

**EXALTING THE CORPORATE FORM OVER
ENVIRONMENTAL PROTECTION THE CORPORATE
SHELL GAME AND THE ENFORCEMENT OF WATER
MANAGEMENT
LAW IN FLORIDA***

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“Hermit crabs house themselves in the empty shell of
snails, whelks, conchs, or other gastropod mollusks.

* The views expressed in this article are those of the authors and do not necessarily reflect the views of the St. Johns River Water Management District Governing Board or staff.

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They cannot live without a shell and must locate another empty shell when they outgrow the old one."⁴

I. INTRODUCTION

Just as the hermit crab cannot live without the protection of a shell, the land developer in Florida exists only within the protective shell of the corporate form. When a land developer has outgrown one shell – i.e., when the developer has completed a project or a phase of a project and is ready to move on to the next project or phase – the developer finds a new protective shell to occupy. The scurrying of developers from one protective corporate shell to another creates a version of a shell game with environmental agencies as the unsuspecting marks. “Pick the shell hiding the developer and win an environmental enforcement case.” Similar to the gun lobby’s favorite shibboleth “Guns don’t kill people, people kill people,” frustrated environmental permit enforcers in Florida may be tempted to adopt the slogan “Corporations don’t pollute, the people behind the corporations pollute.”

Current laws in Florida afford substantial protection to the “people behind the corporations” (corporate principals)⁵ and generally do not allow environmental permitting agencies such as the water management districts to consider such people in their permitting or enforcement efforts. This article poses the question “Do existing corporate law principles of limited liability defeat the important public policy of water resource protection in Florida?” First, in Parts II and III, this article introduces the problem and provides an overview of Florida water management district permitting and enforcement authorities and processes. Next, in Part IV, this article explores the existing legal authorities for water management districts to take into consideration past acts of corporations and corporate principals in permitting and enforcement actions. Part V provides a review of corporate legal protection, describes the various types of business entities that may be permit applicants, and provides an overview of legal mechanisms that can defeat limited liability. Part VI reviews a variety of existing laws, both state and federal, that authorize a permitting agency to peak behind the corporate form. Finally, Part VII of this article presents a number of considerations for change to address the problem.

4. COMPLETE FIELD GUIDE TO NORTH AMERICAN WILDLIFE (1981).

5. As shorthand, this article will use the term “corporate principals” to refer to the directors, shareholders, and officers of a corporation or other business entity.

II. THE PROBLEM

Under current law, the water management districts must accept a permit applicant at face value -- that is the name of the applicant on the application form is considered the applicant for the permit and information supplied in the name of that applicant is used in the permitting process. Whether the applicant applying for the permit is an established corporation with roots in the local community, or whether it is a limited liability company created by a developer last Tuesday, the two are treated equally under the permitting rules. It is this equal treatment that threatens to eviscerate a substantial part of the environmental protections afforded by a water management district's permitting program.

The permitting programs of the water management districts in Florida are premised on the statutory requirement that a permit applicant will receive a permit once that applicant has provided reasonable assurances that the applicant will comply with the agency's rules. These reasonable assurances form the basis for the permitting criteria for the agencies. Once the applicant has met the stated criteria, the permit for the requested activity is issued. As a deterrent to applicants that have violated conditions of earlier permits the water management districts must take into consideration an applicant's history of noncompliance when determining if the applicant has provided sufficient assurances to meet the agency's permitting criteria. Also, when calculating civil penalties against an entity that has violated the agency's rules or permit, the agency can use past violations as a factor to increase the recommended penalty against that entity. Business entities, though, are designed to limit the liability of people participating in business ventures and to encourage people to pool their money and resources for those ventures. The business entity is the outer form while the people provide the inner substance. Because the law treats this outer form with deference and ignores the actual people inside the entity, the water management districts are made unwilling participants in the perpetuation of a fiction. After all, the corporate form is a legal fiction. It exists only on paper; a "thing" created and controlled by statute. The corporate form has no existence outside the law. One cannot physically grasp a corporation. One can touch property owned by a corporation, one can point to a person who controls the corporation, one can receive a check from a corporate bank account, but one can never declare "*ecce corpus!*"⁶ The people who run the businesses though are all too

6. Latin doggerel meaning roughly "behold the body."

real. Also real are the wetlands that are filled, the habitat that is lost, the floodwater on roads and in homes, and the water quality degradation that can occur when water management regulations are violated.

As an example of this problem, consider the following fact pattern:

A developer who is an officer, director, and majority shareholder of a closely held Florida corporation obtains a permit in the name of his company from a water management district to construct a residential subdivision. During the construction of the project the developer violates the conditions of the permit or fails to follow the agency's rules. In response to the violation the water management district initiates an enforcement action against the developer's company that results in a final order or judgment. Contained within that final judgment or final order will be a finding of fact that the developer's company violated the permit or other agency rule. That company now has a history of noncompliance with the agency. There exists a written record of that company's failure to abide by the rules. The developer now wants to construct a new project, this time a commercial development. Knowing that the first company has a history of violations, and knowing that the past violations must be considered by the water management district during the permitting process in determining whether reasonable assurances have been provided that the project meets permitting criteria, the developer simply creates a new entity to be the permit applicant.⁷ The developer can form an entirely new corporation, the developer can form a limited liability company with his original corporation as the manager, or he can form a limited

7. In the world of land development in Florida, it is not uncommon for a multi-phase residential or commercial development to have a new "developer" for each phase of the project. For instance, Phase One of a residential project may be called "Secret Oaks Manor" and may be developed by the "Secret Oaks Manor Development Corporation." Phase II, called "Secret Oaks Estates" is developed by "Secret Oaks Estates Developers, Inc." while Phase III, "Secret Oaks Forest" is developed by the Secret Oaks Forest Development Company. And so it goes for as many phases of the Secret Oaks as are developed. What may or may not be so "secret," however, is that each separate business entirety developer shares the same principals - i.e., regardless of the name, corporate registration and business structure, the "developers" behind each Secret Oaks phase are one in the same.

liability partnership with a figurehead general partner and his company as the limited partner. This new business entity will not have a past that can be used against it and, even though it's the same person controlling the applicant entity, the water management district must look solely at the new entity and ignore the individual developer. From the standpoint of the application, the developer has disappeared, submerged within his new business entity. It is the ease with which new business entities can be created and the apparent blind eye that water management district permitting rules turn to that threatens to frustrate the substantial environmental laws of the permitting programs.⁸

8. Although not a water management district case, the problem of the tension between corporate protection and environmental protection is illustrated by the much publicized case involving the Suwannee American Cement Company's application for an air construction permit to build a cement plant near Branford, Florida. In June 1999, the Florida Department of Environmental Protection (DEP) denied the air construction permit sought by Suwannee American Cement Company, Inc. DEP web site, *available at* <http://www.dep.state.fl.us/offiesec/news/cement.htm> (last visited Feb. 15, 2001). To deny the permit, DEP relied on a little-used rule that allows the agency to consider an applicant's previous violations when determining whether the applicant will comply with the new permit. Telephone interview with Jack Chisholm, DEP attorney (March 14, 2001). This rule provides that the Department shall take into consideration a permit applicant's violation of any Department rules at any installation when determining whether the applicant has provided reasonable assurances that Department standards will be met. FLA. ADMIN. CODE R. 62.4.070(5) (2000). Because Suwannee American was a newly formed corporation, the company had never held an DEP permit and therefore had no violations. *Id.* However, the company was linked to other permittees with a history of permit violations. Thus, in denying the permit, DEP cited the "compliance history of the applicant's related businesses" *at* <http://www.dep.state.fl.us/offiesec/news/cement.htm>. Although the exact relationship is unclear, Suwannee American is affiliated with Anderson Columbia, Inc., a corporation that owned the mine where the cement plant would be located and that is one of the largest road-paving firms in the state. Joe Anderson, II founded Anderson Columbia, and his two sons are the primary shareholders of five other companies. Taken together, the companies have obtained more than 80 state permits and have been cited for 15 violations in a 14-year period. *Enforcement Turnaround*, FLA. TIMES-UNION, Aug. 30, 1999. Suwannee American challenged the permit denial, alleging that DEP's decision was arbitrary because the agency had issued permits to companies with worse environmental records. Eventually Suwannee American and DEP settled the case, and DEP issued the permit one year after the initial denial *available at* <http://www.dep.state.fl.us/offiesec/news/cement.htm> (last visited Feb. 15, 2001). The Suwannee American case is instructive in highlighting the lack of a link between violations and future permits, and the difficulty in evaluating a new company's ability to comply with a permit. Because the case settled, however, DEP's reliance on FLA. ADMIN. CODE R. 62.4.070(5) (2000), and its expansive definition of "applicant" remains untested.

III. OVERVIEW OF WMD PERMITTING AND ENFORCEMENT

A. Background

In 1972, the Florida legislature enacted chapter 373 of the *Florida Statutes*, entitled the Florida Water Resources Protection Act. This Act, based in large part on the Model Water Code,⁹ was intended to implement the policy of Article II, section 7, of the Florida Constitution, by preserving natural resources, fish and wildlife, minimizing degradation of water resources caused by stormwater discharges, and providing for the management of water and related land resources.¹⁰ Under chapter 373, water management districts are responsible for addressing issues such as water supply, flood protection, water quality, and protection of natural systems. These responsibilities are carried out through the implementation of a number of regulatory and nonregulatory programs. One of the most far-sighted acts of the crafters of the Water Resources Act of 1972 was to recognize that water resources do not stop at city or county boundaries and to establish the State's five water management districts based on watershed boundaries rather than political boundaries. This regional/watershed-based aspect of water management is critical to the protection of water resources. Chapter 373 contains two primary regulatory tools for protecting water resources the Environmental Resource Permitting (ERP) program of Part IV and the Consumptive Use of Water Permitting (CUP) tool of Part II. The issues addressed in this article arise primarily in the context of ERP permitting and enforcement.

B. Environmental Resource Permitting

Virtually all land development above a certain size in Florida is regulated under the Environmental Resource Permitting ("ERP") program of Part IV, chapter 373, *Florida Statutes*. This program is extremely broad in its scope, which is not surprising given its roots in the Model Water Code, which intended to capture "virtually every type of artificial or natural structure or construction that can be used to connect to, draw water from, drain water into, or be placed across surface water ... [including] ... all structures and constructions that can have an effect on surface waters."¹¹

9. MALONEY, AUSNESS & MORRIS, A MODEL WATER CODE (1972).

10. FLA. STAT. § 373.016 (2000); Prugh v. St. Johns River Water Mgmt. Dist., 578 So. 2d 1130, 1131 n.2 (Fla. 5th DCA 1991).

11. MALONEY, AUSNESS & MORRIS, A MODEL WATER CODE 223 (1972).

Specifically, the jurisdiction of the ERP program includes the construction, alteration, operation, maintenance, abandonment, and removal of any “stormwater management system,” “dam,” “impoundment,” “reservoir,” “appurtenant works,” “works,” and all “dredging and filling” in surface waters or wetlands. Individually and collectively, these terms are referred to as “surface water management systems” or “systems”.¹² Thus, the ERP program covers most land development systems, including buildings, parking lots, roads, ditches, pits and mines, whether in uplands, wetlands or other surface waters.¹³

The statutory authority for the Districts’ ERP permitting program is derived from sections 373.413 and 373.416, *Florida Statutes*.¹⁴ These sections authorize the water management districts to, among other things, “require such permits and impose such reasonable conditions as are necessary to assure” that the construction, alteration, operation or maintenance of a system will comply with the provisions of Part IV of chapter 373 and will not be harmful to the water resources of the district. Thus, the focus of the ERP program is a public health, welfare and safety purpose, to-wit protection of the water resources. The ERP program is often described as regulating water quality and water quantity and protecting natural water or wetland systems. The specific permitting criteria that address each of these areas of protection are found in each district’s regulations. For the St. Johns River Water Management District,¹⁵ the permitting criteria are found in sections 40C-4.301 and 4C-4.302 of the *Florida Administrative Code*. Section 40C-4.301 of the Code applies to all construction, alteration, operation, maintenance, removal or abandonment of surface waters management systems whether in uplands, wetlands or other surface

12. FLA. ADMIN. CODE R. 40C-4.021(26) (2000).

13. A number of exemptions from ERP requirements for specific activities are found in both the statutes and regulations. FLA. STAT. §§ 373.406, 403.813 (2000); FLA. ADMIN. CODE R. 40C-4.051 (2000). One of the most significant exemptions is the exemption for the alteration of the topography of the land by agricultural, silvicultural, and horticultural activities.

14. Chapter 373, *Florida Statutes* authorizes the water management districts to require permits to protect the water resources of the District. Section 373.413 addresses the construction and alteration of systems. Section 373.416 addresses the maintenance and operation of systems. Section 373.426 addresses the abandonment and removal of systems. FLA. STAT. §§ 373.413, .416, .426 (2000).

15. Each water management district, except for the Northwest Florida Water Management District, has its own ERP regulations. All of these regulations, however, share many similarities. For the purposes of this article, the St. Johns River Water Management District’s regulations, found at FLA. ADMIN. CODE R. 40C-4, will be used for illustrative purposes. The South Florida Water Management District’s regulations are found at FLA. ADMIN. CODE R. 40E-4, the Southwest Florida Water Management District’s rules are found at FLA. ADMIN. CODE R. 40D-4, and the Suwannee River Water Management District’s rules are found at FLA. ADMIN. CODE R. 40B-4.

waters. The application of section 4.302 of the Code is limited to activities that occur in, on, or over wetlands or other surface waters.¹⁶

Among other things, the criteria in 40C-4.301 of the *Florida Administrative Code* expressly prohibits any activity that would cause adverse water quantity impacts, cause or contribute to a violation of a state water quality standard, or cause adverse impacts to the functions provided to fish and wildlife by wetlands and other surface water. Parroting the language of subsection 373.414(a), *Florida Statutes*, section 40C-4.302 of the *Florida Administrative Code* contains the public interest balancing test from the old Wetland Resource Management program, which requires consideration of seven different factors relating to water resource protection. The water quantity and water quality criteria in these rules often can be met through engineering design solutions,¹⁷ whereas the criteria related to protecting wetland functions often are met through either avoiding wetland impacts or providing mitigation to offset impacts to wetlands.¹⁸

C. Enforcement Authorities

1. Legal Authorities

Chapter 373, *Florida Statutes*, provides a number of authorities for water management districts to bring administrative, civil and criminal enforcement actions against violators of water management district statutes, rules, permits, and orders. Parts I and VI of chapter 373 contain general enforcement authorities that apply to all water management district regulatory programs, whereas authorities specific to environmental resource permitting are found in Part IV. The authority for administrative enforcement is found in section 373.119, *Florida Statutes*, which provides that

16. The two different sets of permitting criteria reflect the origins of the ERP program. Prior to the effective date of the ERP program, October 1995, two separate but overlapping regulatory programs governed land development in Florida the Management and Storage of Surface Waters ("MSSW") program in Chapter 373, *Florida Statutes*, and the Wetland Resource Management Program ("WRM", often referred to as "dredge and fill") from Chapter 403. The old MSSW program addressed land activities whether in uplands or wetlands, whereas the scope of the WRM program was limited to activities in wetlands. When the two programs were merged, as part of a legislatively-mandated streamlining effort, to form the ERP program, the bulk of both sets of criteria were retained.

17. District rules contain a number of "presumptive design" criteria, which if met provide a presumption that the applicable criteria will be met. FLA. ADMIN. CODE R. 40C-42.026 (2000).

18. Subsection 373.414(b), *Florida Statutes*, expressly provides that if an applicant is unable to otherwise meet the criteria of section 373.414, it may propose mitigation to offset the impacts from the regulated activity. FLA. STAT. § 373.414(b) (2000).

whenever a District's Executive Director has reason to believe that a violation of any provision of chapter 373, District rules, District orders, or permits, has occurred, is occurring, or is about to occur, the Executive Director may cause a written complaint to be served upon the alleged violator or violators. The administrative complaint will contain a proposed order that will become final unless the person named in the complaint requests an administrative hearing within 14 days after the complaint is served. Notably, this section does not authorize the water management districts to impose administrative penalties. To obtain penalties, the Districts must seek them in court under the Districts' civil enforcement authority in section 373.129, *Florida Statutes*. This section provides that the water management district Governing Board is authorized to commence and maintain proper and necessary actions in any court of competent jurisdiction for the following purposes to enforce rules, regulations, and orders; to enjoin or abate violations of provisions of law or District rules, regulations and order; to protect and preserve the water resources of the State; to recover a civil penalty not to exceed \$10,000 per violation; and to recover investigative costs, court costs, and reasonable attorney's fees.

The Districts' criminal enforcement authority is found in section 373.613, *Florida Statutes*, which provides that any person who violates any provision of this law or any rule, regulation or order adopted or issued pursuant thereto is guilty of a misdemeanor of the second degree. Additional enforcement authorities specific to ERP violations are found in section 373.430, which provides that certain violations of the ERP rules constitute criminal misdemeanors or felonies.¹⁹ Significantly, none of these enforcement authorities expressly limit against whom the districts may bring an action. Section 373.119 refers to "the alleged violator," section 373.129 merely refers to bringing an action to "enforce" rules or to enjoin or abate violations without reference to whom the actions can be brought against and sections 373.430 and 373.614 refer to "any person who violates" applicable laws. The term "person" is defined broadly to include individuals, firms, associations, organizations, partnerships, business trusts, corporations, companies, and governmental entities.²⁰

19. Part IV of Chapter 373 also authorizes the water management districts to revoke or modify a permit under certain specified circumstances. Under section 373.429 a water management district governing board or the DEP may revoke an ERP if the permitted stormwater management system or other permitted works becomes a danger to public health or safety, or if its operation is inconsistent with the objectives of the agency. FLA. STAT. § 373.429 (2000).

20. FLA. STAT. § 373.019(12) (2000).

2. Enforcement Processes and Options

The water management districts issue hundreds of permits each month. Unfortunately, there will always exist those persons who either cannot or will not comply with Florida law or the agency's rules and permits. These violations tend to fall into one of two categories: failure to comply with a condition of a permit issued by the water management district, or undertaking an activity not authorized by either a permit or the rules.

Resolution of a violation begins with the discovery of the violation, usually by either a staff member of a water management district or through a citizen's complaint. Once an agency staff member has inspected the property and determined that a violation does exist, the agency will mail a notice of violation to the responsible party. If the violation stems from noncompliance with an issued permit, the responsible party is the permittee. If no permit has been issued (or is under review by the agency), the notice of violation is sent to the owner of the property. The notice of violation will describe the violation observed, explain why that observed activity violates Florida law or the agency rules, and may set forth a corrective plan of action to resolve the matter. If, because of the nature of the violation, no corrective action plan can be formulated, the agency will request that the responsible party meet with the staff to develop the necessary corrective actions. Generally, the necessary corrective actions will require the responsible party to either obtain a permit from the water management district to authorize the earlier activity or restore the property to its pre-violation condition.

The water management districts have a number of options to resolve violations of their rules. The agency may seek to resolve the violation through an informal process, a consent order, an administrative complaint, or an action in court. The actual means chosen to enforce the rules is left to the discretion of the agency. Deciding which process to use is based on the severity of the violation and the willingness or cooperation of the responsible party to participate in the process.

The most common means to resolve a violation is through an informal resolution process. An informal process is used only for minor violations that are easily corrected and do not involve actual harm to the water resource. Such minor violations may include "paperwork" violations such as the failure to timely submit required monitoring reports or other documentation. After the notice of violation has been sent, and the responsible party agrees to implement the necessary corrective actions, agency staff will work with the responsible party to correct the violation. Given the

cooperation of the responsible party and minimal impact or threat caused by the violation, no formal enforcement action will be initiated and no civil penalty will be requested. Once the responsible party completes the necessary corrective actions in accordance with the agency's directions the violation is considered resolved and the entire matter concluded.

If, due to the severity of the violation, the agency determines that the informal resolution process is not appropriate for the violation, but the responsible party still wishes to resolve the violation amicably, the agency and the responsible party, also known as the respondent, may enter into a consent order. A consent order is a negotiated written agreement between the agency and the respondent setting forth the facts of the unauthorized activity or violation, conclusions of law stating why such activity is a violation of Florida law or agency rules, and containing the corrective actions necessary to bring the matter into compliance. Under the terms of the consent order, the responsible party admits to the violations and acknowledges its failure to comply with the agency rules. Unlike the informal resolution process that required the responsible party only to correct the violation, the agency generally will require the respondent to pay a civil penalty as one of the terms of the consent order in addition to performing the corrective actions. The means of determining the amount of the civil penalty will be explained below, but its purpose is to reflect the severity of the violation and to serve as a deterrent effect to encourage both the respondent and the public to comply with the agency's rules. An additional monetary amount will be added to the civil penalty by the agency to cover the agency's staff investigative costs and attorney's fees for investigating and settling the violation.

Once the consent order has been executed, and the respondent has paid the civil penalty and completed the corrective plan of action, no further enforcement action is taken against that respondent for that violation. From the agency's perspective the matter is considered finished. For a responsible party, however, a consent order often becomes the first record of its history of noncompliance with the agency. The agency now has a written record of that respondent's violations. The consent order is also available to the public under the Public Records law²¹ and so the facts of the violation are easily obtained.

When the responsible party will not admit to the violation, or the agency and the responsible party are unable to reach an agreement to resolve the violation, the agency has the authority to

21. *Id.* ch. 119.

initiate an enforcement action against the responsible party through an administrative complaint.²²

The administrative complaint will contain a statement of facts detailing the violation or unauthorized activity, a statement of law or rules applicable to the administrative complaint, and a proposed order listing the necessary corrective actions.²³ After being served with the administrative complaint, the respondent has fourteen days to request an administrative hearing if he wishes to challenge the agency's allegations in the administrative complaint.²⁴ If the respondent fails to file a request for administrative hearing within the required timeframe, the corrective actions as stated in the proposed order become final.²⁵ That means the proposed order becomes a final order of the agency.

If the respondent does file a request for an administrative hearing, the hearing is conducted in accordance with the Administrative Procedures Act of chapter 120, *Florida Statutes*.²⁶ Following the conclusion of the hearing, the administrative law judge will submit a recommended order to the agency that then issues the final order.²⁷ The agency's final order will contain a statement of facts, conclusions of law, and an order setting forth the actions that must be followed to correct the violation.²⁸

One of the defining features of an administrative complaint is that the agency cannot obtain civil penalties through the administrative process, and, unless it recovers its investigative costs and attorney's fees²⁹ following an administrative hearing, the agency will recover no penalty or fine for the violation. Pursuant to section 120.69, *Florida Statutes*, however, the agency may file a petition to enforce the administrative complaint final order in circuit court. The agency may request that the circuit court assess penalties and require the payment of investigative costs and attorney's fees.

The administrative complaint, like the consent order, serves the purpose of documenting a respondent's history of noncompliance. The administrative complaint is another record of a party or entity's failure to comply with the agency rules

Water management districts also have the option of bypassing the administrative process and seeking relief in a court of competent

22. *Id.* § 373.119(1).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* § 120.569; FLA. ADMIN. CODE ANN. ch. 28-106 (2000).

27. FLA. STAT. §§ 120.569(l), 57(k)-(l) (2000); FLA. ADMIN. CODE R. 28-106.216(1) (2000).

28. *Id.*

29. As allowed under FLA. STAT. § 120.595 (2000).

jurisdiction, either county or circuit.³⁰ The actual relief sought by the water management districts would depend on the type of violation and the remedy appropriate to resolve the matters at issue. The agencies may request injunctive relief, either an injunction preventing the defendant from carrying out certain activities (e.g., an injunction to stop the unauthorized filling of wetlands), or a mandatory injunction instructing the defendant to take certain actions to remedy the problem (e.g., an injunction requiring unauthorized fill to be removed from wetlands).³¹ The agencies may also request a civil penalty be assessed against the defendant for the violations.³² Water management districts are also authorized to recover investigative costs, court costs, and reasonable attorney's fees for the enforcement action.³³

The filing of an enforcement action in court follows the normal pattern of a regular lawsuit and is bound by all the procedural requirements of the Florida Rules of Civil Procedure. The agency will first file a complaint in the appropriate county, usually where the violation occurred, the defendant will answer, discovery will ensue, and, when both parties are ready, the matter is set for trial. The agency must then prove its case that the defendant violated Florida law or the agency's rules. Then a water management district must request the judgment against the defendant include a civil penalty.

Water management districts are also authorized to seek enforcement of their final agency actions, such as Consent Orders and Final Orders resulting from the filing of an administrative complaint, in circuit court.³⁴ This procedure is necessary because the agencies do not have authority on their own to enforce the final orders. If a respondent fails to comply with the final order of administrative complaint or consent order, the water management districts must resort to circuit court to enforce the terms of the final agency action. If forced to file an action under this statute, the agency may request, in addition to an order to comply with the final agency action, civil penalties for the failure to comply with that agency's order.³⁵

The amount of the penalty is almost solely within the discretionary authority of the presiding judge. The only restriction on the amount is the statutory limit of \$10,000 per day for each

30. *Id.* §§ 373.129, 136.

31. *Id.* §§ 373.129(2), 136(1).

32. *Id.* § 373.129(5).

33. *Id.* § 373.129(6).

34. *Id.* § 120.69(1)(a).

35. *Id.* § 120.69(2).

violation.³⁶ The agency bears the burden of presenting sufficient evidence of the severity of the violation and the actual harm or threat of harm to the natural resource to establish a recommended civil penalty. The recommended penalty is calculated by the agency in accordance with the procedures set forth in the penalty matrix.

The water management districts use a penalty matrix to determine the appropriate amount of the penalty for the violation.³⁷ The penalty matrix is part of the guidelines developed by the Department of Environmental Protection and the water management districts to resolve violations of their respective rules and permits. The penalty matrix considers two factors: the potential for environmental harm and extent of deviation from a statutory or regulatory requirement. These two factors form the axes of the actual matrix. Each axis is then divided into three categories or levels: major, moderate, and minor. Each violation is assigned a level from each axis that corresponds to that violation's potential for environmental harm and deviation from the rules. As an example, a violation that is determined to represent a significant threat to human health but only deviates somewhat from the requirements of the law, would be classified as Moderate on the potential for environmental harm axis and as Minor on the deviation from regulatory requirement axis.

The matrix may be pictured as a square containing nine possible categories into which a violation will be placed depending on its factual elements. Each of these nine categories contains a recommended penalty range that is further refined by applying other factors surrounding the violation. Once the agency establishes a penalty based on the penalty matrix, the agency may adjust the penalty up or down based on a number of considerations. The agencies may take into account factors favorable to the violator such as a good faith effort to comply, a willingness to cooperate and inability to pay. On the other side of the equation, the agencies may consider such factors as the violator's refusal to stop an ongoing violation, a failure to cooperate, and the economic benefit the violator gained by its violation of the environmental laws. Using those factors, the recommended penalty is adjusted either up or

36. *Id.* § 373.129(5).

37. The penalty matrix used by the water management districts is found within the "Guidelines for Characterizing Water Management Violations," dated Oct. 10, 1990. The Florida Department of Environmental Protection follows the revised penalty matrix contained within its SETTLEMENT GUIDELINES FOR CIVIL PENALTIES, DEP Directive 923, Effective August 12, 1997. Because the Florida Department of Environmental Protection cannot itself impose penalties on violators, the Settlement Guidelines are not adopted by rule. The penalty matrix remains as guideline and nothing more. *See, Envirochem Env'tl. Serv. v. Dep't of Env'tl. Prot.*, 16 F.A.L.R. 1467 (Fla. Div. Admin. Hrgs. 1994).

down to arrive at a final number. It is this number that is presented to a responsible party for settlement purposes during the negotiation of a consent order, or, is presented to a judge during the penalty determination phase of enforcement litigation.

IV. LEGAL AUTHORITY FOR CONSIDERATION OF COMPLIANCE HISTORY (PAST VIOLATIONS) IN PERMITTING AND ENFORCEMENT

A person's or entity's history of non-compliance with water management district rules plays a role in both the permitting and enforcement process. Past violations and a failure to comply with the agency's rules are required to be taken into account when the agency reviews a new environmental resource permit (ERP) application from that party. The agency must also take past violations into account when determining a recommended penalty for any new violations for which that party is responsible. The three major water management districts, St. Johns River Water Management District, Southwest Florida Water Management District, and the South Florida Water Management District are required by law to consider a permit applicant's past history of violations when determining whether that permit applicant has provided reasonable assurances that the agency's permitting standards will be met. All three of these water management districts have a rule stating:

When determining whether the applicant has provided reasonable assurances that the District permitting standards will be met, the District *shall* take into consideration a permit applicant's violation of any Department [of Environmental Protection] rules adopted pursuant to Sections 403.91-.929, F.S. (1984 Supp.), as amended, which the District had the responsibility to enforce pursuant to a delegation, or any District rules adopted pursuant to part IV, chapter 373, F.S., relating to any other project or activity and efforts taken by the applicant to resolve those violations (emphasis added).³⁸

The Department of Environmental Protection (DEP) has a similar rule concerning an applicant's history and failure to comply with the Department's rules under its standards for issuing or denying permits. DEP "shall take into consideration a permit applicant's violation of any Department rules at any installations

38. FLA. ADMIN. CODE R. 40C-4.301(2), 40D-4.301(2), 40E-4.302(2), (2000) (respectively).

when determining whether the applicant has provided reasonable assurances that Department standards will be met.³⁹

The term “applicant” is not defined in the water management district rules. The policy of the water management districts is to determine the identity of the applicant based on the name of the person or entity signing the application form for an environmental resource permit. If the signature on the application form is that of an individual person, then that person is considered the applicant. If the signature on the form is that of a person signing on behalf of a company or business, then that business entity is considered the applicant. The water management districts do not delve any further into the identity of the applicant. The representations of the identity of the applicant are taken at face value.

If the applicant for an ERP has violated the agency’s rules in the past, the water management districts may impose additional conditions or requirements in the permit as a means of ensuring the applicant will meet the agency’s permitting standards. One means of providing additional assurances that the permitting standards will be met is by the furnishing of financial assurances in the form of a bond by the applicant. The Suwannee Water Management District, Southwest Florida Water Management District, and South Florida Water Management District each have rules authorizing the districts to require a permit applicant to post a bond, made payable to that water management district, conditioned upon full compliance with the terms of the permit, including proper construction, operation, and maintenance of the facility.⁴⁰ Each Governing Board of those water management districts has the authority to determine the amount of the bond.⁴¹ These rules do not specify under what circumstances a bond should be required and do not explicitly authorize the consideration of the applicant’s compliance history in making such a determination. While the St. Johns River Water Management District does not have a specific binding rule, it has in some cases required the posting of a bond as a means of providing reasonable assurances from applicants with a history of violations. The DEP has a similar rule that allows them to require an applicant to submit proof of financial responsibility and may require the applicant to post an appropriate bond to guarantee compliance with the law and Department rules.⁴²

In addition, the St. Johns River Water Management District, as well as the other water management districts and the Florida

39. FLA. ADMIN. CODE R. 62-4.070(5) (2000).

40. FLA. ADMIN. CODE R. 40B-1.704, 40D-1.604, 40E-1.604, (2000) (respectively).

41. *Id.*

42. FLA. ADMIN. CODE R. 62-4.110 (2000).

Department of Environmental Protection, does have a financial assurance requirement for wetland mitigation projects that are estimated to cost more than \$25,000.00.⁴³ This requirement is to ensure that sufficient funding is available to carry out construction, management, monitoring and any corrective action necessary to ensure the mitigation is successful. Financial assurance may be provided through a number of specified mechanisms including, among other things, a performance bond, irrevocable letter of credit, trust fund agreement, or deposit of cash into an escrow account,⁴⁴ and must be in an amount equal to 110 percent of the cost of the mitigation.⁴⁵

If a bond has been furnished to provide additional reasonable assurance, and the permit applicant fails to comply with the permit conditions, then the water management district or DEP can draw on the bond. The money from the bond will be used by the agency to either complete or correct the facility so as to bring that system into compliance with the permit.

The posting of a bond is a common requirement for contractors and other entities that enter into contracts with the state or a local municipality. The bond provides an assurance that the contractor has sufficient financial capabilities to construct the project, and, if the contractor fails to comply with the terms of the contract, the state or municipality can draw on the bond to complete the project. Florida law requires the posting of a bond prior to the construction of public water and sewage systems,⁴⁶ a public building,⁴⁷ a public school,⁴⁸ and construction of a county road.⁴⁹ Florida law also authorizes the state, counties, and municipalities to require contractors to post a bond conditioned upon the contractors' compliance with state and local building codes.⁵⁰ So not only must the contractor complete the job in accordance with the contract, but the contractor must also follow all applicable building codes during the construction of the project.

A history of noncompliance can also be used as a basis for denying a permit application. While there are no reported cases where a water management district used a permit applicant's history of violations as grounds for denial, DEP has asserted Rule

43. Rule 12.3.7, APPLICANT'S HANDBOOK MANAGEMENT AND STORAGE OF SURFACE WATERS (hereinafter A.H.), incorporated by reference in FLA. ADMIN. CODE R. 40C-4.091 (2000).

44. Rule 12.3.7.6, A.H.

45. Rule 12.3.7.2, A.H.

46. FLA. STAT. § 153.10.

47. *Id.* § 255.05(1)(a).

48. *Id.* § 237.201.

49. *Id.* § 336.44(4).

50. *Id.* § 489.131(3)(e).

62-4.070(5), *Florida Administrative Code*, as a consideration in the permitting process. In two of these administrative cases, the permit applicant's past violations of statutes and rules were considered by the DEP in determining whether the applicant had provided reasonable assurances that the standards in the permit application would be met. In both cases, the ALJ made a finding of fact that the past violations did not justify denial of the permit and recommended that the DEP issue the permit.⁵¹

One case that resulted in a different conclusion was *Department of Environmental Protection v. Mid-County Recycling Company*,⁵² in which the ALJ recommended denial of the permit application to operate a Materials Recovery Facility, in part due to the applicant's previous permit violations on the same site. The applicant had received an earlier permit to operate the facility and while inspecting the permitted facility DEP discovered numerous permit violations. The applicant had violated the terms of the earlier permit by storing substantial quantities of waste outside the premises of the facility, by failing to consistently separate and reject unacceptable materials, and by failing to provide a suitable system for collection and treatment of leachate and liquid wastes.⁵³ The DEP eventually filed an administrative complaint against the permit applicant who then failed to comply with the corrective actions to bring the permit into compliance. The applicant was also uncooperative and did not follow through on its promises to repair the problems. The ALJ made a conclusion of law that "Mid-County's willful and repeated violations of its Permit conditions must be considered in determining whether Mid-County's Material Resource Facility (MRF) application gives reasonable assurances that it will meet all DEP standards."⁵⁴ The ALJ then found that "giving proper consideration to Mid-County's history of non-compliance with its Permit, as well as the lack of any assurance that Mid-County has the necessary expertise, Mid-County has not provided reasonable assurances that the MRF application will meet all of these DEP standards."⁵⁵ Based on those findings, the ALJ recommended denial

51. In *Patricia D'Hondt v. Constr. Burning, Inc., and Dep't of Env'tl. Prot.*, 1996 WL 1060015 (Fla. Div. Admin. Hrgs. 1996), the applicant's air curtain incinerator failed inspections resulted in two consent orders with the Department, one of which included a \$2,000.00 fine. In *Julie Hellmuth v. Carolina Solite Corp. and Dep't of Env'tl. Prot.*, 1995 WL 1052772 (Fla. Div. Admin. Hrgs. 1995), the past violations are not specified but the Administrative Law Judge found that the "violations were not severe and [the applicant] corrected the problems."

52. *Dep't of Env'tl. Prot. v. Mid-County Recycling Co.*, 1997 WL 1052392 (Fla. Div. Admin. Hrgs. 1997)

53. *Id.* at paragraphs 13-20.

54. *Id.* at paragraph 66.

55. *Id.* at paragraph 72.

of the MRF application. The DEP accepted that recommendation and denied the permit.

A party's failure to comply with an agency's rules is also taken into consideration during the enforcement process. A history of that party's noncompliance is a factor in the penalty matrix that is included in the calculation to determine an appropriate settlement penalty. In the "Guidelines for Characterizing Water Management Violations" used by the water management districts, a history of noncompliance will be used to boost the original penalty by an additional 10 percent or more. There are no concrete guidelines though as to what is considered a past violation, or if there is a "statute of limitations" that may limit the use of past violations given the length of time between the past and current violation.

The DEP also considers past violations when calculating the recommended settlement penalty. DEP Directive 923 states:

This adjustment factor [history of noncompliance] can only be used to increase the amount of penalties derived from the penalty matrix. This adjustment factor should be used if a violation occurred within a four year period previous to the occurrence of the current violation and at minimum a non-compliance letter or Warning Letter was issued for the violation; the previous violations involved any of the programs regulated by the Department; and the previous violations occurred at the same facility as the current violation, or at another facility under the same management.⁵⁶

Both the "Guidelines for Characterizing Water Management Violations," used by the water management districts, and "Settlement Guidelines for Civil Penalties," used by the DEP, refer to the violator as the "responsible party," a term that is not defined by any of the agencies. As a practical matter, when a violation of a permit has occurred, the issuing agency will seek to hold the permittee as the responsible party. If the violation does not involve an issued permit, the agency will seek to hold the person or entity that performed the unauthorized activity responsible. As with the consideration of who or what is the permit applicant, an agency will not look beyond the surface of an applicant's name when assessing blame.

56. DEP Directive 923, *supra* note 37, at 9.

Because the agencies are not authorized to look behind the façade of the business entity, developers can easily avoid the additional conditions and restrictions imposed on a permit for past violations by simply creating a new business entity for each new project. By starting fresh with a new company, a developer never need fear that a water management district will deny a permit application for his past activities while running a different company.

V. REVIEW OF CORPORATE LEGAL PROTECTIONS

A. Theory of Corporate Structure

Environmental laws and business organization laws were enacted to accomplish very different purposes - - to protect the public interest and the environment and to provide a mechanism for pooling primarily financial resources while providing limited liability to corporate principals.⁵⁷ The fundamental tenet of corporate law is that a corporation is a separate legal entity distinct from its officers, directors, and shareholders. As such, the corporation itself is liable for its obligations and torts, and its officers, directors and shareholders generally are protected from personal liability. Traditionally, corporate shareholders are only investors in the corporation in which they own stock and are not liable for acts and obligations of the corporation beyond the extent of their investment. This is the premise for the doctrine of limited liability. Limited liability insulates not only individual shareholders, but also parent corporation shareholders. Under certain circumstances, however, corporate principals may be liable for the acts or obligations of the corporation. At least three legal mechanisms exist to reach corporate principals who attempt to hide

57. The issue of the friction between corporate protection and environmental protections recently has begun to emerge as an important topic in the environmental law discourse. For example, in 1996, the University of Oregon's Public Interest Environmental Law Conference held a symposium entitled *Environment and Business Toward Sustainability or Ecological Collapse*. Perhaps one of the most provocative participants in the symposium was Richard Grossman, whose paper *Revoking the Corporation*, 11 J. ENVTL. L. & LITIG. 141 (1996), advocates a return to the use of *quo warranto*, the proceeding where the "people" examined corporate acts when some harm had occurred and demanded to know by what authority has this subordinate entity (the corporation) taken such an action. If the corporation was found to have acted *ultra vires*, it was the people's right as sovereign to dissolve the corporation - "not simply to chide it, or scold it, or fine it ... but to remove it." *Id.* While this remedy may be appropriate for certain types of environmental wrongs committed by corporate entities in circumstances such as where a large established manufacturer commits an environmental harm of such import that it is adjudged to no longer have the right to continue to transact business, the remedy would not redress the problem explored in this article - i.e., where new corporate entities are repeatedly created and then dissolved so as to avoid a "history" that can be used against them.

behind the shield of limited liability¹) the judicially created doctrine of piercing of the corporate veil; 2) personal liability where a corporate principal has personally participated in the corporate wrongdoing in his or her individual capacity; and 3) where the legislature has provided explicit authority to reach the corporate principals. Each of these is addressed below.

B. Corporate Formation and Dissolution

Under Florida law, forming and dissolving a corporation is a relatively simple matter. To create a corporation, a person simply must submit articles of incorporation, basic information such as agent's name, and fees to the Department of State.⁵⁸ The corporation exists when the articles are filed, unless the articles specify a date within five days before the filing date, or a date after the filing date.⁵⁹ The Department of State now provides online access, so a person may create a corporation in minutes by responding to a few questions online and by providing a credit card number for fees that can be as low as \$70.⁶⁰

If forming a corporation is easy, dissolving one is even a simpler task. Corporations may dissolve in three ways.⁶¹ First, a corporation may voluntarily dissolve upon action by its board of directors and shareholders and upon filing articles of dissolution with the Department of State.⁶² Nothing in the voluntary dissolution procedure requires the corporation to account for its outstanding obligations.⁶³ After dissolution, the corporation does not operate, but it continues to exist for the purpose of winding up its affairs and liquidating its assets and liabilities.⁶⁴ The act of

58. FLA. STAT. §§ 607.0120-.0122 (2000). The Department of State charges a fee of \$35 for most document filings. FLA. STAT. § 607.0122 (2000).

59. FLA. STAT. § 607.0203 (2000). The provision that allows corporate existence to begin before actual filing protects promoters from personal liability for transactions before the filing date. Section 607.0123(3) also protects promoters by allowing documents to be filed to correct deficiencies in the original incorporation documents, and the original filing date is maintained as if the original documents had been valid, unless a party adversely relies on the original documents. STUART R. COHN & STUART D. AMES, FLORIDA BUSINESS LAWS ANNOTATED (West Group 1999).

60. Department of State Division of Corporations web site: <https://cfss1.dos.state.fl.us/corpweb/efiling/onlmenu.html>, or <http://www.dos.state.fl.us/doc/feecorp.html> (last visited Apr. 23, 2001).

61. FLA. STAT. §§ 607.1401-.14401 (2000).

62. *Id.* §§ 607.1402-.1403 (for corporations that have commenced business). Shareholders may dissolve a corporation without action of the board of directors. *Id.* § 607.1402(5).

63. Curiously, a streamlined procedure for dissolving corporations that have not commenced business requires the corporation to state that no debt remains unpaid. *Id.* § 607.1401(4). This requirement does not exist for corporations that have commenced business.

64. *Id.* § 607.1405. Before the current statute became effective in 1990, a corporation could not voluntarily dissolve until liabilities had been discharged and assets had been distributed.

dissolution does not transfer the corporation's property, relieve directors or officers of their duties, or prevent proceedings against the corporation.⁶⁵ However, if the dissolved corporation notifies its known claimants, the corporation in effect creates a three-year statute of limitations within which claimants must file claims against shareholders for amounts distributed to shareholders in the liquidation.⁶⁶ The statute is silent as to unknown claimants.⁶⁷

Second, the Department of State may dissolve a corporation for failing to comply with requirements.⁶⁸ As with voluntary dissolution, a dissolved corporation continues to exist for the purpose of winding up its affairs, liquidating assets and liabilities, and notifying claimants.⁶⁹ Third, a circuit court may dissolve a corporation upon request by the state, shareholder, or creditor and upon the showing of grounds required by statute.⁷⁰ Under all three dissolution methods, there is no requirement that a corporation transfer a permit, notify the permitting agency of the corporation's dissolution, or handle the obligations under the permit.

C. Business Entities

Corporations have been the focus of this article because the corporate form is the most common business entity encountered by the water management districts. It is the one type of business entity that most people are familiar with and, with the assistance of standardized forms available for no charge on the internet or for sale at stationery stores, is therefore the simplest entity to form. Developers, though, can find the corporate form too restrictive at times as Florida law imposes a number of requirements on the operation of a corporation.

For example, the initial directors are required to meet after incorporation to appoint officers and adopt bylaws;⁷¹ the corporation must maintain a registered agent at all times;⁷² shares in the corporation must be distributed and accounted for;⁷³ and the

Now, however, a corporation can dissolve and then wind up its affairs. The filing of the articles of dissolution can affect the running of the statute of limitations. COHN & AMES, *supra* note 59, at 157.

65. FLA. STAT. § 607.1405(2) (2000).

66. *Id.* § 607.1406.

67. COHN & AMES, *supra* note 59, at 160.

68. FLA. STAT. §§ 607.1420-1421 (2000).

69. *Id.* §§ 607.1421(3).

70. *Id.* §§ 607.1430-1433.

71. *Id.* § 607.0205.

72. *Id.* §§ 607.0403-0505.

73. *Id.* §§ 607.0601-0627.

shareholders must hold an annual meeting.⁷⁴ While these requirements may not seem particularly onerous, other business entity types offer greater flexibility to a developer seeking a short-lived business entity that can easily be controlled and still offer a protective shell to shield the developer from personal liability.

Florida law allows for the creation of two business entities, the limited liability company and the limited partnership, that serve the developer in these situations by allowing the developer to hide its existence yet still grants the developer the power to control the new entity. Obviously not all limited liability companies and limited partnerships are formed with the purpose of hiding past mistakes, but their means of management and the protection from liability they offer make them suitable vehicles for developers seeking a “fresh start” with the regulatory agencies.

1. Limited Liability Companies

Limited liability companies are creatures of statute and controlled by the Florida Limited Liability Company Act under chapter 608, *Florida Statutes*. Unlike Florida corporations that are controlled by a board of directors who then select the officers to handle the day-to-day operations of the company, limited liability companies are controlled by either the member of the company or a manager. In a member-managed company, the members of the limited liability company, that is the persons or entities that contributed the initial cash, property, or services to create the company, manage the company in proportion to their percentage in the profits of the company.⁷⁵ Or, the articles of incorporation for the limited liability company may provide for a manager to run the company.⁷⁶

Neither the members nor the manager of a limited liability company may be held liable for a debt, obligation, or liability of the limited liability company.⁷⁷ This protection from liability also extends to monetary damages to the limited liability company, except in limited circumstances such as a violation of criminal law.⁷⁸

A developer merely has to find or create another person or entity to incorporate as a limited liability company. If the developer contributes the majority of the initial cash or property to the company, then he has the right to run a member-managed limited

74. *Id.* § 607.0701.

75. *Id.* § 608.422(2)(a).

76. *Id.* § 608.422(3).

77. *Id.* § 608.4227(1).

78. *Id.* § 608.4228(1). See *The New Limited Liability Company in Florida*, 73 FLA. B.J. 42 (1999), for a further discussion of Florida limited liability companies.

liability company. Or, if the articles of incorporation call for a manager-managed company, the developer can name himself as the manager. In either case, the limited liability company is simply an extension of the original developer.

Limited partnerships are also controlled by statute under the Florida Revised Uniform Limited Partnership Act found in chapter 620, *Florida Statutes*. Limited partnerships are usually thought of as consisting of the general partner who runs the partnership while the limited partners are restricted to providing funds for the business and then sharing in the profits and losses. For assuming the role of a "silent partner," the limited partner is not liable for the obligations of the limited partnership unless he or she participates in control of the business.⁷⁹ "Control of the business," though, is rather broad and a number of statutory exemptions are provided which allow a limited partner to participate in the business. By statute, the following activities are not considered as participating in control of the business being a contractor for or an agent or employee of the limited partnership; consulting with or advising a general partner with respect to the business; acting as a surety, guarantor, or endorser for the limited partnership.⁸⁰ Similar to the limited liability company, a developer need only find another person to act as general partner to create a limited partnership.⁸¹ The developer assumes the role of a limited partner, contributes the funds for the development project, and then "consults" or "advises" the general partner as necessary to run the partnership.

In both situations, the developer has created a new business entity that it can control and that will shield the developer from any liability imposed on the business entity. More importantly, the new business entity prevents the regulatory agencies from using the developer's history of noncompliance in either the permit application process or enforcement of its laws and rules.

D. Corporate Veil Piercing

As a general matter, limited liability will be preserved except where the corporate principals have abused the corporate form to the detriment of those dealing with the corporation.⁸² Nevertheless, because limited liability has led to abuses of the corporate form,⁸³

79. FLA. STAT. § 620.129(1) (2000).

80. *Id.* § 620.129(2).

81. See Thomas O. Wells, *A Comparison Between Florida Limited Liability Companies and Florida Limited Partnerships*, 68 FLA. B.J. 58 (1994), for a further discussion of Florida limited partnerships and a comparison with limited liability companies.

82. *House of Koscot Dev. Corp. v. Am. Line Cosmetics, Inc.*, 468 F.2d 64 (5th Cir. 1972).

83. See Marilyn Blumberg Cane & Robert Burnett, *Piercing the Corporate Veil in Florida*

courts have responded by developing the doctrine of “piercing the corporate veil” when a corporation is used in a manner not contemplated by law.⁸⁴ In such cases, if a corporation is found liable and is unable to satisfy the judgment, a claimant may attempt to pierce the corporate veil to recover from the corporation’s shareholders or the parent or sister companies, which would otherwise not be liable.⁸⁵ Corporations may be formed for the purpose of limiting liability, and therefore the claimant has the burden of overcoming the presumption that shareholders are immune.⁸⁶ In essence, piercing the corporate veil is a way to enforce a judgment against a corporation.⁸⁷

Each state has developed case law for circumstances in which the corporate veil may be pierced. In Florida, the standard is “improper conduct,” which puts Florida somewhere between the states that require proof of fraud and states that allow piercing without proof of wrongdoing.⁸⁸ However, the Florida Supreme Court has not defined improper conduct, so litigants must examine various cases to understand the type of conduct that warrants veil piercing.⁸⁹

In Florida, every case allowing veil piercing involved a sham corporation or using the corporate form to mislead or defraud creditors.⁹⁰ The case law indicates that where a shareholder (or a parent or sister company) uses the corporation to mislead creditors or to evade liability in a transaction that is personal (or for the benefit of the parent or sister company), then the corporate form has been abused and “improper conduct” might be established.⁹¹ The proof might include evidence that the corporation had no interest in the matter (i.e., the transaction was unrelated to the corporation’s business) or that the corporate property was converted or depleted for the benefit of the shareholder (or parent or sister company).⁹² The cases suggest that an agency may be able to pierce the corporate veil in situations with facts similar to those presented below the corporation’s transaction was really for an individual’s personal benefit, evidenced by the conversion of corporate revenues

Defining Improper Conduct, 21 NOVA L. REV. 663, 665 (1997), for a thorough discussion of corporate veil piercing in Florida. See also Renee A. Roche, *Beyond the Corporate Veil The Potential Liability of Officers and Agents*, 66 FLA. B.J. 22 (1992).

84. *Id.*

85. *Id.* at 665-66.

86. COHN & AMES, *supra* note 59, at 8.

87. Cane & Burnett, *supra* note 83, at 666.

88. *Id.* at 664, 668.

89. *Id.* at 664.

90. COHN & AMES, *supra* note 59, at 9.

91. See Cane & Burnett, *supra* note 83, at 674.

92. See *id.*

to personal assets and by the merging of corporate and personal assets and liabilities;⁹³ the corporation's property was converted or depleted for the personal benefit of shareholders, evidenced by tracing the corporation's property to the shareholders;⁹⁴ the corporation is a sham created for the sole purpose of holding a lease, evidenced by the fact that its officers and its sister company's officers were the same, and the corporation never had a bank account, never filed tax returns, had no assets, and conducted no other business;⁹⁵ the corporation was used to shield personal property from creditors, evidenced by a history of transfers of property;⁹⁶ the corporation had no interest in the transaction, and the corporate name was used as a convenience and to mislead or defraud creditors.⁹⁷

Interestingly, the corporate veil was not pierced where the purpose of incorporation was to prevent a party to a transaction from knowing the identity of the other party.⁹⁸ That ruling could be relevant to situations where an individual would form a corporation to apply for a permit for the purpose of hiding the individual's identity from the agency. In addition, the corporate veil will probably not be pierced just because a poorly managed company is insolvent.⁹⁹

Procedurally, to reach the assets of an individual or a parent or sister corporation, the agency must first obtain a judgment against the corporation and then seek to satisfy the judgment by piercing the corporate veil. Before the veil will be pierced, the agency must show "improper conduct" as described above, as well as establish that the conduct caused injury.¹⁰⁰ Practically speaking, this means two rounds of litigation first to establish liability, then to satisfy the judgment. Given an agency's limited resources and the uncertain outcome of such litigation, an agency may decline to pursue this avenue except in the most egregious cases.

93. See *Futch v. Head*, 511 So. 2d 314 (Fla. 1st DCA 1987).

94. See *Advertects, Inc. v. Sawyer Indus.*, 84 So. 2d 21 (Fla. 1955).

95. See *USP Real Estate Inv. Trust v. Discount Auto Parts, Inc.*, 570 So. 2d 386 (Fla. 1st DCA 1990).

96. See *Estudios Proyectos e Inversiones de Centro America, S.A. v. Swiss Bank Corp., S.A.*, 507 So. 2d 1119 (Fla. 3d DCA 1987).

97. See *Biscayne Realty & Ins. Co. v. Ostend Realty Co.*, 148 So. 560 (Fla. 1933).

98. See *111 Properties, Inc. v. Lassiter*, 605 So. 2d 123 (Fla. 4th DCA 1992).

99. See *Cane & Burnett*, *supra* note 83, at 673 (undercapitalization is relevant only if the corporation was undercapitalized for the purpose of misleading or defrauding creditors); see also *COHN & AMES*, *supra* note 59, at 8.

100. See *Cane & Burnett*, *supra* note 83, at 673; see also *Dania Jai-Alai Palace, Inc. v. Sykes*, 40 So. 2d 1114 (Fla. 1984) (the leading Florida case on corporate veil piercing); *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290 (11th Cir. 1998) (a case involving a parent and subsidiary applying Florida law).

E. Personal Liability

While piercing the corporate veil involves disregarding the corporate form where there has been improper conduct on the part of the corporate principal, personal liability may be directly imposed on corporate principals without the need to pierce the corporate veil, where such principals are found to have personally participated in the corporate wrongdoing.¹⁰¹ In the environmental arena, there is an increasing tendency for courts to assess liability against corporate principals who are directly involved in a violation of an environmental statute that involves tort-like standards such as nuisance.¹⁰² The majority of cases where courts have imposed personal liability for environmental wrongs have been federal cases involving hazardous waste statutes. Although many of these federal hazardous waste statutes are some of the most far-reaching statutes in terms of liability, it has taken almost two decades for the federal courts to resolve the issue of personal liability under these statutes.

The tension between corporation protection and environmental protection is evident even in the most environmentally protective statutes. Perhaps the most far-reaching environmental protection statute, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),¹⁰³ stretches concepts of liability to their outer extreme. Through CERCLA, Congress made clear its intent to impose strict liability, retroactive liability, and joint and several liability. Yet even with the wide net of

101. The theory of personal liability of corporate officers evolved over the course of many years starting in 1943. See *United States v. Dotterweich*, 320 U.S. 277 (1943). In *Dotterweich*, the Court affirmed the conviction of a corporate officer under the Federal Food Drug and Cosmetic Act (FFDCA) for introducing misbranded drugs into interstate commerce. Although the Court did not expressly articulate a theory of personal liability for corporate officers, the Court found that the only way a corporation could act was through the actions of its employees and that because the purpose of the FFDCA was to protect public health, as a matter of public policy, the corporate officer should be held responsible. Almost thirty years later, the U.S. Supreme Court in another FFDCA case found a corporate owner/director liable for the corporation's violation of the Act, finding that a corporate agent, through whose act, default, or omission the corporation committed the crime, was himself guilty of the individual crime. See *United States v. Park*, 321 U.S. 658 (1975). This time, the Court clearly articulated the principle that the necessary element for liability of the corporate agent is for the agent to have had a "responsible relation to the situation." *Id.* at 669. Since *Parks*, numerous federal and state courts have assessed personal liability agents and corporate principals in a number of tort cases and under various public health, safety and welfare statutes. At least two Florida courts have assessed personal liability against corporate principals. See, e.g., *Orlovsky v. Solid Surf, Inc.*, 405 So. 2d 1363 (Fla. 4th DCA 1981); *Adams v. Brickell Townhouse, Inc.*, 388 So. 2d 1279 (Fla. 3d DCA 1980).

102. See, e.g., *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983) (corporate officer is liable if he personally participates in the wrongful, injury-producing act).

103. 42 U.S.C. § 9601-9675 (2000).

liability that CERCLA casts, Congress did not make clear whether corporate principals or parent corporations of responsible corporations should be brought within the purview of CERCLA. For years the federal circuit courts struggled with the issue of whether, and under what legal theory, parent corporations could be liable for their subsidiaries' violations of CERCLA. It was not until 1998 that the U.S. Supreme Court squarely addressed this issue in the case of *United States v. Bestfoods*.¹⁰⁴ In *Bestfoods*, the Supreme Court addressed the application of CERCLA's "owner/operator" provision to parent corporations. The issue was whether a parent corporation that actively participated in and exercised control over the operations of a subsidiary may be held liable as an "operator" under CERCLA. The Court ruled that there are two theories under which a parent corporation could be found liable for the CERCLA violations of its subsidiaries. Not surprisingly, the first theory articulated by the Court is that of corporate veil-piercing. More significant however, is the second theory of liability set forth in this case which does not involve veil piercing. Under this theory, the Court focused on the fact that under CERCLA section 107(a)(2), "operators" of hazardous waste facilities may be liable as well as the "owners" of such facilities. Thus, the Court reasoned that a parent corporation itself could be directly liable as an "operator" of a facility owned by its subsidiary if the parent itself, or in connection with its subsidiary, acted as the operator of the facility by actively participating in and exercising control over the operations of the facility.¹⁰⁵ Thus, it is now clear, that at least for environmental statutes that assess liability against "operators" as well as "owners," parent corporations may be directly liable.¹⁰⁶ Additionally, a number of lower courts have imposed personal liability against corporate officers under CERCLA under the provisions of the act

104. 524 U.S. 51 (1998), *vacating and remaining sub nom.* *United States v. Cordova Chem. Co.*, 113 F.3d 572 (6th Cir. 1997).

105. *See id.* at 64. The *Bestfoods* Court further clarified that to be personally liable, an operator must manage, direct, or conduct operations specifically related to the environmental pollution or make decisions about compliance with environmental regulations. *Id.* at 66-67.

106. For a thorough discussion of the *Bestfoods* decision and the evolution of the law leading up to it see Lucia Ann Silecchia, *Pinning the Blame & Piercing the Veil in the Mists of Metaphor The Supreme Court's New Standards for the CERCLA Liability of Parent Companies and a Proposal for Legislative Change*, 67 *FORDHAM L. REV.* 115 (1998), and Robert J. Sutphin, Jr., *Environmental Law-Owners or Operators Two District Paths to Parent Corporation Liability under CERCLA - United States v. Bestfoods*, 30 *N.M.L. REV.* 109 (2000). *See also* Joel R. Burcat & Craig P. Wilson, *Post-Dissolution Liability of Corporations and Their Shareholders under CERCLA*, 50 *BUS. LAW.* 1273 (1995); Charles E. Dadswell, Jr., *The Corporate Entity Is There Life After CERCLA?*, 7 *COOLEY L. REV.* 463 (1990); George W. Dent, Jr., *Limited Liability in Environmental Law*, 26 *WAKE FOREST L. REV.* 151 (1991); Larry S. Kane, *How Can We Stop Corporate Environmental Pollution? Corporate Officer Liability*, 26 *NEW ENG. L. REV.* 293 (1991).

that assess liability on “persons” who violate the act. Because CERCLA defines “persons” to include individuals as well as corporations, courts have found officers who personally participated in violations to be personally liable as “persons” under the act.¹⁰⁷

Although the vast majority of the cases addressing direct liability of parent corporation as “operators” or personal liability of corporate officers as “persons” in the environmental arena are federal cases, parallels exist with Florida law and there is no reason why Florida courts could not take a similar approach in assessing liability for violations of Florida environmental laws. Notably, with regard to water management district enforcement, chapter 373 attaches liability to “persons.”¹⁰⁸ “Persons” is defined broadly to include “any and all persons, natural or artificial”¹⁰⁹ Thus, Florida courts could impose personal liability against corporate principals who personally participate in violations of chapter 373. Moreover, as with the federal environmental laws that contain tort-like nuisance standards, chapter 373 also embodies public nuisance tort concepts. Specifically in section 373.433, the legislature expressly declared that any work that violates Water Management District rules is a public nuisance. Thus, there are no grounds for distinguishing water management violations from federal hazardous waste violations for the purposes of imposing personal liability. In fact, in at least one case, a Florida court has imposed liability against a corporate officer for an environmental violation under a theory of personal liability. In *State, Department of Environmental Protection v. Harbor Utilities Company, Inc.*,¹¹⁰ the court found that corporate officers, directors and managers may be subject to personal liability under Florida’s Air and Water Pollution Control Act.¹¹¹ Although the case did not involve a violation of chapter 373, it did involve a violation of environmental statutory provisions that assess liability against “persons” who commit violations, much in

107. See, e.g., *New York v. Shore Realty Corp.*, 763 F.2d 1886 (2d Cir. 1985) (corporate officer was liable because he knew that the hazardous waste was on the site and he directed and controlled all corporate decisions); *United States v. Carolawn Co.*, 698 F. Supp. 616 (D.S.C. 1987) (three corporate officers liable because they were personally involved in day-to-day site operation); *United States v. N.E.P.A.C.C.O.*, 579 F. Supp. 823 (W.D. Mo. 1984) (corporate vice president held personally liable because he had direct supervision over and actual knowledge of the waste disposal site).

108. FLA. STAT. § 373.119 (2000). Authorizing an administrative complaint to be served upon an alleged “violation,” and provides that such order shall become final unless the “person” named therein requests an administrative hearing. *Id.* § 373.430. Providing that it shall be a violation of this part, and it shall be prohibited for any “person” to carry out any of the enumerated acts.

109. *Id.* § 373.019(5).

110. 684 So. 2d 301 (Fla. 2d DCA 1996).

111. FLA. STAT. §§ 403.031(5), .141, .161 (2000).

the same way as sections 373.119 and 373.430, *Florida Statutes*. In *Harbor Utilities*, the court was persuaded by the fact that the corporate officer/director had repeatedly represented that he held managerial authority to take “whatever action necessary” to bring the facility into compliance, yet failed to do so. The court found that the statutes at issue expressly assess liability against “persons,” which includes individuals, and that there is no language in the statute to limit civil liability to permittees and facility owners only.¹¹² Likewise, there is nothing in the relevant provisions of Part IV of chapter 373 that would limit liability. Thus, personal liability may be a viable option for water management districts to pursue in bringing enforcement actions for violations of water management district rules or permits.

VI. ENVIRONMENTAL LAWS THAT LOOK BEHIND THE CORPORATE SHELL

Some current laws do exist that allow a permitting agency to take into consideration the people behind the corporate form in the permitting process. For example, the Florida Department of Environmental Protection may refuse to issue a waste management facility permit to an applicant based on that applicant’s past conduct.¹¹³ If the applicant has repeatedly violated the laws and rules governing the operation of waste management facilities and is deemed “irresponsible” by DEP, the applicant may find its permit application denied.¹¹⁴ What gives this section its “teeth” above and beyond the general rule allowing DEP to deny a permit based on past conduct,¹¹⁵ is the DEP’s authority to look behind the applicant’s corporate form in its permitting process for waste management facilities. DEP has defined the term “applicant” in this section to include:

112. *Harbor Utilities*, 684 So. 2d at 303.

113. FLA. STAT. § 403.707(8) (2000).

114. *See id.*; FLA. ADMIN. CODE R. 67-701.320(3)(2000). “Irresponsible” means:

[A]n applicant owned or operated a solid waste management facility in this state, including transportation equipment or mobile processing equipment used by or on behalf of the applicant, which was subject to a state or federal notice of violation, judicial action, or criminal prosecution for activities that constitute violations under Chapter 403, *Fla. Stat.*, or the rules promulgated thereunder, and could have prevented the violation through reasonable compliance with Department rules.

FLA. ADMIN. CODE R. 62-701.320(3)(b) (2000).

115. FLA. ADMIN. CODE R. 62-4.070(5) (2000).

[T]he owner or operator of the facility, or if the owner or operator is a business entity, a parent or subsidiary corporation, a partner, a corporate officer or director, or a stockholder holding more than 50 percent of the stock of the corporation.¹¹⁶

By broadly defining applicant to allow DEP to look behind the corporate form, DEP can learn the identity of the actual operators of the proposed waste management facility will be. If a business entity or person has violated the waste management laws in the past, they cannot hide that past conduct under the shell of a new entity. The Florida Secretary of State cannot be used by a past violator to expunge a history of noncompliance through a simple change of names. The past conduct of that entity or person, no matter under what name or form that conduct occurred, can be used by DEP to determine if the current permit applicant has provided reasonable assurances that it will comply with the agency's laws and rules.

The laws of Florida are not unique in considering an applicant's past violations during the permitting process or in factoring a party's history of noncompliance in the penalty amount for violations of environmental laws. Common to a number of federal environmental permitting programs is the requirement that past violations be considered by the trier of fact in determining the amount of the civil penalty. These types of laws are found in the Clean Water Act,¹¹⁷ the Section 404 wetlands permitting program administered by the U.S. Army Corps of Engineers,¹¹⁸ the Clean Air Act,¹¹⁹ the Toxic Substances Control Act,¹²⁰ and the Surface Mining Control and Reclamation Act.¹²¹

The Surface Mining Control and Reclamation Act deserves special attention because it not only contains statutory language concerning past violations for determining penalties, but also addresses the issues raised in this article the use of various business entities to mask the actual controlling parties to obtain a permit unsoiled by past violations. The application for a surface coal mining and reclamation permit requires, in part, the following information:

116. FLA. ADMIN. CODE. R. 67-701.320(3)(a) (2000).

117. 33 U.S.C. § 1319(d) (2000).

118. *Id.* § 1344(s)(4).

119. 42 U.S.C. § 7413(e)(1) (2000).

120. 15 U.S.C. § 2615(a)(2)(B) (2000).

121. 30 U.S.C. § 1268(a) (2000).

[I]f the applicant is a partnership, corporation, association, or other business entity, the following where applicable the name and addresses of every officer, partner, director, or person performing a function similar to a director, of the applicant, together with the name and address of every person owning, of record 10 per centum or more of any class of voting stock of the applicant and a list of all names under which the applicant, partner, or principal shareholder previously operated a surface mining operation within the United States within a five-year period preceding the date of submission of the application.¹²²

[A] statement of whether the applicant, any subsidiary, affiliate, or persons controlled by or under a common control with the applicant, has ever held a Federal or State mining permit which in the five-year period prior to the date of submission of the application has been suspended or revoked has had a mining bond or similar security deposited in lieu of bond forfeited and, if so, a brief explanation of the facts involved.¹²³

Usually, a permit application is signed only by the president or managing partner of the entity, and the agency has no means of learning the names of the other individuals involved in the business entity. By requiring the information stated above in a permit application, the issuing agency quickly learns who the real people are behind the entity applying for the permit. It is the people who run the business that concern the permitting agencies. Corporations and limited liability companies do not make decisions, the people who occupy the seats on the board of directors and act as officers make the decisions. They are the ones who decide if the business entity will comply with the permit condition and they are the ones who decide when and how to violate the permit.

While some of the information may be available from the entity's state division of corporations or other state agency, the respective state will have on file only that information that was submitted in the articles of incorporation or other documents forming the

122. 30 U.S.C. § 1257(b)(4) (2000).

123. *Id.* § 1257(b)(5).

business entity.¹²⁴ Most states require a new business entity to file the names of the initial officers but there is no requirement that the state be kept apprised of stock ownership.

The requirement in the surface coal mining and reclamation permit that all persons owning 10 per centum or more of any class of voting stock be listed is important because there is no requirement that either an officer or director of a corporation or limited liability company own stock in that company. Compensation for both types of positions can be in cash or services.¹²⁵ And, while the board of directors may set policy and the officers control the day-to-day operations, the stockholders can use their ownership interest to control the business. The stockholders vote for the board of directors and can obviously back those individuals who will carry out the wishes of the major stockholders.¹²⁶ The "10 per centum of stock" requirement prevents an individual from setting up straw men as officers and directors of business and continuing to control the business through his or her majority ownership of stock. The owner of the business cannot hide behind those officers and directors and claim ignorance of the activities of the business.

The purpose of requiring this information in the surface coal mining and reclamation application is to alert the permitting agency of those individuals who were responsible for or involved in permit violations in the past. This information can then be used by the agency in determining whether the permit applicant has provided sufficient reasonable assurances that the applicant will comply with the conditions of the permit. If some of the individuals listed on the permit application have a history of permit violations, then the agency can use that history of noncompliance as grounds for requiring additional assurances before issuing the permit.

Although there are a number of environmental laws that authorize environmental agencies to look behind the corporate shell, Florida law currently does not contain any such provision that would authorize a water management district to do so in enforcing the provisions of part IV of chapter 373.

VII. CONSIDERATIONS FOR CHANGE

If the water management districts desire to enhance their ability to enforce the environmental laws that they administer, there are a number of changes in their practices, regulations, and statutes

124. See FLA. STAT. § 607.0202 (2000). The articles of incorporation for corporation must contain the name and address of the individuals who are to serve as the initial directors.

125. *Id.* § 607.08101.

126. *Id.* § 607.0803(3) (2000).

that could be considered. First, the water management districts could focus their enforcement efforts on aggressively pursuing corporate principals of developer corporations that lack assets to bring projects into compliance or pay the necessary penalties by seeking to either pierce the corporate veil or pursue personal liability against corporate principals who personally participate in the environmental wrongdoings. Both of these options are available without any changes to existing law. However, as described above, the agencies would bear a heavy burden and the processes for obtaining such judgments can be cumbersome.

Another option that the water management districts may want to consider is pursuing statutory changes that would allow the consideration of corporate principals or related corporate entities in both determining whether reasonable assurances have been provided to issue a permit and in assessing penalties for violations that occur. Such statutory changes could involve changes to the definition of permit "applicant" to include not only the business entity that is applying for the permit itself, but also any corporate principal or related business entity. Similarly, statutory changes could be made that would make it clear that in either assessing a penalty informally through a voluntary consent order or in seeking to have a circuit court assess a penalty, the water management districts would have the authority to take into account the past water management violations of not only the business entity that is the permittee or the violator, but also of any principal of the corporation or related business entity. An approach similar to this was pursued by the DEP during the 2001 legislative session. The DEP staff drafted legislation to address the concepts discussed above.¹²⁷ The bill, entitled "The Florida Performance Based Environmental Permitting Act,"¹²⁸ would have, among other things, required a permit applicant to provide information not only on its past activities but also on the past activities of its related entities. The bill also would have authorized FDEP to evaluate the compliance history of the corporation and its related entities based on a point system in determining whether to issue a permit. Finally, the bill would provide incentives for permit applicants and other related entities with good compliance history. The draft legislation contained the following definitions:

127. FDEP staff worked at models from other states at Florida's solid waste permitting laws, at tax and bankruptcy laws and at various debarment programs in developing the draft legislation. Telephone interview with Jack Chisholm, FDEP attorney (Mar. 14, 2001).

128. FLA. HB 1627 (2001); FLA. SB 2112 (2001), available at <http://www.oeg.state.fl.us> (last visited Apr. 25, 2001).

“Applicant” means the owner, operator, or president of the proposed activity requiring a permit as well as the permittee if different from the owner, operator, or president.

“Related entities” means (1) an individual who is or was an officer, manager or partner of applicant during the past five years if the individual has or had operational control of the applicant or the applicant’s environmental affairs, (2) a business entity where that individual worked, (3) a stock holder who owns more than 50 percent of the applicant, and (4) a parent corporation.

Although the bill did not pass and died in committee without much serious consideration, the concepts of considering related entities in determining whether to issue a permit are important concepts that should be considered in future legislative changes. Notably, the definition of “applicant” proposed in the bill includes the term “operator.” The inclusion of this term would make clear that corporate principals or parent corporations that play an active role in the operations of the corporation, may have personal liability for environmental violations under the Supreme Court’s *Bestfoods* approach.

If the water management districts pursue an approach similar to that set forth in the bill, a component could be a statutory change modeled on existing statutes such as the federal Surface Mining Control and Reclamation Act, described above, which requires that business entity applicants provide information on officers, partners, directors, and shareholders and a statement of whether any related entity has held a permit which has been revoked or suspended.

A third consideration for the water management districts would involve statutory changes of a different nature. Water management districts should consider whether to pursue statutory changes that would require corporate permit holders to notify the district within a specified period of time prior to their dissolution. This would allow the water management district to have notice of the impending dissolution in time to pursue any enforcement actions necessary to bring the permitted project into compliance prior to the corporate dissolution. This option has several drawbacks however. First, with regard to involuntary administrative dissolution, it is unlikely that the permit holder would be able to provide notice prior to such dissolution. More importantly, however, notice of dissolution does not address the true issue which is the problem of the corporation whether dissolved or still in existence, failing to

have sufficient assets itself to either carry out the activities necessary to bring the project into compliance or to pay an appropriate penalty.

To address these concerns, perhaps a better option for the water management districts to consider is a requirement that all permit applicants provide financial assurances in the form of a performance bond or letter of credit, up front before obtaining a permit, in an amount sufficient to cover the costs of properly constructing the surface water management system as well as the costs of properly maintaining such system and the costs of addressing problems with the system that may occur in the future. Although this approach would place a burden on the permit applicants who do not have a history of noncompliance and who do follow the rules, it would ensure that sufficient financial resources would be available to ensure that projects were properly built and maintained. If the water management districts do not find it appropriate to place the financial assurance burden on all permit applicants, another option would be for the water management districts to limit the requirement for financial assurance to permit applicants that either themselves have a history of noncompliance with water management district rules or whose corporate principals and/or related business entities have a history of noncompliance with water management district rules. This could be accomplished without a statutory change. Existing statute sections 373.413 and 373.416 already authorize the water management districts to impose such reasonable conditions as are necessary to assure that the construction alteration, operation, or maintenance of a system will not be harmful to the water resources of the district. These provisions provide sufficient authority for the water management districts to adopt regulations that impose conditions requiring financial assurance on permit applicants whose corporate principals or related business entities have shown a history of compliance problems such that financial assurances are necessary to ensure that the permitted project will not cause harm to the water resources of the district.

VIII. CONCLUSION

To resolve the tension between environmental protection and corporate protection, a delicate balance must be struck to ensure that goals of corporate protection are not exalted above the important public policy goals of environmental protection. A number of options exist for water management districts to enhance their enforcement of environmental laws despite the tendency of the developers to form new business entities for each project or phase

of a project. Some of these options can be pursued through existing laws such as under the theory of corporate veil piercing or personal liability. Other options would have to be accomplished through either statutory changes to authorize water management districts to consider the past violations of corporate principals and related business entities in determining whether to issue a permit and in determining the amount of a penalty to be assessed. Other options would not require statutory changes but, instead, could be accomplished through rule changes such as an option that would require permit applicants with a history of noncompliance or whose corporate principals or related business entities have a history of noncompliance to provide financial assurance that a project will be properly carried out and maintained prior to obtaining a permit.

