

RECENT DEVELOPMENTS

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INTRODUCTION

This section highlights recent developments in federal and state environmental and land use case law, as well as notable legislation recently passed by the Florida Legislature. In addition to the sources cited in this section, the reader is encouraged to consult the official website of the Florida Legislature at <www.leg.state.fl.us>, the Florida Department of Environmental Protection's website at <www.dep.state.fl.us>, and the Florida Department of Community Affairs' website at <www.dca.state.fl.us>. Other useful sources the reader may wish to consult include the website of the Environmental Land Use Section of the Florida Bar, <www.eluls.org>, and the FLORIDA ENVIRONMENTAL COMPLIANCE UPDATE, available through M. Lee Smith Publishers, LLC, <www.mleesmith.com>.

I. FEDERAL DECISIONS

Mobil Oil Exploration and Producing Southeast, Inc. v. United States;
Marathon Oil Co. v. United States
120 S. Ct. 2423 (2000)

In *Mobil Oil*, the Court reversed a Federal Circuit decision denying restitution to oil companies who had paid \$156 million to the United States for the rights to explore and develop oil off the North Carolina coast.¹ The Court held the government's unilateral

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1. See *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 120 S.Ct. 2423 (2000).

suspension of an oil lease contract, authorized by a statute enacted after the contract was executed, was a breach for which restitution could be sought.

Mobil Oil and Marathon Oil were seeking restitution of \$156 million they had paid the United States "in return for lease contracts giving them rights to explore for and develop oil off the North Carolina coast."² The companies successfully argued that the contracts were conditioned on acquiring additional governmental permissions and that denial of certain "permission-seeking opportunities"³ amounted to a repudiation of the contracts by the government, entitling the companies to restitution according to the Restatement of Contracts.⁴ The Court accepted the argument that the law treats contracts between the United States and private individuals, as if the United States were a private individual.⁵

At issue were two contract provisions requiring the oil companies to "prepare and obtain Department of Interior approval for a Plan of Exploration"⁶ and "obtain an explanatory well drilling permit."⁷

The companies submitted an initial Exploration Plan, approved by Interior in 1990, before the Outer Banks Protection Act came into effect. The final Exploration Plans, however, were submitted after enactment of the OBPA.⁸ Under that statute, Interior approval of Exploration Plans and Development and Productions Plans was now subject to several new conditions and requirements.⁹ The Secretary of Interior accordingly wrote the Governor of North Carolina, copying to Mobil, that the Plan was "approvable in all respects,"¹⁰ but that OBPA "prohibits the approval of any Exploration Plan at this time."¹¹ In addition, the letter granted a suspension of the lease at issue.¹² Eighteen months later the Secretary received the new panel's report and stated that he would not consider the Exploration Plan until the oil company did further studies.¹³ North Carolina then "objected to the companies' CZMA [Coastal Zone Management Act

2. *Id.* at 2429.

3. *Id.*

4. *See id.* (citing Restatement (Second) of Contracts § 373).

5. *See id.*

6. *See id.* at 2430.

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. *Id.* at 2432.

12. *See id.*

13. *See id.*

of 1972] consistency certification,” a requirement of the contracts, claiming that Mobil did not provide enough information on possible environmental impacts.¹⁴ The OBPA was repealed in 1996.¹⁵

The Government put forth three arguments in its defense: (1) “it did not breach the contracts or communicate intent to do so;”¹⁶ (2) if there was a breach, it was not “substantial;”¹⁷ (3) either way, the oil companies “waived their rights to restitution.”¹⁸ The court refused all three arguments.

As to the “no breach” defense, the Court stated first, that the OCSLA provision that allowed a lessee to suspend operations or activities did not apply to the lessor, here the United States, and was therefore unconvincing.¹⁹ Second, the OPBA provision allowing suspension of activities pending an environmental analysis was not in effect at the time the contract was executed.²⁰ The Court limited contract language referring to “all other applicable ... regulations”²¹ to “include only statutes and regulations already existing at the time of the contract ...”²² and future regulations issued pursuant to those statutes and regulations.²³ Third, Interior stated that the Exploration Plan “fully complied” with the current legal requirements; arguing non-compliance with the OPBA was unpersuasive as the new requirements were not a condition in the contract.²⁴ Fourth, Interior did not have the authority to impose an approval delay under any of the regulations it referred to.²⁵ Finally, Interior, “in communicating its intent to follow the OBPA” communicated its intent to breach the contract.²⁶

The Court disagreed with Government’s claim that the breach was not substantial.²⁷ The companies purchased a promise from the Government that it would not deviate from the standards and procedures it set out in the contracts, but it did.²⁸ The Court held that

14. *See id.*

15. *See id.*

16. *Id.* at 2433.

17. *Id.*

18. *Id.*

19. *See id.*

20. *See id.*

21. *Id.*

22. *Id.*

23. *See id.*

24. *Id.* at 2434.

25. *Id.*

26. *Id.* at 2435.

27. *See id.* at 2435-36.

28. *See id.* at 2436.

the Government promised a “timely and fair consideration of a submitted Exploration Plan” but did not deliver one.²⁹ Although the oil companies only purchased a conditional promise, “a gateway to the companies’ enjoyment of all other rights,”³⁰ “[t]o significantly narrow that gateway”³¹ amounted to a substantial breach of the contract.³²

The Court was also not persuaded by the the Government’s last argument, that the companies waived their right to restitution.³³ First, the companies submitting their Exploration Plans after the OBPA became law did not amount to continued performance, as the companies received nothing with respect to those plans.³⁴ Second, the Secretary, as advised by the OPBA created review panel rejected the companies’ appeal of North Carolina’s CZMA consistency certificate objections.³⁵ The Court stated the Secretary’s actions did not rise to the kind of consideration called for under the contracts.³⁶ Third, the suspension of the leases does not amount to significant performance because the companies were already entitled to these suspensions under a separate agreement.³⁷ Finally, the fact that the companies had not met the CZMA consistency requirements missed the mark.³⁸ The companies here were seeking restitution of their initial payments, which they were entitled to because of the Government’s repudiation of the lease contracts — whether or not they “would, or would not, ultimately have produced a financial gain or led them to obtain a definite right to explore.”³⁹

Appalachian Power Co. v. United States EPA, 208 F.3d 1015
(D.C. Cir. 2000)

The D.C. Circuit Court set aside the Environmental Protection Agency’s (EPA) Periodic Monitoring Guidance for Title V Operating Permits Programs (Guidance) in its entirety. The court held that the Guidance was not an interpretative rule because it broadened the

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *See id.* at 2436-37.

34. *See id.* at 2437.

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.* (citing the Clean Air Act).

39. *Id.*

underlying EPA rule and was therefore improper in the absence of formal rulemaking procedures.⁴⁰

Petitioners, electric power companies and trade associations representing the chemical and petroleum industry, had petitioned for a review of the EPA's Guidance document.⁴¹ The petitioners argued that the document imposed unauthorized requirements on states in connection with their operating permits under the Clean Air Act, the D.C. Circuit agreed.⁴²

After the 1990 amendments to the Clean Air Act, Title V changed the methods of governmental air pollution regulations.⁴³ The amendment held that stationary sources of air pollution had to obtain operating permit from local authorities that administered "their EPA-approved implementation plans."⁴⁴ The EPA was instructed by Congress to establish the "'minimum elements of a permit program...,'" through regulations, which were to be administered by an "air pollution control agency."⁴⁵ The key dispute at issue was EPA's Guidance on the "periodic monitoring rule."⁴⁶ Usually, the EPA delegates its authority to enforce compliance with these standards to the States. The States in turn implement the federal standards into the permit requirements along with their own emissions limitations needed to comply with the national ambient air quality standards. These state requirements usually include not only emissions limitations, but monitoring requirements as well.⁴⁷

The EPA's Guidance document called for periodic monitoring when the "applicable requirement does not require ... monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit."⁴⁸ Hence, if a requirement imposed only a "one-time testing requirement, periodic monitoring is not satisfied" under the new Guidance.⁴⁹

The court held the Guidance document was a final agency action for purposes of judicial review.⁵⁰ The court recognized that the Guidance document, while not promulgated as a legislative rule

40. See *Appalachian Power Company v. United States EPA*, 208 F.3d 1015 (D.C. Cir. 2000).

41. See *id.*

42. See *id.*

43. See *id.* at 1017.

44. *Id.*

45. *Id.*

46. *Id.* at 1017-18 (citing § 70.6 (n) (3) (i) (B) of the Clean Air Act).

47. See *id.* at 1019.

48. *Id.* at 1020.

49. *Id.*

50. See *id.*

under the statutorily required notice and comment procedure, was nonetheless binding as a “practical matter.”⁵¹ The court stated that an interpretive rule could nonetheless be binding if the document is “controlling in the field, if [the agency] treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the document is for all practicable purposes ‘binding.’”⁵² Because the EPA Guidance document has the effect of a rule and the EPA had stated that its position on the “central legal issue here—the appropriateness of a sufficiency review of all Title V monitoring requirements—indeed is settled” the Guidance is binding.⁵³

The court further used a two-part test to determine if the agency action was final. First, the “action must mark the ‘consummation’ of the agency’s decisionmaking process.”⁵⁴ The court found this condition met as the Guidance document was titled “EPA Draft *Final* Periodic Monitoring Guidance.”⁵⁵ The second part is that the action is one by which “‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’”⁵⁶ The court found this condition satisfied, as States were required, under the Guidance, to determine if the standards in effect provided enough monitoring and must insert additional monitoring requirements for permits if the State finds that the current requirements are inadequate.⁵⁷ The court found these to be requirements as they created obligations on the States.⁵⁸

The court agreed with petitioners that the Guidance created a “new legal regime” in that the Guidance now gave the EPA solid legal grounds for denying State issued permits if States did not comply with the Guidance document.⁵⁹ This in effect amended the

51. *Id.* at 1020-21.

52. *Id.* at 1021 (quoting Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?* 41 DUKE L.J. 1311, 1328-29 (1992)).

53. *Id.* at 1021-22.

54. *Id.* at 1022 (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)).

55. *Id.* at 1022 (emphasis added).

56. *Id.* (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

57. *See id.* at 1022.

58. *See id.* at 1023.

59. *Id.* at 1023-24.

periodic monitoring rule.⁶⁰ The court held that an agency could not usurp the notice and comment rulemaking procedure by “labeling a major substantive legal addition to a rule a mere interpretation.”⁶¹ The Guidance now purports to give a broad scope to the periodic monitoring rule, which as originally written has only a very narrow one.⁶² Hence, the court set aside the entire Guidance document.⁶³

American Trucking Ass’ns, Inc. v. United States EPA, 195 F.3d 4 (D.C. Cir. 1999), aff’g in part and denying in part 175 F.3d 1027 (D.C. Cir. 1999), reh’g denied 195 F.3d 4 (D.C. Cir. 1999), cert. granted sub nom. Browner v. American Trucking Ass’ns, 120 S. Ct. 2003 (2000) (ops. combined at 195 F.3d 4 (1999))

This rehearing of American Trucking, and other, petitions for review challenged final rules issued by the Environmental Protection Agency (EPA) that had revised the national ambient air quality standards (NAAQS) for ozone and particulate matter.⁶⁴

The EPA petitioned the D.C. Circuit for a rehearing that was granted in part and denied in part.⁶⁵ The EPA challenged the D.C. Circuit’s initial holdings that: (1) The EPA has no intelligible principle to channel the application of the factors it uses to determine the degree of public health concern associated with different levels of a pollutant; (2) that Subpart 2, not Subpart 1, gives the classifications and attainment dates for non-attainment areas under the revised primary ozone NAAQS, also the EPA is required to enforce any revision of primary ozone under Subpart 2; and (3) that the EPA has to consider the positive identifiable effects of a pollutant’s presence in the ambient air when formulating the air quality standards under § 108 and NAAQS under § 109.⁶⁶

The court first found that the EPA had previously placed forth no asserted intelligible principle that they now claim to find in the statute and its corollaries.⁶⁷ Thus the agency failed to state the acceptable intelligible limiting principles in setting the NAAQS and

60. *Id.* at 1023.

61. *Id.* at 1024.

62. *See id.* at 1026.

63. *See id.* at 1028.

64. *See American Trucking Ass’ns, Inc. v. United States EPA, 195 F.3d 4 (D.C. Cir. 1999), aff’g in part and denying in part 175 F.3d 1027 (D.C. Cir. 1999), reh’g denied 195 F.3d 4 (D.C. Cir. 1999), cert. granted sub nom. Browner v. American Trucking Ass’ns, 120 S. Ct. 2003 (2000)(ops. combined at 195 F.3d 4 (1999)).*

65. *See id.* at 6.

66. *See id.*

67. *See id.* at 6, 7.

to show that the NAAQS was promulgated in accordance with that principle.⁶⁸

The EPA next challenged the court's jurisdiction over Subpart 2 and the revised ozone standard.⁶⁹ The EPA claimed it had not taken final agency action implementing the revision, thus the court lacked jurisdiction.⁷⁰ The court, using a functional inquiry, held that because the revision had imposed requirements on the states, the action was final, and the court had jurisdiction.⁷¹

The court, however, granted EPA's challenge on Subpart 2.⁷² The court stated it had erred in treating the attainment dates set by Congress as if it was their judgment about what is "as expeditiously as practicable." Rather, the court held that the attainment dates truly represent the "outer limits" for reducing ozone levels in the area.⁷³ The court revised their holding on this issue stating "we conclude that Subpart 2 erects no bar to the EPA's requiring compliance with a revised secondary ozone NAAQS 'as expeditiously as practicable.'"⁷⁴

The court also granted EPA's challenge to a discrepancy in the court's initial conclusion.⁷⁵ At Part III.A.2, the court originally stated, "the EPA must enforce any revised primary ozone NAAQS under Subpart 2,"⁷⁶ but then said at the end of the opinion "revised ozone NAAQS 'cannot be enforced by virtue of [Subpart 2].'"⁷⁷ The Court here replaced the first sentence with: "Because the reference to § 107(d) in § 181(a)(1) includes the designation of an area as non-attainment for ozone under a revised ozone NAAQS, that is, under § 107(d)(1), the EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2."⁷⁸ The second sentence was replaced with: "We do not vacate the new ozone standards because the parties have not shown that the standard is likely to engender costly compliance activities in light of our determination that it can be enforced only in conformity with Subpart 2."⁷⁹

The court, without express opinion, denied EPA's third challenge on benefit health efforts.

68. *See id.* at 7.

69. *See id.* at 8

70. *See id.*

71. *See id.*

72. *See id.* at 9, 10.

73. *Id.*

74. *Id.*

75. *See id.*

76. *American Trucking, Inc. v. United States EPA*, 175 F.3d 1027, 1050 (D.C. Cir. 1999).

77. *Id.* at 1057.

78. *American Trucking Inc.*, 195 F.3d at 10.

79. *Id.*

II. FLORIDA DECISIONS

Jesus Fellowship, Inc. v. Miami-Dade County, Florida
752 So. 2d 708 (Fla. 3d DCA 2000)

The Third District Court of Appeals quashed an order that denied a church's zoning application for special exceptions and an unusual use. The court remanded the case to the circuit court with instructions to direct the County Commission to grant the church's application without the limitations the Commission had imposed.⁸⁰ The Third DCA found that the circuit court relied on incompetent evidence and failed to apply the proper principle regarding special exceptions and unusual uses.⁸¹

Jesus Fellowship, Inc. owned 12.2 acres in an area zoned for one-acre estate homes.⁸² The church sought to expand its facilities as well as add a private school and day care center, filing a zoning application for special exceptions and an unusual use.⁸³ The Zoning Appeals Board approved the application after the church agreed to make changes, including limiting enrollment to 524 students, recommended by the county's professional staff.⁸⁴ Objectors appealed the decision to the County Commission, which approved the application generally but denied it in part, requesting the church limit the private school to grades K-6 and 150 students.⁸⁵ The church petitioned the circuit court for a writ of certiorari, alleging the Commission's decision to reduce the enrollment was not supported by competent substantial evidence, but the court upheld the Commission's partial denial.⁸⁶

The Third DCA held the circuit court erred in concluding that the Commission had sufficient basis to deny the application without relevant valid evidence.⁸⁷ The presence in the record of county zoning maps, the professional staff recommendations, aerial photographs, and testimony in objection are not necessarily sufficient.⁸⁸ The maps did not support the Commission's decision, because the land use plan and the zoning districts permit the special exceptions

80. See *Jesus Fellowship, Inc. v. Miami-Dade County, Florida*, 752 So. 2d 708, 711 (Fla. 3d DCA 2000).

81. See *id.* at 709.

82. See *id.* at 708.

83. See *id.* at 709.

84. See *id.*

85. See *id.*

86. See *id.*

87. See *id.*

88. See *id.*

and the unusual use requested by the church.⁸⁹ The professional staff's report recommendation for approval of the application did not support the denial.⁹⁰ The objectors' testimony, consisting of lay opinion testimony, letters, complaints of past violations, irrelevant testimony, and testimony by the director of planning confirming the application was consistent with the zoning code, did not support the denial.⁹¹ In fact, no evidence appeared in the record related to the restrictions on number of grades and students.⁹² The objectors' attorney suggested the restrictions on grades and students after the evidentiary hearing had closed, whereupon the Commission passed a motion to deny the application.⁹³

Putnam County Environmental Council, Inc. v. Board of Comm'rs of Putnam County, 757 So. 2d 590 (Fla. 5th DCA 2000)

The Fifth District Court of Appeals reversed a lower court's dismissal order denying a nonprofit corporation's request for injunctive and declaratory relief to prevent a rezoning.⁹⁴ The Fifth DCA held that the nonprofit corporation, Putnam County Environmental Council, Inc. (PCEC), did have standing to challenge the order under section 163.3215, *Florida Statutes* (1999).⁹⁵

Roberts Land and Timber Company owned property in Putnam County, zoned for agricultural use, located next to the Etoniah Creek State Forest.⁹⁶ Roberts and the Putnam County District School Board applied for a special exception to the county's comprehensive plan in order to build a middle school complex on Robert's property.⁹⁷ The PCEC filed a complaint after the County Commission ratified the Board of Adjustment's approval of the special exception application, seeking to enforce Putnam County's comprehensive plan pursuant to Chapter 163.⁹⁸ The County Commission moved to dismiss the complaint on the grounds that PCEC lacked standing under section 163.3215.⁹⁹ The trial court granted the motion to dismiss with leave

89. *See id.* at 710.

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.* at 711.

94. *See Putnam County Environmental Council, Inc. v. Board of County Comm'rs*, 757 So. 2d 590, 591 (Fla. 5th DCA 2000).

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.*

to amend.¹⁰⁰ PCEC amended its complaint to include allegations of the specific adverse effects that it and its members would suffer to their interests in the conservation and protection of the natural resources of the Etoniah Creek State Forest if the school were built on the Roberts property.¹⁰¹ The complaint indicated that the presence of the school would prevent the use of controlled burns necessary to manage the State Forest, and the increased activity engendered by the presence of the school would interfere with the ability of wide-ranging species such as the black bear to reach or remain in the forest. Further, these conditions would negatively affect the ability of PCEC, its members, and others who participate in PCEC-sponsored activities to observe those species.¹⁰² The County Commission dismissed the amended complaint with prejudice, arguing that PCEC lacked standing to challenge the order.¹⁰³ While the trial court narrowly construed the standing requirement of section 163.3215, PCEC claimed those with standing included those seeking to enforce local comprehensive plans.¹⁰⁴

The Fifth DCA held that the 1985 adoption of section 163.3215, *Florida Statutes* liberalized the standing requirements, thus PCEC's assertions are sufficient to give PCEC standing to seek enforcement of Putnam County's Comprehensive Plan, although the mere fact of PCEC's interest in the environment is alone insufficient to give PCEC standing.¹⁰⁵ PCEC can demonstrate specific injuries it would suffer if the middle school complex were built on Roberts' property, including loss of habitat for species studied by PCEC members and the elimination of access to the forest by PCEC members and wild creatures due to overgrowth resulting from the cessation of controlled burns.¹⁰⁶ The diminution of species being studied by a group is a harm particular to PCEC, therefore the allegations in PCEC's complaint are sufficient to demonstrate the requisite level of interest.¹⁰⁷ PCEC therefore possesses standing to challenge the order under the liberalized standing test.¹⁰⁸ PCEC's involvement in the acquisition and active involvement in the state forest further indicate

100. *See id.*, at 591-2.

101. *See id.* at 592.

102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.* at 593.

106. *See id.*

107. *See id.*

108. *See id.* at 594.

a greater interest than that which all persons share in the community good.

Southwest Florida Water Management Dist. v. Charlotte County, et al., 25 Fla. L. Weekly D2113 (Fla. 2d DCA 2000)

The Second District Court of Appeals ruled that the Southwest Florida Water Management District (District) has broad power to force local governments and utilities to conserve water in order to protect the environment.¹⁰⁹ The District is a Florida agency controlling water resources over a sixteen county area.¹¹⁰ The Court's decision allows water managers to compel water suppliers to use recycled wastewater and purified salt water as alternatives to Florida's groundwater reserves.¹¹¹ Further, utilities applying for water use permits may be required to adopt water conservation rates, which require heavy users to pay more, and to meet criteria aimed at protecting wetlands, wildlife and other natural resources.¹¹²

Contamination of the Floridan Aquifer led the District to enact new regulations to protect the region's groundwater.¹¹³ The District found that the aquifer is being overused and that saltwater is intruding into and contaminating the aquifer as a result.¹¹⁴ Several counties and various other groups challenged the regulations as an invalid exercise of their delegated legislative authority.¹¹⁵ The Administrative Law Judge (ALJ) ruling would have forced the District to modify some of the restrictions. Rather than modify, the District appealed the administrative order.¹¹⁶

The Second District ruled in favor of the District on all thirteen points on appeal. Chapter 373, *Florida Statutes* states that in order to obtain a water use permit (WUP), an applicant must satisfy a "three prong test."¹¹⁷ The test requires that the proposed use "(a) is reasonable-beneficial; (b) will not interfere with any presently existing legal water use; and (c) is consistent with the public interest."¹¹⁸ The

109. See *Southwest Florida Water Management Dist. v. Charlotte County*, 25 Fla. L. Weekly D2113 (Fla. 2d DCA 2000).

110. See *id.* at 1.

111. See *id.* at 8.

112. See *id.*

113. See *id.* at 1, 2.

114. See *id.* at 8.

115. See *id.* at 1.

116. See *id.*

117. See *id.* at 1, 2.

118. *Id.* at 2.

counties argued that the District had to apply a two-prong test and not the three-prong test to water uses established before Chapter 373 was enacted.¹¹⁹ That test required only a reasonable-beneficial use and that it be allowable under the common law.¹²⁰ The court held that the two-prong test was only intended for use as a transitional procedure when converting from the common law use to a permitted use.¹²¹

In implementing the three-prong test, the District promulgated a rule that contains fourteen criteria that a WUP applicant must meet in order to demonstrate that the three-prong test has been satisfied.¹²² First, the court reversed the ALJ, who had held the District cannot require that all fourteen conditions must be met and that the District must apply a balancing test.¹²³ The court stated that only the Florida Department of Environmental Protection (DEP) has the authority to invalidate the requirement.¹²⁴ Second, the court reversed the ALJ's finding that allowing mitigation of any of the conditions that an applicant must meet in order to obtain a permit "to the satisfaction of the District" was an unbridled exercise of discretion.¹²⁵ According to the court "to the satisfaction of the District" did not appear in the rules setting forth those conditions and how to meet them.¹²⁶ The court stated that the form of mitigation could not be prescribed by rule as it can only be determined on a case-by-case, site-specific basis.¹²⁷ Third, the court held that the fourteen conditions were not vague because of the inclusion of terms such as "unacceptable," "adverse," or "significant."¹²⁸ It is acceptable for the rules to allow for the exercise of professional judgment because whether or not an adverse impact will occur is essentially a scientific determination.¹²⁹ Fourth, the court affirmed the ALJ's determination that the District's Basis of Review is valid.¹³⁰

Outside of the fourteen criteria, the court reversed the ALJ's invalidation of the District's authority to require an applicant to investigate the feasibility of the use of reclaimed groundwater and to

119. *See id.* at 6.

120. *See id.*

121. *See id.* at 7.

122. *See id.* at 4.

123. *See id.*

124. *See id.*

125. *Id.*

126. *Id.* at 4, 5.

127. *See id.* at 5.

128. *See id.*

129. *See id.*

130. *See id.* at 6.

use such water if the District determined it was feasible.¹³¹ The court found that the requirements were site-specific, subject to scientific and technical determinations and were within the definition of “reasonable-beneficial.”¹³² The court also reversed the ALJ’s determination that requiring an applicant to consider the economic, environmental and technical feasibility of desalination in lieu of groundwater use was an invalid delegation of legislative authority.¹³³ The Court stated that requiring applicants with a demand for more than 100,000 gallons a day to complete a desalination feasibility investigation was within the three-prong test and an element of the “reasonable-beneficial use.”¹³⁴

The court accepted the District’s argument that permitting wholesale public supply customers to evade the permit requirement transferred water conservation responsibility to other customers.¹³⁵ Because of the public interest to conserve water, the Court found that the District has the authority to require wholesale public supply customers to obtain a permit, and that this was not an unlawful impairment of contract.¹³⁶

The Court held that the District can require water supply utilities to adopt “water conservation rate structures.”¹³⁷ The Court found no conflicts with Section II, Consumptive Uses of Water, Chapter 373, *Florida Statutes*, in that requirement, but stated that in any conflicts with other state laws concerning local governments’ authority, Chapter 373 controls.¹³⁸

131. *See id.* at 8.

132. *See id.*

133. *See id.*

134. *See id.* at 8, 9.

135. *See id.* at 14.

136. *See id.* at 16.

137. *Id.* at 17.

138. *See id.*

III. NOTABLE BILLS PASSED DURING FLORIDA'S 2000 LEGISLATIVE SESSION

The descriptions below are excerpts from Senate or House Committee summary reports compiled by legislative staff and listed at the Florida Legislature's web site, <www.leg.state.fl.us>. Summaries for many of these bills are also available at either the Department of Community Affairs' site, <www.dca.state.fl.us>, or the Department of Environmental Protection's web site, <www.dep.state.fl.us>. The reader is also encouraged to review the Florida Bar Environmental and Land Use Section summary of the 2000 legislative session, prepared by Eric T. Olsen of Hopping, Green, Sams and Smith, P.A. and Kathryn Mennella, general counsel for the St. Johns River Water Management District, available at <www.eluls.org/june2000_summary.html>.

CS/CS/HB 221, 1957 Save Our Everglades Trust Fund, Everglades Restoration Investment Act Chapter 2000-129, *Florida Statutes*

This Act exempts the Save Our Everglades Trust Fund from certain service charges; revises the redistribution criteria for unencumbered balances from the Florida Preservation 2000 program; directs a transfer of funds from the Forever Trust Fund into Save Our Everglades Trust Fund; and creates the "Everglades Restoration Investment Act."

The Act requires the South Florida Water Management District, in cooperation with the Army Corps of Engineers, to complete a Project Implementation Report to address each of the project component features that were mandated in last year's law (see section 373.1501, *Florida Statutes*) including such things as its economic and environmental benefits and engineering feasibility and identify the increase in water supplies resulting from the project component. Finally, the Act dedicates approximately \$100 million in state funding to the Comprehensive Everglades Restoration Program.

CS/CS/HB 991, 1189 Lake Okeechobee Protection Trust Fund Chapter 2000-130, *Florida Statutes*

This Act creates a trust fund to establish a comprehensive, long-term program to restore and protect Lake Okeechobee and downstream receiving waters. The Lake Okeechobee Protection Program phases in phosphorous load reductions by requiring: (a) construction

of stormwater and other detention treatment centers; (b) detailed evaluation and monitoring of the water quality in the watershed; (c) development of “best management practices” for all non-point sources, (d) implementation of measures to protect native flora and fauna, and (e) a study to assess ways to reduce the phosphorus loads within Lake Okeechobee followed by implementation of the findings.

The Act also establishes Lake Okeechobee Protection Permits which requires all water control structures discharging into or from the lake to obtain an operating permit. The Appropriations Act contains a \$38.5 million appropriation for Lake Okeechobee.

CS/CS/CS/SB 1406 Brownfields
Chapter 2000-317, *Florida Statutes*

This bill improves the cleanup procedures associated with brownfield redevelopment sites. In the past four years there have been only a small number of brownfield redevelopment projects which have implemented site rehabilitation agreements. The modifications made this year are intended to further increase brownfield cleanup and redevelopment. To more closely conform with the American Society for Testing and Materials, the bill makes more clear the risk based corrective action (RBCA) cleanup criteria to describe the iterative process of risk analysis. The bill requires the Department of Environmental Protection (DEP) to make available an early decision while the analysis is ongoing informing the party responsible for the cleanup what exposure factors will apply and what approach should be applied to risk management. The bill does not allow the DEP to require more stringent target cleanup levels than the site-specific naturally occurring background concentration for that contaminant in both groundwater and soils.

If specific criteria are met in the risk-based cleanup, the bill provides that institutional controls are required. The bill provides for and expansion of the liability protections afforded to innocent third party purchasers, as well as the limitations applicable to a property owner whose land becomes polluted through the migration of contaminated materials from a designated brownfield area. The bill provides for the express authorization of the expedited permitting process (section 403.973, *Florida Statutes*) for projects within a designated brownfield area.

The bill provides that not only target industries (section 288.106(2)(o) *Florida Statutes*), be included in the eligibility criteria for

brownfield redevelopment bonus refunds, but also mixed-use business activities where the business shows a fixed capital investment of at least \$2 million. Mixed-use activities include multi-unit housing, commercial, retail, and industrial activities occurring in brownfield areas and who pay at least 80% of the average private sector wages in the county containing the brownfield area.

The bill amends section 376.051, *Florida Statutes* to grant authority to the DEP to use RBCA cleanup criteria on state university system lands. The bill adds language to section 376.303, *Florida Statutes* obliging local governments to create central repositories for the registration of Brownfield sites and to represent those sites on their land use maps.

The bill requires Enterprise Florida, Inc. to develop a comprehensive marketing plan for the redevelopment of brownfield areas and to apply 30% of the funds appropriated for Quick Response Training for enterprise zone and brownfield area businesses. The bill allows Community Development Districts to finance and undertake investigation and remediation of contamination within its boundaries.

HB 1999, 2001, 2403 Florida Forever Trust Fund
Chapter 2000-280, 2000-281, 2000-170, *Florida Statutes*

This is a Florida Forever “glitch” bill. The bill provides that the \$3 billion limit on issuing Florida Forever bonds does not apply to refunding bonds. The bill creates the Land Management Uniform Accounting Council (LMUAC) within the Department of Environmental Protection. The LMUAC is required to review current land management activities and needs, grouping them into categories by June 20, 2000. Once the LMUAC adopts the initial list of categories, the agencies that manage conservation or recreation lands must account for land management costs in accordance with the category into which the expenditure is assigned. The LMUAC must provide its adopted complete list of land management categories to the Governor, the Board of Trustees of the Internal Improvement Trust Fund, the President of the Senate, the Speaker of the House, and the Acquisition and Restoration Council by January 1, 2001. The LMUAC is required to report agencies’ expenditures pursuant to the adopted categories to the President of the Senate and the Speaker of the House beginning on July 1, 2001 and continuing annually.

Habitable structures located in water conservation areas two or three can be subject to reasonable conditions, consistent with existing laws and rules, by the South Florida Water Management District (SFWMD) or the DEP. The owners of habitable structures currently on these lands must inform the SFWMD of its existence and location. Failure to report subjects the structure to removal.

According to the bill, when the state acquires land without giving monetary compensation, the price of any land sold as surplus must not be greater than the fair market value of the land. Fair market value is to be determined by the average of two appraisals conducted by approved appraisers. Titles to land protection agreements and conservation agreements that were or will be acquired pursuant to section 380.0677, *Florida Statutes*, will be held by the Trustees.

CS/HB 1425 Solid Waste Collection/Recovered Materials/Citrus Processing Air Permitting Chapter 2000-304, *Florida Statutes*

This bill deals with several environmental issues. The bill protects solid waste collection operations from local government annexation, merger or incorporation for a period of five years or through the expiration of their current contract terms, whichever is shorter. The bill amends section 403.087 and section 403.722, *Florida Statutes* to allow for the use of post-closure plans as alternatives to hazardous waste programs and caps the fee for post-closure programs at \$32,500.

The bill provides that recovered materials dealers may provide contractual services to commercial establishments without being required to obtain a franchise agreement from local governments. Additionally, local governments are statutorily limited to charging only their direct costs in the registration of recovered materials dealers.

The bill provides for an experimental new regulatory alternative, effective July 1, 2002, for twenty-six citrus juice processing facilities in Florida. The bill allows a statutory permit that deals with specific air emission requirements for sulfur, volatile organic compounds, nitrogen oxides, visible emissions, and particulate matter. The bill is dependent on EPA approval, which the DEP must apply for by February 1, 2001. If the EPA does not approve this new law within two years from the DEP application, the traditional permit requirements will apply. The DEP must prepare a report and present it to the Legislature by March 2004. The bill aids other major sources

of air pollution with provisions authorizing the separate processing of Title IV (acid rain) and Title V (new source) permit applications.

CS/CS/SB 714 Waste Exchange/
Hazardous Waste Transfer

This bill continues state funding for the Southern Waste Information Exchange (SWIX) to provide continuing solid and hazardous waste management assistance to Florida. The DEP will evaluate SWIX future funding needs and determine what funding SWIX will receive in comparison to other funding demands of the DEP's Solid Waste Management Trust Fund. SWIX is a non-profit organization formed to assist with Florida's waste management needs in both the public and private sectors. SWIX has operated as a clearinghouse for information on waste recycling use and reuse opportunities for Florida waste generators. The same regulations that apply to other hazardous waste facilities, as well as permitting requirements, will apply to management or storage of hazardous waste at a transfer facility.

The bill codifies the definition of "hazardous waste transfer facility" in Chapter 403, *Florida Statutes* to include places where manifested shipments of hazardous wastes are stored or held for more than 24 hours, but less than 10 days.

HB 2071 Water Management District General Permit Delegation
Chapter 2000-319, *Florida Statutes*

This bill specifically authorizes the water management district rules that allow the governing boards to delegate the duty to review and issue general permits to their executive directors. The district executive directors may then execute the delegated authority through designated staff. This bill validates existing ERP and consumptive use general permit rules that allowed a staff-issued general permit process for projects with minimal water resource impact.

Most water management districts had listed these delegation rules as lacking sufficient statutory authority in 1999 under section 120.536, *Florida Statutes*. During the 2000 legislative session, much broader delegation authority was granted to the water management districts by CS/CS HB 2365. This bill, along with CS/CS HB 2365, requires the district governing boards to provide a process for referring any denial of an ERP or consumptive use permit application to the governing board for final action.

CS/SB 772 Motor Vehicle Inspection Program Elimination
Chapter 2000-266, *Florida Statutes*

This bill eliminates the Motor Vehicle Inspection Program (MVIP) statewide effective July 1, 2000. Because the MVIP is contained in Florida's State Implementation Plan (SIP), the EPA must approve the elimination of it since the SIP implements some of Florida's obligations under the federal Clean Air Act. While the EPA has proposed a rule to eliminate the MVIP from Southeast Florida and Jacksonville due to improved air quality in those areas, it has not done so for Tampa Bay.

CS/SB 186 Environmental Reorganization
Chapter 2000-197, *Florida Statutes*

This bill provides for internal organization requirements for the DEP and the Fish and Wildlife Conservation Commission (FWCC) and continues the reorganization of the FWCC as well as the various duties and responsibilities transferred from the DEP to the FWCC. This bill clarifies the FWCC's obligation to follow the provisions of Chapter 120, *Florida Statutes* when adopting rules in performance of its statutory duties. The DEP is reorganized creating an Office of the Chief of Staff, eliminating the Executive Coordinator for Ecosystem Management, and increases to three the number of deputy secretaries. Several other smaller riders were attached to this bill.

CS/CS/SB 1646 Water Pollution Control
Chapter 2000-271, *Florida Statutes*

This bill expands the reasons for which the DEP may make loans under the federal Sewage Treatment Revolving Loan Fund. The bill also provides a full range of financing options to take advantage of market conditions and expand the funding capabilities of the fund. The Clean Water Act was amended by Congress to allow these funds to be used for projects such as stormwater management systems, non-point source pollution control, and estuary conservation and management projects. This bill expands the types of projects that may be funded to include activity eligible for funding under § 603 of the Federal Water Pollution Control Act, Pub. L. No. 92-500.

The bill requires the DEP to create rules to prioritize projects for funding. The bill lists factors that the DEP shall consider in giving

priority such as whether the project will eliminate public health hazards, assist in the implementation of total maximum daily loads under section 403.067, *Florida Statutes*, promote reclaimed water reuse, and eliminate failing onsite sewage treatment systems that are causing environmental damage.

HB 2055 Florida Keys Rules for Coordinated Agency Permit Review
Chapter 2000-283, *Florida Statutes*

This bill permits state and regional agencies to implement rules to employ coordinated agency review of permit applications for the Florida Keys Area of Critical State Concern. The adoption of this bill fills the gap in the statutory authorization of coordinated review bringing the existing agency rules into compliance with section 120.536, *Florida Statutes*, which holds that agencies may only adopt those rules which implement or interpret specific powers and duties conferred by statute. Florida Water Management Rule 40E-1.615, Florida Administrative Code (F.A.C.), coordinates environmental resource, surface water management, and water use permits for the Florida Keys Area of Critical Concern, had been adopted by reference in Rule 62-330.200(4)(a), F.A.C. But, section 380.051, *Florida Statutes*, did not contain any specific authority for state and regional agencies to adopt such rules for review. HB 2055 cures this apparent problem.

CS/CS/HB 1005 Beach Management and Funding
Chapter 2000-346, *Florida Statutes*

This bill clarifies and expands Chapter 161, *Florida Statutes*, which sets the criteria for selection of beach management projects for state funding. For a project to receive public funds it must allow adequate public access and protect natural resources and endangered species. This bill also authorizes the DEP to enter into cooperative agreements with local governments for inlet management projects and to cost-share parts of inlet management projects that minimize the erosive effects of inlets or provide for the placement of beach quality material on adjacent eroded beaches.

HB 1529 Sham Recycling
Chapter 2000-221, *Florida Statutes*

HB 1529, while acknowledging that small quantities of solid waste can exist in the flow of recyclable materials, addresses when material in a waste collection container changes from a “recyclable” material to a “solid waste” material. The bill assists local governments in identifying “sham recyclers,” who are waste collectors that claim they are hauling recyclables but are really hauling solid waste combined with recyclable materials, and avoiding local government franchise agreements. The bill provides that when there are more than two types of recyclable materials in a collection container, and 10% or more of that material is solid waste, the entire container is deemed to be solid waste.

CS/CS/SB 1114 Right to Farm
Chapter 2000-308, *Florida Statutes*

This bill prohibits local governments from adopting laws to regulate farm operations that occur on duly classified agricultural lands when the activity is already being regulated by either the DEP, the Department of Agriculture and Consumer Services (DACS), or the water management district pursuant to rules adopted under Chapter 120, *Florida Statutes*. Local government may regulate the activity under exceptions granted to local ordinances related to pesticide application, well-field protection, and emergency situations.

The DACS, in consultation with the DEP, may develop rules to address statewide decontamination to prevent and limit the spread of citrus canker disease. The bill prevents the DEP from initiating legal proceedings for costs, damages, or remedial relief associated with soil contamination where the contamination is associated with efforts to limit the spread of citrus canker under DACS regulations. The bill also prohibits the DEP from initiating legal proceedings for costs, damages, or remedial relief associated with pesticide contamination as long as the pesticides are applied according to applicable laws and label requirements, and as long as certain records are kept and provided on request. This pesticide provision applies retroactively. The DACS may adopt rules, in consultation with the DEP, setting the record retention requirements.

IV OTHER RECENT DEVELOPMENTS OF PARTICULAR IMPORTANCE

In October, the United States House of Representatives gave final approval to a bill that will help Florida's Everglades Restoration project.¹³⁹ The bill includes a \$1.4 billion first installment for Everglades Restoration.¹⁴⁰ The Senate has already passed its version of the bill and President Clinton has stated that he will sign the final compromised version.¹⁴¹

Talbot (Sandy) D'Alemberte, President of The Florida State University, was named mediator to the Apalachicola-Chattahoochee-Flint (ACF) River Basin negotiations.¹⁴² The ACF commission was put together by Florida, Alabama and Georgia to negotiate a formula for the equitable allocation of waters in the ACF Basin.¹⁴³ The parties have until December 30, 2000 to reach an agreement or extend the negotiations.¹⁴⁴

139. See David B. Struhs, *Everglades Restoration Receives Final Congressional Approval*, Florida Department of Environmental Protection Press Release, November 3, 2000 (visited Feb. 7, 2001) <<http://www.dep.state.fl.us/comm/releases/2000/00-114.htm>>.

140. See *id.*

141. See *id.*

142. See *Florida State University President Sandy D'Alemberte named Apalachicola-Chattahoochee-Flint River Basin Mediator*, Florida Governor's Press Release, October 31, 2000 (visited Feb. 7, 2001) <http://sun6.dms.state.fl.us/eog_new/eog/library/releases/20.../mediator_dalemberte-10-31-00.html>. See also Dustin S. Stephenson, *The Tri-State Compact: Falling Waters and Fading Opportunities*, 16 J. LAND USE & ENVIL. L. 83, 105 (2000).

143. See *id.*

144. See *id.*

