RECENT DEVELOPMENTS

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I. INTRODUCTION

The relatively new field of land use and environmental law has grown exponentially over the past decade. New developments continue to evolve each day. Major Federal and Florida land use and environmental law cases are included in this article in an attempt to remain abreast of this amorphous subject. Additionally, major changes to Florida land use and environmental statutes are included for the benefit of those practicing in this area.

Additional information can be obtained from websites that provide current information. For example, numerous government entities maintain useful websites, including the Florida Legislature,[1] the Florida Department of Environmental Protection,[2] and the Florida Department of Community Affairs.[3] Many private organizations also provide valuable websites concerning environmental compliance, such as The Florida Bar Environmental Land Use Law Section[4] and Business and Legal Reports, Inc.[5] In addition, a few law firm websites furnish recent developments in the law, namely Hopping Green & Sams.[6]

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* Special thanks to Tim and Kathy Kellogg.
1. http://www.leg.state.fl.us.
2. http://www.dep.state.fl.us.
3. http://www.dca.state.fl.us.
4. http://www.eluls.org.
5. http://www.blr.com.
6. http://www.hgss.com.

II. FEDERAL CASE LAW

Montana Wilderness Association, Inc., v. United States Forest Service, 314 F.3d 1146 (9th Cir. 2003).

Congress passed the Montana Wilderness Study Act (the "Act") in 1977 to "provide for the study of certain lands to determine their suitability for designation as wilderness."[7] The Act requires the Secretary of Agriculture to administer, through the Forest Service, specific Wilderness Study Areas "to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System."[8] The Wilderness Association asserts that the Forest Service failed to maintain seven Wilderness Study Areas' character and potential for wilderness classification in violation of the Act when it "allowed, encouraged, and/or failed to act to prevent motorized vehicle use of the Study Areas."[9]

The district court granted summary judgment for the Wilderness Association and found that the "Forest Service violated the act by failing to consider whether, how and to what extent its management decisions have impacted the wilderness character of the areas . . . and by failing to develop discernible criteria for assessing and maintaining the wilderness character of non-motorized use areas while conducting trail maintenance and improvement in areas of motorized use."[10] The district court issued an injunction "requiring the Forest Service to comply with the Act and to take reasonable steps to restore the wilderness character of each Study Area."[11] The Forest Service appealed, claiming the district court did not have subject matter under the Administrative Procedure Act and should not have granted summary judgment.[12]

Under Section 706(2) of the Administrative Procedure Act, the Wilderness Association must establish subject matter jurisdiction by demonstrating that the Forest Service's continuation of services constitutes final agency action.[13] The court found that for agency action to be final under the Administrative Procedure Act, "the action should mark the consummation of the agency's decision making process; and second, the action should . . . be one by which rights or obligations have been determined or from which legal

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7. Montana Wilderness Ass'n. v. U.S. Forest Service, 314 F.3d 1146, 1148 (9th Cir. 2003).
8. *Id.*
9. *Id.* at 1149.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* (citing Ecology Ctr., Inc. v. U.S. Forest Serv., 192 F.3d 922, 925 (9th Cir. 1999)).

consequences flow."[14] "Trail maintenance does not mark the consummation of the Forest Service's decision making process" because the legislative history suggests that Congress intended the decision-making process to be consummated through trails allowing off-road vehicle access.[15] Thus, the district court did not have subject matter jurisdiction under section 706(2) of the Administrative Procedure Act because the Wilderness Association did not identify a final agency action.[16]

Further, under section 706(1) of the Administrative Procedure Act, judicial review is appropriate if the Wilderness Association shows "agency recalcitrance . . . in the face of clear statutory duty or . . . of such a magnitude that it amounts to an abdication of statutory responsibility."[17] The duty of the Forest Service to maintain wilderness character and potential is mandatory.[18] As a non-discretionary duty, the Forest Service may be compelled to carry out the duty under section 706(1) of the Administrative Procedure Act because the Act does more than provide general guidance or a mere policy statement.[19] Thus, the court found "that the district court did have subject matter jurisdiction to hear this case."[20] Further, there was a genuine issue of material fact about whether the Forest Service discharged its duty to maintain the wilderness character because the Forest Service and Wilderness Association submitted conflicting evidence.[21] Therefore, the court reversed the district court's summary judgment order, vacated the injunction, and remanded the case for trial on this issue.[22]

Dittmer v. County of Suffolk, New York, 59 Fed.Appx. 375 (2nd Cir. 2003).

Plaintiffs, landowners in Suffolk County, New York, appealed a final judgment of the United States District Court for the Eastern District of New York in an action challenging the constitutionality of the Long Island Pine Barrens Maritime Reserve Act (the "Act").[23] The Act's purpose is to "allow the state and local governments to

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14. *Id*. at 1150 (quoting Bennett v. Spear, 117 S.Ct. 1154 (1997)).
15. *Id*.
16. *Id.*
17. *Id*. (quoting ONRC Action v. Bureau of Land Mgmt., 150 F.3d 1132, 1137 (9th Cir. 1998)).
18. *Id*. at 1151.
19. *Id*.
20. *Id*.
21. *Id*. at 1152.
22. *Id*.
23. Dittmer v. County of Suffolk, New York, 59 Fed.Appx. 375, 378 (2nd Cir. 2003).

protect, preserve and properly manage the unique natural resources of the Pine Barrens-Peconic Bay system."[24] The district court dismissed the substantive due process claim because the plaintiffs did not "allege they had a property interest in the continued pre-Act zoning of their land," alleging little more than a "unilateral expectation in the continued zoning of their land" and because landowners do not have a vested interest in the existing classification of property under New York law.[25]

Further, even if the plaintiffs were able to allege a protected property interest, the Act could still survive a substantive due process challenge.[26] The Act would be subject to a rational basis review since the Act does not infringe on fundamental rights or affect a suspect class.[27] The rational basis criteria would easily be met by the state's legitimate interest in protecting the state's largest natural drinking water source and preserving the unique and partially endangered ecosystem of the Pine Barrens.[28]

Similarly, the court denied the plaintiffs' motion for summary judgment on the equal protection claim because it could not survive rational basis review.[29] An act will survive an equal protection challenge "if there is any plausible justification for the distinctions it draws."[30] The Act's distinction between land that is developed and undeveloped is rationally related to the legitimate state interests of protecting the aquifer of the Pine Barrens as well as preserving its unique ecosystem.[31] Thus, the court found that the district court properly granted the defendant's motion for summary judgment on the equal protection claim.

Isle Royale Boaters Association v. Norton, 330 F.3d 777 (6th Cir. 2003).

Isle Royale National Park is located in the northern reaches of Lake Superior, consisting of a series of islands.[32] Created as a national park in 1931, Isle Royale was designated as a national wilderness area in 1976.[33] In 1995, the National Park Service began creating the General Management Plan (GMP) that would guide

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24. *Id*.
25. *Id*.
26. *Id*.
27. *Id*. (quoting Vance v. Bradley, 440 S.Ct. 939 (1979)).
28. *Id*.
29. *Id*.
30. *Id*. (quoting Weinstein v. Albright, 261 F.3d 127, 140 (2d Cir. 2001)).
31. *Id*. at 379.
32. Isle Royale Boaters Ass'n v. Norton, 330 F.3d 777, 779 (6th Cir. 2003).
33. *Id*.

"future use of resources and facilities, to clarify research and resource management needs and priorities, and to address changing levels of park visitation and use."[34] Because the wilderness area designation carries expectations of quiet solitude and because of complaints about noise levels within the park, the GMP sought to separate motorized and non-motorized uses.[35] Under the GMP, some docks would be eliminated and others would be relocated, which would somewhat limit boater's access to trails and shelters.[36]

The Isle Royal Boaters Association filed suit in federal district court alleging that the GMP violated the Wilderness Act and several other acts.[37] The district court held that the GMP was not arbitrary or capricious because the Wilderness Act authorized the Secretary to control boat use in wilderness areas.[38] The plaintiffs appealed the issue of whether the GMP is consistent with the clear intent of Congress.[39]

While the Wilderness Act requires the Secretary to make the enjoyment of national parklands available, the statute does not require the Secretary to make docks available.[40] Removing docks is more consistent with Congress' intent because it reduces noise and facilitates the enjoyment of scenery and wildlife.[41] As a wilderness area, the park must be administered "for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment as wilderness."[42] Thus, the court affirmed the district court's finding that the GMP is neither arbitrary nor capricious since Congress gave the Secretary broad discretion to preserve the land.[43]

National Park Hospitality Association v. Department of the Interior, 123 S.Ct. 2026 (2003).

Following the enactment of the National Parks Omnibus Management Act of 1998 that established a "comprehensive concession management program for national parks," the National Park Service adopted implementing regulations including the

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34. *Id*.
35. *Id*. at 780.
36. *Id*.
37. *Id*. at 781.
38. *Id*.
39. *Id*. at 782.
40. *Id*.
41. *Id*.
42. *Id*. (quoting the Wilderness Act, 16 U.S.C. § 1131(a)(2003)).
43. *Id*. at 782-86.

Contract Disputes Act (CDA).[44] The regulations "purport[ed] to render the CDA inapplicable to concession contracts."[45]

The validity of the CDA was challenged in the District Court for the District of Columbia.[46] The court found that the CDA was ambiguous as to whether it applied to concession contracts and that the National Park Service's interpretation of the CDA was reasonable.[47] The Court of Appeals for the District of Columbia Circuit affirmed on different grounds, "recognizing that [the National Park Service] does not administer [the CDA], and thus may not have interpretive authority over its provisions."[48] However, the court agreed with the National Park Service's interpretation, finding it consistent with both the CDA and the 1998 Act.[49] The U.S. Supreme Court granted certiorari to determine whether contracts between the National Parks Service and concessioners in the national parks were subject to the CDA.[50]

In order to determine whether the administrative action was ripe for judicial review, the court considered the hardship to the parties if court consideration was withheld and the fitness of the issue for judicial decision.[51] The Court found that the National Park Service did not have the power to administer the CDA because that authority rested with boards of contract appeals, contracting officers, the Federal Court of Claims, the U.S. Supreme Court and the Court of Appeals for the Federal Circuit.[52] The court further found that the CDA is "nothing more than a 'general statemen[t] of policy' designed to inform the public of [the National Park Service's] views on the proper application of the CDA.[53]

The Court found that the action was not ripe for review because § 51.3 did not create "adverse effects of a strictly legal kind," which is required for a showing of hardship.[54] The regulation allows the "concessioner free to conduct its business as it sees fit" because it does not order anyone to do, or refrain from doing, anything; it does not withhold, modify or grant any formal legal license, authority or power; it does not subject anyone to criminal or civil liability; it creates no legal rights or obligations; and it does not affect a

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44. Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 123 S.Ct. 2026, 2027 (2003).
45. *Id*.
46. *Id*. at 2029.
47. *Id*.
48. *Id*. at 2030 (quoting Amfac Resorts, L.L.C. v. Untied States Dept. of Interior, 282 F.3d 818, 834-35 (D.C.Cir. 2002)).
49. *Id*.
50. *Id*.
51. *Id*. (quoting Abbott Lab. v. Gardner, 87 S.Ct. 1507, 1507 (1967)).
52. *Id*. at 2031.
53. *Id*.
54. *Id*.

concessioner's primary actions.[55] The regulation merely announces the position the National Park Service will take in disputes arising out of concession contracts.[56] Nothing in the regulation prohibits concessioners from following the CDA's procedures after a dispute over a concession contract arises.[57]

Further, the Court found that the case was not ripe because the case is not fit for review since further factual development would significantly advance the Court's ability to handle the legal issues presented.[58] Even though the question presented in this case is "a purely legal one" and the CDA constitutes "final agency action" under § 10 of the Administrative Procedure Act, the Court found that judicial resolution of this question should wait for a concrete dispute regarding a particular concession contract.[59]

National Wildlife Foundation v. National Marine Fisheries Service, 254 F. Supp. 2d 1196 (D. Or. 2003).

An environmental organization alleged that the no-jeopardy determination for the Columbia River Basin salmon and steelhead was arbitrary and capricious.[60] The court found that the National Marine Fisheries Service's definition of "action area" was arbitrary and capricious since the biological opinion clearly stated that the short-term survival rates depended upon range-wide off-site mitigation actions.[61] Nonetheless, the biological opinion limited the defined action areas to the immediate area impacted by the Federal Columbia River Power System operations.[62] The court further held that the biological opinion improperly relied on federal mitigation actions that were not reasonably certain to occur.[63] The court found that remand to the National Marine Fisheries Service was proper because it gave the National Marine Fisheries Service an opportunity to consult with interested parties to ensure that only mitigation actions, that were reasonably certain to occur or that had undergone ESA consultation, would be considered in the no-jeopardy analysis.[64]

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55. *Id*.
56. *Id*.
57. *Id*.
58. *Id*. (quoting Duke Power Co. v. Carolina Environmental Study Group, Inc., 98 S.Ct. 2620 (1978)).
59. *Id*. at 2032.
60. Nat'l Wildlife Found. v. Nat'l Marine Fisheries Serv., 254 F. Supp. 2d 1196,1211 (D. Or. 2003).
61. *Id*. at 1212.
62. *Id*. at 1212-13.
63. *Id*. at 1214-15.
64. *Id*. at 1215-16.

Center for Biological Diversity v. Badgley, 335 F.3d 1097 (9th Cir. 2003).

The Center for Biological Diversity alleged that the Secretary of Interior violated the Endangered Species Act by finding the listing of the Northern Goshawk unwarranted.[65] The court upheld the Fish and Wildlife Service's finding that the listing of the Northern Goshawk as threatened or endangered was unwarranted.[66] The court found that the decision was not arbitrary or capricious because the Fish and Wildlife Service relied on a report by a team of wildlife biologists with special expertise that conducted a status review based on a comprehensive review of all kinds of data, reports and literature.[67]

Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109 (10th Cir. 2003).

This case concerns a challenge to water diversion along the Middle Rio Grande — the New Mexico portion of the Rio Grande — as violating Endangered Species Act.[68] The court found that the Bureau of Reclamation has discretion to reduce contract deliveries and restrict diversions to meet its duties under section 7 of the Endangered Species Act even though the contracts do not expressly permit a reduction in deliveries of water below the fixed amount.[69] The contract contained clauses that, taken together, establish that the Bureau of Reclamation retained the discretion to determine the "available water" from which allocations would be made.[70] Further, the Bureau of Reclamation could alter the water allotments for the prevention of jeopardy to endangered species.[71] The clauses presume the Bureau of Reclamation's discretion in their implementation if the actual water is less than the estimated firm yield because of drought.[72]

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65. Ctr. for Biological Diversity v. Badgley, 335 F.3d 1097, 1098 (9th Cir. 2003).
66. *Id.*
67. *Id.* at 1100-01.
68. Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109, 1113 (10th Cir. 2003).
69. *Id.* at 1157.
70. *Id.* at 1156-57.
71. *Id.*
72. *Id.*

American Rivers v. US Army Corps, 271 F. Supp. 2d 230 (D.D.C. 2003).

This suit claimed that the Army Corps' operation of the Missouri River's dam and reservoir system jeopardized three species protected by the Endangered Species Act.[73] Even though some courts have found that the priority of saving endangered species supercedes the balancing of the equities test for a preliminary injunction, this court chose to use the traditional four-part test for obtaining preliminary injunctive relief.[74] A preliminary injunction was granted because the Plaintiff showed: 1) a substantial likelihood of success on the merits; 2) that the Plaintiff would suffer irreparable harm if the injunction was not granted because the species would go extinct; 3) that the injunction would not substantially injure others; and 4) that the public interest would be served by the injunction.[75] The Flood Control Act gives the Army Corps discretion to consider its obligations to comply with the Endangered Species Act as one of the "other interests" to be balanced when making river management decisions under the Flood Control Act.[76] Compliance with the Endangered Species Act can come at the expense of other interests, including navigation and flood control, in light of congressional intent to give endangered species priority over the primary missions of federal agencies.[77]

Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944 (9th Cir. 2003).

Environmental groups challenged the Forest Service and the Fish and Wildlife Service's decision to grant an easement to a logging company to build a road in a national forest as violating the Endangered Species Act and the National Environmental Policy Act.[78] The court found that if an agency action is claimed to have violated the Endangered Species Act, any disagreement over issues that are primarily of fact must be resolved in favor of the agency if the agency's decision was based on a reasoned evaluation of the relevant factors, especially if the analysis required a high level of technical expertise.[79] Agencies cannot delegate the protection of the environment to public or private agreements because the agency

73. Am. Rivers v. US Army Corps, 271 F. Supp. 2d 230, 237 (D.D.C. 2003).
74. *Id.* at 248-49
75. *Id.*
76. *Id*. at 239.
77. *Id*. at 240-41.
78. Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944, 948-49 (9th Cir. 2003).
79. *Id*. at 956-57.

must vigilantly and independently enforce environmental laws.[80] The Fish and Wildlife Service's biological opinion did not violate the Endangered Species Act because the Fish and Wildlife Service adequately considered the future activities of the logging company in determining that granting an easement to a logging company over national forest land would not jeopardize endangered species.[81] When considering the cumulative impacts of the company's future activities, the Fish and Wildlife Service relied on a conservation agreement that was entered into by the logging company and the federal agency which had measures to mitigate the impact of the easement on the grizzly bears.[82]

III. FLORIDA CASE LAW

Caribbean Conservation Corporation, Inc. v. Florida Fish and Wildlife Conservation Commission, 838 So.2d 492 (Fla. 2003).

This Florida Supreme Court case involved the constitutionality of a statutory delegation of authority, which may prove essential to future delegation litigation.[83] The case involved a 1998 amendment to the Florida Constitution known as revision 5.[84] In approving revision 5, Florida voters agreed to a provision creating the Fish and Wildlife Conservation Commission (FWCC) and abolishing the Florida Game and Fresh Water Fish Commission (Game Commission) and the Marine Fisheries Commission (Marine Commission). The Game Commission, a constitutional agency, was authorized to carry out "the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life."[85] The Marine Commission, a statutorily created agency, had jurisdiction over marine life except for "endangered species."[86] The exception did not prevent the Marine Commission from acting with reference to endangered species, but merely permitted other agencies to act with reference to endangered species as well.[87]

Subsequent to the adoption of revision 5, chapter 99-245, Laws of Florida was enacted, establishing or amending the statutes that

80. *Id*. at 957-58.
81. *Id*. at 964.
82. *Id*. at 965.
83. Caribbean Conservation Corp., Inc. v. Florida Fish and Wildlife Conservation Comm'n, 838 So.2d 492 (Fla. 2003).
84. Revision 5 is currently article IV, section 9, and article XII, section 23 of the Florida Constitution. *Id*. at 494.
85. *Id*. at 495.
86. *Id*.
87. *Id*. at 496 (quoting State v. Davis, 556 So.2d 1104 (Fla. 1990)).

were challenged in the case.[88] The Caribbean Conservation Corporation, Inc. (Caribbean Conservation) challenged portions of Chapter 95-245, Laws of Florida in circuit court as violative of Article IV, Section 9, and Article XII, Section 23, of the Florida Constitution.[89] Caribbean Conservation claimed that because the constitutional provisions gave the commission "constitutional rule making authority concerning all marine life, including endangered and threatened species," the legislature cannot require the commission to comply with Chapter 120, Florida Statutes under Chapter 95-245, Laws of Florida.[90]

For the most part, the circuit court agreed, adding a few qualifications and clarifications.[91] The newly created FWCC was modeled after the previous Game Commission, in regards to its rule making power and authority, and was not subject to Chapter 120.[92] Similarly, the FWCC was to have the same authority and jurisdiction over marine life as did the Marine Commission.[93] The circuit court found that the FWCC acted as a constitutional commission with "constitutional authority to promulgate rules with impact upon endangered or threatened species."[94] The court further found chapter 99-245 unconstitutional to the extent it required FWCC to follow the APA in exercise of its constitutional powers.[95]

The FWC appealed to the First District Court of Appeal, which reversed the circuit court. The court found that the Marine Commission did not have constitutional authority to establish rules concerning endangered species.[96] Instead, the Marine Commission only had incidental regulatory authority to establish rules regarding endangered species, and that incidental authority "did not usurp or affect the statutory authority specifically assigned to other agencies."[97]

Caribbean Conservation appealed and the Florida Supreme Court construed the constitutional provision based in a manner that "fulfills the intent of the people"[98] and "gives effect to each

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88. *Id.* at 498.
89. *Id.* at 499. David Guest of the Earthjustice Legal Defense Fund represented Caribbean Conservation.
90. *Id.*
91. *Id*.
92. *Id*.
93. *Id*.
94. *Id.* at 500.
95. *Id.*
96. *Id*.
97. *Id.* (quoting Florida Fish & Wildlife Conservation Comm'n v. Caribbean Conservation Corp., 789 So.2d 1053, 1054-55 (Fla. 1st DCA 2001)).
98. *Id*. at 501 (quoting Gray v. Bryant, 125 So.2d 846, 852 (Fla. 1960)).

provision."[99] Based on the history of regulatory and executive powers regarding marine life, the Court found that in regards to marine life the FWCC has some regulatory powers, but not "the" regulatory power of the state.[100] Further, since power to regulate endangered and threatened marine life was given to the Department of Environmental Protection, and not to the Marine Commission, the FWCC did not have the power to regulate endangered and threatened marine life.[101] Thus, the Court held that sections 20.331(6)(c); 370.025(4); and 370.12(1)(c)(3), (1)(h), (2)(g)-(i), 2(k)-(o), 2(p)(1), and 2(q), Florida Statutes (1999), are constitutional, except for the segment of section 20.331(6)(c)(1) which references marine species that are "of special concern" because there is no statutory basis for the Department of Environmental Protection to have regulatory or executive power over marine species categorized as "of special concern."[102]

Schrader v. Florida Keys Aqueduct Authority, 840 So.2d 1050 (Fla. 2003).

In 1976, the Legislature created the Florida Keys Aqueduct Authority (FKAA) by a special act for the purpose of obtaining, supplying and distributing a sufficient water supply in the Florida Keys.[103] However, a 1998 amendment broadened its power to allow for the development of a sewage system.[104] Pursuant to the Florida Keys Area Protection Act, the Florida Keys were listed as an "area of critical state concern" in 1979.[105] As an area of critical state concern, Governor Buddy MacKay required all relevant state and local agencies to cooperate with Monroe County in implementing its Comprehensive Plan, which included a countywide sewage system.[106] In order to institute this plan, Monroe County entered into a "Memorandum of Understanding" with the FKAA, in which the FKAA would "finance and operate the planned sewage system."[107]

In January of 2000, Monroe County enacted a county ordinance that required mandatory connection to a central sewerage system

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99. *Id*. (quoting Advisory Opinion to the Governor — 1996 Amendment 5 (Everglades), 706 So.2d 278, 281 (Fla. 1997)).
100. *Id.* at 502.
101. *Id*. at 502-03.
102. *Id.* at 504.
103. Schrader v. Fla. Keys Aqueduct Auth., 840 So.2d 1050, 1051 (Fla. 2003).
104. *Id*.
105. *Id*. at 1051-52.
106. *Id*. at 1052.
107. *Id.*

within thirty days of receiving notification that an investor-owned or publicly owned sewage system was available.[108] Nine months later, FKAA passed a Master Resolution that authorized "the issuance of sewer revenue bonds in various series to finance projects in distinct localities as part of the larger goal of creating a countywide sewage system."[109] Pursuant to Chapter 75, Florida Statutes, FKAA filed a complaint in circuit court requesting validation of the bonds. The court validated the bonds, holding that "the authorization and provisions of Sections 381.0065 and 381.00655, Florida Statutes, and Monroe County Ordinance 04-2000, which [require] the owners of onsite treatment and disposal systems to connect to available publicly-owned or privately-owned sewage systems, is legal, valid and binding."[110]

An intervener in the bond validation proceedings, Keys Citizens for Responsible Government, Inc. (Citizens), appealed this judgment to the Supreme Court of Florida under its mandatory bond validation jurisdiction claiming that the circuit court's validation of the mandatory connection requirement "went beyond the scope of the bond validation proceeding.[111] The Florida Supreme Court held that "the validity of the mandatory connection ordinance was not a collateral issue," noting that the FKAA's bond resolution "included a provision requiring mandatory connection in order to secure payment on the bonds with the connection fees and service charges."[112]

In July of 2002, FKAA again filed a complaint in circuit court requesting validation of the second bond series and confirmation that the FKAA's service area "is wholly encompassed within the Florida Keys area of critical state concern."[113] At the hearing, Schrader (appellant) did not challenge the validation, but rather the relief requested by FKAA concerning chapter 99-395 and the connection ordinances. Schrader claimed that chapter 99-395 is a special law unconstitutionally enacted as a general law since section 4 of chapter 99-395 relates only to local governments in the Florida Keys area of critical state concern.[114] The circuit court validated the bonds and held that "the provisions of section 4 of chapter 99-395, Laws of Florida, pertain to matters of statewide concern, are

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108. *Id*.
109. *Id.* at 1053.
110. *Id.* (quoting Fla. Keys Aqueduct Auth. v. State, No. CA-K-00-1525, order at 4-5 (Fla. 16th Cir. Ct. order filed Dec. 22, 2000)).
111. *Id*.
112. *Id*. (quoting Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth., 795 So.2d 940, 944-47 (Fla. 2001)).
113. *Id.* at 1053-54.
114. *Id*. at 1054.

applicable in an area of critical state concern, and were properly enacted as a general law."[115] Schrader appealed to the Florida Supreme Court under its mandatory bond validation jurisdiction.[116]

The Florida Supreme Court has defined "special law" as one "relating to, or designed to operate upon, particular persons or things."[117] However, the Florida Supreme Court has found that "legislation that facially appeared to affect only a limited geographic area of the state but which had a primary purpose contemplating an important and necessary state function and an actual impact far exceeding the limited geographic area" to be a general law.[118] Section 4 of chapter 99-395 gives local governments in areas of critical state concern the authority to adopt stricter regulations concerning the treatment of wastewater in an effort to protect the vital natural state resource of the Florida Keys.[119] Having close ties to statewide industries of tourism and seafood, the Florida Keys' actual impact goes beyond the limited geographic areas of Monroe County.[120] Thus, the Florida Supreme Court found section 4 of chapter 99-395 to be a general law not subject to a constitutional challenge.[121]

IV. FLORIDA STATUTES

Traditionally, Hopping Green & Sams, a Tallahassee based law firm at the forefront of land use and environmental law, provides an annual legislative overview. The following section, reviewing developments in land use and environmental law, is directly based on this 2003 legislative overview. For further information, consult the Hopping Green & Sams publication.[122] Additionally, all recently enacted legislation is available on the Website for the Florida Department of State.[123]

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115. *Id.* (quoting Fla. Keys Aqueduct Auth. v. State, No. CA-K-02-826, order at 4, 5, 7 (Fla. 16th Cir. Ct. order filed Aug. 26, 2002)).
116. *Id.*
117. *Id.* at 1055 (quoting State ex rel. Landis v. Harris, 163 So. 237, 240 (Fla. 1934)).
118. *Id.* at 1056 (quoting Dep't of Bus. Regulation v. Classic Mile, Inc., 541 So.2d 1155, 1159 (Fla. 1989)).
119. *Id.*
120. *Id.*
121. *Id.* at 1057.
122. Hopping Green & Sams, *The 2003 Legislative Session*, *at* http://www.hgss.com/upload_HotNews/2003%20HGS%20legislative%20summary%20-%20final%20version.pdf.
123. Florida Dep't of State, *2003 Laws of Florida*, *at* http://election.dos.state.fl.us/laws/03laws/Shotitle.htm.

CS/SB 626 Everglades Restoration

Amending the 1994 Everglades Forever Act (EFA), this legislation established a long-term water quality improvement planning process. The EFA now requires "the South Florida Water Management District (SFWD) to implement 'Best Available Phosphorous Reduction Technology' (BAPRT) in accordance with a Long-Term Plan." The Long Term Plan begins with a 13-year phase (2003-2016), which focuses on optimization of storm water treatment areas.

Other projects will also be implemented to "achieve water quality standards to the maximum extent practicable" during that period. Additionally, the Department of Environmental Protection rule "establishing a phosphorous criterion to include moderating provisions for discharges based upon BAPRT providing net improvement" is specifically authorized by the legislation. The rule's moderating provisions can authorize discharges into unimpacted areas if BAPRT is implemented and if DEP determines that environmental benefits outweigh potential adverse impacts. Permits issued by DEP during the initial phase must include technology-based effluent limitations and must be based on BAPRT. Projects during the subsequent ten-year phase, lasting from 2017-2027, will only be implemented with prior legislative approval.

Further, the imposition of the Everglades agricultural privilege tax of $25 per acre is extended by the legislation through 2016. The legislation also authorizes the South Florida Water Management District to increase its use of the Okeechobee Basin tax in order to fund the initial phase. The payment of the Everglades agricultural privilege tax establishes compliance with the "Polluters Pay" provision in Article II, Section 7(b), of the Florida Constitution.

SB 2586 Office of Boating and Waterways Act

This act establishes the Office of Boating and Waterways, which was one of the major priorities for the marine industry and boating lobbyists. The Office of Boating and Waterways, which helps to coordinate navigation and boating advancements throughout the state, is expected to become a significant advocacy entity within the Florida Fish and Wildlife Conservation Commission. Activities of the Office of Boating and Waterways include: coordinating boating education, boating access, boating safety, signage and many other issues associated with boating activities.

The legislation also provides for the diversion of pre-established gas tax monies generated by motor and diesel fuel taxes that are collected from marina operations. The tax is likely to generate $2.5

million during the 2003-2004 fiscal year, and increase to $13.4 million during the 2007-2008 fiscal year. This money will be used to immediately hire ten additional sworn law enforcement officers. At least $1.8 million will be used to fund equipment, expenses, training and five months of the officer's salaries and benefits. The remaining $700,000 will be used to place uniform waterway markers; construct and maintain publicly owned boat ramps, piers and docks; implement boating safety and education programs; economic development initiatives that promote boating; and manatee technical avoidance technology efforts.

CS/HB 1123 Global Risk-Based Corrective Action

This bill takes Florida's rendition of the risk-based corrective action process, (previously used in petroleum contamination cleanup, dry-cleaning solvent contamination cleanup, and designated brownfield sites) and applies it to all sites contaminated by a release of pollutants or hazardous substances. The bill calls for the Department of Environmental Protection to create a phased risk-based corrective action process that "tailors site rehabilitation tasks and cleanup criteria to site-specific conditions and risks." The process will apply to voluntary site rehabilitation, DEP state-managed site rehabilitation, site rehabilitation conducted according to DEP enforcement actions, as well as many other rehabilitation scenarios where liability for site rehabilitation exists under Chapter 376 or 403, Florida Statutes.

The risk-based corrective action process and associated rules that will be adopted by DEP will apply retroactively to all currently existing contaminated sites where liability for site rehabilitation exists under Chapter 376 or 403, Florida Statutes. However, a few exceptions are allowed where cleanup target levels have been approved by DEP in a current permit, technical document, or other written agreement, or where DEP has ordered "No Further Action" or Site Rehabilitation Completion. The goal of the risk-based corrective action process is to cost-effectively attain protection for the environment and for human health and safety. However, the process does not create any new legal responsibility for rehabilitation at contaminated sites. Further, the bill does not give DEP the authority to prohibit or limit the legal deposit of materials or products on land.

CS/SB 956 Drycleaning Solvent Cleanup

The Drycleaning Solvent Cleanup Program previously established a civil liability immunity provision. This bill tries to

enlarge that provision in order to protect real property owners from property damage claims. This immunity expansion for the cleanup program may establish a foundation for similar changes to immunity provisions for petroleum contamination and brownfield site cleanup programs under the Department of Environmental Protection. In amending Section 376.301, Florida Statutes, the bill creates a new definition for the term "nearby real property owner." The bill defines the term as an "entity having ownership, dominion, or legal or rightful title to real property, onto which dry-cleaning solvent has migrated through soil or groundwater from a dry-cleaning or wholesale supply facility eligible for state-funded site rehabilitation or from such a facility that is approved by DEP for voluntary cleanup under Section 376.3078(11)."

In addition to expanding the statutory immunity to include this newly defined "nearby real property owner," the bill also provides that the Drycleaning Solvent Cleanup Program sites eligible for state-funded site rehabilitation will not be liable for administrative or judicial actions brought by any state or local government or agency, or by any person to force rehabilitation or pay for the rehabilitation of environmental contamination proceeding from the discharge of dry-cleaning solvents. The modified immunity applies retroactively to causes of action amassing before this bill's effective date if a lawsuit has not been filed before the bill's effective date.

CS/SB 2260 Water Management District Water Legislation

Although important legislation concerning alternative water supplies, conservation methods and reuse water failed, the water management districts successfully passed water-related legislative issues that were mainly internal to the districts' operations. Because of boundary changes and changes relating to the Surface Water Improvement and Management Act, all regulated interests dealing with water management districts should review the legislation. For example, basin boundaries inside the Southwest Florida Management District no longer are subject to legislative approval. The bill made it clear that groundwater withdrawals that occur in one county, conditional on a consumptive use from that withdrawal taking place in that same county, does not equal an interdistrict transfer of water regardless of whether the withdrawal and the use happen in two different water management districts.

Changes to the Surface Water Improvement and Management Act include removal of state funding for the program, an increase in the requirements for review, an update from three years to five years, and a cross-reference of waters named on the Surface Water Improvement Management project list to those appearing on the

total maximum daily loads lists and impaired waters lists. Further, the Executive Director was granted authority to hire legal staff to manage the everyday operations of the water management district because of major dissension within the South Florida Water Management District. The loss of the authority previously belonging to the district's Governing Boards did not affect the Governing Board's ability to employ attorneys to represent the Governing Board's legal interest or position.

CS/CS/SB 554 Interdistrict Transfers of Water

This legislative revision defines interdistrict transfers to leave out the withdrawal of groundwater that is later used inside the same county, even if that county is located within two separate water management districts. For situations concerning a single county withdrawal and utilization of groundwater, the only applicable provisions are subsections (4), (11), and (13) of Section 373.2295, Florida Statutes.

CS/CS/SB's 140, 998 &1060 Water and Wastewater Utility Transfers

In response to the proposed sale of the state's biggest privately-owned water and waste-water utility (Florida Water Services, Inc.) to a separate legal entity formed by an interlocal agreement between the towns of Gulf Breeze and Milton, this bill provides local governments a role in the authorization of the utility's acquirement and rate-setting if the local government's citizens would be served by such an entity. The separate legal entity must provide the host government with ninety days' advance written notice for any proposed acquisition of a private utility. The host government may become a member of the separate legal entity if it chooses. The host government may also approve or prohibit the acquisition. Additionally, the host government can choose to delay its decision for an added forty-five days, or it can choose to take no action. If the host government chooses to take no action, the bill provides conflicting provisions as to the effect. One provision states that taking no action is the same as denying the acquisition, while another provision states the separate legal entity may attempt to acquire the utility without further notice.

Additionally, the bill maintains that before increasing its rates, the separate legal entity must provide each host government with ninety days' notice. Each host government has authority to review and approve these rate increases or changes in financing terms that may result in increased costs to customers. In the case of a

disagreement between the separate legal entity and the host government, the host government can seek binding arbitration. Revenues attained for providing utility services can only be transferred from the separate legal entity to the local government whose residents produced the revenues.

CS/SB 1044 Water Use Permits

This legislation states that each time a water management district receives applications for consumptive use permits, the district must inform local governments from which boundaries the withdrawal is requested to be made. The water management district is permitted to send notice of the receipt of permit applications, by regular mail or by electronic mail, to people requesting such notice. The legislation also requires water management districts to put a condition in these permits advising the permittee that they also have to be in compliance with other applicable local, state or federal laws.

CS/HB 623 Northwest Florida ERP Extension

This bill delayed the effective date of the Environmental Resource Permit program inside the bounds of the Northwest Florida Water Management District from July 1, 2003 to July 1, 2005. Until then, regulated interests within the Northwest Florida Water Management District will get their storm water permits from the Department of Environmental Protection. Thus, for at least two more years, the state will not assert isolated wetland jurisdiction and, consequently there will be no need to get an Environmental Resource Permit.

Although the Northwest Florida Water Management District and the Department of Environmental protection have not created a plan, or a draft rule to execute the Environmental Resource Permitting program throughout the Northwest Florida Water Management District, it has been estimated that the execution of the program will need between $1 million and $3 million a year. Because no revenue has been dedicated toward implementation of this program, the legislature was forced to delay implementation another two years. The legislature rejected efforts to attach the subsidy of this permitting program to the approval of an enlargement in the constitutional millage restrictions in the Northwest Florida Water Management District.

CS/SB 472 Recovery for Mining Explosions

In response to on-going debate in south Florida, the legislature recently established an exclusive remedy, available for real and personal property damage brought about by explosives associated with mining. The bill states that recovery must be pursued within six months of when the damage occurred. The legislation also offers a mandatory non-binding mediation and an expedited summary hearing process if settlement is not accomplished through mediation. This hearing is heard through the Division of Administrative Hearings and must be carried out within thirty days of the unsuccessful mediation. In the event that damages are found to have occurred, compensation must be provided within thirty days of the final order, unless appealed.

In circumstances where the mining company cannot pay, the petitioners may retrieve the security deposit that was put up as a prerequisite to obtaining a mining permit. The security deposit may be in the form of a letter of credit or of a bond, but may not be in an amount less than $100,000. Regardless, the prevailing party is entitled to costs, which includes witness fees and reasonable attorney's fees.

CS/SB 1374 Department of Environmental Protection Internet Noticing

The Department of Environmental Protection is now authorized to substitute an Internet website notification in the place of its *Florida Administrative Weekly* notices. Notices that appear on the website are required to state the date that the notice was first published and the notice will only be published on the days that the *Florida Administrative Weekly* is published. However, this attempt at converting to electronic notice via the Internet will be repealed on July 1, 2004, unless the Florida Legislature reenacts the bill.

CS/SB 2388 Fish and Wildlife Conservation Commission Revisions

This bill changes various fees affecting game preserves, non-residential turkey hunters, and vessel operators, and increases the fees charged for the exhibition of wildlife. The fee for non-Floridians to partake in hunting activities in Florida was increased to $45, and is valid for a period of ten days. Similarly, the fee imposed on non-Floridians for the annual turkey-hunting permit was increased from $5 to $100. The fee for possessing or exhibiting poisonous reptiles

also increased from $5 to $100. Fees for operating or owning a private game preserve increased from $5 to $50 per year.

Additionally, the definition of "take" under Section 372.001, Florida Statutes has been changed to specifically include saltwater fish and the definition of "saltwater fish" was expanded. Likewise, the licensure and permitting portion of Section 372.57, Florida Statutes was amended to include "saltwater fish," as well as the act of possessing saltwater fish.

CS/SB 1050 Fish and Wildlife Conservation Commission Fines and Fees Legislation

New fees and penalties were enacted by the bill for persons engaged in saltwater product sales. Violation of the saltwater licensure requirements is subject to a graduated scale of penalties. A first violation is a second-degree misdemeanor, while a fourth violation can be a third degree felony. Additional penalties are imposed when individuals try to buy or sell saltwater products while his or her license is suspended or revoked. Further, the threshold for reporting vessel damage, or damage to other property resulting from vessel operation, increased from $500 to $2,000. Damage must be reported to the Division of Law Enforcement of the Florida Fish and Wildlife Conservation Commission, to the police chief where the accident happened, or to the sheriff of the county where the accident occurred. Finally, anchorage buoy requirements for Silver Glen Springs and Silver Glen Run were repealed along with provisions concerning license and equipment previously needed in order to take or store bait shrimp on certain vessels.

CS/CS/SB 1300 Citrus Processing

Due to delays in the Department of Environmental Protections' transactions with the Environmental Protection Agency, the pilot project regarding citrus processing facilities and their air emission regulations, this legislation changes various aspects of the pilot project. Among those changes are delaying the date and definition of "new sources," and conformity with the air emissions standards until October 31, 2004. Additionally, the sulfur content for "fuel oil fired generating facilities" will not be reduced to 0.1 percent sulfur by weight until October 31, 2004.

CS/HB 1453 Non-Judicial Sale of Vessels

The provisions regulating the non-judicial sale of vessels by marinas was amended by this bill to no longer require a marina to

get two independent appraisals of a vessel with a lien against it prior to auction. Further, the vessel no longer has to be sold for at least fifty percent of its appraised value. The bill also allows any vessel to be sold at a non-judicial sale if it has been held for storage charges, dockage fees, unpaid costs, or for failure to pay costs of removal due to unsanitary vessels. A marina has a possessory lien for costs such as dockage fees, storage fees, improvements, repairs, and expenses necessary for the preservation of the vessel or work-related storage charges. This possessory lien is set from the day that the vessel is first brought to the marina or occupies rental space.

To satisfy a lien, the marina is required to provide written notice to the owner through certified mail, personal service, or posting notice at the marina and at the vessel. The notice has to state an itemized statement of the claim, a demand for payment, a description of the vessel, contact information for the marina and a conspicuous warning that the vessel is going to be advertised and sold. If, after 120 days following the notice, any amount is left unpaid, the marina can advertise the sale of the vessel. This advertisement is required to be published in a general circulation newspaper once a week for two weeks. The owner can redeem the vessel if he or she pays the remaining amount of the lien as well as any reasonable expenses incurred before the sale.

CS/SB 1644 Nitrogen and Phosphorous Fertilizers

In response to the impact of fertilizer on groundwater and surface water, the nitrate legislation was broadened to address nitrogen and phosphorous. For example, the tax of fifty cents per ton on fertilizer was extended to include products containing nitrogen and products containing phosphorous. The revenues associated with this bill are to be used for development, demonstration, research, and execution of interim measures and best management practices dealing with water quality improvement. Finally, the rule provisions addressing this act are no longer subject to review by the Legislature.

SB 174 Marine Turtle Penalties

The Marine Turtle Act was amended to increase the penalties related to possessing turtle eggs and disturbing a turtle nest. Illegally possessing eleven or fewer marine turtle eggs is a first-degree misdemeanor for a first offense. Possessing over eleven turtle eggs, or disturbing a turtle nest is a third degree felony. Any act, by a person or corporation, prohibited by this bill is subject to

a fine of $100 per egg, in addition to any other penalty, for any egg of any marine turtle species.

In order to reflect these changes to the Marine Turtle Protection Act, the terms "properly accredited person" and "take" were amended accordingly. The Florida Fish and Wildlife Conservation Commission was given the authority to implement rules establishing conditions and restrictions for the conservation of marine turtles as provided through this legislation. The Florida Fish and Wildlife Conservation Commission was also given the authority to issue a permit to a person or corporation that allows them to possess an actual marine turtle, or a marine turtle's eggs, hatchlings or nest if it is used for educational, exhibition, conservation or scientific purposes.

CS/CS/SB 1660 Agricultural Lands and Practices Act

After a two-year endeavor, the agricultural interests succeeded in having the Agricultural Lands and Practices Act pass. The purpose of the act is to create protections at the state level for agricultural operations intended to thwart duplication and overreaching local regulation of legitimate farm operations. This act prevents counties from implementing ordinances and rules that would restrict, regulate or prohibit farming operations and activities on agricultural property when the activities are controlled by best management practices or regulations created by the Florida Department of Agriculture and Consumer Services, The Florida Department of Environmental Protection, the U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, or the U.S. Department of Agriculture.

The best management practices must be adopted as a component of a state or regional regulatory program adopted under a federal regulatory program. This is the first step toward preventing local governments from regulating land uses that become unpopular when urban development sprouts up around agriculture. But this legislation does not allow farm operations to increase noise, odor, fumes or dust when located next to a home or business. This act is a supplement to the Florida Right to Farm Act in Section 823.14, Florida Statutes that protects farming activities from nuisance suits.

CS/CS/SB 1220 Real Estate Sale Disclosure Requirements

This bill modifies the disclosure summary that must be provided to a prospective purchaser of real property that is subject to a homeowner's association. This legislation also requires a specified

disclosure statement to be included in the disclosure provision of a purchase and sale contract subject to a homeowner's association. The disclosure statement must state that if the disclosure summary was not given to the prospective purchaser before the execution of the purchase and sale contract, then the contract is voidable by the purchaser at or before three days of receiving the disclosure summary. Exempted from this bill are homeowner's associations regulated by the Cooperative Act, the Florida Vacation Plan and Timesharing Act, the Florida Mobile Home Act or the Condominium Act and subdividers registered under the Florida Uniform Land Sales Practices Law.

CS/CS/HB 861 Homeowners Association

This bill gives homeowner associations the right to initiate and appeal ad valorem tax protests and suits in the homeowner association's name on behalf of its members after developer turnover. The legislation also authorizes homeowner associations to maintain a claim of right or covenant or restriction. Homeowner associations would also be allowed to bring inverse condemnation actions, contest ad valorem taxes on commonly used facilities, and defend eminent domain actions. The bill prohibits amending the bylaws of the homeowner's association in a way that adversely affects the proportion of voting interests or increases the proportion of shared expenses of the homeowner's association.

SB 2164 Enterprise Zones

The purpose of this bill was to expand business operations in certain locations. However, the tax exemptions bestowed by enterprise zone status will create a loss of potential tax revenue. The legislation permits boundary amendment for the enterprise zones existing in Immokalee, St. Petersburg, and Tallahassee for expansion areas that are less than twenty-five acres and that are adjacent to the existing enterprise zones. Upon recommendation of Enterprise Florida, Inc., the boundary of existing rural enterprise zones can be amended if the land is less than twenty square miles and if the proposal is submitted prior to December 31, 2003.