

**RECENT DEVELOPMENTS:  
THE CHANGING TIDE OF LAND USE  
AND ENVIRONMENTAL LAW**

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A single breaker may recede; but the tide is evidently coming in.”<sup>2</sup>

I. INTRODUCTION

Not unlike the ocean’s boundary, the law remains in constant flux, requiring continuing evaluation to monitor its direction of change. Especially in the areas of land use and environmental law, change does not necessarily represent progress towards the eminent goal of advancing efficient laws that fairly protect important competing interests. The court’s attempt to balance these vying concerns can be observed in the frequency of litigation, numerous split decisions, and countless conflicting legal standards. Indeed, an escalating number of cases and legislation in 2007 contemplate the growing influence of land use and environmental law. This Article merely features a few of the noteworthy decisions and statutory developments from the past year, helping to gauge the tide of federal and Florida law.

II. FEDERAL CASE LAW

*Environmental Defense v. Duke Energy Corp.*, 127 S.Ct. 1423  
(2007)

In *Environmental Defense v. Duke Energy Corp.*, a unanimous decision<sup>3</sup> delivered by Justice Souter, the United States Supreme

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1. J.D., December 2007, Florida State University College of Law.  
2. THOMAS B. MACAULAY, SOUTHEY'S COLLOQUIES ON SOCIETY (1830), *reprinted in* LITERARY ESSAYS CONTRIBUTED TO THE EDINBURGH REVIEW, at 94 (Oxford University Press 1913) *available at* <http://www.econlib.org/library/Essays/macS1.html>.  
3. Justice Thomas filed a concurring opinion expressing disagreement with a narrow part of the Court's statutory interpretation analysis.

Court reinforced a long-standing effort to compel power plants to install the best available emissions-control technology.<sup>4</sup> The United States, along with multiple environmental groups,<sup>5</sup> alleged that Duke Energy Corporation (Duke) offended the Clean Air Act<sup>6</sup> (CAA) when it improved components of coal-fired electric generating units at eight power plants located in North Carolina and South Carolina.<sup>7</sup> Specifically, the petitioners argued that Duke violated the Prevention of Significant Deterioration (PSD) provisions of the CAA by failing to obtain permits before refurbishing the units and by not employing Best Available Control Technology (BACT), as is required for major modifications that significantly increase the net annual discharge of pollution.<sup>8</sup>

The case turned on the Environmental Protection Agency's (EPA) definition of the term "modification" which had been interpreted differently under the Clean Air Act's two air pollution control programs: the New Source Performance Standards (NSPS) and PSD.<sup>9</sup> The EPA construed modification in the NSPS regulations to be an increase in hourly emission rates, while defining modification as an increase in annual emissions over the actual baseline emissions in the PSD regulations.<sup>10</sup> Adopting the former interpretation, both the trial court and the Court of Appeals for the Fourth Circuit determined that Congress intended the EPA to evaluate modifications based on their impact on the hourly rate of emissions.<sup>11</sup> Thus, the lower courts held that Duke did not have to obtain PSD permits or utilize BACT because the hourly rate of emissions remained unchanged, even though the improvements prolonged the plants' daily operation and increased the total emissions released.<sup>12</sup>

The Supreme Court reversed, ruling that harmonizing the meaning of modification under the PSD regulations to the NSPS counterpart was "too far a stretch" as it would effectively invalidate the PSD regulations.<sup>13</sup> Borrowing language from *Atlantic Cleaners & Dyers, Inc. v. United States*,<sup>14</sup> the Court explained that

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4. See 127 S.Ct. 1423 (2007).

5. The Environmental Defense, North Carolina Sierra Club, and North Carolina Public Interest Research Group Citizen Lobby/Education Fund.

6. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.).

7. 127 S.Ct. at 1431.

8. *Id.*

9. See *id.* at 1430.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 1434.

14. 286 U.S. 427, 433 (1932).

“most words have different shades of meaning. . . . A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.”<sup>15</sup> Vacating the Fourth Circuit’s decision, the Court announced that the PSD regulations may define modification in terms of annual instead of hourly emissions increase.<sup>16</sup> This landmark decision demonstrates the Court’s subtle shift towards a more expansive approach of environmental regulation enforcement.<sup>17</sup>

*Massachusetts v. Environmental Protection Agency*, 127 S.Ct. 1438 (2007)

In *Massachusetts v. Environmental Protection Agency*, the first case involving climate change to reach the United States Supreme Court, a 5-4 opinion<sup>18</sup> established that the CAA not only grants the EPA the statutory authority to regulate greenhouse gases produced by new motor vehicles, but the CAA obligates the EPA to regulate emissions if it finds that greenhouse gases “may reasonably be anticipated to endanger the public health or welfare.”<sup>19</sup> The decision, penned by Justice Stevens, overturned the EPA’s denial of a request filed by Massachusetts and eleven other states,<sup>20</sup> as well as local governments<sup>21</sup> and environmental groups,<sup>22</sup> to regulate greenhouse gas emissions from the transportation sector.<sup>23</sup> Perhaps more important than the specific holding, the Supreme Court accepted climate change as a legal presumption.<sup>24</sup>

In 1999, a coalition of 19 private organizations<sup>25</sup> filed a rule-

15. 127 S.Ct. at 1432.

16. *Id.* at 1434.

17. *See generally* Richard J. Lazarus, *Fairness in Environmental Law*, 27 ENVTL. L. 705, 716 (1997) (recognizing that CAA as well as other environmental regulations are “products of innovative and expansive interpretations of existing statutory language”).

18. The opinion of the Court was joined by Justices Kennedy, Souter, Ginsburg, and Breyer.

19. 127 S.Ct. 1438 (2007).

20. California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.

21. District of Columbia, American Samoa, New York City, and Baltimore.

22. Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and U.S. Public Interest Research Group.

23. *See* 127 S.Ct. at 1438-63.

24. *Id.* at 1440. (“Global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere.”).

25. Alliance for Sustainable Communities; Applied Power Technologies, Inc.; Bio Fuels America; The California Solar Energy Industries Assn.; Clements Environmental Corp.; Environmental Advocates; Environmental and Energy Study Institute; Friends of the

making petition with the EPA requesting that it develop regulatory standards for four greenhouse gases emitted by automobiles: carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons.<sup>26</sup> The petition asserted that the emissions were “air pollutants” that “may reasonably be anticipated to endanger public health or welfare” and must be regulated by the EPA under section 202(a)(1) of the CAA.<sup>27</sup> Indeed, “air pollutant” is broadly defined by the CAA to include “any air pollution agent or combination of such agents . . . which is emitted into or otherwise enters the ambient air.”<sup>28</sup> Nevertheless, the EPA issued an order denying the rulemaking petition stating that:

(1) contrary to the opinions of its former general counsels, the Clean Air Act does not authorize the EPA to issue mandatory regulations to address global climate change; and (2) that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time.”<sup>29</sup>

Petitioners were joined by Massachusetts and other state and local governments, seeking review of the EPA's order in the Court of Appeals for the D.C. Circuit, but a divided panel ruled in favor of EPA.<sup>30</sup>

The Supreme Court narrowly reversed the lower court's ruling on appeal. First, the Court discussed standing and rejected the EPA's argument that the damage caused by greenhouse gases is too widespread for Massachusetts and the other petitioners to fall within the harm requirement of the federal courts under Article III of the U.S. Constitution.<sup>31</sup> Rather, the Court reasoned that the EPA's refusal to regulate greenhouse gas emissions constitutes an “actual and imminent” risk of harm to Massachusetts.<sup>32</sup> The

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Earth; Full Circle Energy Project, Inc.; The Green Party of Rhode Island; Greenpeace USA; International Center for Technology Assessment; Network for Environmental and Economic Responsibility of the United Church of Christ; New Jersey Environmental Watch; New Mexico Solar Energy Assn.; Oregon Environmental Council; Public Citizen; Solar Energy Industries Assn.; The SUN DAY Campaign.

26. *Id.* at 1449.

27. *Id.* (citing 42 U.S.C. § 7521(a)(1)). The provision requires the Administrator of the EPA to set emission standards for “any air pollutant” from new motor vehicles or new motor vehicle “which in his judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.”

28. 42 U.S.C. § 7602(g).

29. 127 S.Ct. at 1450.

30. *Id.* at 1451.

31. *Id.* at 1453.

32. *Id.* at 1455.

Court added that there was a “substantial likelihood that the judicial relief requested’ [would] prompt [the EPA] to take steps to reduce that risk.”<sup>33</sup> As such, Massachusetts had standing to bring the claim.

Then, reviewing the merits of the case, the majority immediately disposed of the EPA’s contention that carbon dioxide is not an “air pollutant” ruling instead that the CAA’s “sweeping definition” of the term encompasses all greenhouse gases.<sup>2</sup> Additionally, the Court held that “[i]f EPA makes a finding of endangerment, the CAA requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles.”<sup>34</sup> The Court ultimately concluded that the EPA’s refusal “to decide whether greenhouse gases cause or contribute to climate change” was arbitrary and capricious.<sup>35</sup>

Two of the conservative members of the Court authored dissenting opinions. Chief Justice Roberts’ dissent<sup>36</sup> insisted that the legal challenges were nonjusticiable because Massachusetts did not meet its burden “of alleging an injury that is fairly traceable to the [EPA’s] failure to promulgate new motor vehicle greenhouse gas emission standards, and that is likely to be redressed by the prospective issuance of such standards.”<sup>37</sup> Justice Scalia’s dissent,<sup>38</sup> on the other hand, analyzed the merits of the case, contending that the EPA’s interpretation of “air pollutant” is not only reasonable, but “is far more plausible than the Court’s alternative.”<sup>39</sup>

*National Ass’n of Home Builders v. Defenders of Wildlife*, 127  
S.Ct. 2518 (2007)

In another 5-4 decision,<sup>40</sup> the United States Supreme Court settled a procedural conflict between competing provisions of the Clean Water Act<sup>41</sup> (CWA) and the Endangered Species Act<sup>42</sup> (ESA)

33. *Id.* (citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79 (1978)).

34. *Id.* at 1462 (“EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”).

35. *Id.* at 1463.

36. Justice Roberts’ dissent was joined by Justices Scalia, Thomas, and Alito.

37. *Id.* (Roberts, J., dissenting).

38. Justice Scalia’s dissent was joined by Justices Roberts, Thomas, and Alito.

39. *Id.* at 1476 (Scalia, J., dissenting).

40. The opinion of the Court was joined by Justices Roberts, Scalia, Kennedy, and Thomas.

41. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended in scattered sections of 33 U.S.C.).

42. Endangered Species Act of 1973, Pub. L. No. 93-205 § 2, 87 Stat. 884 (codified as

in *National Ass'n of Home Builders v. Defenders of Wildlife*.<sup>43</sup> Justice Alito, writing for the majority, succinctly explained the legal dilemma:

Section 402(b) of the [CWA] requires that the [EPA] transfer certain permitting powers to state authorities upon an application and a showing that nine specified criteria have been met.<sup>44</sup> Section 7(a)(2) of the [ESA] provides that a federal agency must consult with agencies designated by the Secretaries of Commerce and the Interior in order to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species.”<sup>45</sup>

The focus of the dispute was the EPA’s decision to approve the transfer of the CWA’s permitting authority to Arizona.<sup>46</sup> Defenders of Wildlife argued that in addition to the CWA’s nine requirements set forth in Section 402(b), the EPA must additionally consider whether the transfer of permitting authority jeopardizes endangered or threatened species under Section 7(a)(2) of the ESA. In a split decision, the Court of Appeals for Ninth Circuit ruled “that the EPA’s approval of the transfer was arbitrary and capricious because the EPA ‘relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations.’”<sup>47</sup>

Deferring to the EPA’s reasonable interpretation, the majority reversed the appellate court’s holding and ruled that Section

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amended at 16 U.S.C. §§ 1531-1544 (1985 & Supp. 1997)).

43. 127 S.Ct. 2518 (2007).

44. The State must demonstrate that it has the ability: (1) to issue fixed-term permits that apply and ensure compliance with the CWA’s substantive requirements and which are revocable for cause; (2) to inspect, monitor, and enter facilities and to require reports to the extent required by the CWA; (3) to provide for public notice and public hearings; (4) to ensure that the EPA receives notice of each permit application; (5) to ensure that any other State whose waters may be affected by the issuance of a permit may submit written recommendations and that written reasons be provided if such recommendations are not accepted; (6) to ensure that no permit is issued if the Army Corps of Engineers concludes that it would substantially impair the anchoring and navigation of navigable waters; (7) to abate violations of permits or the permit program, including through civil and criminal penalties; (8) to ensure that any permit for a discharge from a publicly owned treatment works includes conditions requiring the identification of the type and volume of certain pollutants; and (9) to ensure that any industrial user of any publicly owned treatment works will comply with certain of the CWA’s substantive provisions. *Id.* at 2525 n. 2 (citing §§ 1342(b)(1)-(9)).

45. *Id.* at 2524-25.

46. *Id.* at 2527.

47. *Id.* at 2528.

7(a)(2) of the ESA only applies to discretionary agency actions of federal agencies.<sup>48</sup> Essentially, because the EPA's transfer of permitting authority was a nondiscretionary action, it was merely required to consider the nine criteria set forth in the CWA.<sup>49</sup> Justice Steven asserted in his dissent<sup>50</sup> that the ESA's requirements applied to both discretionary and non-discretionary agency decisions and that its interpretation does not warrant deference because “[t]he Departments of the Interior and Commerce, not EPA, are charged with administering the ESA.”<sup>51</sup> In a separate dissenting opinion, Justice Breyer expressed that “the majority cannot possibly be correct in concluding that the structure of § 402(b) precludes application of § 7(a)(2) to the EPA's discretionary action. That is because grants of discretionary authority always come with *some* implicit limits attached.”<sup>52</sup>

*United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste*, 127 S.Ct. 1786 (2007)

In *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste*, a plurality opinion delivered by Chief Justice Roberts,<sup>53</sup> the United States Supreme Court upheld the constitutionality of a county ordinance requiring haulers to bring waste to government owned facilities.<sup>54</sup> Both Oneida and Herkimer Counties adopted a local “flow control” ordinance requiring locally-produced garbage to be delivered to particular processing facilities owned by the Oneida-Herkimer Solid Waste Management Authority (Authority), a public benefit corporation.<sup>55</sup> The Authority collected tipping fees to cover its expenses. Although the charge far exceeded the open market rate, it “allowed the Authority to do more than the average private waste disposer.”<sup>56</sup>

The United Haulers Association filed an action against the Counties and the Authority under Rev. Stat. § 1979, 42 U.S.C. § 1983, alleging that the flow control laws violated the Commerce Clause by discriminating against interstate commerce.<sup>57</sup> The peti-

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48. *Id.* at 2535.

49. *Id.* at 2530.

50. The opinion was joined by Justices Souter, Ginsburg, and Breyer.

51. *Id.* at 2542-44 (Stevens, J., dissenting).

52. *Id.* at 2552 (Breyer, J., dissenting).

53. Justices Souter, Ginsburg and Breyer joined the opinion in full. Justice Scalia concurred in part and filed an opinion. Justice Thomas concurred in judgment and filed an opinion.

54. 127 S.Ct. 1786.

55. *Id.* at 1791.

56. *Id.*

57. *Id.* at 1792.

tioner submitted evidence that solid waste could be disposed if at out-of-state facilities for much less expense without the flow ordinance.<sup>58</sup> Relying on *C & A Carbone, Inc. v. Clarkstown*,<sup>59</sup> the district court enjoined the enforcement of the Counties' laws.<sup>60</sup> The Court of Appeals for the Second Circuit conversely ruled that a statute does not discriminate against interstate commerce simply because "it favors local government at the expense of all private industry."<sup>61</sup> However, the case was remanded to determine whether the flow control laws placed an incidental burden on interstate commerce and, if so, whether the benefits of the ordinance outweighed that burden.<sup>62</sup> The district court subsequently found that the petitioners did not show that the ordinances imposed any cognizable burden on interstate commerce. The Second Circuit affirmed in judgment.<sup>63</sup>

On appeal, the Supreme Court similarly affirmed the Second Circuit's decision upholding the ordinance.<sup>64</sup> The Court distinguished the Counties' ordinances from regulations previously rendered unconstitutional where the favored waste-disposal facilities were publicly operated.<sup>65</sup> "The flow control ordinances in this case," Chief Justice Roberts noted, "benefit a clearly public facility, while treating all private companies exactly the same."<sup>66</sup>

In the final part of the opinion, the Court applied the test set forth in *Pike v. Bruce Church, Inc.*<sup>67</sup> Under the *Pike* test, a nondiscriminatory statute is upheld "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."<sup>68</sup> The Court determined that the flow control laws survive the *Pike* test because "any arguable burden the ordinances impose on interstate commerce does not exceed their public benefits."<sup>69</sup>

Justice Scalia joined the plurality opinion by concurring in judgment, but argued in a separate opinion that the *Pike* test was inappropriately applied.<sup>70</sup> In another concurrence, Justice Thomas

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58. *Id.*

59. 511 U.S. 383 (1994).

60. 127 S.Ct. at 1792.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* 1797.

65. *Id.* 1794-95.

66. *Id.* at 1796. ("Unlike private enterprises, the government is vested with the responsibility of protecting the health, safety, and welfare of its citizens."). *Id.* at 1785.

67. 397 U.S. 132 (1970).

68. 127 S.Ct. at 1797 (citations omitted).

69. *Id.* at 1798.

70. *Id.* at 1798 (J. Scalia, concurring) ("[T]he balancing of various values is left to Congress—which is precisely what the Commerce Clause (the *real* Commerce Clause) envi-

stated that *Carbone* was incorrectly decided.<sup>71</sup> In his dissent, however, Justice Alito<sup>72</sup> maintained that the ordinances were “essentially identical to the ordinance invalidated in *Carbone*” and therefore unconstitutionally discriminated against interstate commerce.<sup>73</sup>

*United States v. Atlantic Research Corp.*, 127 S.Ct. 2331 (2007)

In *United States v. Atlantic Research Corp.*, the United States Supreme Court unanimously held that a potentially responsible party (PRP) may recover the costs it incurs in responding to environmental contamination from other PRPs under the Comprehensive Environmental Response Compensation and Liability Act<sup>74</sup> (CERCLA).<sup>75</sup> Writing for the majority, Justice Thomas clarified uncertainties regarding the ability of private parties to sue for contributions from other parties after voluntarily cleaning up a contaminated site.<sup>76</sup>

Atlantic Research leased property at a naval ammunition depot operated by the United States Department of Defense.<sup>77</sup> Atlantic Research retrofitted rocket motors for the federal government using a high-pressure water spray to remove pieces of propellant.<sup>78</sup> The propellant pieces were then burned, contaminating soil and groundwater at the site.<sup>79</sup>

Upon cleaning the site, Atlantic sued the United States under both section 107(a) and 113(f) of CERCLA, seeking partial reimbursement for the costs it incurred.<sup>80</sup> While litigation was pending, the Supreme Court ruled in *Cooper Industries, Inc. v. Aviall Services, Inc.*,<sup>81</sup> that a party cannot bring a section 113(f) claim for contribution unless it is already the subject of a section 107(a) contamination action.<sup>82</sup> Accordingly, Atlantic Research filed a new claim for contribution under section 107(a) which was subsequently dismissed by a district court.<sup>83</sup> The Court of Appeals for

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sions.”) (emphasis in original).

71. *Id.* at 1799 (J. Thomas, concurring).

72. Justice Alito’s dissent was joined by Justices Stevens and Kennedy.

73. *Id.* at 1803.

74. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-75 (2007)).

75. 127 S.Ct. 2331 (2007).

76. *See id.*

77. *Id.* at 2335.

78. *Id.*

79. *Id.*

80. *Id.*

81. 543 U.S. 157 (2004).

82. 127 S.Ct. at 2335.

83. *Id.*

the Eighth Circuit reversed.<sup>84</sup>

The Supreme Court affirmed the appellate court's ruling that Section 107(a) of CERCLA allows PRPs to sue other PRPs for cost recovery.<sup>85</sup> Under section 107(a), PRPs are liable for "(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; [and] (B) any other necessary costs of response incurred by *any other person* consistent with the national contingency plan."<sup>86</sup> The Government argued that the phrase "any other person" in Section 107(a) includes only non-PRPs.<sup>87</sup> But the Court held that "the Government's interpretation makes little textual sense" based on the plain terms of the statute.<sup>88</sup> As Justice Thomas explained, section 107(a)(4) must be read to provide a cause of action to any party other than the United States, a State or an Indian tribe.<sup>89</sup> The decision recognized a policy of encouraging remediation of contaminated sites by assuring PRPs that incurred expenses can be recovered from responsible parties.

*Lombardi v. Whitman*, 485 F.3d 73 (2nd Cir. 2007)

In *Lombardi v. Whitman*, the Court of Appeals for the Second Circuit affirmed the dismissal of a claim brought by five emergency responders to the World Trade Center site in the aftermath of the September 11th terrorist attacks who suffered or feared respiratory damage.<sup>90</sup> The workers, individually and as representatives of a class of individuals similarly situated, alleged that various federal public officials<sup>91</sup> violated their right to substantive due process by issuing reassuring—and knowingly false—announcements about the air quality at the site, causing them to believe it was safe to work without sufficient protective respiratory equipment.<sup>92</sup> However, guided by the Supreme Court's decision in

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84. *Id.*

85. *Id.*

86. 42 U.S.C. section 9607(a)(4)(A)-(B).

87. 127 S. Ct. at 2332-33.

88. *Id.* at 2336.

89. *Id.*

90. 485 F.3d 73 (2nd Cir. 2007). The also brought suit "on behalf of a purported class including all those who worked at or in the immediate vicinity of the site during the period September 11, 2001, to October 31, 2001, who did so without sufficient respiratory equipment in reliance on information supplied by government officials, and who as a result suffer or reasonably fear suffering illness or injury from their exposure to asbestos or other harmful substances." *Id.* at 74.

91. Current or former officials of the Environmental Protection Agency, the White House Council on Environmental Quality, and the Occupational Safety and Health Administration.

92. 485 F.3d at 74. Both the report and the 33 press releases relied on by the plain-

*Collins v. City of Harker Heights*, the Second Circuit held that the allegations were not “egregious, conscience-shocking, and ‘arbitrary in the constitutional sense’” even if the public officials truly acted with deliberate indifference.<sup>93</sup>

“[T]o shock the conscience and trigger a violation of substantive due process,” the Second Circuit explained, the “official conduct must be . . . truly ‘brutal and offensive to human dignity’”<sup>94</sup> Where there are no harmless options available, “an attempt to choose the least of evils is not itself shocking.”<sup>95</sup> In *Lombardi*, the appellate court found that the events of September 11th forced public officials “to make decisions using rapidly changing information about the ramifications of unprecedented events in coordination with multiple federal agencies and local agencies and governments.”<sup>96</sup> Assuming, nonetheless, that public officials made decisions in an unhurried fashion, the Second Circuit held that they were justified because the officials were subjected to the “pull of competing obligations” by having to inform the public about environmental dangers while simultaneously maintaining peace and order.<sup>97</sup>

*Digrugilliers v. Consolidated City of Indianapolis*,  
506 F.3d 612, 2007 WL 3151201 (7th Cir. 2007)

In *Digrugilliers v. Consolidated City of Indianapolis*, the Court of Appeals for the Seventh Circuit held that a church is entitled to a preliminary injunction pending the resolution of its claim that Indianapolis’ requirement that it obtain a variance to operate in a commercial office-buffer district (C-1) violates the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).<sup>98</sup> The pastor of a small congregation alleged that Indianapolis’ zoning ordinance offended RLUIPA which prohibits “impos[ing] or implement[ing] a land use regulation in a manner that . . . treats a religious assembly or institution on less than equal terms with a non-religious assembly or institution.”<sup>99</sup> The ordinance provided that C-1 districts were intended to be buffers between residential dis-

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tiffs are available at <http://www.epa.gov/oig/reports/2003/wtc/toc.htm> (last visited November 11, 2007).

93. 485 F.3d at 84-85 (citing *Collins*, 503 U.S. 115, 125-29 (1992)).

94. *Id.* at 81 (citing *Smith v. Half Hollow Hills Cent. School Dist.*, 298 F.3d 168, 173 (2d Cir.2002)).

95. *Id.*

96. *Id.*

97. *Id.* at 83.

98. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, 804 (codified at 42 U.S.C. § 2000cc *et seq.* (2001)).

99. 506 F.3d 612, \*1, 2007 WL 3151201 (7th Cir. 2007)

tricts and commercial, or industrial, districts.<sup>100</sup> Yet, the code permitted several land uses in C-1 districts without requiring a variance, such as assisted-living facilities, community centers, day-care centers, nursing homes, funeral homes, art galleries, civic clubs and libraries.<sup>101</sup>

The district court found that to allow religious uses in C-1 districts without a variance would give churches greater rights than secular users because the zoning code defines a religious use to include residential uses<sup>102</sup> which are not permitted in districts zoned C-1.<sup>103</sup> However, the Seventh Circuit rejected the lower court's analysis asserting that "[t]here is no indication that the plaintiff lives or intends to live, or that anyone else lives, in the building [because] the lease does not permit the property to be used as a residence."<sup>104</sup> More importantly, RLUIPA forbids local governments from "excluding churches from districts [on the basis of] super-added rights" when the government itself "defin[ed] 'religious use' so expansively as to bestow on churches in districts in which it allows them to operate more rights than identical secular users of land have."<sup>105</sup>

The Seventh Circuit was not convinced by Indianapolis' other contention that the church could relocate to a Special Use district (SU-1) which does not require a variance for religious uses.<sup>106</sup> The record did not demonstrate that the City's discrimination against churches in C-1 districts was offset by the creation of a privileged zone for religious uses in SU-1 districts.<sup>107</sup> The court remarked that "[t]he existence of alternative sites for a church is relevant *only* when a zoning ordinance is challenged as imposing a "substantial burden" on religious uses of land."<sup>108</sup>

Addressing the district court's last reason for its decision, the Seventh Circuit made it clear that it was not overly concerned that allowing a church to locate in a C-1 district would interfere with other land uses. It stated that "[g]overnment cannot, by granting churches special privileges, furnish the premise for excluding

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100. *Id.*

101. *Id.*

102. For example, a rectory for the minister of the church. *Id.* at \*2

103. *Id.* at \*1.

104. *Id.* at \*2.

105. *Id.*

106. *Id.*

107. *Id.* ("[T]here is nothing in the record about the price, ownership, topography, or location of these parcels. Maybe the reason there are no structures on them is that their location or something else about them makes them unsuitable for buildings in general or a church building in particular.")

108. *Id.* (emphasis provided).

churches from otherwise suitable districts.”<sup>109</sup> Since the church’s allegation that the City was violating RLUIPA had at least some and possibly great merit, the Seventh Circuit found that it was an error for the district court to deny the church a temporary injunction.<sup>110</sup>

*United States v. Robison,*  
505 F.3d 1208, 2007 WL 3087419 (11th Cir. 2007)

In *United States v. Robison*, the Court of Appeals for the Eleventh Circuit grappled with fundamental aspects of the CWA,<sup>111</sup> specifically its jurisdiction and permitting powers under section 404.<sup>112</sup> After the defendants were convicted for their roles in a CWA conspiracy and found guilty of substantive violations of the Act, the United States Supreme Court addressed the definition of “navigable waters” under the CWA in *Rapanos v. United States*.<sup>113</sup> The parties agreed that the standard for the definition of “navigable waters” was a key element of the CWA criminal offenses.<sup>114</sup>

Based on the Eleventh Circuit’s ruling in *United States v. Eidson*,<sup>115</sup> the district court charged the jury that “navigable waters” included “any stream which may eventually flow into a navigable stream or river,’ and that such stream may be man-made and flow ‘only intermittently.’”<sup>116</sup> The defendants argued that *Rapanos* demonstrated that the trial court erroneously instructed the jury as to the definition of the term “navigable waters” and that under a correct interpretation, Avondale Creek, the hydrological system at issue, would not be subject to the CWA’s governance.<sup>117</sup> The government responded that Avondale Creek’s connection with the Black Warrior River and/or Village Creek renders Avondale Creek a “navigable water” within the meaning of the CWA.”<sup>118</sup>

At the outset of review, the Eleventh Circuit noted that the Supreme Court recently rejected *Eidson*’s “expansive definition” of “tributaries” in a 4-1-4 split decision *Rapanos* and therefore it must evaluate whether the district court’s “navigable waters” in-

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109. *Id.*

110. *Id.*

111. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified at 33 U.S.C. §§ 1281(a) 1294 97 (2006)).

112. 2007 WL 3087419 (11th Cir. 2007).

113. 126 S.Ct. 2208 (2006). The CWA generally prohibits the discharge of pollutants into “navigable waters.” See 33 U.S.C. §§ 1311(a), 1362(12)

114. See 2007 WL3087419.

115. 108 F.3d 1336 (11th Cir. 1997).

116. *Id.*

117. See 2007 WL3087419.

118. *Id.* at \*5.

struction was erroneous.<sup>119</sup> Under the CWA, “navigable waters” are defined as “the waters of the United States, including the territorial seas.”<sup>120</sup> However, the Court failed to articulate a standard for the definition when presented the opportunity to do so in *Rapanos*.

Justice Scalia’s plurality opinion attempted to construct a two-prong test to determine whether water is “navigable” and thus subject to CWA jurisdiction: “First, that the adjacent channel [to the wetland] contains ‘a water of the United States,’ . . . and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”<sup>121</sup> Conversely, Justice Kennedy’s concurrence endeavored to establish a “significant nexus” test. Under this inquiry test, a water is “navigable” only if it possesses a significant nexus to waters that “are or were navigable in fact or that could reasonably be so made.”<sup>122</sup> In evaluating an upstream waterway or water feature to ascertain whether such a nexus exists, the chemical, physical or biological effect upon a downstream navigable-in-fact waterway must be considered.<sup>123</sup> Finally, Justice Stevens’ dissent stipulated that meeting either Justice Scalia’s plurality test or Justice Kennedy’s “significant nexus” test would prove jurisdiction.<sup>124</sup>

In an effort to utilize the correct framework, the Eleventh Circuit turned to the Supreme Court’s decision in *Marks v. United States*<sup>125</sup> for guidance. *Marks* provides that “[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in judgments on the narrowest grounds.”<sup>126</sup> Finding that Justice Kennedy’s opinion was the “narrowest view of the Justices who concurred in the judgment” the appellate court adopted the “significant nexus” test.<sup>127</sup> The district court’s instruction to the jury was therefore erroneous because it “did not mention the phrase ‘significant nexus’” or otherwise satisfy the test, but merely stated that “[a]n intermittent flow into a navigable-in-fact body of water would be sufficient to bring Avondale Creek within the

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119. *Id.*

120. 2007 WL 3087419 at \*1 (citing 33 U.S.C. § 1362(7)).

121. *Id.* at \*7 (citing *Rapanos*, 126 S.Ct. at 2227 (Scalia, J., plurality)).

122. *Id.* at \*8 (citing *Rapanos*, 126 S.Ct. at 2236 (Kennedy, J., concurring)).

123. *See id.*

124. *Id.* at \*9 (citing *Rapanos*, 126 S.Ct. at 2252 (Stevens, J., dissenting)).

125. 430 U.S. 188, 193 (1997).

126. *Id.* (citations omitted).

127. *See* 2007 WL 308749 at \*14.

reach of the CWA”<sup>128</sup> Finally, because the government did not meet its burden of establishing harmless error, the Eleventh Circuit remanded for a new trial.<sup>129</sup>

### III. FLORIDA CASE LAW

*Neumont v. State*, --- So.2d ----, 2007 WL 2790764 (Fla. 2007)

In *Neumont v. State*, property owners brought a class action alleging that Monroe County’s ordinance restricting the use of property in residential districts as vacation rentals<sup>130</sup> violated their legal right to participate in the lawmaking process.<sup>131</sup> The County first put the public on notice of a hearing regarding the proposed ordinance in an advertisement entitled “Modifying the existing prohibition on tourist housing including vacation rentals in all land use districts.”<sup>132</sup> After receiving feedback at the hearing, the draft ordinance was modified.<sup>133</sup> The County’s second advertisement placing the public on notice of another public hearing differed slightly and read “Modifying the existing prohibition on tourist housing including vacation rentals in all *residential districts*” (as opposed to “land use districts”).<sup>134</sup> At the second hearing, the board considered another version of the ordinance and an “Errata Sheet,” which included more revisions to the proposal.<sup>135</sup> After the meeting, the board approved the rectified ordinance which incorporated the suggested modifications in the errata sheet.<sup>136</sup>

The petitioners owned property in the County, which they previously used for short-term vacation rentals.<sup>137</sup> They brought an action against the County in federal court challenging the ordinance based on state and federal law alleging, among other claims, that the ordinance was unlawful pursuant to section 125.66(4)(b), Florida Statutes (2006), “because the changes made during the enactment process where ‘substantial or material,’ thereby requiring the process to begin anew.”<sup>138</sup> The County conceded that a “sub-

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128. *Id.* at \*12

129. *Id.* at \*14.

130. The ordinance defined vacation rentals as rentals of fewer than twenty-nine days.

131. 2007 WL 2790764 (Fla. 2007).

132. *Id.* at \*1.

133. *Id.*

134. *Id.* (emphasis in original).

135. *Id.*

136. *Id.* at \*2.

137. *Id.*

138. *Id.* Section 125.66(4)(b), Florida Statutes, (2006), governs the enactment procedure of county ordinances.

stantial or material change” to a draft ordinance would require additional notice and public hearings,<sup>139</sup> but argued that the modifications to this ordinance were not substantial or material because the purpose of the ordinance remained the same.<sup>140</sup> The district court upheld the ordinance and the petitioning property owners appealed. Recognizing that if the ordinance is void under state law, there would be no need to resolve the questions of federal law,<sup>141</sup> the Eleventh Circuit certified the following question to the Florida Supreme Court:

Whether, for the purposes of Florida Statutes section 125.66(4)(b), a “substantial or material change” in a proposed ordinance during the enactment process (that is, the kind of change that would require a county to start the process over) is confined to a change in the “original general purpose” of the proposed ordinance, or whether a substantial or material change includes (1) a change to the “actual list of permitted, conditional, or prohibited uses within a zoning category,” or (2) a change necessary to secure legislative passage of the ordinance?<sup>142</sup>

The Florida Supreme Court evaluated three possible definitions of “substantial or material change” proposed by the parties: “a change to the actual list of permitted, conditional, or prohibited uses within a zoning category; a change necessary to secure legislative passage; and a change in the original purpose of the ordinance.”<sup>143</sup> In a unanimous decision, the court ruled in favor of the latter interpretation reasoning that it effectively balances providing the public with adequate notice and permitting the efficient modification of proposed ordinances in response to public input.<sup>144</sup> The court then found that “even if the enactment procedures had begun anew, the public would not have received meaningful notice of the changes because none of them rendered the [advertised] title

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139. See Att’y Gen. Fla. 82-93 (1982) (“[I]f any *substantial or material changes* or amendments are made during the adoption process, the enactment process. . . must start anew, with full compliance with the reading and notice requirements contained [in the statute].”) (emphasis added).

140. See 2007 WL 2790764 at \*2.

141. Federal courts “address questions of federal constitutional law only as a last resort.” *Neumont v. Florida*, 451 F.3d 1284, 1285 (11th Cir. 2006) (quoting *Save Our Dunes v. Ala. Dep’t of Entl. Mgmt.*, 834 F.2d 984, 989 (11th Cir. 1987)).

142. See 2007 WL 2790764 at \*2.

143. *Id.* at \*3.

144. *Id.* at \*8-9.

inaccurate.”<sup>145</sup> Thus, the change in title for the zoning ordinance that prohibited vacation rentals in residential land use districts was not substantial or material.”<sup>146</sup> Having answered the certified question—fundamentally stream-lining the local government’s ability to pass and amend laws—the case was returned to the Eleventh Circuit.<sup>147</sup>

*Lee v. CSX Transp., Inc.*, 958 So.2d 578 (Fla. 2nd DCA 2007)

In *Lee v. CSX Transp., Inc.*, the Florida Second District Court of Appeal held that the state accrual date for wrongful death actions was not preempted by CERCLA.<sup>148</sup> Four years after the decedent’s death, a personal representative brought an action against the owner of a coal tar creosote plant, alleging that decedent’s fatal cancer was caused by toxic environmental contamination released by the plant.<sup>149</sup> The circuit court granted the defendant’s motion for summary judgment concluding that the undisputed facts established that the action “was untimely filed” under Florida’s Wrongful Death Act which establishes a two-year limitations period.<sup>150</sup>

The petitioner argued, however, that the Florida law with respect to the accrual of the wrongful death action was preempted by CERCLA, which modifies the accrual date with respect to actions for personal injury caused by hazardous substances.<sup>151</sup> CERCLA establishes a federally required commencement date (FRCD) which preempts any earlier accrual date applicable under state law.<sup>152</sup> The FRCD is “the date the plaintiff knew (or reasonably should have known) that the personal injury . . . [was] caused or contributed to by the hazardous substance or pollutant or contaminant concerned.”<sup>153</sup> Moreover, the FRCD may be applied to an action “brought under State law for personal injury . . . which [is] caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.”<sup>154</sup>

After evaluating the statute’s text in light of context, structure,

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145. *Id.* at \*9.

146. *Id.*

147. *Id.*

148. 958 So. 2d 578 (Fla. 2d DCA 2007); 42 U.S.C. § 9658 (1994).

149. 958 So. 2d at 579.

150. *Id.*; § 95.11(4)(d), FLA. STAT. (1995).

151. 958 So. 2d at 580.

152. 42 U.S.C. § 9658 (1994).

153. 958 So. 2d at 580.

154. *Id.* (emphasis in original).

and related statutory provisions, the Second District held that CERCLA does not support a broad interpretation of “personal injury” which would encompass actions for wrongful death.”<sup>155</sup> To the contrary, Congress selected “a term of art—a term with a well-established meaning in the law and common understanding—that does not include wrongful death claims within the scope of the FRCD.”<sup>156</sup> Because a wrongful death claim does not fall within the scope of the FRCD contained in CERCLA, the circuit court’s decision was affirmed.<sup>157</sup>

*Trepanier v. County of Volusia*, 965 So.2d 276 (Fla. 5th DCA 2007)

In *Trepanier v. County of Volusia*, the Florida Fifth District Court of Appeal considered a claim brought by individuals to exclude public parking on beach property in which they possessed a fee ownership.<sup>158</sup> The petitioners alleged that Volusia County improperly utilized the property for traffic and parking without a legal right to do so.<sup>159</sup> The record established that hurricanes in 1999 and 2004 heavily eroded the property in question,<sup>160</sup> shifting the mean high water line substantially inland and bringing the beach closer to petitioners’ land.<sup>161</sup> The County consequently moved public parking and driving lanes onto a portion of the beach owned by the petitioners.<sup>162</sup> In response, the petitioners filed a multiple count suit against the County seeking to enforce their property rights.<sup>163</sup> The inverse condemnation claims alleged that both the appropriation of their property for parking and driving lanes, as well as the installation of marker posts, were takings that required compensation.<sup>164</sup> The trespass claim was brought based on the County’s maintenance of the parking and driving lanes.<sup>165</sup> Petitioners also requested declaratory relief establishing the right to exclude the public’s use of their property for vehicular traffic and parking and injunctive relief prohibiting the public from using their property for such purposes.<sup>166</sup>

The trial court denied summary judgment to the property own-

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155. 958 So. 2d at 582.

156. *Id.*

157. *Id.* at 584.

158. 965 So. 2d at 278-80.

159. *Id.* at 279.

160. *Id.* at 278-79.

161. *Id.* at n.1.

162. *Id.* at 279.

163. *Id.*

164. *Id.*

165. *Id.* The court found no error in dismissing this trespass claim. 965 So. 2d at n.4.

166. 965 So.2d at 279-80.

ers and granted partial summary judgment to the County.<sup>167</sup> In doing so, it determined that several property theories permitted the public to access and use the property.<sup>168</sup> The Fifth District acknowledged the complexity of these issues<sup>169</sup> stating that the Florida Supreme Court would ultimately need to determine some of them.<sup>170</sup> It nevertheless addressed three potential sources of public right to the beach that had been relied on by the trial court: prescriptive easement, dedication and custom.<sup>171</sup>

The Fifth District reversed the trial court's summary judgment on prescriptive easement grounds holding that there were issues of material fact that must be determined.<sup>172</sup> It also found that the trial court erred in its finding that the lots were dedicated to public use.<sup>173</sup> The court next painstakingly evaluated custom as a potential source of public right because the case raised a number of issues that had not been address before in Florida, specifically implications of the Florida Supreme Court's decision in *City of Daytona Beach v. Tona-Rama, Inc.*<sup>174</sup>

The court looked at three specific questions in relation to custom. First, it decided that *Tona-Rama* did not necessarily establish a customary interest in this piece of beach.<sup>175</sup> Second, it analyzed several conflicting theories of custom and determined that there was not sufficient evidence in the record to determine that there was customary right to drive on this portion of the beach.<sup>176</sup> The court found that:

Driving and parking on the beach may be considered an adjunct to the recreational use of the beach because it is the way to access the beach; it may be viewed as a customary use in its own right based on either a historic custom of using the beach as a thoroughfare; or it may itself be deemed a recreation.<sup>177</sup>

It concluded that whether a customary right of public access to this portion of the beach was ambulatory is a matter

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167. *Id.*

168. *Id.*

169. *Id.* at 280.

170. *Id.* at n. 21.

171. *Id.* at 284.

172. *Id.* at 284-85.

173. *Id.* at 285-86.

174. *Id.* at 286-87; *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974).

175. 965 So. 2d at 287-89.

176. *Id.* at 289-91.

177. *Id.* at 291.

of proof that must be decided by the lower court.<sup>178</sup> While the procedural posture allowed the court to avoid many of the issues, this case is likely to be seen on appeal and may decide several significant questions regarding coastal property.<sup>179</sup>

#### IV. NOTABLE BILLS FROM FLORIDA'S 2007 LEGISLATIVE SESSION<sup>180</sup>

##### *HB 1375 Relating to Affordable Housing*

HB 1375 necessitates that a local comprehensive plan housing element designate adequate sites for workforce housing.<sup>181</sup> By July 1, 2008, each county, with a disparity between the buying power of a family of four and the median home sales price that exceeds \$170,000, must acquiesce to a plan ensuring affordable workforce housing unless the county is designated as an area of critical state concern. "Affordable workforce housing" is defined by the legislature as "housing that is affordable to a person who earns less than 120 percent of the area median income, or less than 140 percent of the area median income if located in a county in which the median purchase price for a single-family existing home exceeds the statewide median purchase price of a single-family existing home."<sup>182</sup> Failure to adopt an affordable workforce housing plan will render the local government ineligible to receive state housing assistance grants.

Additionally, affordable housing units in close proximity to employment centers are exempt from transportation concurrency requirements under HB 1375 if certain criteria are met.<sup>183</sup> Local governments and developers of affordable workforce housing may identify employment centers with at least 25 full-time employees located within five miles of the nearest point of a development of regional impact. If at least half of the units are occupied by employees, then all the affordable workforce housing units are exempt from transportation concurrency requirements.

Recognizing the down turn in the Florida real estate market,

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178. *Id.* at 289-91.

179. *Id.* at 278.

180. This segment is largely based on legislative summary from the Environmental and Land Use Section of the Florida Bar and the Senate Committee on Environmental Preservation. See Eric T. Olsen and Jennifer Fitzwater, *2007 Legislative Session Summary*, available at [http://www.eluls.org/2007/Reporter\\_July%202007/July07\\_legislative\\_session.html](http://www.eluls.org/2007/Reporter_July%202007/July07_legislative_session.html) [hereinafter Olsen].

181. H.R. 1375, 2007 Leg., Sess. (Fl. 2007).

182. Fla. Stat. 380.0651(3)(j) (2007).

183. See Olsen, *supra* note 180.

the legislation also extends all phase, buildout, and expiration dates for projects that are developments of regional impact and under construction on July 1, 2007, for three years.<sup>184</sup> The extension is not a substantial deviation, not subject to further review and must not be considered when determining if a subsequent extension is a substantial deviation. HB 1375 further exempts from substantial deviation review development changes that permit the sale of an affordable housing unit to a person who earns less than 120% of the area median income as long as the developer actively markets the unit as such for at least six months.<sup>185</sup>

The measure states that local governments may expedite consideration of such plan amendments once they have determined, within a comprehensive plan, the types of housing development and conditions that are consistent with local housing incentive strategies.<sup>186</sup> The bill sets forth requirements to consider these amendments, obligating local governments to hold only one public hearing which is the plan amendment adoption hearing. Moreover, an affordable housing tax deferral program is created by authorizing local governments to adopt ordinances allowing for the deferral of ad valorem taxes and non-ad valorem assessments if the property owners are engaging in the operation, rehabilitation or renovation of affordable rental housing property.

HB 1375 also revises and clarifies the responsibilities of the Florida Housing Finance Corporation (FHFC). Notably, the enactment provides that the FHFC may require that an agreement be recorded in the public records mandating that the project be used for affordable housing for persons that meet specific income criteria.<sup>187</sup> The FHFC is authorized by HB 1375 to forgive a share of a loan to a nonprofit organization if the loan is from funds allocated for sponsors of housing for the elderly to make building preservation, health or sanitation, life-safety or security related repairs or improvements. The FHFC is granted authority to create a loan application process for the Community Workforce Housing Innovation Pilot Program.

#### *CS/SB 1472 Relating to Beaches and Shore Preservation*

*CS/SB 1472* modifies Florida's beach management program in several regards. First, the definition of "access" or "public access" is expanded to include established accessways that are to be retained

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184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

for public use, unless a comparable alternative accessway is provided.<sup>188</sup> Second, provisions governing the issuance of dune restoration permits by the Department of Environmental Protection for projects that incorporate geotextile containers or similar structures are amended.<sup>189</sup> Third, the legislation includes specific requirements governing the installation of these structures, including siting, engineering, legal and financial requirements as well as a provision for the removal of failed containers. Fourth, methods are provided for valuing impacts to upland owners in conjunction with a beach restoration project. Finally, the Department of Environmental Protection is required to develop a sand source inventory of offshore sand sources. County commissions in coastal counties must be notified when a renourishment project proposes to use adjacent sand sources outside of the region.

*SB 2770 Relating to Comprehensive Everglades Restoration Plan*

SB 2770 is a memorial from the Florida Legislature imploring the United States Congress to fully authorize funding for the Comprehensive Everglades Restoration Plan (CERP) as approved in the Water Resources Development Act of 2000.<sup>190</sup> “SB 2770 states that the Everglades is one of the most unique and fragile ecosystems in the world which is recognized as imperiled and must be restored. . . [s]ince 2000, the Florida Legislature and the South Florida Water Management District have appropriated more than \$2 billion to implement CERP, which accounts for more than 90% of the total funding.”<sup>191</sup> Furthermore, “the Water Resource Development Act of 2000 approved CERP as a full and equal partnership” between the Florida and the federal government.<sup>192</sup> Finally, SB 2770 maintains that “the Indian River Lagoon, Picayne Strand, and ten conditionally approved projects also require funding authorization from Congress.”<sup>193</sup>

*SB 7173 Relating to Fish & Wildlife Conservation Commission*

SB 7173 delineates the Fish and Wildlife Conservation Commission’s (“FWCC”) constitutional authority over marine life.<sup>194</sup> The bill determines that FWCC’s authority does not include areas

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188. S. 1472, 2007 Leg., Sess. (Fla. 2007).

189. See Olsen, *supra* note 180.

190. S. 1472, 2007 Leg., Sess. (Fla. 2007).

191. See Olsen, *supra* note 180.

192. *Id.*

193. *Id.*

194. S. 7173, 2007 Leg., Sess. (Fla. 2007).

retained by the Legislature or vested in any other agency, other than the Marine Fisheries Commission, as of March 1, 1998. FWCC's governance similarly does not extend to marine aquaculture retained by the Legislature or vested in any other agency as of July 1, 1999. Furthermore, the FWCC must adopt adequate due process procedures by rule which are published in the Florida Administrative Code.

The bill allows up to ten percent of fees deposited in the Save the Manatee Trust Fund, the Florida Panther Research and Management Trust Fund and the State Game Trust fund to be used to promote or market manatee, Florida panther and largemouth bass specialty license plates. Certain proceeds collected under the Marine Resources Conservation Trust Fund are to fund the stone crab trap reduction program, the blue crab effort management program, the spiny lobster trap certificate program and the derelict trap retrieval program. Additionally, the enactment mandates legislative approval for certain commission rules that establish equitable rent.

The Blue Crab Effort Management Program which establishes funding fee schedules, administrative penalty limits, license suspension and revocation requirements and third-degree felony penalties is created by SB 7173. Pursuant to the bill, the FWCC may temporarily waive the trap tag fees for stone crab, blue crab and spiny lobster fisheries in areas that are declared to be a disaster emergency area by the governor where massive trap losses occur.

SB 7173 requires the assessment of administrative penalties and eradicates the suspension of endorsement provision in the stone crab and spiny lobster programs for first-time rule violations. The bill also authorizes the FWCC to use trap retrieval fees to recover blue crab traps and black sea bass traps. Lastly, the legislation moderately increases several license and permit fees for residential and non-residential freshwater and saltwater fishing and hunting as well as offers nonresidents a three-day freshwater fishing license.<sup>195</sup>

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195. See Olsen, *supra* note 180.

