

**Save the ‘Glades:  
Proposals to Safeguard the Everglades**

Michael S. Kraynick\*

**I. INTRODUCTION**

Between 1990 and 1999, the earth's population grew from about 1.6 billion to 6 billion people.<sup>1</sup> Development is essential to support this excessive population growth. But at what cost? This rapid population growth has led to the development of technology that can alter and pollute the environment on a far greater scale.<sup>2</sup> Substantial harm to the environment and to human health is attributable to both technological advancements and an unparalleled population increase.<sup>3</sup> In Florida alone approximately half of the original Everglades, the state's most prominent and important ecosystem, has been converted into agricultural and urban uses.<sup>4</sup>

This Article will examine why the effects under existing federal and state laws are inadequate to save the Everglades, a precious and unique resource. Part I presents an overview of the Everglades and its vital importance to life in Florida. Part II gives a brief history of government action in the Everglades and a description of Everglades, its habitats and importance. Part III explores the Clean Water Act and how the Clean Water Act's shortcomings led to the creation of the Everglades Forever Act. Part IV discusses the relevant portions of the Everglades Forever Act, a significant legislative act to safeguard, conserve, and preserve the Everglades. Part V discusses the Miccosukee Case, which evaluates the effectiveness of the Everglades Forever Act when compared to the Clean Water Act. Part VI briefly discusses the

---

\* Michael S. Kraynick is a second year law student at Barry University School of Law. Prior to coming to Barry, he graduated from The Florida State University with degrees in finance and real estate. He wishes to thank Professor Patrick E. Tolan for their invaluable assistance.

<sup>1</sup> John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 Fla. L. Rev. 299, 306 (2000).

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Miccosukee Tribe of Indians of Florida v. United States, 1998 U.S. Dist. LEXIS 15838, 13.

importance of environmental provisions in constitutions, how Florida has adopted environmentally focused constitutional provisions, and the legal effect of these provisions. This Article concludes with a plea for both government and society to recognize the importance of the Everglades; its protection, conservation, and preservation.

## II. HISTORY OF THE EVERGLADES

In Florida, we have an attractive, unique, environment with rich natural attributes.<sup>5</sup> One of the most essential environments is the Everglades, a wetland and wildlife resource consisting of millions of acres that is unique in the entire world.<sup>6</sup> This ecosystem has defined life in South Florida since we, as humans, first arrived.<sup>7</sup>

The Everglades extends south from Lake Okeechobee to Florida Bay.<sup>8</sup> The north end, the Everglades Agricultural Area (EAA), is made up of 553,000 acres of farmland that is used to produce sugar cane, vegetables, and sod.<sup>9</sup> The other key area of the Everglades is the Everglades Protection Area (EPA).<sup>10</sup> This area is comprised of the Arthur A. Marshall Loxahatchee National Wildlife Refuge, Everglades National Park, and water conservation areas.<sup>11</sup> Water conservation areas are large tracts of land that are set aside to help provide flood protection, water supply storage, and environmental resource protection for the Everglades.<sup>12</sup>

The water that nourishes the Everglades begins in the upper Kissimmee chain of lakes.<sup>13</sup> This water collects and slowly makes its way to the Kissimmee River and eventually reaches

---

<sup>5</sup> See John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 Fla. L. Rev. 299 (2000)

<sup>6</sup> See Alfred R. Light, *Everglades Symposium Issue: Miccosukee Wars in the Everglades: Settlement, Litigation, and Regulation to Restore an Ecosystem*, 13 St. Thomas L. Rev. 729 (2001)

<sup>7</sup> *Id.*

<sup>8</sup> *Supra* note 4 at 5.

<sup>9</sup> *Id.*

<sup>10</sup> Fla. Stat. § 373.4592(2)(g) (2005)

<sup>11</sup> Fla. Stat. § 373.4592(2)(g) (2005)

<sup>12</sup> *Supra* note 4 at 6.

<sup>13</sup> *Id.* at 12

Lake Okeechobee.<sup>14</sup> This water then overflows the lake's southern edge to fill the Everglades. Combined with rainfall, this water travels south until it reaches Florida Bay, the Atlantic Ocean, and the Gulf of Mexico.<sup>15</sup>

This environment is both a blessing and a curse however.<sup>16</sup> The blessing: mild climate, unique hydrology, and a geographic location that has a high ecological value, which supports a unique and diverse array of ecosystems and species.<sup>17</sup> The curse: the blessings attract many people, visitors and residents alike, who destroy the very natural and aesthetic attributes that attracted them to Florida in the first place.<sup>18</sup>

Society has responded to their own destruction of the environment by adopting laws to conserve natural resources and control pollution.<sup>19</sup> In 1850, Congress enacted the Swamp Lands Act.<sup>20</sup> This act transferred ownership of "overflowed" lands in the Everglades to the State of Florida on the condition that the lands be drained.<sup>21</sup> Early in the twentieth century several public and private projects were undertaken.<sup>22</sup> Between 1948 and 1962, the Army Corps of Engineers constructed the Central and South Florida Project.<sup>23</sup> This project established the EAA, set aside Water Conservation Areas, and created a system of levees.<sup>24</sup>

During the same time period, the State of Florida established the Central and South Florida Flood Control District to operate the levee system.<sup>25</sup> In 1972, Congress passed legislation

---

<sup>14</sup> Id.

<sup>15</sup> Id. at 12-13

<sup>16</sup> John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 Fla. L. Rev. 299 (2000)

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Id. at 301 – 302

<sup>20</sup> *Supra* note 6 at 730.

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Id. PRIMARY

to guarantee minimum water flows to Everglades National Park.<sup>26</sup> The State of Florida established a statewide system of water management districts, the largest being the South Florida Water Management District (SFWMD).<sup>27</sup>

The Everglades National Park has been one specific area that has been conserved by way of federal statutes. In 1947, Congress created the Everglades National Park, located west of the city of Miami.<sup>28</sup> The Everglades National Park is often characterized as a water marsh, and several very distinct habitats exist within its boundaries.<sup>29</sup> These distinct habitats include: Marine and Estuarine Ecosystems, Mangrove Forests, Coastal Prairies, Freshwater Marl Prairies, Freshwater Sloughs, Cypress Tree Forests, Hardwood Hammocks and Pinelands.<sup>30</sup>

Picture 1: Everglades Habitats



31

Florida Bay, the largest body of water within the Everglades National Park, comprises the marine ecosystem.<sup>32</sup> The bay contains over 800 square miles of marine bottom.<sup>33</sup> This bottom shelters fish and shellfish, which sustains the food chain that supports all higher vertebrates in the bay.<sup>34</sup> Mangrove forests act as an estuary system.<sup>35</sup> They are found in the coastal channels

---

<sup>26</sup> Id. PRIMARY

<sup>27</sup> Id. PRIMARY

<sup>28</sup> Id. PRIMARY

<sup>29</sup> Habitats, Everglades National Park, at <http://www.nps.gov/ever/eco/habitats.htm> (last visited Mar. 28, 2006).

<sup>30</sup> Id.

<sup>31</sup> Picture gained from Habitats, Everglades National Park, at <http://www.nps.gov/ever/eco/habitats.htm> (last visited Mar. 28, 2006).

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Id.

rivers around the tip of South Florida.<sup>36</sup> This is a valuable nursery for shrimp and fish.<sup>37</sup> The coastal prairie is a dry region of salt-tolerant vegetation.<sup>38</sup> It is located between the tidal mud flats of Florida Bay and dry land and is periodically flooded by hurricane waves and buffeted by heavy winds.<sup>39</sup> The freshwater marls are large prairies with marl sediments, a calcareous material that settles on the limestone.<sup>40</sup> The marl allows slow seepage, but not the drainage, of the water.<sup>41</sup> The freshwater slough is a deeper and faster-flowing center of a broad marshy river that carries waters from north to south at a measure of 100 feet per day.<sup>42</sup> There are two distinct sloughs in the Everglades National Park: Shark River Slough and Taylor Slough.<sup>43</sup> Other sloughs series supply freshwater through the Big Cypress Swamp to western Florida Bay and the Ten Thousand Islands.<sup>44</sup>

Hammocks are teardrop-shaped islands that are comprised of dense stands of hardwood trees.<sup>45</sup> These trees grow on natural rises and because of their slight elevation they are rarely flooded.<sup>46</sup> The hammock are protected from fire, by a natural moat created by acids from decaying plants which dissolve the limestone around each tree island.<sup>47</sup> The pinelands are the most diverse habitat in the Everglades, consisting of slash pine forests, an understory of saw palmettos, and over 200 varieties of tropical plants.<sup>48</sup> Unlike the hardwood hammocks, fire is a

---

<sup>36</sup> Id.  
<sup>37</sup> Id.  
<sup>38</sup> Id.  
<sup>39</sup> Id.  
<sup>40</sup> Id.  
<sup>41</sup> Id.  
<sup>42</sup> Id.  
<sup>43</sup> Id.  
<sup>44</sup> Id.  
<sup>45</sup> Id.  
<sup>46</sup> Id.  
<sup>47</sup> Id.  
<sup>48</sup> Id.

necessary evil for the survival of the pine community.<sup>49</sup> Only the outer bark is scorched during fires as pine bark is protected through its multi-layers.<sup>50</sup>

The Everglades is also home to at least fifteen endangered species that reside within it.<sup>51</sup> These species include: American crocodile, Green turtle, Atlantic Ridley turtle, Atlantic hawksbill turtle, Atlantic leatherback turtle, Cape Sable seaside sparrow, Snail (Everglades), Wood stork, West Indian manatee, Florida panther, Key Largo wood rat, Key Largo cotton mouse, Red-cockaded woodpecker, Schaus swallowtail butterfly, Garber's Spurge.<sup>52</sup>

### III. THE CLEAN WATER ACT

In 1972, Congress passed the CWA<sup>53</sup> to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."<sup>54</sup> The goal was to eliminate the discharge of all pollutants into navigable waters by 1985.<sup>55</sup> Even though the Agency and the states share the duty of fulfilling this still-unmet goal, the states have primary responsibility for establishing appropriate water quality standards.<sup>56</sup>

The CWA requires each state to adopt water quality standards and review them at least once every three years.<sup>57</sup> States must first classify the uses for each body of water, then determine the level of water quality necessary to protect those uses.<sup>58</sup> The standards must include three components:

---

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Supra* note 6 at 730.

<sup>52</sup> Endangered Species, Everglades National Park, at <http://www.nps.gov/ever/eco/danger.htm> (last visited Mar. 30, 2006).

<sup>53</sup> *See* 33 U.S.C. § § 1251-1376.

<sup>54</sup> *See* 33 U.S.C. § 1251(a).

<sup>55</sup> *Id.*

<sup>56</sup> *See* 33 U.S.C. § 1251(g).

<sup>57</sup> *See* 33 U.S.C. § 1313.

<sup>58</sup> *Id.*

(1) the designated use(s) for each body of water, such as recreational, agricultural, or industrial; (2) water quality criteria (specific limits on pollutants to protect the designated uses) expressed either as a narrative standard or a numeric concentration level; and (3) an antidegradation policy to protect existing uses and high-quality water.<sup>59</sup>

If water quality standards are changed by a state, the state must submit these changes to the Agency.<sup>60</sup> The Agency must approve the standards within 60 days, or disapprove them within 90 days.<sup>61</sup> If the Agency disapproves the new standards, the agency has an additional 90 days to promulgate substitute standards, unless the state first comes up with standards that meet with Agency approval.<sup>62</sup> The Agency must review any new state standards, but they have discretion whether to approve or disapprove them.<sup>63</sup> The Agency also has discretion under the CWA to promulgate new standards for a state at any time "the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter."<sup>64</sup>

The CWA also establishes the National Pollutant Discharge Elimination System (NDPES) permit program.<sup>65</sup> Under this program, either the Agency or states that have received Agency approval can administer permits to specific entities that discharge chemicals into the nation's waters.<sup>66</sup> These entities<sup>67</sup> are known as point sources.<sup>68</sup> These permits specifically identify the types and amounts of pollutants that a point source may discharge.<sup>69</sup> However, nonpoint sources<sup>70</sup> and are not subject to either Agency regulation or the NDPES permit

---

<sup>59</sup> *Id.* See also 40 C.F.R. § 131 (EPA regulations enforcing the CWA).

<sup>60</sup> See 33 U.S.C. § 1313(c)(2)(A).

<sup>61</sup> *Id.* at § 1313(c).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at § 1313(c)(4)(B).

<sup>65</sup> *Id.* at § 1342.

<sup>66</sup> *Id.*

<sup>67</sup> An example, industrial companies.

<sup>68</sup> See 33 U.S.C. § 1342.

<sup>69</sup> *Id.*

<sup>70</sup> Other types of pollution, such as agricultural runoff

program.<sup>71</sup> Instead, states are charged with regulating nonpoint sources.<sup>72</sup> The Clean Water Act encourages the states to develop area-wide waste treatment management plans.<sup>73</sup>

All of this law has substantially reduced air and water pollution.<sup>74</sup> Its downfall however, has been its failure to adequately conserve ecosystems.<sup>75</sup> The Everglades has become an oligotrophic wetlands system.<sup>76</sup> This means that this ecosystem is one that is earmarked by low levels of nutrients and productivity.<sup>77</sup> The defining characteristic of this ecosystem is the phosphorous, in that there are very low levels of it.<sup>78</sup>

Development drastically altered both the water quantity and quality of the Everglades.<sup>79</sup> Developers drained marshes at the eastern edges to make room of city growth.<sup>80</sup> Federal and state agencies constructed canals, pumps, and levees in order to control flooding and redirect water away from coastal communities.<sup>81</sup> Arguably the biggest problem was the water runoff from farms located within the EAA.<sup>82</sup> This runoff contained excessively high levels of phosphorous and other nutrients.<sup>83</sup>

Extreme changes occurred in the Everglades due to this combination of reduced water flow and increased nutrients.<sup>84</sup> These changes included in a decline in wading bird populations,

---

<sup>71</sup> *Id.* at § § 1342, 1352(14).

<sup>72</sup> *See* 33 U.S.C. § 1288.

<sup>73</sup> *Id.*

<sup>74</sup> John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 Fla. L. Rev. 299, 301 – 302 (2000)

<sup>75</sup> *Id.*

<sup>76</sup> *Supra* note 4 at 13.

<sup>77</sup> *Id.* at 13

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 13-14

growth of non-native plants such as cattails which crowded out native sawgrass, and alterations in the microorganisms that were the base of the Everglades food chain.<sup>85</sup>

Throughout the 1908s, Florida undertook cleanup efforts, but in 1988 the United States government sued the state of Florida and the SFWMD.<sup>86</sup> The United States alleged that this agent of the state of Florida was not enforcing water quality standards in the Everglades; in that the agricultural runoff violated state water standards.<sup>87</sup>

In July 1991, a Settlement was reached instituting a plan for a massive Everglades cleanup effort.<sup>88</sup> In the settlement agreement, the State of Florida acknowledged that water flowing from the EAA into the Everglades contained excess levels of nutrients.<sup>89</sup> These discharges violated Florida's water quality standards by causing imbalances in the natural aquatic flora and fauna.<sup>90</sup> The violations were so severe that "the ecological integrity and ultimately the survival of the [Everglades]" was threatened.<sup>91</sup> The EAA water discharges into the Everglades were causing "potentially devastating degradation."<sup>92</sup> Most importantly, the agreement established a schedule insuring that runoff from the EAA would meet state water quality standards by 2002.<sup>93</sup>

Following the requirements of the settlement agreement, the SFWMD developed a plan to reduce phosphorous loads.<sup>94</sup> Consequentially, several farming groups filed an administrative challenge to the plan alleging that it was too harsh on them.<sup>95</sup> Additionally, thirty-six lawsuits

---

<sup>85</sup> *Supra* note 4 at 14.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 15

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 15-16

challenging the cleanup plan were filed by other entities.<sup>96</sup> The Florida Legislature attempted to resolve the litigation and develop a comprehensive cleanup plan once and for all by passing the Everglades Forever Act in 1994.<sup>97</sup>

#### **IV. THE EVERGLADES FOREVER ACT**

The Everglades Forever Act (EFA) is codified at Fla. Stat. § 373.4592.<sup>98</sup> The Legislature understood that the Everglades “not only contributes to South Florida's water supply, flood control, and recreation, but serves as the habitat for diverse species of wildlife and plant life.”<sup>99</sup> The Legislature further acknowledged that the Everglades is one of Florida's great treasures and must be restored and protected.<sup>100</sup>

The Legislature stated that the purpose for the EFA was threefold. The first purpose was to bring to an end of five years of costly litigation.<sup>101</sup> The second purpose was to promote Everglades restoration and protection through a reduction in excessive levels of phosphorus.<sup>102</sup> The final purpose was to pursue solutions to the issues of water quality, water quantity, hydroperiod<sup>103</sup>, and invasion of exotic species in the Everglades ecosystem. <sup>104</sup>

The Legislature determined that the most reliable method for achieving the purposes in the EFA was to utilize a long-term planning process.<sup>105</sup> The plan has adopted the combination of

---

<sup>96</sup> Id. at 16

<sup>97</sup> Id.

<sup>98</sup> Id.

<sup>99</sup> Fla. Stat. § 373.4592(1)(a)

<sup>100</sup> Id.

<sup>101</sup> Fla. Stat. § 373.4592(1)(c)

<sup>102</sup> Fla. Stat. § 373.4592(1)(d)

<sup>103</sup> Hydroperiod is the period of time during which a wetland is covered by water.

<sup>104</sup> Fla. Stat. § 373.4592(1)(e)

<sup>105</sup> Fla. Stat. § 373.4592(3)(b)

the Best Management Practices (BMP)<sup>106</sup> and Stormwater Treatment Areas (STA)<sup>107</sup> in order to provide the best available phosphorus reduction technology in order to achieve the proper “phosphorus criterion” in the EPA.<sup>108</sup> This long-term plan contains of two phases an initial phase and a 10-year second phase.<sup>109</sup> The initial phase consists of a 13-year period. During this time period, a monitoring station network will determine water quality standards relating to the phosphorus levels in the EPA.<sup>110</sup>

The long-term plan can be reviewed in several ways. At least 10 years after implementation of the initial phase, the Legislature will review this act.<sup>111</sup> The purpose of the review is to ensure that the EPA is achieving state water quality standards, including phosphorus reduction, and the long-term plan is using the best technology available.<sup>112</sup> Furthermore, the Legislature must approve the 10-year second phase prior to implementation of any projects.<sup>113</sup> This approval cannot occur until after the Florida Department of Environmental Protection has developed, reviewed, and approved any of the projects.<sup>114</sup> Additionally, as science and environmental conditions warrant, the Florida Department of Environmental Protection may propose changes to the long-term plan.<sup>115</sup>

---

<sup>106</sup> Best management practice" or "BMP" means a practice or combination of practices determined by the district, in cooperation with the department, based on research, field-testing, and expert review, to be the most effective and practicable, including economic and technological considerations, on-farm means of improving water quality in agricultural discharges to a level that balances water quality improvements and agricultural productivity. Fla. Stat. § 373.4592(2)(b)

<sup>107</sup> "Stormwater treatment areas" or "STAs" means those treatment areas described and depicted in the district's conceptual design document of February 15, 1994, and any modifications as provided in this section. Fla. Stat. § 373.4592(2)(o)

<sup>108</sup> Fla. Stat. § 373.4592(3)(b)

<sup>109</sup> Fla. Stat. § 373.4592(3)(d)

<sup>110</sup> Fla. Stat. § 373.4592(3)(e)

<sup>111</sup> Fla. Stat. § 373.4592(3)(d)

<sup>112</sup> Id.

<sup>113</sup> Id.

<sup>114</sup> Id.

<sup>115</sup> Fla. Stat. § 373.4592(3)(b)

How does the Legislature intend on implementing this long-term plan? Through the Everglades Construction Program, which is to be implemented by the SFWMD.<sup>116</sup> The Everglades Construction Program is the largest environmental cleanup and restoration project ever undertaken.<sup>117</sup> The project consists of over 18 different and separate projects.<sup>118</sup>

The Legislature recognized that due to factors outside the control of the SFWMD, such as timely receipt of funds from any and all contributors.<sup>119</sup> That being the case, the Legislature stressed the importance of the SFWMD taking all the reasonable measures necessary to complete the timely performance of the schedule in order to complete the Everglades Construction Project.<sup>120</sup> Fla. Stat. § 373.4592(4)(a) listed the milestones that applied to the completion of the Everglades Construction Project:

1. The [SFWMD] must complete the final design of the STA 1 East and West and pursue STA 1 East project components as part of the cost-shared program with the Federal Government. The [SFWMD] must be the local sponsor of the federal project that will include STA 1 East, and STA 1 West is so authorized by federal law;
2. Construction of STA 1 East is to be completed under the discretion of the United States Army Corps of Engineers in conjunction with the currently authorized C-51 flood control project;
3. The [SFWMD] must complete construction of STA 1 West and STA 1 Inflow and Distribution Works under the direction of the United States Army Corps of Engineers, if the direction is authorized under federal law, in conjunction with the currently authorized C-51 flood control project;
4. The [SFWMD] must complete construction of STA 3/4 by October 1, 2003; however, the [SFWMD] may modify this schedule to incorporate and accelerate enhancements to STA 3/4 as directed in the long-term plan;
5. The [SFWMD] must complete construction of STA 6;
6. The [SFWMD] must, by December 31, 2006, complete construction of enhancements to the Everglades Construction Project recommended in the long-term plan and initiate other pre-2006 strategies in the plan; and
7. East Beach Water Control District, South Shore Drainage District, South Florida Conservancy District, East Shore Water Control District, and the lessee of agricultural lease number 3420 shall complete any system modifications described in the Everglades Construction Project to the extent that funds are available from the Everglades Fund<sup>121</sup>. These entities shall divert the

---

<sup>116</sup> Fla. Stat. § 373.4592(4)(a)

<sup>117</sup> Fla. Stat. § 373.4592(1)(h)

<sup>118</sup> Fla. Stat. § 373.4592(4)(a)

<sup>119</sup> Id.

<sup>120</sup> Id.

<sup>121</sup> . Everglades Trust Fund; allocation of revenues and expenditure of funds for conservation and protection of natural resources and abatement of water pollution, Fla. Stat. § 373.4592(5). “Funds deposited into the Everglades Trust Fund pursuant to this section shall be expended for implementation of the Everglades Forever Act as provided by § 373.4592.”

discharges described within the Everglades Construction Project within 60 days of completion of construction of the appropriate STA. Such modifications shall be deemed to be a part of each district's plan of reclamation pursuant to chapter 298.

The legislature also realized that in order to revitalize the Everglades there had to be a plan to improve the water quality reaching the EPA.<sup>122</sup> In order to accomplish this water users were to implement water conservation practices, reuse measures, and reduction measures.<sup>123</sup> The water supply management goals included improving water quantity reaching the Everglades, correcting long-standing hydroperiod problems, and increasing the total flow of water through the system.<sup>124</sup>

In order to achieve these goals, the SFWMD was to provide additional inflows to the EPA, maximize the water quantity benefits, and improve the hydroperiod of the EPA.<sup>125</sup> As to the additional inflows, the increased flow must achieve an average annual increase of 28% compared to the baseline years of 1979 to 1988.<sup>126</sup> The flows to the EPA will no longer be reduced by BMP.<sup>127</sup> Instead, the SFWMD developed a model to quantify the amount of water to be replaced.<sup>128</sup> In order to maximize the natural balance of the Everglades Protection Area, the release of water were to be timed and distributed.<sup>129</sup> Pursuant to Fla. Stat. § 373.042, the SFWMD was charged with “expeditiously implementing the minimum flows and levels for the EPA.”<sup>130</sup>

To determine compliance with state water quality standards, the SFWMD is in charge of monitoring all discharges into the EPA.<sup>131</sup> For the purposes of evaluating the effectiveness of the

---

<sup>122</sup> Fla. Stat. § 373.4592(4)(b)(1)

<sup>123</sup> Id.

<sup>124</sup> Id.

<sup>125</sup> Id. at 4(b)(2) – 4(b)(3)

<sup>126</sup> Id. at 4(b)(2)

<sup>127</sup> Id. at 4(b)(3)

<sup>128</sup> Id.

<sup>129</sup> Id.

<sup>130</sup> Id. at 4(b)(7)

<sup>131</sup> Id. at 4(d)(1)

BMPs and STAs, Florida Department of Environmental Protection and the SFWMD initiated a research and monitoring program.<sup>132</sup>

This program's purpose is to evaluate the ecological and hydrological needs of the EPA. Additionally, the program is to evaluate water quality standards for the EPA and for the canals of the EAA.<sup>133</sup> This is so that these canals can achieve the applicable water quality standards by complying with the BMPs and STA treatment.<sup>134</sup> In order to achieve optimum water quality and water quantity for the benefit of the Everglades, the program also includes continual research for the optimization of the design and operation of the STAs, and to identify other treatment and management methods and regulatory programs that are superior to STAs.<sup>135</sup>

In order to handle the influx of exotic species within the Everglades, the SFWMD was charged to establish a biological monitoring network throughout the EPA. The SFWMD also prepares a survey of exotic species at least every 2 years.<sup>136</sup> Additionally, the SFWMD established a program to control the continual expansion and the removal of these exotic species.<sup>137</sup> The highest priority is on any species affecting the largest area within the EPA.<sup>138</sup>

The Legislature recognized that the inclusion of certain public lands would be needed for the treatment or storage of water prior to its release into the EPA.<sup>139</sup> The governing board of the SFWMD will carry out the acquisition of real property. The board is empowered by eminent domain to acquire either fee title or easements for the limited purpose of implementing stormwater management systems.<sup>140</sup>

---

<sup>132</sup> Fla. Stat. § 373.4592(4)(d)(1)

<sup>133</sup> Id. at 4(d)(2)

<sup>134</sup> Id.

<sup>135</sup> Id. at 4(d)(3), (7)

<sup>136</sup> Fla. Stat. § 373.4592(4)(g)(1)

<sup>137</sup> Fla. Stat. § 373.4592(4)(g)(2)

<sup>138</sup> Id.

<sup>139</sup> Fla. Stat. § 373.4592(5)(b)

<sup>140</sup> Id.

In order to minimize the loss of land acquired for Everglades restoration and hydroperiod purposes, impacted farmers have priority in the leasing of available land.<sup>141</sup> An impacted farmer is one in the EAA who uses more than 30 percent of that land for the production of vegetables.<sup>142</sup>

These impacted farmers have the right to lease each parcel of available land for a period of 20 years with the rental rates determined by an appraisal.<sup>143</sup> Fla. Stat. § 373.4592(5)(b) defined available land as “land within the EAA owned by the board of trustees which is covered by any of the following leases: Numbers 3543, 3420, 1447, 1971-5, and 3433, and the southern one-third of number 2376 constituting 127 acres, more or less.”

The rental rate cannot fall below the rate the board of trustees currently receives.<sup>144</sup> However, the board of trustees<sup>145</sup> can adjust the rental rate on an annual basis.<sup>146</sup> Any impacted farmer has the right to lease the available land for either a 20 years term or a term ending August 25, 2018, whichever term expires first.<sup>147</sup> The lessee also has the option to elect an initial 5-year term, with consecutive options to renew the lease for additional 5-year terms.<sup>148</sup> Even after these leases have become effective, the board of trustees has the authority to terminate any lease after 9 years or any lease extension upon 2 years' notice to the lessee.<sup>149</sup> Furthermore, the board must find that the lessee is no longer impacted.<sup>150</sup>

In order to provide financing for land purchasing costs, construction costs, and monitoring costs the Everglades Forever Act has inherent taxation capacity. There are four main

---

<sup>141</sup> Fla. Stat. § 373.4592(5)(b)

<sup>142</sup> Fla. Stat. § 373.4592(5)(a)(5)

<sup>143</sup> Id.

<sup>144</sup> Id.

<sup>145</sup> "Board of trustees" means the Board of Trustees of the Internal Improvement Trust Fund.

Fla. Stat. § 373.4592(5)(a)(2)

<sup>146</sup> Fla. Stat. § 373.4592(5)(b)

<sup>147</sup> Fla. Stat. § 373.4592(5)(d)

<sup>148</sup> Id.

<sup>149</sup> Fla. Stat. § 373.4592(5)(g)

<sup>150</sup> Id.

ways that taxes can be gleaned: Ad Valorem Tax, Special Assessments, Everglades Agricultural Privilege Tax, and C-139 Agricultural Privilege Tax. Under the Ad Valorem Tax, the SFWMD can levy taxes no greater than 0.1 mill within the Okeechobee Basin.<sup>151</sup> This tax is required to be used for the purposes of design, construction, and acquisition of land for the Everglades Construction Project.<sup>152</sup>

The SFWMD may create one or more stormwater management system benefit areas.<sup>153</sup> These areas can include property located outside the EAA and the C-139 Basin, and property located within these areas that are not subject to the Everglades agricultural privilege tax or the C-139 agricultural privilege tax.<sup>154</sup> The SFWMD may also levy special assessments within these benefit areas.<sup>155</sup> These funds attained from the assessments must be used for the planning, acquisition, construction, financing, operation, maintenance, and administration of stormwater management systems for any of the benefited areas.<sup>156</sup>

Another source of revenue is the Everglades agricultural privilege tax. This is an annual tax for “the privilege of conducting an agricultural trade or business on all real property located within the EAA that is classified as agricultural under the provisions of chapter 193; and leasehold or other interests in real property located within the EAA.”<sup>157</sup> This tax is charged on a per acre basis and acts as a lien on any property described on the Everglades agricultural privilege tax roll.<sup>158</sup> The lien effect will last from January 1 of the year the tax notice is mailed until payment is received.<sup>159</sup> The annual tax break down is as follows: November 1994 through

---

<sup>151</sup> Fla. Stat. § 373.4592(4)(a)

<sup>152</sup> Id.

<sup>153</sup> Fla. Stat. § 373.4592(8)(a)

<sup>154</sup> Id.

<sup>155</sup> Id.

<sup>156</sup> Id.

<sup>157</sup> Fla. Stat. § 373.4592(6)(a)(1) – (2)

<sup>158</sup> Fla. Stat. § 373.4592(6)(a), (c)(1)

<sup>159</sup> Fla. Stat. § 373.4592(6)(a)

November 1997 the tax shall be \$ 24.89 per acre; November 1998 through November 2001 the tax shall be \$ 27 per acre; November 2002 through November 2005 the tax shall be \$ 31 per acre; and November 2006 through November 2013 the tax shall be \$ 35 per acre.<sup>160</sup>

With the aim of encouraging reduction of phosphorus load discharges from the EAA, the Legislature provided an incentive credit against the Everglades agricultural privilege tax.<sup>161</sup> These credits are offered to encourage continual use of BMPs.<sup>162</sup> The formula for determining whether the credits will be granted is:

The total phosphorus load reduction shall be measured for the entire EAA by comparing the actual measured total phosphorus load attributable to the EAA for each annual period ending on April 30 to the total estimated phosphorus load that would have occurred during the 1979-1988 base period.<sup>163</sup>

The phosphorus load reductions calculations are used to compute the credits against the Everglades agricultural privilege tax.<sup>164</sup> Only if the phosphorus load reduction exceeds 25 percent will the incentive credits will reduce the Everglades agricultural privilege tax.<sup>165</sup> For every percentage point in excess of 25 percent the incentive credits are as follows: November 1994 through November 1997 the tax shall be \$ 0.33 per acre; November 1998 through November 2001 the tax shall be \$ 0.54 per acre; November 2002 through November 2005 the tax shall be \$ 0.61 per acre; and November 2006 through November 2013 the tax shall be \$ 0.65 per acre.<sup>166</sup> Nonetheless, the “minimum tax” is \$ 24.89 per acre, as these credits cannot reduce the Everglades agricultural privilege tax to less than this figure.<sup>167</sup>

---

<sup>160</sup> Fla. Stat. § 373.4592(6)(c)(1)

<sup>161</sup> Fla. Stat. § 373.4592(6)(c)(2)

<sup>162</sup> Id.

<sup>163</sup> Id.

<sup>164</sup> Fla. Stat. § 373.4592(6)(c)(3)

<sup>165</sup> Id.

<sup>166</sup> Id.

<sup>167</sup> Fla. Stat. § 373.4592(6)(c)(4)

The final tax that SFWMD can levy is the C-139 agricultural privilege tax. This annual tax is imposed on the any and all real property that is located within the C-139 Basin, so long as that land is classified as agricultural land.<sup>168</sup> This tax operates in the same way as the Everglades agricultural privilege tax in that this tax constitutes a lien against the property until payment is completed.<sup>169</sup>

The formula for determining the annual tax for the years between November 1994 and November 2002 is calculated by dividing \$ 654,656 by the number of acres included on the C-139 agricultural privilege tax roll for each year.<sup>170</sup> The formula changes for the years between November 2003 and November 2013.<sup>171</sup> The tax calculation for this time frame is determined by dividing \$ 654,656 by the number of acres included on the C-139 agricultural privilege tax roll for November 2001.<sup>172</sup> After November 2014, the C-139 tax will consist of a flat tax rate of \$ 1.80 per acre.<sup>173</sup>

## V. THE MICCOSUKKEE CASE

In 1998, under 33 U.S.C. § 1365(a)(2)<sup>174</sup>, the Miccosukee Tribe<sup>175</sup> sued the United States, the Environmental Protection Agency (Agency), and two Agency administrators, Carol Browner and John Hankinson.<sup>176</sup> The complaint alleged the Everglades forever Act (EFA)

---

<sup>168</sup> Fla. Stat. § 373.4592(7)(a)(1) – (2)

<sup>169</sup> Fla. Stat. § 373.4592(7)(a)

<sup>170</sup> Fla. Stat. § 373.4592(7)(c)(1)

<sup>171</sup> Fla. Stat. § 373.4592(7)(c)(2)

<sup>172</sup> *Id.*

<sup>173</sup> Fla. Stat. § 373.4592(7)(c)(3)

<sup>174</sup> Under 33 U.S.C. § 1365(a)(2), the Clean Water Act grants individual citizens the right to sue the EPA to force the agency to perform any Clean Water Act -mandated duty.

<sup>175</sup> A federally recognized Indian Tribe occupying three separate parcels of land in and around Everglades National Park in Dade, Broward, and Collier counties. The EFA and Everglades restoration efforts directly affect the Tribe's land. *Supra* note 4 at 4.

<sup>176</sup> The EPA is the federal agency charged with enforcing the Federal Water Pollution Control Act, popularly known as the Clean Water Act ("the CWA"). Browner is the EPA Administrator. Hankinson is the EPA Administrator for Region IV, which oversees the Everglades. *Id.*

changed Florida's water quality standards, and that the Agency had ignored its duty under the federal Clean Water Act (CWA) to review the EFA to determine whether it altered those standards.<sup>177</sup>

The water quality standards at issue in the Miccosukee Case were approved by Florida<sup>178</sup> in 1989 and later approved by the Agency in 1991 and 1992.<sup>179</sup> FAC Chapter 62-302, consistent with the both the CWA and Agency regulations, contains five categories of designated water uses<sup>180</sup>, water quality criteria necessary to protect those uses<sup>181</sup>, and an antidegradation policy<sup>182</sup>.<sup>183</sup> Florida designated Everglades waters as Class III waters, entitling them to the protection necessary to sustain recreation and a healthy, well-balanced population of fish and wildlife.<sup>184</sup> The water quality criteria for nutrients<sup>185</sup> are stated as a more of a vague standard, rather than specific numeric concentration levels:

(48)(a) Nutrients -- The discharge of nutrients shall continue to be limited as needed to prevent violations of other standards contained in this Chapter. Man-induced nutrient enrichment (total nitrogen or total phosphorous) shall be considered degradation in relation to the provisions of Sections 62-302.300, 62-302.700, and 62-4.242 F.A.C.

(48)(b) Nutrients -- In no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora and fauna.<sup>186</sup>

---

<sup>177</sup> *Id.* at 3

<sup>178</sup> See Florida Statutes Chapter 403, Florida Administrative Code (FAC) Chapter 62-302, and FAC Chapter 62-4 for the relevant provisions.

<sup>179</sup> *Supra* note 4 at 9.

<sup>180</sup> See FAC § 62-302.400(1) Florida's five classes of water are: I -- potable water supplies; II -- shellfish propagation or harvesting; III -- recreation, propagation and maintenance of a healthy, well-balanced population of fish and wildlife; IV -- agricultural water supplies; and V -- navigation, utility and industrial use.

<sup>181</sup> See FAC § 62-302.530

<sup>182</sup> See FAC § 62-302.300

<sup>183</sup> *Supra* note 4 at 9 – 10.

<sup>184</sup> See FAC § 62-302. 600.

<sup>185</sup> This means the level of nutrients that can be present in Everglades waters and still have those waters meet Class III standards

<sup>186</sup> See FAC § 62-302.530.

The district court granted the United States' motion to dismiss for lack of subject matter jurisdiction finding that the EFA had not changed Florida's water quality standards, and, as a result, the Agency had no mandatory duty to review the Act and therefore the Court did not have subject matter jurisdiction under the citizen suit provision because that provision authorizes suits only to enforce the Agency's mandatory duties.<sup>187</sup>

On appeal, the Eleventh Circuit subsequently reversed the lower court's grant of the, finding the district court should not have relied solely on the state's representations that the Act did not change its water quality standards.<sup>188</sup> The Eleventh Circuit remanded the case, holding that the district court should have conducted its own factual findings to determine whether the EFA changed Florida's water quality standards and invoked a mandatory duty of review by the EPA.<sup>189</sup>

After remand, the EPA performed a review of the EFA; the same review that Miccosukee Tribe wanted to compel.<sup>190</sup> The Agency concluded that the EFA does not change the state's water quality standards.<sup>191</sup> The parties subsequently filed motions for summary judgment.<sup>192</sup> The district court reviewed the Agency's conclusions in regards to the EFA to aid in their determination of the motions before the court.

The Agency concluded that the EFA is a reasonable compliance schedule for achieving standards by 2006, rather than changing Florida's water quality standards.<sup>193</sup> For support, the Agency cited Section 11(a) "Except as otherwise provided in this section, nothing in this section

---

<sup>187</sup> Miccosukee Tribe of Indians of Fla. v. United States, 105 F.3d 599, 602-03 (11th Cir. 1997).

<sup>188</sup> Id.

<sup>189</sup> Id.

<sup>190</sup> Id.

<sup>191</sup> Id.

<sup>192</sup> Id.

<sup>193</sup> *Supra* note 4 at 42.

shall be construed: 1. As altering any applicable state water quality standards."<sup>194</sup> The Agency determined that the narrative standard for nutrients remains in effect until the state enforces a numeric standard.<sup>195</sup>

The district court disagreed stating that “the Agency’s conclusion as to the effect of Section 11(a) is arbitrary and not supported by the record.”<sup>196</sup> The Court stated the Agency’s conclusion contravened the language of Section 11(a) and other portions of the EFA. The Court further stated that the EFA “is not a compliance schedule; it is a de facto suspension of; and therefore a change in, water quality standards” by not requiring farmers to implement additional water quality measures<sup>197</sup> until 2006.<sup>198</sup>

Furthermore, the Court held that the language of Section 4(f)(3)<sup>199</sup> does not support the Agency’s conclusion that there is a difference between violation of water quality standards and changing the standards.<sup>200</sup> Further examination of Section 4(f)(3) shows that the Agency’s conclusion that this section requires EAA farmers to meet state quality water standards before 2006 is lacking.<sup>201</sup>

The Agency’s final conclusion was that the EFA is consistent with the Clean Water Act because the Agency does not regulate nonpoint source discharges.<sup>202</sup> The Court held that “the Clean Water Act would be nothing more than a paper tiger if it didn't apply to nonpoint

---

<sup>194</sup> Id.

<sup>195</sup> *Supra* note 4 at 42.

<sup>196</sup> Id.

<sup>197</sup> Section 4(f) of the Act exempts farmers in the EAA from having to meet water quality standards until 2006. Subsection 4(f)(3) flatly states that farmers within the EAA and nearby areas who have paid their Agricultural Privilege Tax and have implemented BMPs "shall not be required to implement additional water quality measures, prior to December 31, 2006..." Id. at 43.

<sup>198</sup> Id. at 45.

<sup>199</sup> *See* 251.

<sup>200</sup> Id. at 48 – 49

<sup>201</sup> Id. at 52.

<sup>202</sup> Id.

sources.<sup>203</sup> The goals of Congress showed that the Clean Water Act was to apply to all sources pollutants.<sup>204</sup> By allowing nonpoint sources to violate state water quality standards until 2006, the Agency's conclusion is record does not supported by the record.<sup>205</sup>

In conclusion, the Court set aside the Agency's decision because the Agency's finding that the EFA did not change Florida's water quality standards was arbitrary, capricious, and not supported by the administrative record.<sup>206</sup> The Court denied summary judgment and remanded the case to the Agency and, as the CWA requires<sup>207</sup>, ordered it to approve or disapprove changes to Florida's water quality standards.<sup>208</sup>

Neither the Clean Water Act nor Florida law authorize compliance schedules for achieving state water quality standards.<sup>209</sup> Without having a sound timetable for when BMP or BAPRT is to be implemented, the EFA accomplishes nothing. It allows polluters to continue to pollute and destroy an important ecosystem. The court itself stated that the "even in viewing the EFA as a compliance schedule it would violate the CWA as a result of a change in state water quality standards".<sup>210</sup> Additionally, federal law does not authorize anything like a twelve-year compliance schedule.<sup>211</sup>

---

<sup>203</sup> *Id.* at 52 – 53.

<sup>204</sup> *See* 33 U.S.C. § 1251(a)

<sup>205</sup> *Supra* note 4 at 53.

<sup>206</sup> *Id.* at 54.

<sup>207</sup> If a state changes its water quality standards, it must submit them to the EPA.

*See* 33 U.S.C.S. § 1313(c)(2)(A).

The EPA must approve the standards within 60 days, or disapprove them within 90 days.

*See* 33 U.S.C.S. § 1313(c).

If the EPA disapproves the state's new standards, the agency has an additional 90 days to promulgate substitute standards, unless the state first comes up with standards that meet with EPA approval. The EPA must review any new state standards, but has discretion whether to approve or disapprove them. The EPA also has discretion under the Clean Water Act to promulgate new standards for a state at any time the administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

*See* 33 U.S.C.S. § 1313(c)(4)(B).

<sup>208</sup> *Id.* at 56.

<sup>209</sup> *Id.* at 46.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

The EFA took effect in 1994, but compliance is not required until 2006. This is why the EFA is flawed, it allows for the continual pollution of the Everglades for twelve years. That is twelve years to long. Compliance schedules are concepts that must be used in any type of clean up or restoration legislation. Without a timetable to set up when items have to be completed by, then the Court's idea of a "paper tiger" has comes to fruition.

## **VI. THE BEGINNING OF ENVIRONMENTAL CONSTITUTIONAL PROTECTIONS**

Over the past several centuries, society as a whole has developed an environmental ethic.<sup>212</sup> This is a societal survival response due to the burgeoning human population.<sup>213</sup> This concept of an environmental ethic is without a concrete definition.<sup>214</sup> Generally, it represents an enhanced societal awareness of ecological principles and environmental problems.<sup>215</sup> Most significantly, it signifies the placing of the environment on equal footing with other societal values.<sup>216</sup>

Society has started to realize this environmental ethic by adopting laws to conserve natural resources and control pollution.<sup>217</sup> During the 1970s and 1980s, both the United States federal government and individual states adopted countless statutes and regulations.<sup>218</sup> All of this newly enacted law had advantages and disadvantages. The advantages: substantial reduction in air and water pollution.<sup>219</sup> The disadvantages: failure to conserve ecosystems and biodiversity, and failure to resolve controversies between the environment and development.<sup>220</sup> Furthermore,

---

<sup>212</sup> John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 Fla. L. Rev. 299, 300 (2000).

<sup>213</sup> *Id.* at 301

<sup>214</sup> *Id.* at 306.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 302.

<sup>220</sup> *Id.*

a great deal of this law was created without any specific constitutional authority related to the environment.<sup>221</sup>

As the people of earth further understand the vital role the environment plays, they insist that the earth be provided greater thought and protection than in the past.<sup>222</sup> As a result of this awakening, environmental provisions are now being integrated into constitutions throughout the world.<sup>223</sup>

Constitutions are important because they reflect basic principles and values that are important to society.<sup>224</sup> When the United States Constitution was adopted, both understanding and concern for the environment was limited.<sup>225</sup> Environmental protection was not part of the general societal concern, as the technology to manipulate and pollute the environment did not yet exist.<sup>226</sup> This all changed dramatically with the induction of the machine age and the Industrial revolution.<sup>227</sup> These technological advances have acted as a double-edged sword. One side contains the numerous benefits to society.<sup>228</sup> The other, considerable costs to the environment and human health.<sup>229</sup>

Today, an environmental ethic has developed out of necessity.<sup>230</sup> Most people understand that future of the environment is directly tied to quality and conservation.<sup>231</sup> Evidence of a societal environmental ethic is supported by the integration of environmental provisions into

---

<sup>221</sup> Id. at 301 – 302.

<sup>222</sup> Id. at 302.

<sup>223</sup> Id.

<sup>224</sup> Id. at 303.

<sup>225</sup> Id.

<sup>226</sup> Id.

<sup>227</sup> Id.

<sup>228</sup> Id.

<sup>229</sup> Id.

<sup>230</sup> Id. at 304.

<sup>231</sup> Id.

state constitutions, national constitutions, and international law.<sup>232</sup> Today, this ethic is reflected in the constitutions of over half the states in the United States.<sup>233</sup> Surprisingly, Florida is near the forefront of this worldwide movement to constitutionalize an environmental ethic.<sup>234</sup>

#### **A. FLORIDA’S ENVIRONMENTAL CONSTITUTIONAL PROTECTIONS**

When it was adopted in 1838, Florida's first constitution contained no references to the environment.<sup>235</sup> Florida has adopted five new constitutions since that time, the most recent occurring in 1968.<sup>236</sup> Today, Florida's Constitution contains sixteen environmental provisions.<sup>237</sup> Table 1 identifies these environmental provisions and the five general topics that they fall under: 1) pollution control and conservation of natural resources, 2) funding for environmental programs, 3) restrictions on alienation of public lands designated for conservation, 4) tax incentives for conservation, and 5) fish and wildlife management.<sup>238</sup>

---

<sup>232</sup> Id. at 306.

<sup>233</sup> Id. at 304.

<sup>234</sup> Id. at 300.

<sup>235</sup> Id. at 309.

<sup>236</sup> Id.

<sup>237</sup> Id.

<sup>238</sup> Id.

**Table 1: Florida Constitution Environmental Provisions**

1. Pollution Control & Natural Resources Conservation	Art. 2, § 7(a) (conservation policy) Art. 2, § 7(b) (pollution abatement and conservation directive) Art. 2, § 7(b) (Everglades polluter pays) Art. 10, § 16 (net ban)
2. Funding	Art. 3, § 18(b) (appropriations) Art. 7, § 9(b) (water management taxes) Art. 7, § 11(e) (land acquisition bonds) Art. 7, § 14 (pollution control bonds) Art. 10, § 17 (Everglades Trust Fund) Art. 12, § 9(a) (land acquisition bonds) Art. 10, § 11 (ownership and sale of sovereignty lands) Art. 10, § 18 (sale of state conservation lands)
3. Public Lands	Art. 10, § 11 (ownership and sale of sovereignty lands) Art. 10, § 18 (sale of state conservation lands)
4. Tax Incentives	Art. 7, § 3(d); Art. 12, § 19 (renewable energy tax exemption) Art. 7, § 4(a) (tax incentive to protect aquifer recharge)
5. Fish & Wildlife	Art. 3, § 11(a)(19) (hunting and fishing laws) Art. 4, § 9; Art. 12, § 23 (Fish and Wildlife Conservation Commission)

239

The backbone of Florida's environmental provisions is the Natural Resource Clause, which first appeared in the 1968 constitution.<sup>240</sup> The Clause establishes the state's environmental policy and directs the Legislature to implement that policy.<sup>241</sup> The Clause declares "it shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources."<sup>242</sup>

Florida's Constitution also includes two provisions initiated by citizens.<sup>243</sup> The first provision bans the use of certain nets in near-shore marine waters.<sup>244</sup> The second provision relates to the state's failure to adequately protect the Florida Everglades.<sup>245</sup> This provision requires that "those in the Everglades Agricultural Area who cause water pollution within the

<sup>239</sup> Table gained from *Id.* at 311.

<sup>240</sup> *Id.* at 309.

<sup>241</sup> *Id.*

<sup>242</sup> Fla. Const. Art. II, § 7(a)

<sup>243</sup> 52 Fla. L. Rev. 299, 310.

<sup>244</sup> See Fla. Const. art. X, § 16 (proposed by initiative petition filed with the Secretary of State, Oct. 2, 1992, adopted 1994).

<sup>245</sup> 52 Fla. L. Rev. 299, 311.

Everglades Protection Area or the Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution."<sup>246</sup> This amendment, known as the “polluter pays” provision, would come under controversy as to whether it was self-executing and enforceable. Another amendment, the Everglades Trust Fund, established a trust fund to support conservation and protection of natural resources and abatement of water pollution in the Florida Everglades.<sup>247</sup>

Constitutional provisions that provide protection for the environment are important for several reasons. First, the people institute these provisions. The citizens of a state are the ones who can see the damage being done first hand. They are the ones who have and create the drive for an environmental ethic. They are concerned about the damage being done to the environment. They , in turn, take steps to get the state legislature involved. The other reason is protection. No matter what way it is worded, conservation, protection or abatement, these constitution provisions set in stone what the will of the people is. But as we will see, this protection, even when voted upon, and metaphorically set in stone be being added to a constitution, can all be for not.

## **B. THE ADVISORY OPINION**

In 1996, the SFWMD requested an advisory opinion from the Florida Attorney General concerning these recent constitutional amendments pertaining to pollution control in the Florida Everglades were self-executing or required implementing legislation.<sup>248</sup> The questions were in regards to the “polluter pays” provision, and the provision establishing the Everglades Trust

---

<sup>246</sup> Fla. Const. art. II, § 7(b) (proposed by initiative petition filed with the Secretary of State, Mar. 26, 1996, adopted 1996).

<sup>247</sup> See Fla. Const. art. X, § 17 (proposed by initiative petition filed with the Secretary of State, Mar. 26, 1996; adopted 1996).

<sup>248</sup> 52 Fla. L. Rev. 299, 320.

Fund.<sup>249</sup> The Attorney General applied the Gray v. Bryant test for determining whether a constitutional provision is self-executing:

“The basic . . . test . . . is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment.”<sup>250</sup>

The Attorney General determined that both provisions were self-executing.<sup>251</sup> He surmised “all constitutional amendments are self-executing because, otherwise, the legislature could defeat the will of the people.”<sup>252</sup> Subsequently, the Governor of Florida balked at the Attorney General's Opinion and requested that the Florida Supreme Court review the issue.<sup>253</sup>

The first question asked of the Court was whether the “polluter pays” provision (hereinafter Amendment 5) is self-executing.<sup>254</sup> The Court, in applying the aforementioned test, disagreed with the Attorney General’s opinion.<sup>255</sup> The Court concluded that “Amendment 5 is not self-executing and cannot be implemented without the aid of legislative enactment because it fails to lay down a sufficient rule for accomplishing its purpose.”<sup>256</sup> In the Court’s opinion Amendment 5 raised too many questions such as “what constitutes ‘water pollution’; how will one be adjudged a polluter; how will the cost of pollution abatement be assessed; and by whom might such a claim be asserted.” For these reasons, the Court determined that Amendment 5 was self-executing.<sup>257</sup>

---

<sup>249</sup> Id.

<sup>250</sup> Id.

<sup>251</sup> Id. at 321.

<sup>252</sup> Id.

<sup>253</sup> Advisory Opinion to the Governor--1996 Amendment 5 (Everglades) 706. So. 2d 278, 281 (Fla. 1997).

<sup>254</sup> Id.

<sup>255</sup> Id.

<sup>256</sup> Id.

<sup>257</sup> Id.

The second question asked the Court whether legislative action is required even though Everglades Forever Act pre-existing.<sup>258</sup> The Court found no inconsistency between the Everglades Forever Act and Amendment 5.<sup>259</sup> Amendment 5 was adopted for a similar purpose as the Everglades Forever Act; requiring polluters to pay for the abatement of their pollution.<sup>260</sup> Despite the similarities, The Court did not construe the Everglades Forever Act to be the enabling legislation for Amendment 5.<sup>261</sup> The Court reasoned that:

“We believe the voters adopted Amendment 5 to effect a change, and construing the Everglades Forever Act as Amendment 5's implementing legislation would effect no change, nullify the Amendment, and *frustrate the will of the people*. We therefore glean that in adopting Amendment 5, the voters expected the legislature to enact supplementary legislation to make it effective, to carry out its intended purposes, and to define any rights intended to be determined, enjoyed, or protected.”<sup>262</sup>

The last question asked the Court to interpret the phrase "primarily responsible" within Amendment 5.<sup>263</sup> The Court stated that the “words and terms of a Constitution are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense.”<sup>264</sup> The Court determined that the words "primarily responsible" required those in the EAA who cause water pollution in the EPA or EAA to bear the costs of abating that pollution.<sup>265</sup>

Ironically, the Court's wisdom is having the same exact effect that the Court was concerned about in the first place. It has been almost a decade since the decision that Amendment 5 was not self-executing. To date, the Florida Legislature has taken zero steps to

---

<sup>258</sup> Id.

<sup>259</sup> Id. at 282.

<sup>260</sup> Id.

<sup>261</sup> Id.

<sup>262</sup> Id.

<sup>263</sup> Id.

<sup>264</sup> Id.

<sup>265</sup> Id. at 283.

implement Amendment 5 or provide any kind of implementing language. It seems the will of the people continues to be frustrated.

## **VII. CONCLUSION**

The existing federal law is inadequate to protect and save the Everglades for two reasons. The CWA has no compliance schedule. There is no time frame to fulfill the CWA own goal of eliminating the discharge of all pollutants into navigable waters by 1985. The year is 2006 and all the pollutants in the navigable waters of the US have not been eliminated. Additionally, the CWA does not cover nonpoint sources such as agricultural runoff. In the Everglades case, nonpoint sources make up most of the pollution entering the waters of the Everglades. In order for federal legislation to be effective in safeguarding the Everglades additional steps must be provided for under the CWA or new legislation.

Florida's State legislation, the EFA, is flawed in that there is no compliance schedule for when the BMP are to be put into practice. The EFA took effect in 1994, but compliance is not required until 2006. It allows polluters to continue to pollute and destroy an important ecosystem. Furthermore, the EFA is a "paper tiger" of sorts through its inability to provide any type of punishment for not following the EFA's proper procedures forth in the Act. The Act's only real enforcement mechanism is the payment of taxes for the use of the land in the EAA. This is not enough. Taxes might raise revenues to provide for the studies and oversight needed for the Act, but without any enforcement to make sure that the procedures of this Act are followed, the act becomes that "paper tiger".

Finally, the will of the people is based upon what is stated in any constitution. Amendments to that constitution are voted upon and added because the will of the people wants these amendments. The people in Florida wanted Amendment 5 to be added to the constitution

and it was. The Florida Supreme Court, however, frustrated the will of the people by not allowing the amendment to go forth as it was because there was no implementing legislation. The will of the people was further frustrated by the legislature lack of any effort to rehabilitate this amendment and provide implementing legislation. What good are constitutional amendments if the state government continually frustrates the will of its own people?

The key to environmental acts such as the EFA to have greater effectiveness is communication between the judicial and legislative branches of government on both the state and federal levels. Communication in the form of committee notes or advisory notes to allow the court to see what the will of the people truly is, not what the legalese writing of the amendment is. There must be more communication between the federal agencies and that state agencies that are both appointed to carry out similar tasks. Without this communication and with the will of the people continually frustrated, both government and society will fail to recognize the importance of the Everglades; its protection, conservation, and preservation.