1969. Letter from Joe L. Kennedy, Everglades Park Superintendent, to David C. Brennan, Nov. 14, 1969.

27. *See* Florida Times-Union, Jan. 17, 1970, §B at 2, col. 8. The state agreed to assist the DCPA in finding another site and to provide the land without cost if the best location was found to be on state property. Implicit in the DCPA's acceptance of this plan was knowledge that the Department of Transportation (DOT) would not approve a fund release for further expansion of the project.

28. *Id.* Training flights will continue, however, until a new location can be found and developed.

and thus are worthy of analysis in the effort to combat present and future environmental crises.

GOVERNMENTAL STRUCTURES AND THE ENVIRONMENTAL CRISIS

Control of environmental destruction depends initially upon early identification of the sources of pollution and waste of resources. While attention has heretofore been focused primarily upon private destruction of resources, it is increasingly obvious that there are pollution problems of governmental origin as well.

Lack of Control over Local Governments

The spreading of governmental power among several levels provides many advantages;[29] it not only balances concentrations of power, but also assures, to some extent, local determination of local issues.[30] Unfortunately, in the area of environmental preservation, local control can result in local determination of matters of state and national concern. As pressure for expansion of urban and suburban areas continues to accelerate, local governments have been forced to promote and develop municipal improvement projects to provide expanded services.[31] Local governments have become large-scale resource users, often to the detriment of larger areas quite remote from their localities.

The environmental implications of this problem were fully exposed in the Miami jetport case. The airport was a local improvement project; yet its effects were far reaching. Because of its location in the Everglades, the jetport threatened to alter the south Florida ecosystem,[32] thus potentially endangering Everglades National Park[33] and the area's tourist trade.[34] Both the state and federal governments, therefore, opposed the plan.[35] Nevertheless, the nature of the project made it almost impossible for either government to take decisive action.[36]

Often the federal government can control local development by the "power of the pursestrings."[37] Here, however, the project was funded by a local bond issue.[38] Apparently because of this, federal authorities (possibly incorrectly) felt that their power in the jetport controversy was merely persuasive. The

29. *See* J. BURNS, GOVERNMENT BY THE PEOPLE 81-83 (2d ed. 1966).
30. *Id.* at 117.
31. In addition to providing modern airport facilities, municipalities, (and often metropolitan counties) also operate sewage plants, parks and recreation areas, expanding highway systems, and often public utilities.
32. FLORIDA TREND, *supra* note 1, at 47.
33. *Jetport Hearings, supra* note 1, at 140-42.
34. *Id.* at 145.
35. For a general summary of the state and federal position, see Florida Times-Union, Jan. 17, 1970, §B at 2, col. 8.
36. *See* text accompanying notes 37-40 *infra*.
37. *Jetport Hearings, supra* note 1, at 58.
38. *Id.* at 107.

local financing also removed a method of state control;[39] and since there was no statutory authority for intervention by any state agency[40] the state was unable to act directly in the matter. Presently, little direct legal action can be taken by higher governmental levels in such situations.

Priority of Uses

The controversy essentially involves a question of priority of uses.[41] The jetport struggle revealed widely divergent opinions about the degree of consideration to be given environmental factors in planning construction projects. Proponents of the jetport felt that sacrifice of wild areas was a necessary incident of human progress.[42] Opponents argued that the ability to protect the environment was one indication of such progress.[43]

Although environmental factors are usually nonmonetary in nature,[44] they nonetheless vitally affect the public interest. The factor of economic development is of concern in the immediate geographic area of expansion, but environmental factors, though nonpecuniary, may affect a much larger segment of society.[45] Despite short-term, economic advantage, the end result may be a stifled economy if raw materials and natural resources are wasted. It can be argued, therefore, that the environment, which affects society generally, should take precedence over the local developments that threaten it.[46] Thus, while the Miami jetport was an important project for south Florida, its value should not outweigh the interest, economic as well as aesthetic, that the State of Florida and the Nation generally have in preserving the unique Everglades region.[47]

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39. *Id.* at 55.

40. Letter from Randolph Hodges, Executive Director, Florida Department of Natural Resources, to David C. Brennan, Sept. 30, 1969. Mr. Hodges enumerated the Department's statutory responsibilities and then admitted it had no authority to act in the jetport case. A possible state action is suggested by the textual consideration of the Florida Air and Water Pollution Control Act. FLA. STAT. ch. 403 (1969).

41. Another illustration is the Cross-State Barge Canal Project where the battle lines are not so clearly drawn as in the jetport example. One side has stressed economic and recreational advantages while the other complains of ecological misuse. Thus, the problem is reduced to a matter of priorities. See *Former U.S. Army Engineer Blasts Barge Canal Project,* Tampa Tribune, Jan. 16, 1970, §B at 1, col. 5.

42. *See* Florida Times-Union, Jan. 13, 1970, §B at 10, col. 4 (statement by the chairman of the Florida Council of 100). Advocates of the Everglades site also maintained that construction of the training facility would not disrupt the area's ecology. DCPA BOOKLET, *supra* note 5, at 4.

43. LEOPOLD REPORT, *supra* note 25, at 10. The report observed that "benefits to society flow from failure to develop" land resources. *Id.*

44. Environmental issues are generally nonmonetary, however there may often be economic ramifications. In the jetport case, conservationists alleged damage to the sport fishing and shrimp industries as well as to the south Florida tourist trade. *Jetport Hearings, supra* note 1, at 136, 145.

45. *Jetport Hearings, supra* note 1, at 9.

46. LEOPOLD REPORT, *supra* note 25, at 10.

47. Aesthetic values are not the only ones to consider, of course. Environmental damage

Though case law remains scarce, recent statutory and constitutional enactments have shown a greater emphasis on conservation of natural resources as a state and federal priority.[48] The Florida Constitution of 1968 establishes as state policy, the conservation of "natural resources and scenic beauty."[49] On the federal level, several statutes require consideration of environmental factors in projects developed thereunder. For example, the Fish and Wildlife Coordination Act requires planning to prevent damage to water resources in dredging and other operations.[50] Other acts that specifically state a policy of environmental protection are the National Estuarine Act of 1968,[51] the Department of Transportation Act of 1967,[52] and most recently the National Environmental Policy Act of 1969.[53]

Although attempting to fight pollution or resource waste still must present reasons why environmental protection should have legal priority over a damaging activity, recent legal developments[54] show a trend toward granting such priority, and emerging cases should increasingly reinforce that view.

Lack of Intergovernmental Coordination

County, state, and federal governments were all involved to some degree in the jetport cases. In retrospect, however, it is apparent that these agencies were not only unable to avoid the ecological crises that ensued, but they were also unable to expedite resolution of the crisis once it was discovered. The

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would also be felt at the local level and would have economic consequences of wide-ranging effect. *See* LEOPOLD REPORT, *supra* note 25, at 10.

48. Relevant Florida cases seem to indicate judicial concern for natural resources, even before the policy statement in the 1968 constitution. See note 49 *infra*. The court in Alford v. Finch, 155 So. 2d 790 (Fla. 1963), held that taking private property for a game preserve was a proper public use for which compensation must be paid. The older decisions of the state and federal courts appear mixed. In Township of Weehawken v. Erie R.R., 20 N.J. 572, 120 A.2d 593 (1956), the state supreme court ruled in favor of economic interests, allowing a railroad to condemn a city's public park on the theory that the city had more flexibility in locating its park than had the railroad in locating its railyard. Similar to *Alford* is *In re* United States, 28 F. Supp. 758 (W.D.N.Y. 1939), in which the United States successfully condemned New York state property for conservation purposes.

49. FLA. CONST. art. 2, §7: *"Natural Resource and Senic Beauty*—It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise."

50. 16 U.S.C. §§661-64 (1964). Analogous requirements are found in Scenic Hudson Preservation Conference v. FPC, 354 F. 2d 608 (2d Cir. 1965), and Udall v. FPC, 384 U.S. 428 (1967).

51. 16 U.S.C.A. § 1221 (Supp. 1971).

52. 49 U.S.C. §1653 (f) (Supp. IV, 1965-1969).

53. National Environmental Policy Act of 1969, 42 U.S.C.A. §§4321 *et seq.* (Supp. 1971). The Act's sponsor, Senator Henry Jackson, referred to the Act as a means of preventing future jetport type conflicts. Letter from Senator Jackson to David C. Brennan, Sept. 30, 1969. For a discussion of the possible uses of the Act, see V. Coleman, Possible Repercussions of the National Environmental Policy Act of 1969 on the Private Law Governing Pollution Abatement Suits, April 7, 1970 (unpublished thesis).

54. *See* text accompanying notes 144-194 *infra*.

slow reaction time of the governments involved indicates inadequacies in both inter- and intra-governmental coordination.

An inability of higher governments to exercise control over their local counterparts in jetport type situations is apparent. Moreover, even if the federal government were fully able to control the situation, it still might lack the coordination within its own agencies to do so effectively. Finally, it has been asserted that the federal government lacks the research capability to determine, in the first instance, the environmental consequences of projects receiving its attention.[55] Departments may make decisions that affect other agencies or lower governmental units without any machinery for consultation with these units.[56]

While most state governments exhibit similar fractionalization,[57] Florida's system at least encourages the exchange of information between agencies and between the state and local governments.[58] Florida conservation activities have now been consolidated under the new Department of Natural Resources,[59] which functions, *inter alia,* to provide hydrological and ecological data for other state agencies involved in development projects.[60] Since the various offices of this department are specifically designed to collect and disseminate environmental information, a statutory requirement that state and local development projects be checked through the department before they are begun could prevent ecological traumata such as the jetport conflict. In this way, the state could maximize its efforts by requiring that improvement projects be advantageous enviromentally as well as economically.

Legal Remedies

In considering remedial action against environmental problems, two types of damage must be distinguished. One type of danger is pollution of air and water resources by noise, chemicals, and similar pollutants. An example of such damage is that done by jet airplane exhaust to air, water, and plant life. Such pollutants can alter the environment they enter,[61] thereby upsetting

55. *Jetport Hearings, supra* note 1, at 2.

56. *Id.* The federal Department of Transportation, for example, granted $500,000 to the DCPA for construction of the jetport training facility. This implicit approval was later reconsidered when the Department realized the threat to the Everglades. *Id.* at 38.

57. *Id.* at 34.

58. When federal funds are used in a state or county project, it is required that the appropriate state conservation agency be consulted for suggestions. The procedure is also available, but not mandatory, where a project is funded wholly by the state or county. The weakness is illustrated by the jetport example where DOT provided $500,000 for construction of the training runway. The DCPA advised various state conservation agencies of its planned training facility, but the agencies were not informed of the long-range plans until later. With full information at the outset, the state might have helped develop a plan for environment protection consistent with the DCPA's proposal.

59. Created in 1969 by Fla. Stat. §20.25 (1969).

60. Letter from Randolph Hodges, Executive Director of the Department of Natural Resources, to David C. Brennan, Sept. 30, 1969.

61 Florida Wildlife, April 1970, at 29 (*Conservation Notes*). It is now felt, for example, that pollutants are responsible for the demise of Spanish moss in many areas.

the balance of nature. The second form of damage is destruction of unique wilderness areas or waste of resources that need not be sacrificed. Conservationists warned of this type of damage when they predicted that the jetport would destroy a substantial portion of the world's only everglades-type wilderness. Legal means to prevent resource waste by local governments should be addressed to both types of damage. Although much of the possible action must be taken by higher governmental levels, various forms of actions are still available to concerned individuals and groups.

Nuisance

The doctrine of nuisance, both public and private, has been used extensively to abate pollution. In fact, pollution regulatory agencies have encouraged such suits on the ground that an individual injured by industrial pollution would find it preferable to have a jury rather than a governmental agency determine the damage award.[62] However, as evidenced by the jetport example, local projects may damage the environment not only by pollution but also by alteration or destruction of unique wilderness areas, and while nuisance law has been applied in suits arising from pollution danger,[63] it remains uncertain how effective it will be to prevent the waste of resources.

The underlying rule upon which nuisance is based is that every person should use his property so as not to harm that of another.[64] The classic definition of nuisance is: [A] more or less continuous interference with the use and enjoyment of property by causing or permitting the escape of deleterious substances, or things such as smoke, odors, noises, etc."[65] This definition clearly encompasses the problem of pollution,[66] but would not affect resource *waste,* as such. However, in *Mercer v. Keynton*[67] the Florida supreme court appeared to state a broader definition in allowing a homeowner to enjoin the building of a gasoline station on an adjoining lot:[68]

> Anything which annoys or disturbs one in the free use, possession, or enjoyment of his property or which renders its ordinary use or occupation physically uncomfortable may become a nuisance.

Even the reduction in numbers of such a minor plant can have wide-ranging effects. Moss provides a home for many insect species that help control the population of lower organisms and that, in turn provide food for birds and other animals. Thus, in effect, the pollutants can be responsible for altering the whole life cycle of an area in which they are introduced.

62. In particular, the National Air Pollution Control Administration has urged such suits and has offered technical assistance in their preparation. Address by Richard Farrell, General Counsel, Standard Oil Co. (Indiana) to Association of General Counsel, Washington, D.C., Oct. 6 ,1969 [hereinafter cited at Farrell Address].

63. *See* City of Jacksonville v. Schumann, 199 So. 2d 727 (Fla. 1967).

64. Jones v. Trawick, 75 So. 2d 785 (Fla. 1954).

65. F. HARPER & F. JAMES, THE LAW OF TORTS 64 (1956).

66. *See generally* City of Lakeland v. State *ex rel.* Harris, 143 Fla. 761, 197 So. 470 (1940).

67. 121 Fla. 87, 163 So. 411 (Fla. 1935).

68. *Id.* at 413-14.

It might be analogized that if a landowner's "free use, possession, or enjoyment" of his land was to leave it in its natural state, then activities on neighboring lands that caused alteration or destruction of the natural character of the landowner's property would be a nuisance.[69] Nevertheless, the last clause of the *Mercer* definition, "may become a nuisance," leaves a degree of uncertainty. However, the court later clarified its meaning in *Jones v. Trawick*,[70] in upholding prohibition of a cemetery from a residential area. The court used the definition quoted above except that in place of the phrase "may become a nuisance" it supplanted "*is* a nuisance."[71]

Although it is conceivable that the *Mercer-Jones* definition could encompass resource waste either by ecological disruption or destruction of wilderness areas, a nuisance action thereunder could only be brought by a party whose property interest was impaired.[72] The result would be only an indirect attack on the over-all environmental problem. The *Restatement of Torts* strictly limits a private nuisance to interference with the affected party's use of land.[73] In Florida, such actions are even further restricted; an action will lie only where there is occupation of real property by both parties.[74] Furthermore, nuisance law is designed to protect reasonable uses of land[75] and will not work in favor of unreasonable or ultra-sensitive uses.[76]

Private nuisance suits, while of only limited applicability to environmental problems, do, however, effectively interact with the various pollution statutes. Since a private action is not preempted by such statutes,[77] it can provide a specialized weapon against an offender. Pollution laws are generally designed to regulate a large area of activity and often are inadequate to deal with severe localized problems. Such problems may be better resolved, therefore, in a private action in which equitable relief is available.[78]

The field of public nuisance law, on the other hand, has been limited by applicable pollution statutes. In *Commonwealth v. Glen Alden Corporation*[79] Pennsylvania sought an injunction against the company's practice of burning coal refuse, which caused air pollution. The state supreme court refused to allow the injunction, stating that the Air Pollution Control Act was set up to deal with that type of problem and that to bypass the law in favor of an

69. To illustrate this argument, assume that the Miami jetport (or a similar project) were constructed in such a manner that it obstructed a water flow to a landowner's undeveloped land, resulting in water shortage, disappearance of animal life, and alteration of the character of the land. Ignoring any water law complications, the landowner's argument in nuisance would be that the project unreasonably interfered with his use of the land, which was to preserve it in its natural state.

70. 75 So. 2d 785 (Fla. 1954).

71. *Id.* at 787 (emphasis added).

72. Mercer v. Keynton, 121 Fla. 87, 163 So. 411 (1935).

73. RESTATEMENT OF TORTS §822 (1939).

74. Mercer v. Keynton, 121 Fla. 87, 163 So. 411 (1935).

75. *Id.*, 163 So. 411.

76. *See* Beckman v. Marshall, 85 So. 2d 552 (Fla. 1956).

77. *See* Reynolds Metals Co. v. Martin, 337 F.2d 780 (9th Cir. 1964).

78. *See* Comment, *The Role of Private Nuisance Law in Control of Air Pollution*, 10 ARIZ. L. REV. 107, 112 (1968).

79. 418 Pa. 57, 210 A.2d 256 (1965).

equity suit would thwart the statutory purpose.[80] The court further held that to apply for injunctive relief, a party must show that the delay involved in pursuing the statutory remedy would cause irreparable damage.[81]

Since Florida has enacted a similar pollution statute,[82] the *Glen Alden* rationale may seem appropriate in this state.[83] However, Florida law[84] explicitly provides equitable remedies in cases involving a public nuisance. Thus, when a Florida plaintiff is able to show air pollution amounting to a public nuisance, he probably will be able to obtain injunctive relief as well as the remedies provided by the Florida Air and Water Pollution Control Act.[85]

There are, however, two procedures available in Florida to a private citizen who brings a public nuisance action. First, he can sue in his own behalf, but he must show a special injury different from that of the public at large.[86] Such an action would be similar in effect to a private nuisance suit; but since it would be limited to the specific damage the party incurred, it would be only a collateral attack on the general pollution issue. Second, under Florida Statutes, section 60.05, a citizen may sue in the name of the state to enjoin a public nuisance.[87] The complainant need not allege special injury, but the complainant must be a citizen of the county in which the nuisance exists.[88] However, the wisdom of this limitation is doubtful in view of the wide-ranging effect of ecological damage. Locations geographically remote may be directly and foreseeably damaged by pollution. For example, the south Florida jetport was located in Dade and Collier counties. The question raised by the statute is whether a resident from an adjoining county, for instance, Monroe,[89] could have sued to enjoin any environmental damage incurred there.[90] To date, this question has not been answered by the courts but a combined look at

80. *Id.* at 61, 210 A.2d at 258.

81. *Id.* 210 A.2d at 259.

82. FLA. STAT. ch. 403 (1969).

83. No Florida cases have yet relied upon *Glen Alden*. Pennsylvania has amended its anti-pollution statute to allow equitable remedies. *See* Borough of Brookhaven v. American Rendering, Inc., 434 Pa. 290, 256 A.2d 626 (1969).

84. The Florida Statutes provide criminal penalties and injunctive relief against nuisances that "tend to annoy the community . . . . [or] to the immediate annoyance of the citizens in general . . . ." FLA. STAT. §823.01 (1969). It would seem that disruption of an area's ecological balance (as threatened in the jetport case) with its resultant economic and aesthetic damage would tend "to the immediate annoyance of the citizns in general . . . ." and thus call into operation the Florida public nuisance statute. This result obtains despite the possible advantages a development may bring to the particular locality.

85. FLA. STAT. ch. 403 (1969).

86. Florio v. State, 119 So. 2d 305 (2d D.C.A. Fla. 1960).

87. *See* National Container Corp. v. State, 138 Fla. 32, 189 So. 4 (1939).

88. FLA. STAT. §60.05 (1) (1969).

89. Monroe County lies directly south of Dade and Collier Counties and includes the southern Everglades and Florida Keys.

90. The question is whether possible damage to land use in Monroe County, for example, to tourist trade, fisheries, et cetera, could be enjoined under FLA. STAT. §60.05 (1969) as unreasonable interference with the use of land, resulting in an annoyance to the community. *See* note 84 *supra*. If the answer to this question is affirmative, then it remains to be asked if §60.05 (1) the "county of nuisance" rule, would allow a resident of a county adversely affected to enjoin the activity when it originated in a different county.

Florida Statutes, sections 60.05 and 823.01,[91] would logically indicate that a nuisance exists where the damage is done, not solely where it originates.

In determining nuisance remedies for environmental damage, courts will attempt to balance the interests of the offender and the injured party. This is basically a matter of priorities, with courts seeking to promote the greatest good for the greatest number.[92] Of course, the wide-ranging effects of pollution and resource waste are also factors to be considered. Thus, a broad action brought by or on behalf of the state will be more likely to result in injunctive relief than private nuisance suits in which courts have been willing to award damages but have generally refused to grant injunctions.[93] So far, however, airports and similar local developments have not been challenged under the public nuisance statutes.[94] A fuller use of nuisance law in this area should at least provide a method of collaterally attacking pollution and resource waste.

Inverse Condemnation

Actions for inverse condemnation have been effective in recent years, primarily against airport noise and pollution. Although the theory is to force governmental condemnation and payment for a property right already taken, the basis of such actions is usually in nuisance.[95] Where a complainant shows that an activity such as airport pollution constitutes a nuisance, courts have found that the interference amounted to the taking of an easement for which compensation must be paid.[96] Inverse condemnation was originally utilized in suits against railroads and highway commissions, which used private property without undergoing a condemnation procedure. In 1898 in *Florida Southern Railway v. Hill*[97] the Florida supreme court for the first time endorsed inverse condemnation, holding that a landowner could bring suit to require a

91. In listing the factors required for a public nuisance, the emphasis in the Florida statutes is upon the persons or community affected. Therefore, the implication is that the existence or nonexistance of nuisance is determined at the place the effects of the alleged nuisance are felt. *See* FLA. STAT. §823.01 (1), (2) (1969).

92. *See generally* Juergensmeyer, *Control of Air Pollution Through Assertion of Private Rights*, 1967 DUKE L. J. 1126.

93. *See, e.g.*, Boomer v. Atlantic Cement Co., 30 App. Div.2d 480, 294 N.Y.S.2d 452 (3d Dep't 1968); *cf.* Milling v. Berg, 104 So. 2d 658 (2d D.C.A. Fla. 1958).

94. City of Miami Beach v. Kline, 189 So. 2d 503 (3d D.C.A. Fla. 1966), suggests an alternative approach. The court granted an injunction to prevent the city from dumping garbage on private property, declaring that the balance of convenience doctrine was inapplicable since the city had failed to show public necessity for its action. In environmental cases, this argument could be applied to building or expansion programs by requiring justification of the location and the project itself in terms of necessity. If environmental disruption could be shown as a likely result, the local authority would have to show the necessity of causing the disruption.

95. *See e.g.*, City of Jacksonville v. Schumann, 199 So. 2d 727 (Fla. 1967). The court's decision in favor of the complaining landowner was based upon a determination that the nearby airport constituted a nuisance.

96. *Id.*

97. 40 Fla. 1, 23 So. 566 (1898).

railroad (with eminent domain power) to compensate him for land taken.[98] A similar result was reached in *Stanton v. Morgan*,[99] a 1937 case in which a county was required to pay for private property taken for highway construction.[100]

Utilization of inverse condemnation to combat airport pollution is comparatively new. The general argument for a plaintiff-landowner in such cases is that noise, vibration, pollutants, or other interference with the use of his property constitutes the taking of an interest, an "avigation easement," for which he should be compensated.[101] Following the rationale of the *Florida Southern Railway* and *Stanton* decisions, the airport must then compensate for the interest taken.[102]

Brooks v. Patterson,[103] an early Florida case, indicated that as long as an airport was operated in the usual, normal, and customary manner it could not be declared a nuisance. However, an earlier Supreme Court decision seemed to establish a different criterion.[104] In *United States v. Causby*[105] a farmer claimed his land use was hampered by the noise and vibration emanating from an adjacent military airfield. The Court recognized the inverse condemnation action without limiting it to the "usual . . . manner" restriction adopted in *Brooks*.[106] The *Brooks* case, it should be noted, did involve a physical invasion of the landowner's airspace, but the Florida court evidently found that the airport's normal operation did not extraordinarily affect the existing use.[107]

Florida law has now been reconsidered to the extent that an airport today may be a nuisance sufficient to support inverse condemnation suits, even when operated in a normal, customary manner.[108] Moreover, noise alone is now considered to be a sufficient invasion of property rights to support a nuisance action.[109] The limitation of inverse condemnation as a weapon against environmental damage is the remedy it affords. Only damages have been awarded; no

98. The court held: "Even where the original taking is tortious, because against the consent of the owner, and without condemnation, it is, nevertheless referable to the power of eminent domain whose express provisions . . . require that compensation be made for the property taken. The company can have no just cause of complaint if the landowner ratifies such tortious taking by electing to treat its possession thereunder as valid, and asking to be compensated." *Id.* at 11, 23 So. at 570.

99. 127 Fla. 34, 172 So. 485 (1937).

100. *See also* Rosenbaum v. State Road Dep't, 129 Fla. 723, 177 So. 220 (1937).

101. See Hillsborough County Aviation Authority v. Benitez, 200 So. 2d 194, 199 (Fla. 1967).

102. *Id.*; City of Jacksonville v. Schumann, 167 So. 2d 95 (1st D.C.A. Fla. 1964), *aff'd*, 199 So. 2d 727 (Fla. 1967).

103. 159 Fla. 263, 31 So. 2d 472 (Fla. 1947) (landowner unsuccessfully sought to enjoin aircraft flights less than 500 feet above his land).

104. 328 U.S. 256 (1946).

105. *Id.* at 259.

106. *See Id.* at 266.

107. *See* Alekshun, *Aircraft Noise Law*, 55 A.B.A.J. 740 (1969).

108. *See* Hillsborough County Airport Authority v. Benitez, 200 So. 2d 194 (Fla. 1967).

109. City of Jacksonville v. Schumann, 167 So. 2d 95 (1st D.C.A. Fla. 1964), *aff'd*, 199 So. 2d 727 (Fla. 1967).

suit has resulted in the abatement of the nuisance cited. It is possible, however, that an inverse condemnation suit could achieve such a result extralegally.[110]

In *City of Pompano Beach v. Beatty*[111] landowners sued to enjoin construction of improvements on a strip of land adjacent to, but not part of, a highway right of way.[112] The Second District Court of Appeal, finding that improvements had been constructed on private property, ruled that the city must either remove the improvements or compensate the landowners for the property taken.[113] Although the court left the choice to the city, the decision leaves open the possibility that a court could require the removal of the interference. By analogy, an airport authority might be required to remove an airport causing interference with the use of adjacent land, although it is concededly unlikely.

In inverse condemnation suits, there is no direct balancing of interests required in setting damage awards.[114] The courts need not consider the landowner's rights vis-a-vis the social utility of the airport since only monetary damages, to the extent of the property value taken, are awarded. Balancing on a broader scale may be seen in the court's reluctance to expand the application of inverse condemnation beyond airport pollution cases. For example, in *Northcutt v. State Road Department*[115] the court refused to allow an award for damages caused by highway noise and vibration. On the other hand, the differentiating factor may be the extent of interference. In any case it is perhaps this same reluctance that has kept courts from granting the injunctive relief suggested above. If so, it will be necessary to look elsewhere for a complete means to abate or prevent the kind of damage that was threatened by the jetport development. Nonetheless, there is a place for inverse condemnation in the struggle for environmental preservation, and such actions should be considered, not only by those attacking jetport-type projects, but also by authorities who must plan the developments. The possibility of an inverse condemnation suit may force environmental responsibility into the planning stage of airport projects.[116]

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110. Changing priorities could allow such a result. In the past, the rights of an individual landowner have had to accommodate the good of the majority. As our priorities are changed by necessity, courts may view the complainant's side as representing not only private rights but also environmental interests.

111. 117 So. 2d 261 (2d D.C.A. Fla. 1965).

112. The city had neglected to condemn land necessary for pipelines and other improvements, but used private land adjacent to its right-of-way for such improvements until the error was discovered by landowners. *Id.* at 262.

113. "The Court may upon a finding that a governmental agency with power of Eminent Domain has constructed improvement on private property be required to remove the improvement or proceed to exercise its power of Eminent Domain . . . ." *Id.* at 263.

114. Thornburg v. Port of Portland, 244 Ore. 69, 415 P.2d 750 (1966).

115. 209 So. 2d 710 (3d D.C.A. Fla. 1968). Comment, *Eminent Domain: Inverse Condemnation—What Constitutes A Taking?*, 21 U. FLA. L. REV. 257 (1968).

116. Although inverse condemnation suits have most frequently involved airports, such actions could also affect planning for any type of public development, particularly projects with high pollution potential such as utility and sewage plants.

Trespass

While rarely used in environmental cases, the theory of trespass provides another possible basis for action.[117] Unlike a nuisance action, in which damages must be shown,[118] a complainant in a trespass action need not prove damages in order to prevail.[119] Proof of the intrusion is sufficient to make out a cause of action. A trespass action against a polluter is appropriate on the theory that pollutant particles settling on a plaintiff's land constitute an actionable trespass. Although there are no reported Florida cases, a federal district court in Oregon endorsed this argument in *Fairview Farms, Inc. v. Reynolds Metals Co.*[120] wherein a dairy farm sought damages and injunctive relief. The court awarded damages, but after applying a balancing of equities test refused to grant an injunction.[121]

While environmental trespass actions appear to have been limited to private suits, it is probable that they could be expanded to apply to governmental as well as to industrial offenders. This is particularly true in simple pollution cases; however, the balancing test illustrated by *Fairview* would probably restrict the value of the remedy as a preventive measure. This restriction accentuates the prevalent belief that trespass is essentially a private action, not designed to protect the public generally. In cases of governmental damage it is likely that a trespass action would achieve the same result as an inverse condemnation suit, with the important additional aspect that a trespass may be continuing and thus the subject of multiple actions.[122] While inverse condemnation is typically based on the nuisance doctrine,[123] many of the decisions are couched in the terminology of trespass.[124]

Despite the limited relief afforded by a trespass action, it may still be valuable in focusing public attention on the offending activity and forcing the agency responsible to justify it in court. For example, the construction of the Miami jetport may have altered the flow of surface water in the Everglades, thus disrupting the ecology of the area. A particular landowner might have difficulty showing any damage to his property caused by an increased flow of water, but he could still bring a trespass action and receive at least

117. *See generally* Juergensmeyer, *supra* note 92, at 1132.

118. *See, e.g.*, Lawrence v. Eastern Air Lines, 81 So. 2d 632 (Fla. 1955).

119. Juergensmeyer, *supra* note 92, at 1138.

120. 176 F. Supp. 178 (D. Ore. 1959). *See also* Martin v. Reynolds Metals Co., 221 Ore. 86, 342 P.2d 790 (1959), *cert. denied*, 362 U.S. 918 (1960).

121. Fairview Farms, Inc. v. Reynolds Metals Co., 176 F. Supp. 178, 180 (D. Ore. 1959). The landowner sought to enjoin the emission of fluorides from the defendant's plant. The court balanced the landowner's loss against the plant's value to society to determine damages. See Jurgensmeyer, *supra* note 92, at 1140.

122. *See* text accompanying notes 96-116 *supra*.

123. *See* notes 95-96 *supra* and accompanying text.

124. In United States v. Causby, 328 U.S. 256 (1946), the Supreme Court found physical intrusion of plaintiff's property to be a requisite of recovery and denied the landowner relief from the noise of a military airbase. However, in Hillsborough County Aviation Authority v. Benitez, 200 So. 2d 194 (Fla. 1967), an inverse condemnation action was successful and the landowner was compensated for the invasion of his property by low flying airplanes. *See also* Alekshun, *supra* note 107, at 741.

a nominal damage award. The byproduct of publicity might be more effective than the action itself, however. Where pollution and environmental control agencies are hesitant to act, such suits could spur them into activity while serving the dual purpose of protecting landowners from the effects of the pollution. Victor Yamacone of the Environmental Defense Fund has declared: "It's the highest use of the courtroom . . . to focus public attention and disseminate information about intolerable conditions."[125]

Mandamus

Another legal tool available to individuals or groups combating environmental spoilage is the writ of mandamus. While the survey of statutory law that follows will indicate the writ's potential usage in specific situations, examination of its nature and scope at this point will indicate its potential usefulness in the field of environmental law generally.

Mandamus is a common law writ[126] that requires the performance of official duties that an officer charged by law to perform has refused or otherwise failed to do.[127] Issuance of a writ of mandamus is not a right, but is within the discretion of the court,[128] which bases its decision on equitable principles.[129] Generally, mandamus will issue only to enforce a ministerial act.[130] Where the duty is discretionary, mandamus will not lie.[131] However, a writ will issue to compel the *use* of discretion, where a statute requires it, even though it cannot direct or dictate the outcome of that discretion unless abused.[132] Further, if use of discretion is shown to be clearly arbitrary or erroneous, mandamus will apply.[133]

Another characteristic of the writ is that it will issue only where there is no other adequate remedy available.[134] However, while the availability of an

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125. Conservation Foundation Letter, Sept. 30, 1969.

126. *See, e.g.*, Vassar v. State *ex rel.* Gleason, 139 Fla. 213, 190 So. 434 (1939).

127. State *ex rel.* Buckwalter v. City of Lakeland, 112 Fla. 200, 150 So. 508, 511 (1933). *See also* Overstreet v. State *ex rel.* Carpenter, 115 Fla. 151, 155 So. 926 (1934).

128. State *ex rel.* Long v. Carey, 121 Fla. 515, 164 So. 199 (1935); Bradenton v. State, 118 Fla. 838, 160 So. 506 (1935).

129. State *ex rel.* Dixie Inn v. City of Miami, 156 Fla. 784, 24 So. 2d 705 (Fla. 1946).

130. City of Miami Beach v. State *ex rel.* Epicure, Inc., 148 Fla. 255, 4 So. 2d 116 (1941). The court defined a "ministerial act" as follows: "A ministerial act is distinguished from a judicial act in that in the former the duty is clearly prescribed by law, the discharge of which can be performed without the exercise of discretion. If the discharge of the duty requires the exercise of judgment or discretion the act is not ministerial and mandamus will not lie." *Id.* at 256, 4 So. 2d 117.

131. State *ex rel.* Curley v. McGeachy, 149 Fla. 633, 6 So. 2d 823 (1942).

132. Florida C. & P. Ry. v. State, 31 Fla. 842, 13 So. 103 (1893).

133. State *ex rel.* Roberts v. Knox, 153 Fla. 165, 166, 14 So. 2d 262, 264 (1943).

134. City of Coral Gables v. State, 44 So. 2d 298 (Fla. 1950); State *ex rel.* Palmer v. Atkinson, 116 Fla. 366, 156 So. 726 (1934). The court in *Palmer* stated: "The relator must have a clear legal right to the enforcement of the officer's duty. And there must exist no plain, complete, and adequate method of redress other than mandamus directed to the delinquent officer." *Id.* at 375, 156 So. at 730.

action at law for damages will bar mandamus,[135] the fact that a party may have an equitable remedy will not.[136] Although this requirement will bar those who also seek damages in trespass or nuisance actions, it nevertheless provides a distinct means of combating spoilage of the environment. Conservationists who opposed the jetport project were unable to bring the common law suits for damages discussed above, yet they could have sued for a writ of mandamus to require compliance with state or local pollution standards or the use of requisite discretion in planning local improvements.[137] The availability of an injunction under Florida's public nuisance law[138] may not prevent a mandamus action since such a suit would provide only an equitable remedy.[139] In view of the availability of mandamus to compel the performance of a statutory duty,[140] examination of statutory law will help to clarify its usage.

STATUTORY ACTIONS

Private actions at common law can seldom control the total environmental problem effectively. Comprehensive solutions require the participation of one or more governmental agencies. In response to this need, state and federal governments have nearly tripled their budgets for environmental control activities since 1967.[141] These agencies have encouraged individual and class actions to promote compliance with environmental standards.[142] However, the most comprehensive attacks on pollution and other environmental damage are increasingly[143] made directly by governmental agencies or through legislative enactment. The statutes discussed below are representative of legislation that can be utilized to cope with the environmental crisis.[144]

135. Madruga v. Borden Co., 63 Cal. 2d 116, 146 P.2d 273 (Dist. Ct. App. 1944); *cf.* State *ex rel.* Roberts v. Knox, 153 Fla. 165, 14 So. 2d 262 (1943). While this is the general rule, courts have held it applicable only where the action for damages provides an adequate remedy. *See* Head v. Waldrup, 197 Ga. 500, 510, 29 S.E.2d 561, 567 (1944).

136. *See* State *ex rel.* Long v. Carey, 121 Fla. 515, 164 So. 199 (1935). The court stated that an available remedy in equity "may be considered by . . . the court in the exercise of its discretion . . . ." *Id.* at 532, 164 So. 206. *But see* State *ex rel.* Allen v. Rose, 123 Fla. 544, 167 So. 24 (1936).

137. This remedy will be discussed in terms of specific application in the statutory law section following.

138. FLA. STAT. §60.05 (1969).

139. *See* State *ex rel.* Long v. Carey, 121 Fla. 515, 164 So. 199 (1935), holding that equitable actions may not bar issuance of a writ of mandamus.

140. FLA. STAT. §§60.05 (1), (2) (1969) specify injunctive relief.

141. Farrell Address, *supra* note 62.

142. *Id.* at 8.

143. Juergensmeyer, *supra* note 92, at 1156.

144. The statutes to be discussed are representative of many that are designed to help preserve natural resources. *See* text accompanying notes 49-53 *supra*. Other pertinent acts include: Oil Pollution Act of 1924, 33 U.S.C. §§431-37 (1964); Water Resources Planning Act, 42 U.S.C. §1962 (Supp. 1, 1965); Water Pollution Control Act, 33 U.S.C. §466 (1964); Wild and Scenic Rivers Act, 16 U.S.C.A. §§1271-87 (Supp. 1971).

Federal Laws

Fish and Wildlife Coordination Act.[145] In the field of water resource development the Fish and Wildlife Coordination Act has elevated wildlife conservation to national policy.[146] The Act applies not only to pollution but also to other forms of ecological disruption. Section 662a of the Act provides that before any department of the government or agency under federal license controls or modifies a body of water, it must first plan for the protection of wildlife resources.[147] This requirement applies not only to the United States Fish and Wildlife Service, but to any agency, federal or state, operating under a federal license.

The force of the statutory policy may be vitiated first, by an agency's failure to comply[148] and second, by the failure of the Department of the Interior to require such compliance.[149] Nonetheless, the statute requires that an agency subject to its provisions "shall consult" with the Fish and Wildlife Service;[150] and if the Department of the Interior fails to require compliance, interested citizens might still obtain enforcement by petitioning for a writ of mandamus as provided by the Judiciary and Judicial Procedure Act.[151]

The policy of the Fish and Wildlife Coordination Act is to promote awareness and concern for wildlife resources. Although its attack on environmental spoilage is indirect,[152] its stimulation of prior planning makes it a valuable tool in preventing such damage. For example, in a case such as the Miami jetport, a mandamus action might be brought to insure that the required consultations and studies be made before construction begins.

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145. 16 U.S.C. §§661-64 (1964).

146. See notes 49-53 *supra* and accompanying text for statutes with similar policy statements.

147. Section 622(a) provides, in part: "[W]henever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service . . . with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development."

148. This is not an unlikly occurrence. Departments may not be aware of the requirement or they may simply ignore it. For example, §662(a) requires investigation of possible wildlife damage as a part of the engineering report concerning projects under the Act. In the jetport case it was charged that the Federal Aviation Administration, which is subjct to the Act, did not substantially comply with this section. Sierra Club Memorandum: The Everglades Jetport Matter, Sept. 2, 1969, at 9 [hereinafter cited as Memorandum].

149. The Fish and Wildlife Service is an agency of the U.S. Department of the Interior.

150. 16 U.S.C. §662(a) (1964).

151. 28 U.S.C. §§1350 *et seq.* (1964).

152. The Act is not designed to cure pollution and other environmental problems; its language clearly reveals that its purpose is to require advance planning in order to protect fish and other wildlife resources.

Air Pollution Control Act.[153] With its purpose being of establishing and enforcing standards of air quality, this Act not only enables the federal government to combat air pollution, but also encourages state and local participation.[154] Where pollution occurs, the federal government is directed to assist state efforts to combat it[155] or, if the state fails to act, the United States Attorney General is authorized to bring suit on behalf of the United States "to immediately enjoin any contributor to the pollution . . . or to take such other action as may be necessary."[156]

While the major thrust of the statute is an effort to eradicate industrial pollution, the term "any contributor" makes it clear that the Act also applies to governmental polluters as well. Thus, in jetport-type cases where the federal government cannot control a local project by withholding funds, it may invoke the provisions of this statute to enforce pollution control standards. If the federal government fails to act, it is possible that a mandamus action could force the application of the Act. However, a writ of mandamus will not issue to compel the Attorney General to enjoin alleged pollution absent a determination that the specific procedure prescribed by the Act is ministerial rather than discretionary.[157] Likewise, no writ will issue to force officials to declare that an activity is polluting the air. However, it can be argued that the establishment of clean air standards[158] has removed the element of discretion in that activities that do not conform to the standards constitute pollution per se. If such is the case, the duty of officials to request that the Attorney General sue for injunction is ministerial and thus potentially subject to a mandamus action.

Although no use of this approach has yet been reported, it may serve as a means not only of enjoining pollution but also of bringing it to the attention of federal officials, since concerned local groups may be the first to realize that an incident of pollution exists or is imminent. Even though the statute concerns only air pollution, its broad scope permits a comprehensive means of controlling environmental spoilage.

Transportation Act of 1967.[159] Most of the Department of Transportation's (DOT) power to prevent environmental nuisance derives from its power to withhold funds from local projects. Its policy and power in this regard derives from section 1653 (f) of the Transportation Act, which established a national policy to preserve natural beauty and requires that environmental factors be

153. 42 U.S.C. §1857 (Supp. 1, 1965). The Water Pollution Control Act, 33 U.S.C. §466, *as amended* 1966, is similar in content and design to the Air Pollution Act and therefore will not be discussed.

154. *See* 42 U.S.C. §§1857d (b) (Supp. 1, 1965).

155. 42 U.S.C. §§1857 (b) (3) (Supp. 1, 1965).

156. 42 U.S.C.A. §1857d (k) (1969).

157. See Florida C. & P. Ry. v. State, 31 Fla. 482, 13 So. 103 (1893). *See also* note 130 *supra* for a definition of "ministerial act" as set forth in City of Miami Beach v. State *ex rel.* Epicure, Inc., 148 Fla. 255, 4 So. 2d 116 (1941).

158. 42 U.S.C.A. §1857c-2 (b) (1) (1969) requires the establishment of air quality standards.

159. 49 U.S.C. §§1651-59 (Supp. V, 1965-1969).

carefully considered in planning development programs.[160] The Act applies whenever a transportation project subject to it requires the use of any park, recreation area, or wildlife refuge,[161] and significantly, it covers not only land *taken* for development but also for land *used*. Although the Act does not specifically define the term "use," it has been argued that excessive noise, airplane overflights, settling pollution, and other ecological disruptions constitute uses under the Act.[162] Proponents of this view point to inverse condemnation cases in which airplane overflights[163] and excessive noise[164] have been termed aviation easements, which are classified as a type of land use. Apparently no court has yet construed this term, but if the broad definition as proposed by solicitor of the DOT is given it, the Act will protect against a wide range of environmental abuses. Although not fully tested, an application of the Act consistent with this construction was strongly urged in the jetport case[165] on the ground that damage done to the Everglades National Park would constitute a "use" of park property under the Act.[166]

In some cases, the DOT can require compliance with the Act even without a grant of funds as leverage. A possible example lies in the area of airport construction. Such facilities are regulated by the Federal Aviation Administration (FAA) to the extent that no airport can be built without a "Determination of No Objection" from the FAA.[167] This amounts to a federal license. Traditionally, in making a "Determination of No Objection" the FAA's decision has been "based exclusively on considerations of the safe and efficient use of airspace by aircraft."[168] However, the FAA is an agency of DOT and as such is required to conform to section 1653 (f) of the Transportation Act. Although some officials doubt that FAA licensing can be put to such a purpose,[169] conservationists have suggested that consideration of section 1653 (f) should also be made a prerequisite of FAA approval.

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160. 49 U.S.C. §1653 (f) (Supp. V, 1965-1969) provides: "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands . . . . [T]he Secretary shall not approve any program or project which requires the *use* of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm . . . resulting from such *use*." (Emphasis added.)

161. *Id.*

162. Memorandum, *supra* note 148, at 9.

163. Griggs v. Allegheny County, 369 U.S. 84 (1962); Hillsborough County Aviation Authority v. Benitez, 200 So. 2d 194 (Fla. 1967).

164. City of Jacksonville v. Schumann, 199 So. 2d 727 (Fla. 1967).

165. *Jetport Hearings, supra* note 1, at 128-29.

166. Regarding the Act's application to the jetport, Dr. Elvis Stahr, President of the National Audubon Society, remarked: "[I]t would be an ironic thing, indeed, if the law were interpreted to say that the abuse of land can be tolerated because it is not a use of land." *Id.* at 141.

167. 49 U.S.C. §1350 (1964).

168. *See* 14 CFR §157.7 (rev. 1970).

169. Assistant Secretary of DOT James Braban has said: "I don't believe that legally the FAA can revoke their approval of a tower needed for the safety of people using aircraft as a means of stopping . . . an airport." *Jetport Hearings, supra* note 1, at 41. The sugges-

There seems to be support for this approach in other agency actions. In addition, private citizens or groups may possibly obtain standing to require the FAA to make the considerations required by section 1653 (f). In *Scenic Hudson Preservation Conference v. Federal Power Commission*[170] a private group challenged the Federal Power Commission's (FPC) grant of a license for construction of a hydroelectric plant. The Second Circuit Court of Appeals held that while the court generally was not concerned with the substance of FPC decisions, it nevertheless recognized a duty to insure that the FPC's decisions were based on the considerations required by statute.[171] Since the commission had ignored relevant factors, and failed to consider alternatives as required, the licensing order was set aside.

In *Palisades Citizens Association, Inc. v. Civil Aeronautics Board*[172] a citizens group successfully challenged a Civil Aeronautics Board route award. The court stated:[173]

> No agency entrusted with determinations of public convenience and necessity is an island. . . . Its decisions affect not only its primary interest groups but also the general public at large. . . . *To say that the environmental impact of that service is not a proper consideration of the Board in its certification hearing is folly.*

Both of the preceding cases are similar to the FAA situation. *Palisades,* in particular, indicates that not only the particular agency requirements but also those of the general public should be considered. Similarly, the FAA should also be required to consider environmental factors in accordance with section 1653 (f) in its licensing decisions.

Significant, too, is the fact that both *Scenic Hudson* and *Palisades* were successfully brought by private groups even though serious questions of standing were involved. In *Scenic Hudson,* the FPC claimed that the conservation group had no sufficient interest.[174] The court held otherwise, stating that groups need not have a personal economic interest to be "aggrieved parties" within the meaning of the Administrative Procedure Act.[175] In a later case, *Road Review League v. Boyd*[176] a federal district court held that even where there was no statutory provision for judicial review, statutory language calling for environmental consideration meant that conservation groups should be afforded standing to sue.[177] Thus, in FAA licensing cases (and other situations

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tion had been made that environmental studies be made before granting approval of a project. *Id.*

170. 354 F.2d 608 (2d Cir. 1965). The action was brought under the Federal Power Act, 16 U.S.C. §825p (1964) providing for judicial review of FPC decisions.

171. 354 F.2d at 613.

172. 420 F.2d 188 (D.C. Cir. 1969).

173. *Id.* at 191 (emphasis added).

174. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 615 (2d Cir. 1965).

175. Administrative Procedure Act, §10, 5 U.S.C. §1009 (a) (1964).

176. The court granted standing to the civic group, but ruled that its challenge to a federal highway administrator's approval of right-of-way for an interstate highway failed to show arbitrariness. 270 F. Supp. 650 (S.D.N.Y. 1957). *See* 23 U.S.C. §§101 (b), 109 (a) (1964).

177. 270 F. Supp. at 652. *See also* Conservation Foundation Letter, Sept. 30, 1969, at 4.

in which a federal agency must license, certify, or approve a project) the agency can be compelled to consider environmental factors.[178] The FAA could, for example, have required the Dade County Port Authority to make adequate provisions for ecological protection before granting the jetport a "Determination of No Objection." This was not done, possibly because neither the FAA nor its parent, DOT, were aware of the application of United States Code, section 1653 (f), at the time. In future jetport-type cases, however, the experiences of *Scenic Hudson, Road Review League,* and the various statutes and agencies to which they apply should prove educational.

Florida Law

In Florida, statutory control of pollution is primarily effected through the Air and Water Pollution Control Act,[179] which provides, *inter alia,* that once a substantial pollution problem has been identified notice must be served on the offender by the Pollution Control Comission.[180] This notice must contain a statement of the regulation violated and the corrective measures necessary. Thereafter, a hearing will be held if requested by the offending party,[181] and after such hearing the Commission shall either affirm or modify its preliminary decision (contained in the notice).[182] Florida statute, section 403.131 deals with noncompliance:

> If preventative or corrective measures are not taken in accordance with any order of the commission, or if the director finds that a generalized condition of air or water pollution exists and that it creates an emergency requiring immediate action to protect human health and safety, the director shall institute proceedings for injunctive relief. . . . Such injunctive relief may include both temporary and permanent injunctions.

The statute also hold a polluter civilly liable to the state for (1) damage caused, (2) cost of investigating the damage, and (3) restoration.[183] This provision affords the state great flexibility in dealing with a wide range of pollution problems, and although the statute creates no right of action for individuals, an interested party may seek a writ of mandamus to force the Commission to act if it fails to perform its statutory functions.

In Florida, a person must have a peculiar interest to assert private rights through a mandamus petition,[184] but he needs no such interest if he asserts public rights.[185] Thus, any interested citizen may petition for mandamus in

178. The emergence of this approach will greatly aid the cause of conservationists because of the broad range of federal permit and licensing requirements. *Scenic Hudson* and *Road Review League* are indications of the trend.

179. FLA. STAT. ch. 403 (1969).

180. FLA. STAT. §403.121 (1969).

181. FLA. STAT. §403.121 (1) (1969).

182. FLA. STAT. §403.121 (2) (1969).

183. FLA. STAT. §403.141 (1) (1969).

184. Board of Pub. Instruction v. State, 150 Fla. 213, 7 So. 2d 105 (1942).

185. *Id.,* 7 So. 2d 105. *See also* text accompanying notes 172-179 *supra.*

order to enjoin pollution that affects public health.[186] The rule that mandamus actions cannot compel the performance of discretionary duties[187] may be overcome on the theory that enforcement of pollution standards should be considered a ministerial, rather than discretionary, duty and should therefore be enforceable with mandamus.[188]

The Florida statute is adequate to deal with the problems for which it was intended and is a potential means for individual action as well. Unfortunately, its scope is narrowed by its own terms, which require that, to be actionable, pollution must create an "emergency requiring immediate action to protect human health or safety."[189] Other pollution, different in kind or degree, would not be subject to regulation pursuant to the statute. Moreover, the pollution statute disregards other types of environmental problems. Assuming, for instance, that the jetport were completed and caused the environental damage that conservationists feared, action under the statute could alleviate the air pollution caused by jet exhausts and water pollution caused by sewage and pesticides. However, the Act could not effect abatement of the obstruction of surface water, harm to wildlife, disruption of the ecological balance, or physical destruction of the wilderness area itself. These problems could be dealt with, more or less effectively, by nuisance, trespass, or related actions; but there is presently no statutory method of preventing them, except possibly by the public nuisance statute.[190]

Other possible actions might be responsive to environmental spoilage;[191] however, many of these are of very limited application, based upon unique location or circumstances,[192] and thus will not be considered here. Other remedies against pollution appear to be developing,[193] but because they presently are in a conjectural state, they too will be left for further study. Other

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186. FLA. STAT. §403.121 (1969).

187. State v. McGeachy, 149 Fla. 633, 6 So. 2d 823 (1942).

188. *See generally* text accompanying notes 130-133 *supra.*

189. FLA. STAT. §403.131 (1969).

190. FLA. STAT. §§60.05, 823.01 (1969).

191. *See, e.g.,* statutes listed note 144 *supra.*

192. The Everglades region presents relatively unique waterlaw problems. *See* Memorandum, *supra* note 148, at 4-6.

193. Some pollution control agencies have advocated the development of a new tort: "damage to health from air pollution." Such a tort would be a "more effective and more readily recognized remedy" than nuisance or trespass. Farrell Speech, *supra* note 62, at 9. This argument has never been asserted in court, however the likelihood of its success is probably remote.

A more persistent argument is that the ninth amendment to the Constitution should apply in environmental control cases. The amendment provides that "the enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people." It is argued that the right to an unpolluted environment is reserved to the people. Professor E. F. Roberts of the Cornell Law School has stated: "[T]he enunciation of such a right would require every agency of government . . . to review their [*sic*] plans to make certain that their activities did not actually exacerbate the deteriorating environment." Conservation Foundation Letter, Sept. 30, 1969, at 8. No reported cases have yet reflected this view.

remedies have been exhaustively studied elsewhere.[194] Survey of the major remedies revealed both overlapping and gaps in the various areas of environmental law.[195] Perhaps further development of this field will fulfill the need for protection of currently unprotected areas of our environment.

RECOMMENDATIONS

Eminent Domain

In order to more fully implement statutory environmental control, Florida should enact legislation expressly authorizing the state to condemn the lands of counties and municipalities where necessary to effect the policy espoused in article II, section 7, of the Florida Constitution.[196] Although apparently unprecedented, the state policy and analogous case law indicate that such a use of the eminent domain power would be legitimate. Once land was acquired, the state could either use it for park and recreational areas or sell it back into private ownership with specified restrictions on its use.

Eminent domain is an incident of sovereignty,[197] and as such may be exercised against lower governmental units as well as private landholders. Accordingly, the federal government has taken land belonging to a state,[198] state from city,[199] and county from city.[200] The scarcity of reported cases indicates that this use of the power is exercised with caution and moderation.[201] In order to be lawfully condemned, land must be intended for a public use.[202] Determination of public use is ultimately a decision of the courts,[203] although legislative definitions of the term are given presumptive force.[204] The United States Supreme Court, in *Old Dominion Land Co. v. United States*,[205] ruled that a legislative decision is "entitled to deference until it is shown to involve an impossibility."[206]

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194. For an in-depth discussion of the technique of appealing condemnation cases, *see* Rohan, *Preparation and Presentation of a Condemnee's Viewpoint*, 44 ST. JOHNS L. REV. (1969). For a survey of the strict liability field, see Juergensmeyer, *supra* note 92, at 1148.

195. For example, of the several legal theories, including nuisance, inverse condemnation, and federal and state pollution laws, that may be utilized to combat pollution none can be used directly to prevent per se destruction of natural resources.

196. See note 49 *supra*.

197. *See, e.g.*, United States v. Carmack, 329 U.S. 230 (1946).

198. *In re* United States, 28 F. Supp. 758 (W.D.N.Y. 1939).

199. State Highway Comm'n v. City of Elizabeth, 102 N.J. Eq. 221, 140 A. 335 (Ch. 1928).

200. Village of Richmond Heights v. Board of County Comm'rs, 112 Ohio App. 272, 166 N.E2d 143 (Ct. App. 1960); Borough of Barnegat Light v. Board of Chosen Freeholders, 44 N.J. Super. 332, 130 A.2d 409 (1957).

201. *Cf.* A. JAHR, LAW OF EMINENT DOMAIN: VALUATION AND PROCEDURE §22 (1953).

202. *E.g.*, United States v. 1177 Acre of Land, 51 F. Supp. 84 (S.D. Fla. 1943).

203. *E.g., id.*

204. *In re* United States, 28 F. Supp. 758 (W.D.N.Y. 1933). *See also* United States *ex rel.* TVA v. Welch, 327 U.S. 546 (1946).

205. 269 U.S. 55 (1925).

206. *Id.* at 66.

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In view of the Florida constitutional policy expressed in article II, section 7, the policy statements contained in the Air and Water Pollution Control Act, and the national policy statements found in the various federal statutes, condemnation to protect the environment would within reasonable limits, probably be considered a public use. In addition to various legislative declarations, several eminent domain cases have also indicated that environmental control is, or should be, a public use. In *Via v. State Commission on Conservation & Development*[207] a federal district judge noted that "the furtherance of the health, pleasure, and recreational facilities of its people is a function of the state."[208] In *United States ex rel TVA v. Welch* the Supreme Court upheld condemnation of land, under the TVA project, for a national park.[209] The Florida supreme court reached a similar result in *Alford v. Finch*[210] in which the court recognized the right of the Game and Fresh Water Fish Commission to take land for a game preserve.[211]

All the preceding cases involved the taking of land from private sources; yet the same principle would apply if the condemnee were an inferior governmental unit. A higher government may always take from a lower level. However, when the property is already in public use it cannot be condemned unless (1) it is done by the state in its sovereign capacity,[212] or (2) there is express legislative authority for the taking.[213] For example, the state could condemn a county's airport property in its own behalf, but the State Road Department could do so only with specific statutory authority.

The state could probably take land from a county or municipality, even without an enabling statute, where the present use endangered the environment; however, concerned agencies, such as the Department of Natural Resources,[214] could not. Moreover, the power may never be exercised without express statutory intent to authorize its use. This is the probable reason why use of the eminent domain power was not even suggested in either the jetport case or any past case involving pollution or destruction of natural resources. Hopefully, the power would need little exercise; its deterrent effect would serve to enforce requisite consideration of the environment in local development projects.

The North Carolina Alternative

An alternative to the eminent domain plan would be adoption, or modified adoption, of article 7, section 6, of the North Carolina Constitution, which

207. 9 F. Supp. 556 (S.D. Va. 1935).

208. *Id.* at 562. A similar pronouncement was made in *In re* United States, 28 F. Supp. 758 (W.D.N.Y. 1939); however, the court specifically related "flood control, re-forestation, and prevention of soil erosion . . . ." to the general welfare. *Id.* at 764.

209. 327 U.S. 546 (1946).

210. 155 So. 2d 790 (Fla. 1963).

211. *Id.* at 794.

212. *E.g.*, State v. Ouachita Parish School Bd., 242 La. 682, 138 So. 2d 109 (1961).

213. United States v. Certain Parcels of Land, 196 F.2d 657 (4th Cir. 1952). *See generally* A. JAHR, *supra* note 201, §22.

214. *See* FLA. STAT. §20.25 (1969).

provides that no local government shall levy taxes or contract any debt (without an election) "except for the necessary expenses" of the governmental unit.[215] This section greatly restricts a local government's ability to undertake projects that would endanger the environment or otherwise affect large areas of the state. North Carolina courts have used this section for such restriction, declaring, for instance, that an airport is not a necessary expense.[216]

No other southern state has such a provision and it appears also that the section has lost some favor in North Carolina.[217] Furthermore, verbatim acceptance of these provisions in Florida would probably have at least two disadvantages: (1) it would prevent much affirmative environmental control by local areas[218] and (2) its effect can be nullified by a vote within the local areas.[219]

Admittedly, full implementation of this section would unduly restrict Florida's metropolitan counties, however, the general intent and mechanics could be modified to fit Florida's environmental needs. A possible suggestion would be to substitute state review for local vote on projects with potential impact beyond the local area. Further, the restriction should be used only to protect natural resources, and criteria both for determining which projects were included and for granting approval should be based solely on environmental considerations. This procedure would avoid both undue restriction on local activities and the temptation to let regional politics enter the picture. To further insure this result, enforcement of such a provision should be entrusted to the Department of Natural Resources, which has the facilities for ecological investigation and whose purpose is limited to protecting the environment.

State-Wide Zoning

The practice of zoning has always been limited to the local levels of government. Nevertheless, state-wide zoning for the purpose of preserving wilderness areas is a possibility worthy of examination. Such zoning would not affect all land within the state, but would establish districts and limit land usage within these districts in order to protect existing wilderness areas.

In the past, Florida has preserved unique wild areas by creating state parks. This is not a completely satisfactory method for future purposes. First, the cost of incorporating all worthy areas into the state park system in time to

215. Full text of the provision appears as follows: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same *except for the necessary expenses* thereof, unless approved by a majority of those who shall vote thereon in any election held for such purpose." (Emphasis added.).

216. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

217. See Comment, *Local Government Airport not a "Necessary Expense" Within Meaning of Article VII, Section 6, of North Carolina Constitution,* 46 N.C.L. REV. 188 (1967) for an unfavorable view regarding this constitutional provision.

218. Purser v. Ledbetter, 227 N.C. 1, 40 S.E.2d 702 (1946) (parks and recreation areas also held unnecessary).

219. N.C. CONST. art. 7, §6.

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save them from development is prohibitive. Second, the incorporation of an area into a park may be, in itself, a form of development. Since the area must then be made accessible and convenient to the general public, it may be transformed from a wilderness area into a playground with camping lots, concession stands, and paved roads. Although such areas are undoubtedly needed, true wilderness tracts may be preserved by zoning.

There has already been some movement in this direction. The federal Air Quality Act of 1967[220] granted authority to the Department of Health, Education and Welfare (HEW) to designate "air quality control regions."[221] Under the Act, HEW designates regions and publishes criteria on pollutants and pollution control. States are then on notice to develop and implement standards for their regions satisfying HEW criteria.[222] From this perspective it is possible to analogize a state plan designating certain unique areas as "no development," "grazing lands," or "outdoor recreation" areas as appropriate. Zoning as described should be used only to preserve areas already in such use, not to change existing usage. Even so, a plan of the scope suggested would contain practical problems and delicate constitutional questions[223] that require resolution before it could be instituted. Nonetheless, the jetport conflict mobilized public opinion in favor of preserving the unique Everglades ecology. Surely that experience suggests that there are many beach areas, springs, spring runs, river basins, forests, and swamplands worthy of preservation in their natural state.

Conclusion

National interest in environmental matters has increased remarkably during the last five years, as have many threats to the environment. The law has struggled to keep pace with the dangers created by increased population and industrial development. Common law remedies, while affording protection to individual victims, have not been able to control environmental crises as such. New state and federal legislation has added a measure of prevention to the many attempts and seems to offer an efficient means of environmental protection. Future statutory development may be needed, however, to fill the gaps that still exist.

David Brennan

220. 42 U.S.C.A. § 1857 (1969).
221. 42 U.S.C.A. §1857c-2 (a) (1) (1969).
222. *See* Farrell Address, *supra* note 62, at 9.
223. While it might be feasible to zone lands owned by counties and municipalities, it would probably be more difficult to justify such action in regard to private property. The state may be unable to find sufficient constitutional authority to so restrict private property, even though it might be able to control state subdivisions by zoning.