RECENT DEVELOPMENTS:

CONTEMPORARY DEVELOPMENTS IN ENVIRONMENTAL AND LAND USE LAW

MAUREEN WALTERBACH*

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I. INTRODUCTION

Land use and environmental law has continued its development over the past year. The Supreme Court of the United States heard the most environmentally related cases in its history.[1] There have been several developments in this field in both Federal and Florida case law. This article is a sampling of case summaries related to the recent developments in environmental compliance. Also, some alterations to Florida's land use and environmental law statutes from the 2004 Legislative Session are included to supplement the updates of court decisions.

In addition to this article, several websites provide up-to-date information on this topic. Government websites include the Environmental Protection Agency,[2] Department of the Interior,[3] Department of Transportation Federal Highway Administration,[4] and special reports on land-use from the Pacific Northwest National Laboratory.[5] Private organizations also maintain sites, namely The Florida Bar Environmental Land Use Law Section[6] and the Rand Corporation.[7] In addition, law firms such as Holland & Knight maintain websites with updated information on environmental law.[8]

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* Special thanks to Mark LaFeir.

1. http://www.eli.org/.
2. www.epa.gov.
3. www.doi.gov.
4. http://www.fhwa.dot.gov/environment.
5. http://www.pnl.gov/aisu/pubs/eemw/papers/ipccreports/specialreports/land_use/index.htm; http://www.whitehouse.gov/infocus/environment/; http://www.whitehouse.gov/infocus/everglades/.
6. www.eluls.org.
7. http://www.rand.org/research_areas/energy_environment/index.html.
8. http://www.hklaw.com.

II. FEDERAL CASE LAW

South Florida Water Management District v. Miccosukee Tribe of Indians, 124 S. Ct. 1537 (2004).

The Miccosukee Tribe and Friends of the Everglades (Tribe) filed suit claiming that a pumping facility under the South Florida Flood Water Management District's (District) "Central and South Florida Flood Control Project" (Project) was required to obtain a National Pollutant Discharge Elimination System (NPDES) permit. The Tribe's claim alleged that a station, associated with the Project, moved phosphorous-laden water from a canal into a water conservation area that was part of the original Everglades.

The district court granted the Tribe summary judgment finding that polluted water was being transferred from the canal to the reservoir, two distinct bodies of water. Therefore, the transfer of the water did not occur naturally. The Eleventh Circuit Court of Appeals affirmed. The court concluded that the polluted water from the canal would not flow into the reservoir without the pump station, finding the station was the cause-in-fact of the pollutants in the reservoir.

Under the Clean Water Act (Act), individual states can set water quality standards by considering the designated uses of the navigable waters.[9] These standards affect the local NPDES permits, which limit the type and quantity of pollutants that can be released.[10] The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source."[11] The District did not contest that phosphorous is a pollutant or that the canal and reservoir are navigable waters. The South Florida Water Management District appealed, however, on the basis that its "operation does not constitute the 'discharge of a pollutant' under the Act" based on (1) the definition of a point source as the original source of the pollutant, (2) all water bodies under the Act should be viewed unitarily for permit purposes, and (3) the canal and reservoir are not distinct water bodies.[12]

The Supreme Court rejected the first argument because the definition of point sources does include those that do not themselves generate pollutants. They declined to resolve the second argument,

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9. 33 U.S.C. § 1251 (2003).
10. 33 U.S.C. § 1342 (2003).
11. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 124 S. Ct. 1537, 1541 (2004) (quoting 33 U.S.C. §1362(12) (2003)).
12. *Id.* at 1542.

and left it open for review on remand. The case was remanded on the basis of the third argument. The District's belief that the canal and reservoir are two parts of the same body of water was contrasted with the Tribe's contention that they are distinct. The Court saw this division as uncertain because evidence indicated "there is some significant mingling of the two waters…even without the use of the S-9 pump station, water travels" between the canal and reservoir.[13] The Tribe focused on the biological and ecological characteristics of the waters, while the District highlighted the hydrologic similarities. The Court refrained from ruling on the adequacy of the lower court's determination of the distinctness of the water bodies. Several factual issues were unresolved, as arguments remained about what test the courts should use to determine the connection of the waters. Therefore, the Court vacated the judgment of the Court of Appeals and remanded it to the district level, leaving the District's last two arguments open for further proceedings.

Engine Manufacturers Association v. South Coast Air Quality Management District, 124 S. Ct. 1756 (2004).

The South Coast Air Quality Management District (District) is responsible for air pollution control in the Los Angeles metropolitan area. It enacted Fleet Rules (Rules) that prohibit the purchase or lease of vehicles that do not comply with certain emission standards, all of which exclude diesel fueled vehicles. The Clean Air Act (CAA) prohibits the "adoption or attempted enforcement of any state or local 'standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.'"[14] The district court granted summary judgment for the District, holding that the Rules did not come under the CAA because they only regulated purchase and not vehicle sales. The Ninth Circuit Court of Appeals affirmed the ruling on the same basis.

This case hinged on the interpretation of the word "standard" in comparing emissions requirements versus enforcement of emissions standards under the CAA. Using the term's ordinary meaning, as expressed by Congress, the Court found that emissions standards are different than enforcement standards. Emissions standards can be applied to the engines and vehicles themselves, but enforcing the standards can be applied to the manufacturers and producers. The Court applied this distinction to the present case by stating that

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13. *Id.* at 1546.

14. Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 124 S. Ct. 1756 (2004) (quoting 42 U.S.C. § 7543(a) (2003)).

Congress intended to enforce emissions standards by enacting purchase requirements. In so doing, the Court wanted to maintain the CAA's preemption of standards that prevented states from using this distinction to force manufacturers to produce vehicles to state emission standards as a condition of sale.

The Court discussed treating purchase limitations different from sales limitations. The Court could not reconcile the different treatment. If there is no right to buy the vehicles, then it would be useless for another party to have a right to sell the vehicles. Because no distinction between purchase and sale was made within §209, the Court also declined to create one. The Court held that the Fleet Rules were not entirely outside the pre-emptive reach of §209. However, some issues remained unresolved: (1) whether the Rules can be characterized as internal state purchase decisions and if a different standard would apply; and (2) whether §209 would apply beyond the purchasing of new vehicles. All these issues would affect the final decision. The Court vacated the judgments of the lower courts and remanded the case for further proceedings.

Alaska Department of Environmental Conservation v. Environmental Protection Agency, 124 S. Ct. 983 (2004).

Alaska Department of Environmental Conservation (ADEC) issues Prevention of Significant Deterioration (PSD) permits to companies such as Teck Cominco Alaska, Inc. (TCA), which operates a zinc concentrate mine in Alaska. It is a major emitting facility of nitrogen dioxide. ADEC approved a technology known as selective catalytic reduction (SCR) as the best available control technology (BACT) for reducing these emissions. However, when TCA added new generators, ADEC approved Low NOx as the BACT for two of the generators even though it only achieves 30% reduction of nitrogen dioxide compared to SCR's 90%.

The EPA objected that ADEC had established SCR as a BACT, but they still approved the use of Low NOx. ADEC justified this by saying that SCR would impose a disproportionate cost on the mine, contradicting its earlier findings that it could make no judgments of SCRs impact on the mine's operation, profitability, and competitiveness. The EPA issued orders under the Clean Air Act (CAA) that prohibited ADEC from issuing a PSD permit to TCA until it documented why SCR was not a BACT for their Wartsila diesel generator. The EPA also stopped the company from beginning construction at the mine.

The CAA's PSD program prevents the construction of a major air pollutant emitting facility, "unless the facility is equipped with 'the

best available control technology.'"[15] The CAA provides that the BACT should be defined on a case-by-case basis taking into account relevant impacts and costs. The role of the EPA is to halt construction, penalize, or commence a civil action for injunctive relief if they find a state is not complying with the CAA requirement. The EPA designated Alaska as an attainment area for nitrogen dioxide, and thus no facility "emitting more than 250 tons per year" may operate without a PSD permit, which they can only acquire if they use the BACT.[16]

After Cominco petitioned the Ninth Circuit Court of Appeals for review of the EPA's orders, the court ruled in favor of the EPA. The court decided the EPA had not overstepped its authority because the "'provision of a reasoned justification' by a permitting authority is undeniably a 'requirement' of the Act."[17] The court affirmed, stating the TCA did not establish why SCR was economically infeasible, and ADEC did not justify why it had eliminated SCR as the BACT. ADEC challenged this ruling on the basis that the EPA's oversight role should be restricted to only assuring the PSD permit contains a BACT, but not making a BACT determination. The EPA interpreted the definition of the BACT along with CAA's requirement of BACT, as a "preconstruction requirement." [18] It did so in order to bring about a determination of the BACT under the statute's definition. The EPA believes it can review permits to ensure the BACT is reasonable under CAA provisions.

The Court agreed with the EPA and confirmed its role in reviewing the reasonableness of BACT. The Court recognized that Congress had expressly endorsed an expansive surveillance role for the EPA in two independent provisions. As such, the Court could not reconcile why Congress would implicitly preclude the EPA from verifying substantive compliance with BACT provisions but also limit the EPA's role based on "whether the state permitting authority had uttered the key words 'BACT.'"[19] The Court explained further that the EPA did not act arbitrarily or capriciously when determining that ADEC's BACT decision lacked supportive evidence. Therefore, the Court affirmed the Ninth Circuit decision, but emphasized that it does not prevent ADEC from finding support for their decision by revisiting their determination of Low NOx as the BACT.

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15. Alaska Dep't of Envtl. Conservation v. Envtl. Prot. Agency, 124 S. Ct. 983, 990 (2004).
16. *Id.* at 985.
17. *Id.* at 987.
18. *Id*. at 999.
19. *Id*. at 988.

Department of Transportation v. Public Citizen, 124 S. Ct. 2204 (2004).

In November 2002, President George W. Bush lifted the moratorium on Mexican motor vehicles in compliance with the North American Free Trade Agreement. The Federal Motor Carrier Safety Administration (FMCSA) issued an Environmental Assessment (EA) for their proposed Application and Safety Monitoring Rules (application and safety-monitoring requirements for Mexican carriers). The EA was based on different scenarios dependent upon whether the moratorium was lifted. "Because FMCSA concluded that the entry of the Mexican trucks was not an 'effect' of its regulations, it did not consider any environmental impact that might be caused by the increased presence of Mexican trucks within the United States."[20] The Court of Appeals said the EA was deficient because it did not consider the overall environmental impacts, and they should have prepared the more detailed Environmental Impact Statement (EIS) because the rescission of the moratorium was "reasonably foreseeable."[21] The court remanded the case for the FMSCA to prepare an EIS and a CAA conformity determination.

The National Environmental Policy Act (NEPA) imposes evaluative procedural requirements upon federal agencies, with a particular focus on analysis of environmental effects of their actions. Combined with the Clean Air Act (CAA), these statutes require the FMCSA to evaluate the environmental effects of cross-border operations of Mexican motor carriers. The federal agencies are required to provide a detailed EIS about the impacts of any recommendations, reports for legislation, or major federal actions that will ultimately affect the quality of the environment. However, if the agencies determine a "finding of no significant impact," [22] when the actions are not clearly excluded nor included in the requirements to produce an EIS, they may issue an EA, which is a less detailed report.

The Supreme Court reversed the appellates court decision. The Court highlighted the "rule of reason" analysis of NEPA.[23] When a more detailed EIS serves no purpose under NEPA's regulatory scheme taken as a whole, then the agency is not required to prepare the EIS. Therefore, the FMSCA was not required to prepare an EIS for an action that it could not decline to execute. They expressed

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20. Dep't of Transp. v. Public Citizen, 124 S. Ct. 2204, 2212 (2004).
21. *Id*. (referring to Public Citizen v. Dep't of Transp., 316 F.3d 1002, 1022 (2003)).
22. *Id.* at 2210.
23. *Id*. at 2216.

that it is the action of the President, not the FMSCA, to lift the moratorium. Since the emissions from the Mexican trucks are neither directly nor indirectly caused by the issuance of FMCSA's proposed regulations, the FMSCA acted reasonably in issuing the less detailed EA, rather than a full review in an EIS. Thus, the FMCSA did not violate NEPA.

Norton. v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373 (2004).

The land at issue was designated as "wilderness study areas" (WSAs) by the Bureau of Land Management (BLM), a division within the Department of the Interior (DOI) responsible for managing the land pursuant to a land use plan under the Federal Land and Policy Management Act of 1976 (FLPMA).[24] The land use plan is essentially a "multiple use" plan intended to balance competing current and future uses for federally controlled land. Essentially, when land is designated as a WSA, commercial enterprise and permanent roads are prohibited, along with motorized vehicles and man-made structures. One of the competing interests to be considered by BLM is the use of Off-Road Vehicles (ORVs) on federally protected land and the conflict with environmental groups over the protection of wilderness areas.

The Southern Utah Wilderness Alliance (SUWA) sought declatory and injunctive relief over the failure of BLM to protect the land in question from ORV destruction in these WSAs. SUWA claimed BLM: (1) violated its non-impairment obligation under 42 U.S.C. § 1782(a); (2) failed to implement land use provisions related to ORV usage; and (3) failed to take a "hard look" at the environmental impact of ORV usage as required under the National Environmental Policy Act of 1969 (NEPA).[25] SUWA claimed it could compel the agency to act if it has a mandatory, nondiscretionary duty pursuant to the Administrative Procedures Act, 5 U.S.C. § 706(1). The district court dismissed the case and a divided panel at the Tenth Circuit reversed.

Under APA section 706(1), a claim can only proceed where an agency failed to take a discrete action that it is required to take. The "failure to act" was found to be limited to a discrete action as defined by the APA.[26] While the non-impairment obligation is a mandatory requirement of BLM, how the agency accomplishes this is within the agency's discretion. The Court found that the APA

24. 42 U.S.C. § 1701 (2003).
25. 42 U.S.C. § 4321 (2003).
26. 5 U.S.C. § 551(13) (2003).

does not provide for extensive judicial involvement into agency discretion in accomplishing its mandatory requirements.

Regarding SUWA's land use claims, the Court held that such land use management plans are merely guidelines that cannot be used as a basis for a lawsuit under §706(1). The land use plan is generally a statement of projected present and future uses and is a preliminary step in managing public lands. It is essentially a statement of priorities that guides and constrains agency action regarding the land management but does not prescribe them. Judicial enforcement of these priorities would make them legally binding commitments instead of the projections they were intended to be.

Finally, SUWA claims that BLM did not satisfy the "hard look" requirement of NEPA by its failure to supplement its Environmental Impact Statement (EIS) to consider OVR usage. An agency's initial EIS is sufficient unless significant new information or changes relevant to the environmental concerns occur. The agency must take a "hard look" at the new information to determine if the EIS should be supplemented. If a major federal action remains to be completed, such as approving a land use plan, then the EIS should be supplemented based on the new information. In this case, the Court found that the increased ORV usage was not a significant change that required supplementation because the land use plan was the major federal action that had already been approved and no major federal action remained. The Court reversed the Tenth Circuit and remanded the case for further proceedings.

Pennaco Energy, Inc. v. United States Department of the Interior, 377 F.3d 1147 (10th Cir. 2004).

This case originated as an appeal of the Department of the Interior's Board of Land Appeals' (IBLA) decision reversing the Bureau of Land Management's (BLM) decision to auction three oil and gas leases. Pennaco, the winning bidder in the auction, appealed the decision to the District Court of Wyoming under the Administrative Procedures Act (APA). The district court reversed the IBLA's decision on the grounds that it was arbitrary and capricious and reinstated the BLM approval. On appeal, the Tenth Circuit reviewed the record of this administrative action independent of the district court's review to determine whether the IBLA's decision was indeed "arbitrary, capricious, otherwise not in accordance with law, or not supported by substantial evidence."[27] Under the National Environmental Policy Act (NEPA),[28]federal agencies must "take a 'hard look' at the environmental consequences" of the proposed courses of action.[29] In the case of major federal actions, the agencies must prepare an environmental impact statement (EIS) to evaluate the proposed action and the impact on the environment, including consideration of not taking any action. NEPA also allows varying degrees of detail in an EIS to be considered. However, the detail must be sufficient to allow the agency to take a "hard look" at the potential environmental impacts of the proposed action when a reviewing court looks at the administrative record. Agencies are required to supplement the EIS when substantial changes are made to the proposal or relevant information to the environmental concerns changes. If a less detailed environmental assessment (EA) is used, the agency should issue a "finding of no significant impact (FONSI)."[30]

In managing the use of federal oil and gas resources, the BLM initially determines whether the issuance of a particular oil and gas lease is consistent with the resource management plan (RMP). At issue here is whether BLM satisfied the "hard look" requirement of NEPA before auctioning three oil and gas leases for tracts of land in the Powder River Basin, Wyoming. Originally, forty-nine tracts were made available for lease. All but the claims surrounding the instant three were dismissed for lack of standing. The leases were issued for the extraction of coal bed methane (CBM).

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27. Pennaco Energy, Inc. v. U.S. Dep't of the Interior, 377 F.3d 1147, 1157 (10th Cir. 2004).
28. 42 U.S.C. § 4321 (2003).
29. *Id.* at 1150.
30. *Id.*

An underlying question is whether CBM extraction impacts the environment differently compared to non-CBM oil and gas development. Prior to auctioning the leases, the acting field manager of the BLM Buffalo Field Office, Richard Zander, prepared NEPA adequacy worksheets (DNAs) for the tracts to determine whether the agency could properly rely on existing documents in the analysis. He determined that the Buffalo Resource Management Plan (Buffalo RMP EIS) and the Wyodak Coal Bed Methane Project Draft EIS (Wyodak DEIS) were sufficient. The Buffalo RMP EIS, published in 1985, encompassed the appropriate parcels of land but failed to specifically address CBM extraction. The Wyodak DEIS, published in 1999, addressed CBM mining but was a post-leasing project level study that did not consider whether leases should have been issued initially and did not encompass two of the three tracts of land.

The IBLA concluded that the Buffalo RMP EIS was inadequate because it failed to address CBM extraction. The Wyodak DEIS was deficient because it did not consider reasonable alternatives relevant to a pre-leasing environmental analysis as required by NEPA. As such, the documents did not satisfy the "hard look" requirement of NEPA. The district court reversed the IBLA decision and reinstated the decision of the BLM, stating that the IBLA acted arbitrarily and capriciously by refusing to consider the two documents together.

On review, the Tenth Circuit Court concluded the IBLA did consider the relevant factors, and the IBLA decision was supported by substantial evidence in the administrative record. Pennaco relied on a purported uncontroverted affidavit by Zander in support of its claims. The court found this affidavit was a "post-hoc analysis" that did not satisfy the NEPA. The IBLA properly determined that the Buffalo RMP EIS failed to address the environmental concerns of CBM development on these parcels, and the Wyodak DEIS did not consider pre-leasing options, including not issuing leases at all. Even considered together, the documents did not properly supplement each other. Thus, the BLM failed to satisfy NEPA requirements.

E.I. Du Pont De Nemours & Co., Inc. v. United States, 365 F.3d 1367 (Fed. Cir. 2004).

The United States government hired E.I. Du Pont De Nemours & Co., Inc. (Du Pont) during World War II to produce chemicals for the government's use. Du Pont built and operated a plant in West Virginia to produce these chemicals. Later, the Environmental Protection Agency designated that clean up of the plant site was required pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). The original contract between the U.S. and Du Pont provided for government indemnification for clean up where the contractor was not directly responsible. Du Pont incurred considerable costs in investigations and feasibility studies and brought suit against the U.S. to recover the associated costs incurred under CERCLA.

The Federal Circuit Court of Appeals stated the trial court correctly held that the government had agreed to indemnify Du Pont for the costs, but had erred in finding that a predecessor to the Anti-Deficiency Act (ADA) barred recovery. Certain contracts are exempted from the ADA by the Contract Settlement Act of 1944 (CSA). The CSA was created to ensure the equitable final settlement of claims under terminated war contracts. The parties signed a Termination Supplement in 1946, two years after CSA was enacted.

Du Pont claimed indemnification recovery under CSA. The Court of Appeals noted that the CSA addressed the issue of authority for the preservation of indemnity clause and that deference may be given to the War Department's contemporaneous interpretation of the statute as implying that authority. The court held that the government's inclusion of a preservation of indemnity clause in their Termination Supplement with Du Pont preserved the indemnity granted to Du Pont in 1940, under CSA. This indemnity was deemed broad enough to include CERCLA costs. The judgment was reversed and the case remanded to determine damages.

In re: Operation of the Missouri River System Litigation, 2004 WL 1402563 (D. Minn. 2004).

The U.S. District Court in Minneapolis ruled in favor of the United States Army Corps of Engineers (Corps) over numerous environmental groups, states, businesses, and a Native American Nation claims to overturn the Corps plan to manage the Missouri River. The claims mainly addressed the Flood Control Act (FCA), the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), as well as collateral claims by Native American

tribes and businesses. The challenges specifically addressed the substance of the Corps' 2004 Master Manual, and also the procedures used to develop the manual. The court upheld the development of the manual.

The court held, under the FCA, that managing the competing interests of the river was under the Corps discretion. Unless Congress amended the FCA to establish specific requirements, e.g. minimum water levels, prioritizing these interests is completely discretionary and the priorities of river interests is subject to the discretion of the Corps. Thus, the Corps did not have to change these specifics within the Manual according to the desires of the claimants.

The opposition to the plan also alleged that it would jeopardize three animal species: the least term, the piping plover, and the pallid sturgeon. The ESA does not allow any person or agency to "take," defined as harming, hunting, wounding, capturing, etc., a species listed under the ESA.[31] As long as the decisions and plans of the agency are based on a consideration of relevant factors and the interpretation is reasonable, the court defers to the agency to make the final judgments. The court held that the Biological Opinion (that influenced the Manual) issued in regards to the effects on the species was in accord with the ESA and that no capricious or arbitrary acts were involved. In addition, the court held the Master Manual and other planning documents did not violate the ESA.

The claimants also challenged the sufficiency of the Environmental Impact Statement (EIS), as required by NEPA, used by the Corps. Against the claims that the EIS should be supplemented or changed, the court upheld the sufficiency of the EIS and the alternative considerations included therein. The Court ruled that alternatives were considered by the Corps, the final plan was not put together capriciously or arbitrarily, and it was done in good faith.

Lastly, the Court held that the Native American Nation failed to demonstrate how the implementation of the 2004 Master Manual would result in injury to them. Thus, the Court ruled the Nation lacked standing and dismissed their complaint.

Overall, the Court found that because the Corps had a duty to balance all interests in the river, and because it did not act arbitrarily or capriciously, the plans were valid. The Corps was allowed to manage the Missouri River accordingly.

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31. 16 U.S.C. §§ 1532(19), 1538(a)(1)(B) (2003).

Southwest Four Wheel Drive Association v. Bureau of Land Management, 363 F.3d 1069 (10th Cir. 2004).

In 1998, the Bureau of Land Management (BLM) closed roads in the Robledo Mountains Wilderness Study Area to off-road vehicles and deemed the area "roadless."[32] In 2004, Southwest Four Wheel Drive Association (Southwest) filed suit against the BLM to grant the public title to these roads. The district court held that the Quiet Title Act[33] provided the exclusive remedy available to Southwest but that the claim was outside the Act's twelve year statute of limitations.

The Tenth Circuit Court of Appeals affirmed the decision, but with different reasoning. The Court of Appeals stated that Southwest could not state a claim under the provisions of the Act because only states and counties can claim ownership of public highways. Therefore, the federal court dismissed the case for lack of jurisdiction over the claim, so there was no reason to address the issue of the statute of limitations.

III. FLORIDA CASE LAW

D'Alto v. State of Florida Department of Environmental Protection, 860 So. 2d 1003 (Fla. 1st DCA 2003).

D'Alto filed an Early Detection Incentive Program (EDI) Notification Application in an attempt to participate in the Petroleum Cleanup Protection Program (PCPP). The current application form used by the Department of Environmental Protection (DEP) was the Discharge Reporting Form (DRF). When completing the form, D'Alto answered 'unknown' to five of twelve questions on the application. The DEP alleged that the lack of information disqualified the submitted form as a DRF.

The PCPP was enacted as a cleanup program to "encourage detection, reporting, and cleanup of contamination… by… petroleum products."[34] The DEP had the responsibility of directing the program. Because of similar predecessor programs to the PCPP, the DEP was supposed to accept "any discharge reporting form" as an application so the same people did not have to reapply.[35]

The Court held that the Notification Application qualified as a DRF. The source of the contamination, an abandoned Texaco

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32. S.W. Four Wheel Drive Ass'n v. Bureau of Land Mgmt., 363 F.3d 1069, 1070 (10th Cir. 2004).
33. 28 U.S.C. § 2409a (2003).
34. D'Alto v. Fla. Dep't of Envtl. Prot., 860 So. 2d 1003, 1004 (Fla. 1st DCA 2003).
35. *Id*. at 1004-05.

station, was identified. Also, the DEP could not say how the lacking information had specifically inhibited D'Alto's ability to participate. The Court held the DEP was free to request needed or missing information, but it had to accept D'Alto's application to participate in the petroleum cleanup program. The Court reversed the decision of the lower court and remanded it back to determine if D'Alto was eligible to participate based on the application.

Thomas v. Southwest Florida Water Management District, 864 So. 2d 455 (Fla. 5th DCA 2003).

This action arose from Southwest Florida Water Management District's (SFWMD) denial of Thomas' request for a modification of his water use permit. Thomas added acreage to his land, and he wanted an increase in his water usage. SFWMD was concerned with the availability of the water and the availability to people outside the county. The court ruled in favor of SFWMD. Thomas appealed the decision, alleging he possessed a superior right to the water since he was within the county, as required under section 373.1961(1)(e) of the Florida Statutes.

The Florida Court of Appeals upheld the denial of his appeal because section 373.217, Florida Statutes, superseded the statute Thomas relied upon. The superseding statute gives SFWMD "supremacy and exclusivity" in its permitting authority. Thus, although, the former statute gives priority of water usage to residents within the county, the latter gives the authority to SFWMD to override it. The lower court judgment was affirmed.

E.I. Du Pont De Nemours & Co. v. Aquamar S.A., 881 So. 2d 1 (Fla. 4th DCA 2004).

E.I. Du Pont de Nemours & Co. (Du Pont) supplies Benlate, a fungicide, to banana farms to prevent the spread of a disease, Black Sigatoka. They supply the fungicide to farms in Ecuador, some of which are near rivers. Nearby shrimp farms depend on those same local rivers. Since the introduction of the fungicide, some shrimp farms have experienced increasing shrimp fatality rates.

The jury in the lower court found in favor of Aquamar. They held that Du Pont negligently distributed Benlate under Florida law by making recommendations for application in combination with other fungicides, not warning the banana farmers of the run-off potential and, expressly, its toxicity to shrimp. Du Pont appealed the decision, arguing that Aquamar's state law claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

If Aquamar would have elected to enter as a foreign plaintiff, relying on foreign law, it could bring an inadequate warning claim in a state court based on an injury arising outside the United States. However, because the claim was brought under state law, FIFRA can preempt Florida law. The court ruled Du Pont's negligence could be remedied by a specific label warning of run-off potential and toxicity to shrimp. Therefore, instead of a negligent distribution claim under state law, this was a labeling claim under FIFRA. The court reversed the jury verdict and remanded the case.

Monroe County v. Ambrose, 866 So. 2d 707 (Fla. 3d DCA 2003).

The Landowners-Appellees own undeveloped land in the Florida Keys, within Monroe County. In 1979, Monroe County was designated as an area of critical state concern, with intent to establish a land use management system. The landowners sought declatory relief to determine the effects of the 1986 Land Development Regulations. The trial court found the landowners had vested rights to build single family homes by recording parcels of land.

The applicable statute, Fla. Stat. §380.05(18), protects the rights of Landowners so the development cannot be limited or modified by a critical concern designation or by subsequent land regulations. The Court of Appeals agreed generally, but disagreed with the trial court's ruling that the landowners had vested rights by recordation alone.

The purpose of section 380, Florida Statutes, is to "protect the natural resources and environment of the state, preserve water resources, and facilitate orderly and well planned development."[36] Thus, the court determined that allowing landowners, who have not previously developed their property, to have vested rights would be contrary to the intent of the statute.

Therefore, the court held that the landowners must prove, in addition to recordation, that they *relied on* section 380.15(18), Florida Statutes, for vested rights to develop the land. The court remanded the case to determine if the vested rights were based on the two components, instead of just recordation. It also concluded that landowners who do have vested rights are not subject to subsequently enacted land regulations. If the regulations did affect the value of the land, the landowners must receive full compensation. Last, the date to determine if vested rights were

36. Monroe County v. Ambrose, 866 So. 2d 707, 711 (Fla. 3d DCA 2003).

obtained was changed from 1972 (when section 380.05(18), Florida Statutes, was enacted) to 1986 when the first land development regulations were enacted. The court reversed and remanded the proceedings with instructions accordingly.

Aramark Uniform & Career Apparel, Inc. v. Easton, 29 Fla. L. Weekly S551 (Fla. 2004).

Chemical solvents from Aramark's property permeated the groundwater, which moved onto Easton's property. The contamination imposed no immediate health risks, but Easton's building occupants had to avoid contact with the groundwater. Easton brought suit for damages and injunctive relief for the continuing passage of the contaminated water.

The district court held for Aramark because Easton failed to prove that Aramark had caused the contamination. The First District Court of Appeal reversed, basing the decision on a strict liability claim under section 376.313(3) of the Florida Statutes (from the Water Quality Assurance Act of 1983) which did not require proof that Aramark caused the contamination. The Florida Supreme Court affirmed the decision of the First District Court of Appeal. It held that the statute created a new cause of action based on strict liability, rather than merely modifying existing common law. The Court remanded the case with instructions not to require proof that the petitioners caused the contamination on their own property, and to determine whether any statutory exceptions and defenses apply.

IV. FLORIDA STATUTES

The 2004 Florida Legislative Session passed several bills regarding the state's natural resources. There are several websites that have information on the various bills proposed and passed.[37] Unless otherwise stated, the information contained herein comes from the Senate Committee on Natural Resources report on the 2004 Legislative Session.[38] In addition, law firms, specifically Holland & Knight, provide summaries of environmental related legislation on their website.[39] Below is a sampling of legislation that was passed into law.

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37. http://election.dos.state.fl.us/laws/04laws/shotitle.htm; http://www.flsenate.gov/publications/2004/senate/reports/summaries/pdf/natural.pdf; http://www.flsenate.gov/statutes/index.cfm.

38. http://www.flsenate.gov/publications/2004/senate/reports/summaries/pdf/natural.pdf.

39. www.hklaw.com.

CS/SB 388 Brownfield Loan Guarantees

Under the Brownfield Redevelopment Act, a brownfield is defined as "a site that is generally abandoned, idled, or under-used industrial or commercial properties where expansion or redevelopment is complicated by actual or perceived environmental contamination."[40] The Department of Environmental Protection (DEP) provides oversight and regulation to the contaminated areas.[41] The DEP needed the amendments regarding the brownfields program to be updated, both for clarification and technical reasons. The EPA recently made changes at the federal level, so there were several changes needed at the state level for conformity. The definition of "brownfield site" was revised. The rehabilitation of proposed brownfield sites must create 10 new jobs that are not associated with construction or demolition occupations. The provisions related to the contractor liability coverages were also updated. Last, when a browfield site escheats to a county, this bill gives the county liability protection. These changes will make it easier for the DEP to manage the federal brownfields grants.[42]

CS/SB 540 Manatee Protection

This bill creates an exception to penalties for violations of regulations that control the speed and operation of motorboats to protect manatees. If an activity is reasonably necessary to prevent the loss of human life or a vessel, it will fall under this exception. In regions where the goals set forth by the Fish and Wildlife Conservation Commission have been achieved, this bill can slow the creation of new speed zones.

This bill also mandates that the Fish and Wildlife Conservation Commission (FWC) should define how biological goals will be measured when considering the need for additional manatee protections. Under the enhanced manatee protection study, the FWC must conduct a signage and speed assessment by January 2007, and have specific recommendations for local policies for the placement of signs. The study used by the FWC should conform to its mission of protecting the manatees while providing maximum recreational use of waterways.

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40. http://www.dep.state.fl.us/southeast/hottopics/FAQ/faqs.htm.
41. *Id.*
42. www.hklaw.com.

CS/CS/CS/SB 1214 Wekiva Parkway and Protection Act

The Wekiva Parkway and Protection Act is "a blueprint for building an environmentally sensitive expressway, protecting rivers, springs and wildlife habitat while meeting the growing transportation needs of Central Florida."[43] This bill creates the Act and also provides the legislative intent and legal description of the Wekiva Study Area. Most of the land in the Study Area plays a role in the groundwater recharge to the Wekiva River and springs.

Three main goals were addressed by the Wekiva Committee, who provided the research behind the Act.[44] A parkway will be built to complete a transportation corridor in Central Florida, to help alleviate the traffic congestion.[45] They also wanted to maintain the land surrounding the parkway, especially the spring and groundwater recharge areas in the basin of the Wekiva River.[46] Last, they developed the plan to coordinate the land use and water supply planning.[47]

Local governments within the Study Area must adopt amendments to their comprehensive plan and add an interchange land use plan. Also, they must implement a storm water management plan. They must establish land use strategies to optimize open space and promote development that protects the most effective recharge areas. Last, they must provide a ten year water supply facility work plan for building new drinkable water facilities.

CS/SB 2736 Taking of Fish and Shellfish

This bill raises the annual fee for crawfish trap numbers for those trapping crawfish in commercial quantities or for commercial purposes from $100 to $125. The extra $25 will be used to pay for the recovery of lost and abandoned traps. It clarifies that the traps are included in the retrieval program of the FWC.[48] It also elucidates that those taking crawfish without a trap must pay an annual fee of $100. For each trap number, the trap owner gets the first five traps retrieved for free.

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43. http://www.wekivacommittee.org/wekivaact/pressrelease.htm.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&SubMenu=1&Year=2004&billnum=2736.

CS/CS/SB 2820 Fish and Wildlife Conservation Commission

This bill reorganizes the Fish and Wildlife Conservation Commission (FWC). The purpose was to "flatten the agency's organizational structure, improve agency efficiency, and align and integrate similar functions within the agency."[49] The Fish and Wildlife Research Institute will be the primary source for expertise on Florida's saltwater, freshwater, and wild animal life species and their habitats. The Division of Freshwater Fisheries Management will become responsible for the use of freshwater aquatic life resources. The Division of the Habitat and Species Conservation will oversee the protection of the unique fish and wildlife species. The Division of Hunting and Game Management will be responsible for the sustained use of wildlife resources. The Division of Law Enforcement's role is to ensure enforcement of the laws and govern the activities of the FWC. The Division of Marine Fisheries Management is responsible for the use of marine life resources. Last, the Office of Executive Direction and Administrative Support Services will be the main department for clerical and support assistance. The bill also authorized the FWC to publish the Florida Wildlife Magazine.

SB 2832 Water Management District Planning and Reporting

This bill directs the South Florida Water Management District (SFWMD) to begin a pilot project to review plans and reports submitted annually to the Governor and Legislature. SFWMD is to determine how the information in these reports can be provided more effectively and efficiently and submit the plans no later than February 2005. This deadline temporarily replaces the statutory deadlines for the submission of the plans and reports of the district.[50]

HB 293 Water Resources

This bill was backed by several environmental groups to promote the use of reclaimed wastewater and lay a foundation for a water conservation program.[51] The bill compels local governments to address the water supply sources necessary to meet and achieve present and expected water use demand. It requires the districts to

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49. http://www.myflorida.com/myflorida/governorsoffice/pdfs/2004notablebills.pdf.
50. http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&SubMenu=1&Year=2004&billnum=2832.
51. http://www.floridaca.org/vote/spotlight_legislature.htm.

use reclaimed wastewater instead of surface or groundwater if it is environmentally, technically, and economically feasible. It also requires the districts to develop landscape irrigation design standards to conserve water under present state plans.

SB 1156 Relating to Sport Shooting & Training Ranges

This bill exempted shooting range owners from environmental laws designed to reduce lead contamination in groundwater.[52] State environmental regulation employees are no longer allowed to enforce the laws.[53] It is instead the responsibility of the federal government to follow the lead pollution allegations.[54] The NRA backed this bill alleging that enforcement of the laws was a back door gun control method by the Department of Environmental Protection.[55]

52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*