RECENT DEVELOPMENTS

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I. INTRODUCTION

This article summarizes recent developments in federal and state environmental and land use case law. This article also provides an update to the Apalachicola-Chattahoochee-Flint River Basin Water Dispute between Florida, Georgia, and Alabama that has been ongoing since the 1980's.[1] For more information on environmental issues, the reader should consult the official websites of the United States Environmental Protection Agency,[2] the Florida Legislature,[3] the Florida Department of Environmental Protection,[4] and the Department of Community Affairs.[5] Another source that might be useful to the reader is the website of the Environmental & Land Use Law Section of the Florida Bar.[6]

II. FEDERAL DECISIONS

Bordon Ranch Partnership v. United States Army Corp of Engineers, 123 S.Ct. 599, *aff'g* 261 F.3d 810 (9th Cir. 2001).

On December 16, 2002, the Supreme Court affirmed the Ninth Circuit Court of Appeals decision in *Bordon Ranch*.[7] The *Bordon Ranch* case dealt with alleged Clean Water Act[8] ("CWA") violations

1. Dustin S. Stephenson, *The Tri-State Compact: Falling Waters and Fading Opportunities*, 16 J. LAND USE & ENVTL. L. 83, 86 (2000).
2. http://www.epa.gov
3. http://www.leg.state.fl.us This article does not discuss legislation that is before the Florida Legislature because at the writing of this article the Legislature is still in session.
4. http://www.dep.state.fl.us
5. http://www.dca.state.fl.us
6. http://www.eluls.org
7. The circuit court decision was affirmed without a written opinion by an equally divided Court with Justice Kennedy taking no part in the consideration or decision of the case. *Bordon Ranch P'ship v. U.S. Army Corp of Eng'r,* 123 S.Ct. 599, *aff'g* 261 F.3d 810 (9th Cir. 2001).
8. 33 U.S.C. §§ 1251-1387 (1972).

in wetlands under the United States Army Corp of Engineers ("Corp") authority over "dredge and fill."[9]

Angelo Tsakopoulos, purchased the 8400-acre Bordon Ranch, the main use of which had been rangeland for cattle grazing.[10] Portions of the ranch had hydrologic features that created vernal pools[11] and swales[12] most of which were attached to navigable waterways.[13] These features were found to be caused by a "clay pan" beneath the soil surface that trapped water.[14]

Tsakopoulos wanted to convert the land to vineyard and orchards, divide the land, and sell off parcels.[15] However, the hydrologic features prevented the possibility of vineyards and orchard being successful because the roots of these plants could not penetrate the clay pan.[16] Tsakopoulos engaged in a technique called "deep ripping," which involved vertically inserting four to seven foot rods into the soil and then pulling them with a tractor to slice the soil open.[17] These rods were long enough to penetrate the clay pan the gashes in the soil drained the wetlands.[18]

Tsakopoulos engaged in these activities without a permit from the Corp due to an ongoing dispute with the Corp over whether it had the authority to regulate this technique.[19] At one point, the parties reached an agreement that Tsakopoulos would discontinue any deep ripping on this land, however, not long after the agreement, the deep ripping continued.[20] The Corp issued a regulatory guidance letter that distinguished plowing from deep ripping techniques because of the destruction that deep ripping caused to the hydrologic characteristics of the land.[21] The Corp reasoned that this allowed it to regulate the use of deep ripping techniques.[22]

Tsakopoulos challenged the Corp's authority by filing suit.[23] The Corp counterclaimed for injunctive relief to stop Tsakopoulos from deep ripping and for statutory penalties under the Clean

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9. 33 U.S.C. § 1344.
10. *Bordon Ranch P'ship v. U.S. Army Corp of Eng'r*, 261 F.3d 810, 812 (9th Cir. 2001).
11. Vernal pools form during the rainy season but are dry for most of the summer. *Id.* at 812.
12. Swales are wetlands that are sloped to allow for water flow and filtration. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 812-13
20. *Id.* at 812.
21. *Id.*
22. *Id.*
23. *Id.* at 813.

Water Act ("CWA").[24] The district court ruled that Tsakopoulos violated the CWA.[25] The district court awarded $1,000,000 in statutory penalties, and also ruled that there were 348 violations.[26] The district court did give Tsakopoulos the choice of only paying $500,000 plus mitigation for the damage done, but he declined.[27]

The Ninth Circuit looked to cases that analyzed the accidental fall back and gold mining.[28] The court analogized the mixing of the soils with the accidental fall back from dredging and "addition" of "pollutants" from the return of soil due to placer gold mining operations.[29] The court stated that even though the soil that was redeposited, was of the same type, and from the same area, it qualified as a pollutant.[30] The court went on to reason that the deep mixing of the soil was the exact same as the redeposit in *Rybachek*.[31] Also, the court stated the prongs qualified as a discrete point source.[32] Therefore, the court ruled that the deep ripping technique was a violation of the CWA.[33]

The court stated that the deep ripping technique did not qualify under the express farming exception because of the change in hydrologic characteristics.[34] The court also analyzed the statutory penalties that the district court doled out.[35] Tsakopoulos argued that the penalties in the CWA only allowed a maximum of $25,000 *per day*.[36] The court ruled that this was against the intent of the CWA and that penalties were to be assessed up to $25,000 *per violation*.[37] The court concluded that the $1.5 million that was awarded against the petitioner was proper, though it remanded the case for recalculation of the penalties because a portion of the penalties was tied to the vernal pools.[38]

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24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 814 (analyzing *Rybachek v. United States Envtl. Prot. Agency*, 904 F.2d 1276 (9th Cir. 1990) and *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000)).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 815.
33. *Id.*
34. *Id.* at 815-16.
35. *Id.* at 816-17.
36. *Id.* at 817.
37. *Id.* at 818.
38. The court reasoned that, in light of *Solid Waste Agency of Northern Cook County v. United States Army Corp of Engineers*, 531 U.S. 159 (2001), the isolated vernal pools did not fall within the regulatory ambit of the CWA. *Id.* at 812.

Judge Gould dissented to the decision.[39] Judge Gould reasoned that the deep ripping was nothing more than plowing.[40] He stated that the mixing of the soil through deep ripping was nothing more than the same type of mixing of the soil achieved through plowing.[41] He called for a more explicit indication from Congress as to whether the CWA was to cover the "deep plowing" that was performed by Tsakopoulos.[42]

The Supreme Court upheld the decision by a split decision.[43]

McAbee v. City of Fort Payne,
318 F.3d 1248 (11th Cir. 2003).

In *McAbee*, the Eleventh Circuit Court of Appeals ruled that state Clean Water Act ("CWA") provisions must be "roughly comparable" to the federal provisions in order to preclude citizen suits.[44] Since rough comparability between the different provisions did not exist, a third-party citizen suit would not be precluded even though administrative action had already been taken against the defendant.[45]

The city of Fort Payne, Alabama, ("City") held a CWA permit for its wastewater treatment plant.[46] The Alabama Department of Environmental Management ("ADEM") filed an enforcement order and penalty of $11,200 fine pursuant to its delegated authority under the CWA.[47] The Alabama statute did not require notice to the public prior to the administrative action.[48] The treatment plant was only required to give *post hoc* notice that did not include the location of the plant nor the waterways affected.[49] The notice that was actually given did not provide information about the process for third parties to contest the penalty.[50]

McAbee, a riparian landowner downstream from the treatment plan, filed a suit claiming that the City was in further violation of its permit limitations.[51] The City requested summary judgment

39. *Id.* at 819.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Borden Ranch P'Ship v. United States Corp of Eng'rs*, 123 S.Ct. 599 (2002).
44. *McAbee v. City of Fort Payne,* 318 F.3d 1248, 1257 (11th Cir. 2003).
45. *Id.*
46. *Id.* at 1250.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*

claiming the CWA precluded citizen suits when the enforcement agency, ADEM in this case, was diligently regulating the permit holder.[52] The district court denied the motion for summary judgment after analyzing the comparability of the Alabama statute to the federal scheme.[53]

The Eleventh Circuit analyzed the citizen suit provision of the federal CWA[54] looking to the specific language of the statute, the purposes behind the statute, and the split between the circuits that currently exists on this issue.[55] The court found that, under the federal CWA, a citizen suit would be precluded unless two conditions are met.[56] First, the implementing agency must be diligently prosecuting violations of the CWA.[57] Second, the court stated that the state enforcement provisions must be "roughly comparable" to the federal scheme.[58] However, the court recognized that there was a split between the circuits as to what constitutes comparability.[59]

The court recognized that Congress intended that the States were to be the primary enforcement arm of the CWA.[60] Because of this, the court reasoned that the state regulatory scheme need not be exactly the same but only required "rough comparability."[61] The court went on to note that the citizen suit aspect was also important in supplementing the enforcement efforts of the government by allowing enforcement where the government is not willing to act.[62] The court noted that the First Circuit required comparable penalties, access to the penalties, and the overall scheme must roughly regulate the same violations as the CWA.[63] The court noted that the Eighth Circuit adopted the First Circuit's method but added the requirement of citizen participation.[64] The court noted that the Ninth Circuit did not evaluate comparability respective to the overall statutory scheme but required comparability under the specific section contested.[65] Lastly, the court noted that the decision

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52. *Id.*
53. *Id.*
54. 33 U.S.C. § 1319(g)
55. *McAbee*, 318 F.3d at 1251-54.
56. *Id.* at 1251.
57. *Id.*
58. *Id.*
59. *Id.* at 1252-54.
60. *Id.* at 1252.
61. *Id.*
62. *Id.*
63. *Id.* at 1252-53.
64. *Id.* at 1253.
65. *Id.*

of the Sixth Circuit also required overall comparability between the state statute and the federal scheme.[66]

The Eleventh Circuit announced that its standard would be that comparability must be viewed in light of "each class of state-law provisions."[67] The Eleventh Circuit specifically pointed to public participation provisions, penalty assessment provisions, and judicial review processes as the classes of state law provisions that needed to be comparable to their federal law counterparts.[68] The court stated that requiring courts to compare the overall statutory schemes would be too burdensome and could result in uncertainty to possible litigants as to whether there was comparability.[69] The court ruled that the Alabama scheme was not comparable, because there was no prior public notice requirement, no right to petition for a hearing, no notice of a hearing, and no judicial review if a hearing was not held.[70] Therefore, the court affirmed the district court's decision and allowed the citizen suit to continue.[71]

III. FLORIDA DECISIONS

Caribbean Conservation Corporation v. Florida Fish and Wildlife Conservation Commission, 2003 WL 124536 (Fla. January 16, 2003).

The Caribbean Conservation Corporation ("Corporation") brought suit against the Florida Fish and Wildlife Conservation Commission ("FWCC") seeking a declaratory judgment as to whether certain statutory sections, which require the FWCC to comply with Chapter 120, *Florida Statutes*, usurped of constitutionally granted power.[72] The Supreme Court of Florida analyzed the history of the creation of the FWCC, including the duties that are granted to it constitutionally and statutorily.[73] The Court found that the named statutes dealing with species of special concern are unconstitutional but that statutes requiring adherence to Chapter 120 relating to endangered or threatened were constitutional.[74]

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66. *Id.*
67. *Id.* at 1256.
68. *Id.*
69. *Id.*
70. *Id.* at 1256.
71. *Id.* at 1257.
72. *Caribbean Conservation Corp. v. Florida Fish and Wildlife Conservation Comm'n*, 2003 WL 124536, *1 (Fla. January 16, 2003).
73. *Id.*
74. *Id.* at *10.

The Court analyzed the creation of the FWCC to discern where its duties arose.[75] The FWCC was created by a constitutional amendment in 1998.[76] This amendment combined the Florida Game and Fresh Water Fish Commission ("Game Commission") and the Marine Fisheries Commission to create the FWCC.[77] The Court noted that the Game Commission was a constitutionally created agency but that the Marine Fisheries Commission was created statutorily.[78] The Court found that the Marine Fisheries Commission had exclusive jurisdiction over all marine life except endangered species.[79] In *State v. Davis*,[80] the Court stated that this meant that the Marine Fisheries Commission had jurisdiction over endangered species; however, the jurisdiction was shared with the Department of Environmental Protection ("DEP").[81] The constitutional amendment that created the FWCC included all duties that the Game Commission and Marine Fisheries Commission each held.[82]

The Legislature then enacted Chapter 99-245, which required the FWCC to adhere to Chapter 120 with respect to any statutory duty that it exercised.[83] This statute was challenged as a usurpation of the constitutional powers of the FWCC.[84] Other statutes that required the FWCC to comply with Chapter 120 when dealing with endangered or threatened species were also challenged.[85]

The circuit court stated that the statutory sections were constitutional because the FWCC lacked full authority over endangered or threatened species, rather, it shared authority with DEP.[86] The First District Court of Appeals approved the decision of the circuit court following a different interpretation of *State v. Davis*.[87]

The Supreme Court of Florida reviewed the text and legislative history of the constitutional amendment.[88] The Court found that

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75. *Id.* at *2-5.
76. *Id.* at *3-5.
77. *Id.* at *3-4.
78. *Id.* at *2
79. *Id.*
80. *State v. Davis*, 556 So.2d 1104 (Fla. 1990).
81. *Caribbean*, 2003 WL 124536 at *2.
82. *Id.* at *3-4.
83. *Id.* at *4-5.
84. *Id.*
85. *Id.*
86. *Id.* at *5-6.
87. *Id.* at *6-7.
88. *Id.* at *7-10.

the text of the amendment was seemingly ambiguous.[89] The legislative history, however, explicitly showed that the amendment did not grant constitutional authority to the FWCC over endangered or threatened species.[90] The Court also agreed with the First District's interpretation of *Davis* in that the FWCC had authority to regulate endangered or threatened species because of incidental effects that would be felt due to its proper exercise of its authority.[91] The Court ruled that the statutory sections at issue were constitutional except that Chapter 120 did not have to be adhered to when regulating species of special concern.[92]

Florida Department of Agriculture and Consumer Services v. Haire, 836 So.2d 1040 (Fla. 4th DCA 2003).

In *Haire*, the Fourth District Court of Appeals decided that the statute requiring the destruction of all citrus trees within 1900-foot radius of a tree infected with citrus canker is a valid exercise of the state's police power.[93] The court also ruled that because citrus canker posed imminent danger to the citrus industry, the state need not give a pre-deprivation hearing before summarily destroying the citrus trees within the 1900-foot radius.[94]

In 1999, the Department of Agriculture and Consumer Services ("Department") reviewed a study that concluded that the rule calling for the destruction of all citrus trees within 125 feet of an infected tree was not sufficient to eradicate a newly discovered strain of citrus canker.[95] The Department proposed adopting a rule that would expand the destruction radius to 1900 feet from the infected tree.[96] Following litigation, the Department was enjoined from enforcing the rule during an administrative review of the rule.[97] During the administrative review period, the Legislature enacted 2002-11, Laws of Florida, which statutorily created the 1900-foot destruction radius.[98]

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89. *Id.* at *8.
90. *Id.* at *9.
91. *Id.* at *10.
92. *Id.*
93. *Florida Dep't of Agric. and Consumer Serv. v. Haire*, 836 So.2d 1040, 1054 (Fla. 4th DCA 2003).
94. *Id.* at 1056-60.
95. *Id.* at 1044.
96. *Id.*
97. *Id.*
98. *Id.*

The Appellees amended their current action to add claims for a declaratory judgment as to the constitutionality of 2002-11.[99] The trial court declared the act unconstitutional and enjoined the Department from searches pursuant to area-wide warrants that had been electronically signed.[100] The trial court also enjoined the Department from destroying any trees that were not visibly infected with citrus canker.[101]

The Fourth District analyzed the constitutionality of the act.[102] The court noted the importance of the citrus industry on Florida's economy and stated that it was within the state's police powers to protect Florida's economic welfare.[103] The court analyzed two other decisions where the respective courts had reasoned that the eradication of citrus canker was within the police power.[104] Under these cases, both courts upheld a destruction radius of 125 feet.[105] Both the *Nordmann* and *Denney* courts evaluated the *Corneal* decision,[106] which stated that if a harm was imminent, then the state could summarily destroy property to protect the industry.[107] Both of these courts ruled that citrus canker posed an imminent threat and the state could summarily destroy the infected trees and the exposed trees so long as the actions were compensated.[108] The *Haire* court also analyzed the *State Plant Board* decision[109] that concluded that pre-deprivation hearings were not required so long as the danger was imminent.[110] The *Haire* court concluded that citrus canker posed a imminent danger and, thus, it was within the police power to destroy seemingly healthy trees without a pre-deprivation hearing but that full compensation was required.[111]

The *Haire* court then analyzed whether the expansion of the destruction radius violated substantive due process requirements.[112] The court ruled that the reasonable relationship test was the appropriate test to use because the expansion was based on scientific evidence which was not adequately challenged,

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99. *Id.* at 1044-45.
100. *Id.* at 1045.
101. *Id.*
102. *Id.* at 1046.
103. *Id.* at 1047.
104. *Id.* at 1047-49 (analyzing *Nordmann v. Fla. Dep't of Agric.*, 473 So.2d 278 (Fla. 5th DCA 1985) and *Denney v. Conner*, 462 So.2d 534 (Fla. 1st DCA 1985)).
105. *Id.*
106. *Corneal v. State Plant Bd.*, 95 So.2d 1 (Fla. 1957).
107. *Haire*, 836 So.2d at 1048.
108. *Id.*
109. *State Plant Bd. v. Smith*, 110 So.2d 401 (Fla. 1959).
110. *Haire*, 836 So.2d at 1048.
111. *Id.* at 1050.
112. *Id.*

compensation was given, and inverse condemnation claims were adequate to cover the value of the property lost.[113] The court specifically relied on the fact that the scientific evidence relied on by the Legislature was published in peer-reviewed journals.[114] Therefore, the court noted that "debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment."[115]

On the issue of damages, the court noted that the statute specifically provided for compensation for any trees destroyed.[116] The court did require that fair and full compensation be awarded by a court based on the value of the tree destroyed, but that this could be done in conjunction with the statutory compensation scheme.[117] In coming to this conclusion, the court pointed to language that the statute did not "limit the amount of any other compensation that may be paid by another entity *or pursuant to court* order."[118]

The court went on to discuss the necessity and requirements for a search warrant.[119] The court ruled that the Department was required to have a warrant before it could enter private property to search for infected trees or to search for trees that fall within the definition of "exposed."[120] The court ruled that citrus canker did not fall within the exigent circumstances exception.[121] The court also ruled that area-wide search warrants were unconstitutional under federal Supreme Court jurisprudence; however, the court did allow that multiple properties could be listed on the same warrant and still meet constitutional muster.[122] Finally, the court ruled that the judge could electronically affix his signature to the warrants but expressed reservations about the Department itself performing this task.[123]

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113. *Id.* at 1051.
114. *Id.* at 1051-52.
115. *Id.* at 1052.
116. *Id.* at 1053-54.
117. *Id.* at 1058.
118. *Id.*
119. *Id.* at 1055.
120. *Id.* at 1056-57.
121. *Id.* at 1057-58.
122. *Id.* at 1058-59.
123. *Id.* at 1059-60.

IV. ACF WATER WARS UPDATE

In 1989, a dispute arose between Florida, Georgia, and Alabama.[124] Florida and Alabama claimed that Atlanta was pulling too much water from the Chattahoochee and Flint Rivers and was polluting the water that was actually allowed to escape downstream.[125] Interstate water apportionment suits were filed in 1990.[126] Florida and Alabama were asking for a judicial apportionment of the waters of the Apalachicola-Chattahoochee-Flint river basin.[127]

In 1992, all cases were voluntarily dismissed and the three states agreed try to resolve the dispute through the Compact Procedure.[128] The United States Army Corp of Engineers ("Corp") performed a five-year, fifteen million dollar study of the ACF River Basin.[129] In 1997, the three states enacted the ACF Interstate Compact into their individual statutory schemes and Congress ratified the Compact.[130] The discussions then began and so did the collateral attacks.[131]

In 2001, Georgia circumvented the ACF Compact and petitioned the Corp for a larger volume of water to be taken for Atlanta's needs directly from Lake Sidney Lanier.[132] The Corp denied the petition and Georgia appealed.[133] The Eleventh Circuit finally ruled that Georgia's request was not appropriate because the charter that created the Buford Dam did not allow for any greater releases for drinking and municipal water than was already taking place.[134]

In the Spring of 2002, as the deadline was drawing near, the States seemed to be near an agreement.[135] However, Florida pulled out of the discussions at the last minute threatening to end the entire compact discussion process.[136] Florida was coaxed to rejoin

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124. *Deadline in water talks extended again*, ATLANTA JOURNAL-CONSTITUTION, July 31, 2001, at 6B.
125. *Id.*
126. Dustin S. Stephenson, *The Tri-State Compact: Falling Waters and Fading Opportunities*, 16 J. LAND USE & ENVTL. L. 83, 87 (2000).
127. *Id.*
128. *Id.* at 88.
129. *Id.*
130. ACF River Basin Compact, Pub. L. No. 105-104.
131. *Georgia v. U.S. Army Corps of Engineers*, 302 F.3d 1242, 1247 (11th Cir. 2002).
132. *Id.*
133. *Id.*
134. *Id.*
135. Harry Franklin, *Florida to Extend Water-Sharing Talks with Georgia, Alabama* (March 20, 2002).
136. *Id.*

the talks, though the agreement which was so close all but disappeared.[137]

Since 1997, the three States have extended the deadline for reaching an agreement thirteen different times.[138] The last extension was in January of 2003 that extended the deadline to July 31, 2003.[139] Since January, the States have agreed to dismiss and discontinue any further collateral attacks and instead focus on the agreement as a whole.[140]

Currently, discussions continue and the July 31st deadline is looming.[141] The latest meeting occurred in Bainbridge, Georgia on March 31st.[142] This meeting was merely an opportunity for the three governors to meet and become acquainted and set a date for the next round of negotiations.[143] The three governors will meet again on April 21st in Dothan, Alabama, in an attempt to set the final parameters for the apportionment of the ACF waters.[144] If the discussions fail, then the States will be headed to a long, drawn out-even more so than it already is-and costly court battle to determine who gets how much water.[145]

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137. *Id.*
138. *All Georgians have a stake in negotiations over water*, ATLANTA JOURNAL-CONSTITUTION, January 9, 2003, at 18A.
139. *Id.*
140. Bruce Ritchie, *Water fight looming State gears up for a possible legal tussle with Georgia*, Tallahassee Democrat (April 3, 2003) at 1B.
141. *All Georgians*, supra footnote 138.
142. Ritchie, supra footnote 140.
143. *Id.*
144. *Id.*
145. *Id.*