Nova Law Review

Volume 24, *Issue* 1 1999 *Article* 5

Environmental Law

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Environmental Law: 1999 Survey of Florida Law

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I. INTRODUCTION

In the November 1998 election, Florida voters provided mixed signals with respect to environmental issues.[1] For the first time this century a republican governor, Jeb Bush, was elected along with republican majorities in both the house and senate.[2] Throughout the election campaign, Bush had been criticized by environmentalists because of his ties to oil and real estate development interests.[3] At the same time, voters passed Florida Constitution Revision 5, making it a legislative duty to make adequate provision for conservation and protection of natural resources and allowing for the issuing of bonds for environmental conservation.[4]

However, during the first half of 1999, Governor Bush pleased many of his environmental critics with his appointment of David Struhs to head the Department of Environmental Protection,[5] his water management appointments,[6] and his appointment to lead the Environmental Forever Program.[7] In addition, his opposition to off shore oil drilling, commitment to Everglades restoration, and the passage of the Florida Forever Program have been applauded.[8] With this background in mind, this article will discuss the changes to Florida law and Florida environmental programs due to the Florida Constitutional revisions, Florida case law, and statutory changes during the time period July 1998 through July 1999.

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1. Tom Friedler, *Floridians Adore Jeb, but Want Buddy's Platform,* MIAMI HERALD, Nov. 5, 1998, at 29A.

2. *A Glance at Jeb Bush's Agenda*, TALLAHASSEE DEMOCRAT, Jan. 3, 1999, at 8A; Mark Silva, et al., *Bush Rallies a Friendly Crowd*, Mar. 3, 1999, at 1A.

3. *See, e.g.,* Shirish Date, *Environment Pulls Buffett to MacKay*, PALM BEACH POST, Oct. 29, 1998, at 14A; *Excerpts from Bush, MacKay Radio Debate*, ST. PETERSBURG TIMES, Oct. 14, 1998, at 12A; Cyril T. Zaneski & Mark Silva, *MacKay Stressing Protection of Nature*, MIAMI HERALD, Oct. 28, 1998, at 1B. *But see, Bush Looks Good in Green*, ST. PETERSBERG TIMES, Feb. 6, 1998, at 18A (comparing Bush's 1998 environmental platform with his 1994 failed election campaign).

4. FLA. CONST. art. II, § 7(a); art. VII, § 11(e); art. X, § 18 (amended 1998).

5. Zy Zaneski, *Environmental Chief: Change Starts Within*, MIAMI HERALD, Feb. 27, 1999, at 1B.

6. Mark Silva, *Water Management Appointments Get General Thumbs-Up*, MIAMI HERALD, Mar. 6, 1999, at 5B.

7. Cy Zaneski, *Bush Chooses Activist for Florida Forever Program*, MIAMI HERALD, July 17, 1999, at 1B.

8. *See, e.g.,* Cyril T. Zaneski & Phil Long, *Bush Takes Stand for Glades Restoration, Seeks Right Price Tag*, MIAMI HERALD, Jan. 22, 1999, at 4B; Craig Pittman, *Bush Reaffirms Well Opposition*, ST. PETERSBURG TIMES, Jan. 16, 1999, at 1B; Neil Santiniello & Robert McClure, *Bush Already Getting Environmental Award*, SUN SENTINEL, Jan. 16, 1999, at 6B.

II. FLORIDA CONSTITUTION REVISIONS

There were two proposed Florida constitutional revisions relating to environmental issues on the November 1998 ballot.[9] Only one, Revision 5, passed.[10] Revision 10 was narrowly defeated.[11] Revision 10's environmental related provisions included an option for local tax districts to exempt property used for conservation purposes and to allow for increased citizen access to local officials on the subject of public hearings.[12]

Revision 5 passed in a landslide with over seventy percent of the voters voting in favor of the revision.[13] Amending Florida Constitution Article II, § 7(a), Article IV § 9, Article VII, § 11 (e)-(f), Article X, § 18, and Article XII, § 22, Revision 5 makes it a duty to pass adequate laws for the conservation and protection of natural resources, requires the creation of the Fish and Wildlife Conservation Commission through the merger of the Game and Fresh Water Fish Commission and the Marine Fisheries Commission, allows for the issuance of bonds to finance conservation and related projects, and restricts the sale of state lands designated for conservation purposes.[14] As discussed below,

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9. *See* Proposed Constitutional Amendments and Revisions to be Voted on Nov. 3, 1998 (available at <http://elections.dos.state.fl.us/1998elec/amendments/intro.htm>).

10. *See id.*

11. *See id.*

12. *Id.* at 18. The ballot title and summary for Revision 10 was:

> LOCAL AND MUNICIPAL PROPERTY TAX EXEMPTIONS AND CITIZEN ACCESS TO LOCAL OFFICIALS
>
> Broadens tax exemption for governmental uses of municipal property; authorizes legislature to exempt certain municipal and special district property used for airport, seaport, or public purposes; permits local option tax exemption for property used for conservation purposes; permits local option tangible personal property tax exemption for attachments to mobile homes and certain residential rental furnishings; removes limitations on citizens' ability to communicate with local officials about matters which are the subject of public hearings.

Id.

13. *See* Proposed Constitutional Amendments and Revisions to be Voted on Nov. 3, 1998 (available at <http://election.dos.state.fl.us/1998elec/amendments/intro.htm>). *See also,* Zaneski, *supra* note 5 at 1B.

14. Revision 5's ballot title and summary were:

> CONSERVATION OF NATURAL RESOURCES AND CREATION OF FISH AND WILDLIFE CONSERVATION COMMISSION
>
> Requires adequate provision for conservation of natural resources; creates Fish and Wildlife Conservation Commission, granting it the regulatory and executive powers of the Game and Fresh Water Fish Commission and the Marine Fisheries Commission; removes legislature's exclusive authority to regulate marine life and grants certain powers to new commission; authorizes

Revision 5 resulted in a number of statutory changes during the 1999 Florida Legislative Session.[15]

III. THE DRYCLEANING SOLVENT CONTAMINATION CLEANUP ACT

A. *Overview*

In 1995, the Florida Legislature enacted the Drycleaning Solvent Contamination Cleanup Act ("the Act") to address the management and cleanup of current and former drycleaning sites.[16] The Act limits liability and provides for immunity for owners and operators of eligible sites.[17] Cleanups are funded through a state-funded cleanup program administered by the Florida Department of Environmental Protection ("FDEP").[18] Voluntary cleanups are allowed[19] and encouraged through tax incentives.[20]

An important legislative modification to the drycleaning program became effective during the past year.[21] Pursuant to legislation passed by the 1998 Legislature, the FDEP stopped accepting cleanup program applications on December 31, 1998.[22] Therefore, any previously undiscovered contamination or new releases will no longer be eligible for the limited liability and immunity provisions of the program.[23]

B. *Case Law*

In two cases decided this year, Miami-Dade County tested the limits of the Act's liability and immunity provisions.[24] In *Metropolitan Dade County*

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bonds to continue financing acquisition and improvement of lands for conservation, outdoor recreation, and related purposes; restricts disposition of state lands designated for conservation purposes.

Proposed Constitutional Amendments and Revisions to be Voted on Nov. 3, 1998 (available at <http://election.dos.stat.fl.us/1998elec/amendments/intro.htm>).

15. *See infra* pages 161–62, 164–74.

16. Ch. 95-239, § 3, 1995 Fla. Laws 2125, 2127–38 (codified at FLA. STAT. § 376.3078 (1995)).

17. *See* FLA. STAT. § 376.3078(3) (1999).

18. *See id.* § 376.3078(2).

19. *Id.* § 376.3078(11).

20. *Id.* § 199.1055(1)(a)1–2.

21. *See id.* § 376.3078(3)(a)5.

22. FLA. STAT. § 376.3078(3)(a)5 (1999).

23. *See id.*

24. *See* Metropolitan Dade County v. Chase Fed. Hous. Co., 737 So. 2d 494 (Fla. 1999); Metropolitan Dade County v. Department of Envtl. Protection, 714 So. 2d 512 (Fla. 3d Dist. Ct. App. 1998).

v. Chase Federal Housing Co.,[25] Dade County appealed final summary judgments in favor of several shopping center owners where drycleaning solvent contamination was discovered.[26] Dade County had sued the shopping center owners to enforce a cleanup, to recover costs for the installation of water mains, to impose penalties, and to seek attorneys' fees and administrative costs.[27]

The suit arose from the 1991 discovery of contamination in private drinking water wells in the Suniland area of Dade County.[28] Subsequent environmental assessments determined that the contamination was emanating from several shopping centers with drycleaner tenants.[29] Following the issuance of notices of violation by Dade County, the shopping centers conducted remediation of their property but did not address offsite migration of the contamination.[30] Over the next two years, Dade County incurred considerable expense in the installation of water mains and conducting environmental investigations.[31]

On appeal before the Third District Court of Appeal, Dade County argued that the Drycleaning Chemical Cleanup Program was not intended to be retroactive, and thus did "not apply to actions to recover expenditures made by the County prior to the enactment of the immunity provisions." [32] The court rejected this argument and found the Act's grants of immunity retroactive and, as such, precluded Dade County's actions against the shopping center owners.[33]

However, the district court certified the following question to the Supreme Court of Florida as a matter of great public importance:

> ARE SUBSECTIONS 376.3078(3) AND 376.3078(9), FLORIDA STATUTES (1995), WHICH PROVIDE TO ELIGIBLE ENTITIES CONDITIONAL IMMUNITY FROM CERTAIN ADMINISTRATIVE AND JUDICIAL ACTIONS BY STATE AND LOCAL GOVERNMENTS AND AGENCIES, INTENDED BY THE LEGISLATURE TO APPLY RETROACTIVELY, THUS PRECLUDING ACTIONS AGAINST IMMUNIZED ENTITIES FOR THE RECOVERY BY A GOVERNMENT FOR

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25. 737 So. 2d 494 (Fla. 1999).
26. *Id.* at 498–99.
27. *Id.* at 496–97.
28. *Id.* at 496.
29. *Id.*
30. *Chase Fed. Hous. Corp.*, 737 So. 2d at 497.
31. *Id*
32. *Metropolitan Dade County v. Chase Fed. Hous. Corp.*, 705 So. 2d 674, 675 (Fla. 3d Dist Ct. App. 1998).
33. *Id:* at 675.

ENFORCEMENT AND REHABILITATION COSTS EXPENDED PRIOR TO THE ENACTMENT OF THESE SUBSECTIONS?[34]

The Supreme Court of Florida answered the certified question in the affirmative.[35] Using a two-prong test the court found that the legislature intended to apply the statute retrospectively and that retroactive application was constitutionally permissible.[36]

In *Metropolitan Dade County v. Department of Environmental Protection*,[37] Dade County appealed an administrative hearing final order approving the eligibility of a property owner, Sekoff Investments, Inc. ("Sekoff"), to participate in the Florida Drycleaning Contamination Cleanup Program.[38] Dade County contended that "Sekoff had committed gross negligence . . . because Sekoff was 'in willful violation of local law . . . regulating the operation of drycleaning facilities,' for failure to comply with the County's cleanup requests."[39] "The County maintained that this gross negligence disqualified Sekoff from participating in the Cleanup Program and enjoying statutory immunity from County enforcement efforts."[40]

The suit arose out of drycleaning chemical contamination discovered on Sekoff's property.[41] Dade County issued a Notice of Violation and Orders for Corrective Action ("NOV") on March 15, 1994 for the presence of drycleaning solvents in the septic tank and storm drain/soakage pit located on the Sekhoff property.[42] In response to the NOV, Sekoff hired an environmental consulting firm and commenced assessment activities.[43] During this same time period, the Florida Drycleaning Solvent Contamination Cleanup Act became effective.[44] Sekoff continued to conduct assessment activities, removed the contents of the septic tank and

34. *Id.* at 676.

35. *Chase Fed. Hous. Corp.*, 737 So. 2d at 496.

36. *Id.* at 499. The court made two inquiries. They were: 1) whether there is clear evidence of legislative intent to apply the statute retrospectively; and, if so, 2) whether retroactive application is constitutionally permissible. *Id.*

37. 714 So. 2d 512 (Fla. 3d Dist Ct. App. 1998).

38. *Id.* at 513–14.

39. *Id.* at 514 (citing Fla. Stat. § 376.3078(3)(c) (1997)).

40. *Id.* (citing FLA. STAT. § 376.3078(3) (1995) (precluding sites found to be grossly negligent from being eligible for the program)). Section 376.3078(3)(c) defines grossly negligent as a willful violation of local law. *See* FLA. STAT. § 376.3078(3)(c) (1995).

41. *See Metropolitan Dade County*, 714 So. 2d at 514.

42. *Id.*

43. *Id.*

44. *Id.*

storm drain, and advised Dade County that it would apply for participation in the Drycleaning Solvent Contamination Cleanup Program as soon as the FDEP promulgated the necessary implementation rules.[45]

The site was found eligible for the program on June 11, 1996 and Dade County filed its request for an administrative hearing.[46] Relying on the definition of "willful" in *Thunderbird Drive-In Theatre, Inc. v. Reed*,[47] the hearing officer concluded that "Sekoff's actions were not unreasonable and not willful in view of the legislature's enactment of section 376.3078."[48] The FDEP adopted the order recommended, and affirmed Sekoff's eligibility.[49]

The Third District Court of Appeal approved the order noting that an amendment to the Act defined "gross negligence" as the "willful violation of [a] local . . . rule regulating the operation of drycleaning facilities . . . ."[50] The court further found that the property owner's attempts at compliance demonstrated that it did not willfully violate the county's code.[51]

IV. THE PETROLEUM CLEANUP PROGRAM

A. *Overview*

There have been several petroleum cleanup programs enacted by the state including the Early Detection Incentive Program ("EDIP"),[52] the Abandoned Tank Restoration Program ("ATRP"),[53] the Petroleum Cleanup Participation Program ("PCPP"),[54] and the Florida Petroleum Liability and Restoration Insurance Program ("FPLRIP").[55] These programs are now closed to eligibility for new sites placing the cost for the cleanup of new, or newly discovered discharges on the site owner or other responsible party.[56] Under these programs, cleanup costs are to be paid for out of the Inland

45. *Id.* at 515.

46. *Metropolitan Dade County*, 714 So. 2d at 515.

47. 571 So. 2d 1341, 1344 (Fla. 4th Dist. Ct. App. 1990) (willful "requires intent and purpose that the act or condition take place").

48. *Metropolitan Dade County*, 714 So. 2d at 515.

49. *Id.*

50. *Id.* at 516 (citing FLA. STAT. § 376.3078(3)(c) (1995)).

51. *See id.*

52. FLA. STAT. § 376.3071(9) (1999). EDI eligibility ended December 31, 1988. *See id.*

53. *Id.* § 376.305(6).

54. *Id.* § 376.3071(13). Eligibility ended December 31, 1998. *Id.*

55. FLA. STAT. § 376.3072. (1999). Discharges eligible for coverage ended December 31, 1998. *See id.* § 376.3072(2)(d)2.e.

56. Glenn R. MacGraw, PG, *New Legislation Shifts More Financial Responsibility for Petroleum Cleanup to Site Owners*, FLORIDA SPECIFIER, July, 1999, at 14.

Protection Trust Fund.[57] Legislative changes in 1995 converted all cleanups under these programs into a preapproval or state administered program based on priority ranking.[58]

Recognizing that "the inability to conduct site rehabilitation in advance of a site's priority ranking . . . may substantially impede or prohibit property transactions or the proper completion of public works projects," the Preapproved Advanced Cleanup Program ("PACP") was established.[59] Under the PACP, responsible parties may apply for cleanup funding in advance of the site's priority ranking if the responsible party is willing to enter into a cost sharing arrangement.[60] Voluntary cleanups, with no state funding obligations, are also allowed.[61]

B. *Petroleum Program Cases*

Environmental Trust v. Department of Environmental Protection[62] is a consolidation of four administrative hearing appeals relating to forty-five reimbursement applications submitted to the FDEP for work performed between July 1994 and February 1995.[63] Environmental Trust and Sarasota Environmental Investors ("the investors") had advanced capital for the remediation projects.[64] FDEP denied part of their applications for reimbursement for cleaning up petroleum contamination and an administrative law judge authorized FDEP's use of "incipient non-rule policies to deny the applications."[65] Also part of this consolidated case is FDEP's appeal of an order by another administrative law judge invalidating a new rule adopting the policies approved in the above case and an award of attorneys' fees.[66]

In each of the forty-five applications, the investors had advanced capital for remediation work at the various sites through a factoring arrangement.[67]

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57. FLA. STAT. § 376.3071(2)(a) (1999).
58. *See* FLA. STAT. §§ 376.3071(5), (12), .30711 (1999).
59. FLA. STAT. § 376.30713(1)(a) (1999).
60. *Id.* § 376.30713(1)(c)–(d).
61. *See id.* § 376.3071(11) (1997).
62. 714 So. 2d 493 (Fla. 1st Dist. Ct. App. 1998).
63. *Id.* at 495.
64. *See id.*
65. *Id.*
66. *Id.*
67. *Environmental Trust*, 714 So. 2d at 495.
The cost of the work was financed in each case by a factoring arrangement. Generally, factoring is the process of purchasing accounts receivable at a discount. In these cases, the factoring company advanced capital at a discounted rate to the subcontractor, the contractor, and an investment company like Environmental Trust or Sarasota Investors, and then applied for

In addition to this financing arrangement, at least thirty of the projects included a fifteen percent markup for a final site inspection performed by a general contractor who did not otherwise participate in the remediation activities.[68] The FDEP stated its position denying the applications in an April 21, 1995 memorandum and an October 20, 1995 internal electronic mail.[69] In the April 21, 1995 memorandum, the FDEP said that the factoring arrangement amounted to the payment of interest, a non-reimbursable expense.[70] The October 20, 1995 electronic mail established the FDEP policy that general contractor markups would only be allowed if they were related to an "integral management function in the rehabilitation of a site."[71]

The investors filed for administrative hearings on the application denials pursuant to sections 120.57(1) and 120.535, of the *Florida Statutes*.[72] The administrative law judge found in favor of the FDEP allowing the use of the policies as unadopted rules for which the FDEP had initiated rulemaking procedures as soon as "practical or feasible."[73]

Before the dismissal of the investors' petitions, the FDEP published notices of proposed policies on factoring and contractor markup policies.[74] These rules were challenged in a separate action from the above petitions, by Environmental Trust and other investment companies.[75] The administrative law judge in this second case found the rules invalid and awarded costs and attorney fees to the Environmental Trust and the other investment companies.[76]

The FDEP appealed these orders and the First District Court of Appeal consolidated them with the investors' appeal for hearing.[77] The court ruled in favor of the FDEP by finding the FDEP's denial of the factoring charges and contractor markups proper under the existing rules and statute.[78] In

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> reimbursement from the state based on the face amount of the invoices submitted at each level of the process. As a result, the cost of the discount for providing investment capital to the contractor, subcontractor, and investment company, was passed along to the state as a part of the cost of the rehabilitation.

Id. at 495–96.

68. *See id.* at 496.
69. *Id.*
70. *Id.*
71. *Environmental Trust*, 714 So. 2d at 496.
72. *Id.* at 496. *See* FLA. STAT. §§ 120.57(1), .535 (1995).
73. *Environmental Trust*, 714 So. 2d at 496.
74. *Id.*
75. *Id.* at 496–97.
76. *Id.* at 497.
77. *Id.* at 495.
78. *Environmental Trust*, 714 So. 2d at 497.

addition, the court found that the FDEP's revised rule was valid and that it could be applied retroactively.[79] The court reasoned that "if [a] rule merely clarifies another existing rule and does not establish new requirements"[80] then it falls within an exception to Florida's general prohibition against the promulgation of retroactive administrative rules.[81]

The court's pronouncement of this exception caused significant controversy.[82] In response, the 1999 Florida Legislature amended section 120.54(1)(f) of the *Florida Statutes* to include a prohibition against an agency adopting retroactive rules even if intended to clarify existing law unless expressly authorized by statute.[83] This amendment is discussed more fully below.[84]

In a subsequent decision, *Florida Department of Environmental Protection v. Environmental Corporation of America, Inc.*,[85] the Second District Court of Appeal dismissed a federal civil rights claim brought against three individual FDEP employees under 42 U.S.C. § 1983. The suit was brought by Environmental Corporation of America, Inc. which alleged that the FDEP's revised reimbursement rules violated "clearly established law against retroactive rule-making" depriving the plaintiff of a vested property right.[86] Citing *Environmental Trust,* the Second District Court of Appeal found the revised rule a mere clarification of existing rules which fell within the exception to the prohibition against retrospective administrative rules. Therefore, the court found the government employees had a qualified immunity as their conduct did not violate a clearly established right.[87]

C. *Petroleum Program Statutory Changes*

A few legislative changes occurred during the 1999 Legislative Session affecting the petroleum program. First, the Legislature has allowed for the continuation of the Preapproved Advanced Cleanup Program by eliminating

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79. *See id.* at 498.

80. *Id.* at 500.

81. *Id.* at 499–500. In its analysis, the court relies on federal, and not state court, cases stating that both Florida and federal courts apply the same principle that "an administrative rule generally has only prospective application." *Id.* at 499.

82. *See, e.g.*, Lawrence E. Sellers, *The Environmental Trust: Will the Exception "Swallow the Rule?"* FLA. B. ENVT'L & LAND USE L. SEC. REP. (1999).

83. Ch. 99-379, § 4, 1999 Fla. Laws 3788, 3792–93 (codified at FLA. STAT. § 120.54(1)(f) (1999)).

84. See *infra* pp. 167–69.

85. 720 So. 2d 273 (Fla. 2d Dist. Ct. App. 1998).

86. *Id.* at 274.

87. *Id.*

an October 1, 1999 program deadline.[88] Second, funding has been provided, in advance of a site's priority ranking, for free product recovery.[89] In addition, the Legislature has established that "[t]he department shall select five sites eligible for state restoration funding assistance . . . each having a low-priority ranking score . . . for an innovative technology pilot program."[90]

Fourth, the FDEP has been given authority to enter into site rehabilitation agreements for the cleanup of mixed eligibility sites with eligible discharges and non-eligible discharges on a cost-sharing basis.[91] The law also establishes a timeframe for a responsible party to complete negotiations with the FDEP for cost sharing arrangements.[92] If negotiations are not complete within 120 days, the site is to be deemed ineligible.[93] All liability protections afforded by the program would be revoked resulting in the property owner, operator, or other responsible party liable for the complete cost of rehabilitation.[94]

Perhaps the most important statutory modification impacting the transfer of sites currently participating in the Petroleum Cleanup Participation Program, is the elimination of Florida Statutes Section 376.3071(13)(g)(5).[95] This section, in effect, attached program eligibility to the property owner which resulted in the loss of the site's program eligibility when a property transfer occurred.[96] This potential cause for loss of eligibility has now been removed.

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88. Ch. 99-376, § 2, 1999 Fla. Laws 3734, 3736–37 (codified at FLA. STAT. § 376.30713(7) (1999)).

89. *Id.* § 1, 1999 Fla. Laws at 3734–35 (codified at FLA. STAT. § 376.3071(5)(c) (1999)).

90. *Id.* § 2, 1999 Fla. Laws at 3736 (codified at FLA. STAT. § 376.30711(8) (1999)).

91. *Id.* § 4, 1999 Fla. Laws at 3737 (codified at FLA. STAT. §§ 376.30714(1)(d)–(e) (1999)).

92. *Id.* § 1, 1999 Fla. Laws at 3735 (codified at FLA. STAT. § 376.3071(13)(c) (1999)).

93. Ch. 99-376, § 1, 1999 Fla. Laws 3734, 3735 (codified at FLA. STAT. § 376.3071(13)(c) (1999)).

94. *See id.*

95. *See id.* Section 376.3071(13)(g)(5) of the *Florida Statutes* stated:

> Any person who knowingly acquires title to contaminated property shall not be eligible for restoration funding pursuant to this subsection. The provisions of this subsection do not relieve any person who has acquired title subsequent to July 1, 1992, from the duty to establish by a preponderance of the evidence that he or she undertook, at the time of acquisition, all appropriate inquiry into the previous ownership and use of the property consistent with good commercial or customary practice in an effort to minimize liability, as required by s. 376.308(1)(c). The provisions of this subparagraph do not apply to any person who acquires title by succession or devise.

FLA. STAT. § 376.3071(13)(g)(5) (1997).

96. *See* Ch. 99-376, § 1, 1999 Fla. Laws 3734, 3735 (codified at FLA. STAT. § 376.3071(13) (1999)).

V. OTHER 1999 LEGISLATIVE CHANGES OF INTEREST

A. *The Administrative Procedure Act*

The Florida Administrative Procedure Act ("APA") governs the rulemaking authority of state agencies.[97] Prior to 1996, the APA was interpreted to allow an agency to adopt a rule if it was "reasonably related to the purpose of the enabling legislation and [was] not arbitrary and capricious."[98] In 1996, however, revisions to the APA's rulemaking provisions specifically rejected the "reasonably related" test.[99]

Subsequent to the 1996 APA Amendments, several appellate decisions were questioned as to whether they met "the spirit and the letter of the law."[100] Two of these cases related to environmental matters and were decided within the past year; *Environmental Trust*,[101] discussed above, and *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*[102] In *Consolidated-Tomoka*, the St. Johns Water Management District appealed an administrative law judge's invalidation of a series of its proposed rules relating to the designation of two areas as hydrologic basins.[103]

As the proposed rules would result in more restrictive development and permitting requirements, affected property owners challenged the proposed

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97. *See* FLA. STAT. § 120 (1999).

98. Lawrence E. Sellers, Jr., *More APA Reform: The 1999 Amendments to Florida's Administrative Procedure Act*, Fla. B. J., July/August 1999, at 78. *See also* Frank E. Matthews, *APA Reform Refined*, FLA. B. ADMIN. L. SEC. NEWSLETTER, Mar. 1999, at 1.

99. *See* FLA. STAT. §§ 120.52(8), 120.536(1) (1997), which provided:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

Id.

100. Frank E. Matthews, *APA Reform Refined*, FLA. R. ADMIN. L. SEC. NEWSLETTER, March 1999, at 1.

101. Environmental Trust v. Department of Envtl. Protection, 714 So. 2d 493 (Fla. 1st Dist. Ct. App. 1998).

102. 717 So. 2d 72 (Fla. 1st Dist. Ct. App. 1998).

103. *Id.* at 75.

rules.[104] Discussing the 1996 version of the APA, the administrative judge concluded that the rules "were invalid as a matter of law" in that they were not within the "particular powers and duties granted by the enabling statute," they exceeded "the agency's grant of rulemaking authority," and "they enlarge[d], modif[ied] or contravene[d] the law implemented."[105]

On appeal, the First District upheld the proposed rules finding them "a valid exercise of delegated legislative authority."[106] In reaching this conclusion, the court found the term "particular powers and duties" in section 120.52(8) ambiguous.[107] Looking at two possible interpretations, the court chose the less restrictive alternative and concluded that "particular" meant "that the powers and duties must be identifiable as powers and duties falling within a class."[108]

In part to address the judicial decisions in *Environmental Trust* and *Consolidated-Tomoka Land Co.*, the 1999 Legislature again amended the APA.[109] This law has been received with mixed reactions due to its potential effect on existing environmental regulations.[110] As indicated in section one of chapter 99-379, *Laws of Florida*, the language added to sections 120.52(8) and 120.536(1) of the *Florida Statutes*[111] is "intended to reject the class of

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104. *Id.* at 75–76.

105. *Id.* at 76.

106. *Id.* at 81.

107. *Consolidated Tomoka Land Co.*, 717 So. 2d at 79.

108. *Id.* at 80.

109. Ch. 99-379, § 2, 1999 Fla. Laws 3788, 3790 (codified at FLA. STAT. § 120.52(8) (1999)). This amendment has been criticized by environmentalists and was initially opposed by DEP Secretary David Struhs, however, Mr. Struhs later reversed his position and supported the bill's passage. *See* Julie Hauserman, *DEP Chief Warns Against Rules Bill*, ST. PETERSBURG TIMES, June 17, 1999 at 1B; Julie Hauserman, *New Law will Ease State Rules Battles*, ST. PETERSBURG TIMES, June 18, 1999 at 1B; Editorial, *A Bad Sign Series*, ST. PETERSBURG TIMES, June 25, 1999 at 16A.

110. *See* Julie Hauserman, *DEP Chief Warns Against Rules Bill*, ST. PETERSBURG TIMES, June 17, 1999 at 1B; Julie Hauserman, *New Law will Ease State Rules Battles*, ST. PETERSBURG TIMES, June 18, 1999 at 1B; Editorial, *A Bad Sign Series*, ST. PETERSBURG TIMES, June 25, 1999 at 16A. *See also*, Lawrence E. Sellers, *APA: Legislation Clarifies Agency Rulemaking Authority* and Terrell K. Arline, *The Environmental Impacts of the Administrative Procedures Act Bill*, THE FLA. B. ENVTL. & LAND USE L. SEC. REP., Vol. XX, No. 3, June 1999 at 8–9.

111. Sections 120.52(8) and 120.536(1) of the *Florida Statutes*, are modified as follows:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and *capricious or is within the agency's class of powers and duties,* nor shall an agency have the authority to

powers and duties analysis."[112] Further, the Law rejects the exception to retroactive rules enounced in *Environmental Trust*[113] by adding language to section 120.54(f) prohibiting retroactive rules intended to clarify existing law.[114]

The legislature has included a provision to shield those rules that may exceed rulemaking authority from attack until proper legislation can be passed or they can be repealed.[115] Each agency is to provide a list of rules that exceed the new standards to the Administrative Procedures Committee by October 1, 1999.[116] The committee shall provide a cumulative list to the legislature so that the legislature can determine whether legislation authorizing the identified rules should be enacted during the 2000 Regular Session.[117] Rule challenges are allowed after July 1, 2001.[118]

In addition to the above, the law modifies the definition of agency to include regional water supply authorities and to remove water control districts from the definition.[119] The law provides that district school boards

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> implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than *implementing or interpreting the specific* powers and duties conferred by the same statute.

FLA. STAT. §§ 120.52(8), 120.536(1) (1999) (emphasis added).

112. Ch. 99-379, § 2, 1999 Fla. Laws 3788, 3789 (codified at FLA. STAT. § 120.52(8) (1999)). *See also* Florida House of Representatives as Further Revised by the Committee on Governmental Rules and Regulations Final Analysis (June 30, 1999) <http://www.leg.state.fl.us/session/1999/House/bills/analysis/pdf/HB0107Z.GRR> (staff analysis stating that the amendment rejects the class of powers test in *Consolidated-Tomoka).*

113. Florida House of Representatives as Further Revised by the Committee on Governmental Rules and Regulations Final Analysis (June 30, 1999) <http:\\www.leg.state.fl.us/session/1999/House/bills/analysis/pdf/HB0107Z.GRR> (staff analysis).

114. Ch. 99-379, § 4, 1999 Fla. Laws 3788, 3793 (codified at FLA. STAT. § 120.54(1)(f) (1999)).

> An agency may adopt rules authorized by law and necessary to the proper implementation of a statute prior to the effective date of the statute, but the rules may not be effective until the statute upon which they are based is effective. *An agency may not adopt retroactive rules, including retroactive rules intended to clarify existing law, unless that power is expressly authorized by statute*

Id. (emphasis added).

115. *Id.* § 3, 1999 Fla. Laws at 3792 (codified at FLA. STAT. § 120.536(2)(b) (1999)).

116. *Id.*

117. *Id.*

118. Ch. 99-379, § 3, 1999 Fla. Laws 3788, 3792 (codified at FLA. STAT. § 120.536(2)(b) (1999)).

119. *Id.* § 2, 1999 Fla. Laws at 3789 (codified at FLA. STAT. § 120.52(1) (1999)).

need only adopt rules pursuant to section 230.22(2) of the *Florida Statutes*.[120] Further, the law clarifies the burden of proof for a rule challenge.[121] Finally, the law requires that when an agency rejects or modifies

> a conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.[122]

B. *The Florida Forever Program*

Two main laws were passed during the 1999 legislative session relating to the Florida Forever Program.[123] Chapter 99-247 is entitled the Florida Forever Program and contains provisions related to a variety of environmental matters.[124] This includes the creation of a land acquisition program, and the Florida Forever Act,[125] allowing for the continuance of certain submerged land leases,[126] the creation of the Florida Forever Advisory Counsel[127] and the Acquisition and Restoration Council,[128]

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120. *Id.* § 7, 1999 Fla. Laws at 3794 (codified at FLA. STAT. § 120.81(1)(a) (1999)).

121. *Id.* § 5, 1999 Fla. Laws at 3793 (codified at FLA. STAT. § 120.56(2)(a) (1999)) (stating that "[t]he petitioner has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised").

122. *Id.* § 6, 1999 Fla. Laws at 3793 (codified at FLA. STAT. § 120.57(1) (1999)).

123. 1999 Fla. Laws chs. 99-246, 247. Several other laws were also enacted which addressed affected statutes relating to agencies other than the DEP. *See* 1999 Fla. Laws chs. 99-246, 292, 353, 391.

124. 1999 Fla. Laws ch. 99-247.

125. Ch. 99-247, § 21, 1999 Fla. Laws 2446, 2484–94 (codified at FLA. STAT. § 259.105 (1999)).

126. *Id.* § 9, 1999 Fla. Laws at 2458–59 (codified at FLA. STAT. § 253.03 (1999)). This amendment will not effect the seven stilthomes known as Stiltsville located in the Biscayne National Park. However, the House of Representatives did adopt a resolution urging for Stiltsville to be listed in the National Register of Historic Places. 1999 HR 9217.

127. Ch. 99-247, § 14, 1999 Fla. Laws 2446, 2474–77 (codified at FLA. STAT. § 259.0345 (1999)). The seven-member counsel will report annually on the progress of the program and make recommendations on goals and procedures. *Id.*

128. *Id.* § 16, 1999 Fla. Laws at 2477–78 (codified at FLA. STAT. § 259.035 (1999)). The nine-member council, composed of the Secretary of the DEP, representatives from the Department of Community Affairs, the Fish and Wildlife Commission, Division of Historic Resources, the Department of Agriculture and Consumer Services and four members appointed

requiring a two thirds vote by the Board of Trustees of the Internal Improvement Trust Fund prior to the sale of land purchased for conservation purposes,[129] allowing for the issuance of permits for certain coastal armoring,[130] creating the Florida Greenways and Trails Council within the FDEP,[131] and allowing for payment in lieu of taxes to government certain entities where the state's land acquisitions result in a loss in ad valorem tax revenue.[132]

The Florida Forever Act is a continuation and expansion of the Florida Preservation 2000 Act land acquisition program, scheduled to expire on July 1, 2000.[133] The Florida Forever Program was enacted in accordance with Florida Constitutional Revision 5.[134] As the program was one of Governor Jeb Bush's campaign issues, it was a priority during the 1999 legislative session.[135] Under the Florida Forever Program, bonds up to $300 million per year, totaling three billion dollars over a ten-year period, may be issued for the acquisition of environmentally significant lands and for water resource development projects.[136]

Unlike its predecessor, the Florida Forever Program allows for alternative uses of acquired land including water resource development projects, water supply development projects, stormwater management projects, linear facilities, and sustainable agriculture and forestry.[137] "[L]inear projects can not include petroleum product pipelines, paved roads,

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by the governor, will assist the board of trustees in reviewing program recommendations and plans. *Id.*

129. *Id.* § 10, 1999 Fla. Laws at 2460 (codified at FLA. STAT. § 253.034(6) (1999)). This amendment conforms with Florida Constitution Revision 5 which requires a restriction on the sale of lands purchased for conservation. *See supra* note 13.

130. Ch. 99-247, § 4, 1999 Fla. Laws 2455, 2466 (codified at FLA. STAT. § 161.085(2) (1999)).

131. *Id.* § 25, 1999 Fla. Laws at 2495–98 (codified at FLA. STAT. § 260.0142 (1999)).

132. *Id.* § 38, 1999 Fla. Laws at 2515 (codified at FLA. STAT. § 373.59(10)(b) (1999)).

133. FLA. STAT. § 259.101 (1999).

134. Ch. 99-246, 1999 Fla. Laws 2444–45 ("[C]reating the Florida Forever Trust Fund; providing sources of moneys; providing purposes and requirements; providing duties of the Department of Environmental Protection; providing a contingent effective date."). *See also* Ch. 99-247, 1999 Fla. Laws 2446–2515.

135. *See* Associate Press, *Bush Commits $3 Billion for Land*, PALM BEACH POST, June 6, 1999 at 5A (Governor Bush called the law "a validation of Florida's long-standing commitment to the environment."); Wetherell, *1999 ELULS Legislative Report: A Summary of Environmental and Land Use Legislation Considered in the 1999 Regular Session*, THE FLA. B. ENVTL. & LAND USE L. SEC. REP., Vol. XX, No. 3, June 1999 at 1.

136. Senate Staff Analysis and Economic Impact Statement, Fla. Senate Bill CS/SB 908, Part I, <http://www.leg.state.fl.us/session/1999/Senate/bills/analysis>.

137. FLA. STAT. § 253.034 (1999).

rail corridors or other facilities for motorized vehicles . . . ."[138] Another major difference between the two programs is that the Florida Forever Program has slated twenty-five percent of its bond proceeds to community-based, urban open spaces, parks, and greenways with an emphasis for projects in low-income or otherwise disadvantaged communities.[139] The Florida Forever Program also provides for a greater emphasis on alternatives to fee simple acquisitions.[140]

The second major bill related to the Florida Forever Program creates the Florida Forever Trust Fund.[141] The purpose of the fund is to provide sources of moneys and requirements to support the Florida Forever Act. The fund is administered by the FDEP.[142]

C. *Creation of the Fish and Wildlife Conservation Commission*

In accordance with Florida Constitution Revision 5, the legislature created the Fish and Wildlife Conservation Commission.[143] The commission is formed through a merger of the Game and Freshwater Fish Commission and the Marine Fisheries Commission.[144] In addition, certain FDEP responsibilities were transferred to the new commission including the Bureau of Environmental Law Enforcement, the Bureau of Administrative Support, the Bureau of Operational Support, and the Office of Enforcement Planning and Policy Coordination within the Division of Law Enforcement.[145] The law specifically states that the FDEP will no longer have any responsibilities for boating safety.[146] The Division of Marine Resources within the FDEP is also transferred to the new commission "except for . . . [t]he Bureau of Coastal and Aquatic Managed Areas which is

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138. *Id.*; *See also* Kent Wetherell, *1999 ELULS Legislative Report: A Summary of Environmental and Land Use Legislation Considered in the 1999 Regular Session*, THE FLA. B. ENVTL. & LAND USE L. SEC. REP., Vol. XX, No. 3, June 1999 at 1 (linear facilities can include electric transmission lines and pipelines).

139. Ch. 99-247, § 21, 1999 Fla. Laws 2446, 2484–85 (codified at FLA STAT. § 259.105(2)(a)5, (3)(c) (1999)). *See also* Senate Staff Analysis and Economic Impact Statement, Fla. Senate Bill CS/SB 908, Part III, § 1 (discussing the creation of section 259.202 of the *Florida Statutes*) <http://www.leg.state.fl.us/session/1999/Senate/bills/analysis>.

140. Ch. 99-247, § 19, 1999 Fla. Laws 2446, 2481 (codified at FLA STAT. § 259.041(11)(a) (1999)).

141. *Id.* § 21, 1999 Fla. Laws at 2484 (codified at FLA. STAT. § 259.105(1) (1999)).

142. *Id.*

143. FLA. CONST. art IV, § 9.

144. Ch. 99-245, §§ 2–3, 1999 Fla. Laws 2251, 2257 (codified at FLA. STAT. § 20.06(2) (1999)).

145. *Id.* § 4, 1999 Fla. Laws at 2257 (codified at FLA. STAT. § 20.06(2) (1999)).

146. *Id.*

assigned to the Division of State Lands at the Department of Environment Protection."[147] The FDEP does retain the Office of Environmental Investigations, the Florida Park Patrol, and the Bureau of Emergency Response which are assigned to the FDEP's Division of Law Enforcement.[148]

The commission must provide adequate due process to parties "whose substantial interests" are affected by its actions.[149] However, the new Commission will have both constitutional and statutory duties and responsibilities. The law "encourages the commission to incorporate the provisions of [s]ection 120.54(3)(c) [of the *Florida Statutes* in the exercise] of its constitutional duties."[150] However, it mandates that the performance of the commission's statutory duties are in accordance with section 120.[151]

D. *Total Maximum Daily Loads*

The Florida Watershed Restoration Act[152] was passed to comply with the Federal Clean Water Act.[153] In addition, this act is intended to address a lawsuit filed on April 22, 1998 on behalf of the Florida Wildlife Federation, Environmental Confederation of Southwest Florida, Inc., and Save our Creeks, Inc. alleging that the "defendants, EPA and its Administrator, Carol Browner, have not enforced Florida's adherence to the Clean Water Act."[154] Under the act, DEP is assigned as the "lead agency."[155] The act requires the identification of water bodies that are not meeting water quality standards and a process for determining the maximum amount of pollutant that the water body can assimilate or "Total Maximum Daily Load" ("TMDL").[156]

147. *Id.* § 5, 1999 Fla. Laws at 2258 (codified at FLA. STAT. § 20.06(2)(a) (1999)).

148. *Id.* § 6, 1999 Fla. Laws at 2258.

149. Ch. 99-245, § 1, 1999 Fla. Laws 2251, 2255 (codified at FLA. STAT. § 20.331(6)(a) (1999)).

150. *Id.* § 1, 1999 Fla. Laws at 2255 (codified at FLA. STAT. § 20.331(6)(b) (1999)).

151. *Id.* § 1, 1999 Fla. Laws at 2255–56 (codified at FLA. STAT. § 20.331(6)(c) (1999)).

152. 1999 Fla. Laws ch. 99-223.

153. 33 U.S.C. §§ 1313(d), 1315(b) (1994).

154. Senate Staff Analysis and Economic Impact Statement, Implementation of Water Quality Standards (Mar. 22, 1999) <http://www.leg.state.fl.us.session/1999/Senate/bills/analysis/pdf/SB2282.html>; *see also*, Philip Moffat, *The Florida Watershed Restoration Act: Total Maximum Daily Loads*, THE FLA. B. ENVTL. & LAND USE L. SEC. REP., Vol. XX, No. 3, June 1999, at 12. (Both citations provide good discussions on the background of the Act).

155. Ch. 99-223, § 3, 1999 Fla. Laws 1389, 1391 (codified at Fla. Stat. § 403.067(1) (1999)).

156. 1999 Fla. Laws ch. 99-223. The act defines "Total maximum daily load" as:

> the sum of the individual wasteload allocations for point sources and the load allocations for nonpoint sources and natural background. Prior to determining individual wasteload allocations and load allocations, the maximum amount of a pollutant that a water body or water segment can

The DEP must submit a list of surface waters or segments for which TMDL assessments will be conducted and establish a priority ranking and schedule.[157] The act does not require that assessments be conducted on all 709 waters currently listed,[158] but that assessments conducted are based on their priority ranking.[159]

E. *Everglades Restudy*

The Comprehensive Review Study of the Central and Southern Florida Project ("restudy") "is an investigation to determine specific operational and structural changes that can be made to restore South Florida ecosystems, enhance water supply, and maintain flood control within the South Florida region."[160] The restudy is being conducted by the US Army Corps of Engineers as directed by the Federal Water Resources Development Acts of 1992 and 1996.[161] In an effort to "support the restudy through a process concurrent with Federal Government review," statutory amendments were enacted.[162] First, the South Florida Water Management District is established as the local sponsor of the restudy.[163] The DEP, however, must approve any project component prior to its submission to Congress.[164] The Executive Office of the Governor must review all proposed expenditures for project components.[165]

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assimilate from all sources without exceeding water quality standards must first be calculated.

Id. § 2, 1999 Fla. Laws at 1390 (codified at Fla. Stat. § 403.031(21) (1999)).

157. *Id.* § 3, 1999 Fla. Laws at 1391 (codified at FLA. STAT. § 403.067(2) (1999)).

158. Senate Staff Analysis and Economic Impact Statement, Implementation of Water Quality Standards at 3 (Mar. 22, 1999) <http://www.leg.state.fl.us.session/1999/Senate/bills/analysis/pdf/SB2282.html>.

159. Ch. 99-223, § 3, 1999 Fla. Laws 1389, 1392 (codified at Fla. Stat. § 403.067(3) (1999)).

160. Senate Staff Analysis and Economic Impact Statement, Bill CS/SB 1672 (Mar. 30, 1999) <http://www.leg.state.fl.us.session/1999/senate/bills/analysis/pdf/SB2282.html> (summarizing US Army Corps of Engineers, *Overview Central and Southern Florida Project Comprehensive Review Study* (Oct. 1998)).

161. *Id.*

162. 1999 Fla. Laws ch. 99-143.

163. Ch. 99-143, § 1, 1999 Fla. Laws 820, 820–823 (codified at FLA. STAT. § 373.1501(4) (1999)).

164. *Id.* § 2, 1999 Fla. Laws at 823–24 (codified at FLA. STAT. § 373.026(8)(b) (1999)).

165. *Id.* § 2, 1999 Fla. Laws at 824 (codified at FLA. STAT. § 373.026(8)(d) (1999)).

F. *One Stop Permitting*

In 1996, Florida created an "expedited permitting process intended to facilitate the location and expansion of certain types of economic development projects."[166] Although permits were issued faster under the program, it was under-utilized.[167] In an effort to increase usage of the program, the 1999 amendments create a statewide "one-stop permitting system" with incentives for local governments to integrate their permitting with the state's system.[168] A one-stop permitting internet site is to be established by the Department of Management Services by January 1, 2000.[169]

G. *Environmental Compliance Costs of Private Utilities*

Since 1996, there have been a number of administrative petitions and rule challenges related to the Florida Public Service Commission's ("PSC") policies and the recovery of environmental compliance costs.[170] In *Florida Public Service Commission v. Florida Waterworks Ass'n,*[171] the First District reversed an administrative hearing judge's order and found a PSC rule on the treatment of contributions-in-aid-of-construction in relation to margin reserves valid.[172] With respect to the recovery of expenditures made for environmental compliance, the administrative judge had found the rule "invalid for failure 'to provide a mechanism for full-cost recovery of capital improvements required by governmental regulations.'"[173] The district court disagreed, however, and found that the rule did "not purport to include or exclude any particular type or class of expenditure."[174] Amendments to the Water and Wastewater System Regulatory Law clarify the issue by making

166. Senate Staff Analysis and Economic Impact Statement, Bill CS/SB 662 (Mar. 18, 1999) <http://www.leg.state.fl.us.session/1999/Senate/bills/analysis/pdf/SB2282.html>; *See* FLA. STAT. § 403.973 (1999).

167. Senate Staff Analysis and Economic Impact Statement, Bill CS/SB 662 (Mar. 18, 1999) <http://www.leg.state.fl.us.session/1999/Senate/bills/analysis/pdf/SB2282.html>.

168. Ch. 99-244, §§ 5–6, 1999 Fla. Laws 2237, 2243–45 (codified at FLA. STAT. §§ 288.1092–.1093 (1999)).

169. *Id.* § 4, 1999 Fla. Laws at 2241–43 (codified at FLA. STAT. § 288.109 (1999)).

170. *See* Senate Staff Analysis and Economic Impact Statement, Bill CS/SB 1352 (Mar. 17, 1999) <http://www.leg.state.fl.us.session/1999/Senate/bills/analysis/pdf/SB1352.html>.

171. 731 So. 2d 836 (Fla. 1st Dist. Ct. App. 1999).

172. *Id.* at 836.

173. *Id.* at 844 (quoting Florida Cities Water Company v. State, 705 So. 2d 620, 623 (Fla. 1st Dist. Ct. App. 1998)).

174. *Id.*

the PCS's approval of rates to allow for the full recovery of environmental compliance costs mandatory.[175]

VI. OTHER SIGNIFICANT CASES

A. *Avatar Development Corporation v. State of Florida*

Avatar Development Corporation and its vice president, Amikam Tanel, were charged with first-degree misdemeanor violations of section 403.161 of the *Florida Statutes*, for failure to comply with a dredge and fill permit.[176] Specifically the corporate and individual defendants were charged with a failure to notify the DEP at least forty-eight hours prior to dredging activities and for failure to install and maintain floating turbidity curtains.[177] The trial court dismissed the charges and certified the following question to the district court: "Are Florida Statutes § 403.161(1)(b) or § 403.161(5) unconstitutional as charged in the information?"[178]

The district court reversed the trial court's dismissal of the charges and found the statute constitutional stating that: 1) the statute did not violate the State Constitution in prohibiting administrative agencies from imposing sentences of imprisonment or other penalties except as provided by law; 2) the statute did not violate the State Constitution prohibiting delegation of legislative authority to administrative agencies; and 3) the statute did not violate due process.[179]

The Supreme Court of Florida affirmed the district court holding that the statute was a proper delegation of legislative authority as the DEP's authority to determine permit conditions was "limited to conditions necessary to effectuate the Legislature's [sic] specific policy."[180] Therefore, the court found that "it is the Legislature [sic], and not the administrative body, that has declared such acts unlawful based upon express legislative policy."[181]

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175. Ch. 99-319, § 1, 1999 Fla. Laws 3410, 3410–3411 (codified at FLA. STAT. § 367.081(2)(a)2.c. (1999)).

176. Avatar Dev. Corp. v. State, 723 So. 2d 199, 200 (Fla. 1998). Section 403.161(1)(b) of the *Florida Statutes* establishes any permit violation as a chapter violation. *Id.* Further, section 403.161(5) provides that "[a]ny person who willfully commits a violation specified . . . is guilty of a misdemeanor of the first degree." *Id.*

177. *Avatar Dev. Corp.*, 723 So. 2d at 200.

178. *Id.* at 201 n.3.

179. State v. Avatar Dev. Corp., 697 So. 2d 561, 562 (Fla 4th Dist. Ct. App. 1997).

180. *Avatar Dev Corp.*, 723 So. 2d at 207.

181. *Id.*

B. *Florida Department of Environmental Protection v. Allied Scrap Processors*

Florida Department of Environmental Protection v. Allied Scrap Processors,[182] is an action brought by the DEP to recover cleanup costs from the generators of waste shipped to a former battery processing plant.[183] The DEP appealed a circuit court order granting a summary judgment in favor of the generators finding that the Water Quality Assurance Act of 1983[184] was not intended to have retroactive application.[185] The district court reversed and remanded the case finding the law was retroactive.[186] In its discussion, the district court found that the state law was modeled after the Federal Comprehensive Environmental Response, Compensation, and Liability Act, and should be given the same retroactive construction.[187]

1. Miccosukee Tribe of Indians v. South Florida Water Management District

The Everglades Forever Act is a comprehensive program to address the preservation of the Everglades.[188] The act grants primary responsibility for the Everglades Construction Project to the South Florida Water Management District ("the District").[189] It requires that the District apply for certain construction permits for flood control structures.[190] *Miccosukee Tribe of Indians v. South Florida Water Management District* [191] is an appeal of a DEP order granting the Water Management District a permit for the continued use of thirty-seven such structures.[192] The district court affirmed the granting of the permit finding that the record showed "that the South Florida Water Management District met its burden of demonstrating reasonable assurances that its schedules and strategies will provide compliance with water quality standards" as required under the act.[193]

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182. 724 So. 2d 151 (Fla. 1st Dist. Ct. App. 1998).

183. *Id.* at 151.

184. 1983 Fla. Laws ch. 83-310 (liability provisions codified at FLA. STAT. §§ 376.308(1)(b), 430.727(4)(a) (1999)).

185. *Allied Scrap Processors*, 724 So. 2d at 151.

186. *Id.* at 152.

187. *Id.* (citing 42 U.S.C. §§ 9601–9675).

188. FLA. STAT. § 373.4592 (1999).

189. *Id.* § 373.4592(4)(a).

190. *Id.* § 373.4592(9)(k).

191. 721 So. 2d 389 (Fla. 3d Dist. Ct. App. 1998).

192. *See* Miccosukee Tribe of Indians v. South Fla. Water Management Dist. No. 96-1851, 1998 WL 216942 (Fla. Dep't. Envtl. Protection Apr. 20 1998).

193. *Miccosukee Tribe of Indians*, 721 So. 2d at 390 (citing FLA. STAT. § 373.4592(9)(k), (l) (1997)).

2. Nelo Freijomel v. City of Stuart

Freijomel v. City of Stuart[194] is an appeal of a Florida Division of Administrative Hearing order finding that the DEP's arsenic soil cleanup goals were an illegal rule.[195] The Fourth District affirmed, without an opinion, that the hearing officers finding that the DEP's use of certain health based goals for arsenic in the evaluation of a permit application creates a presumption of risk that the applicant must overcome.[196] As such, the hearing officer found the use of the arsenic goals in denying a permit application a violation of section 120.54(1)(a) of the *Florida Statutes*.[197] The officer concluded that the goals should be promulgated as a rule.[198]

3. Miami Sierra Club v. State Administration Commission

In *Miami Sierra Club v. State Administration Commission,*[199] the Miami Sierra Club and the Tropical Audubon Society appealed a final order of the Florida Administration Commission approving a reuse plan for the former Homestead Air Force base in Dade County.[200] The Third District found the plan approval invalid stating: "The final order cannot stand as it was error for the Administration Commission to approve the plan based on the premature action by Miami-Dade County. The County should not have taken any action, or adopted any plan before the Supplemental Environmental Impact Statement ("SEIS") and the requisite management plans were completed."[201]

The court looked at the requirements of sections 288.975 and 288.976 of the *Florida Statutes*, and found that state agencies were compelled to use "information analyses, and recommendations generated by the federal environmental impact statement process."[202] Reasoning that as the federal government had decided that a SEIS was required, the court found that it was improper for the state to approve the plan prior to completion of the SEIS.[203] The court also found the approval improper as the county had not completed

194. 718 So. 2d 1252 (Fla. 4th Dist. Ct. App. 1998).

195. City of Stuart v. Department of Envtl. Protection, No. 96-1112RU, 1996 Fla. ENV. LEXIS 170 (Dec. 9, 1996).

196. *Id.* at 24.

197. *Id.* at 28.

198. *Id.* at 26. On Aug. 5, 1999, the DEP's Contaminant Cleanup Target Levels became effective. *See*, FLA. ADMIN. CODE r. 62-777.

199. 721 So. 2d 829 (Fla. 3d Dist. Ct. App. 1998).

200. *Id.* at 289.

201. *Id.* at 830.

202. *Id.*

203. *Id.*

certain management plans as required by section 163.3177(10)(e) of the *Florida Statutes*.[204] Finally, the court found the plan approval improper as it did not "'consider the nature of the issues in dispute, the compliance of the parties with the statute, the extent of the conflict between the parties, and the comparative hardships and the public interest involved.'"[205]

204. *Miami Sierra Club*, 721 So. 2d at 831.
205. *Id.* at 832 (quoting FLA. STAT. § 288.975(12)(d) (Supp. 1996)).