

**LEGISLATING EARTH JURISPRUDENCE:
AN EXAMINATION OF ENFORCEMENT UNDER INTERNATIONAL,
FEDERAL AND STATE LAWS**

by

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The evidence of a global environmental crisis is undeniable. International experts in the field of climate change have concluded the change in the global climate over the twentieth century is not the result of natural causes.¹ The U.S. Environmental Protection Agency (EPA) agrees, with virtual certainty,² that human activities are changing the composition of the Earth's atmosphere.³ Increasing levels of greenhouse gases like carbon dioxide in the atmosphere since pre-industrial times are well-documented and understood.⁴ The atmospheric buildup of carbon dioxide and other greenhouse gases is largely the result of human activities.⁵

As a consequence, increasing greenhouse gas concentrations tend to warm the planet.⁶ Over the past 50-100 years 90 percent of all large fish have disappeared from the world oceans.⁷ A total of 15,503 species of plants and animals are known to face a high risk of extinction in the near future, in almost all cases as a result of human activities.⁸

At no time in our history have we seen a more evident need to protect our environment from current destructive forces, thereby securing a future for ourselves and generations to come. By acknowledging the existence of a global environmental crisis, we can move forward in the practical application of determining the changes necessary to effect a solution.

¹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IPCC, 2001: CLIMATE CHANGE 2001: THE SCIENTIFIC BASIS. CONTRIBUTION OF WORKING GROUP I TO THE THIRD ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (J.T. Houghton et al. eds., 2001) [hereinafter IPCC 2001].

² "Virtual certainty" (or virtually certain) conveys a greater than 99% chance that a result is true. IPCC 2001.

³ U.S. Environmental Protection Agency, Climate Change: State of Knowledge, <http://www.epa.gov/climatechange/science/stateofknowledge.html> (last visited Sept. 21, 2007).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Ransom A. Myers and Boris Worm, *Extinction, survival or recovery of large predatory fishes: One contribution of 15 to a Theme Issue 'Fisheries: a Future?'*, 360 Philosophical Transactions of the Royal Society B: Biological Sciences 1453, 13-20 (January 29, 2005).

⁸ The International Union for Conservation of Nature and Natural Resources [IUCN] Species Survival Commission, 2007 Red List of Threatened Species, http://www.iucnredlist.org/info/2007RL_Stats_Table%201.pdf (last visited Sept. 21, 2007).

A New Environmental Ethic

Cultural historian, Thomas Berry, states humanity must evolve from a period of human devastation of the natural world to a period of mutual benefit between humanity and nature.⁹ While we acknowledge human rights, we must also recognize the sense in which every being has rights, including non-human and non-animal rights.¹⁰ Reforming legislation to include these rights will require a new societal understanding that the role of human governance is to create a mutually enhancing relationship between people and the natural environment.¹¹ Once embraced, this environmental philosophy or ethic will influence many areas of human culture, including the law. It will encourage the emergence of new theories or philosophies of law, an Earth jurisprudence, which will guide us in transforming existing laws and governance systems.¹²

Legislating Rights of Nature

Humanity will thrive if we regulate our use of natural resources in view of being a part of the whole Earth community.¹³ This self-regulation should be reflected in our legal system, encouraging humans to act in concert with the well-being of the planet.¹⁴ Law needs to respect the ecological wisdom inherent in each unique biosystem.¹⁵ Each unique environmental community or ecosystem has a natural ability to maintain and replenish its resources.¹⁶ As humans, we need to acknowledge this inherent natural wisdom and limit our activities within each ecosystem to complement the ecosystem's sustainability. Once we achieve a balance between our use of natural resources and nature's ability to replenish and renew these same

⁹ Thomas Berry, *The Great Work 2* (1999).

¹⁰ *Id.* at 5.

¹¹ Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* 30 (Green Books 2003).

¹² *Id.* at 185.

¹³ THE CENTER FOR EARTH JURISPRUDENCE, LEAFLET, CORE PRINCIPLES OF EARTH JURISPRUDENCE (2007).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

resources, we will need to establish a restorative justice and mediation as opposed to an adversarial legal approach.¹⁷ This restorative justice should focus on restoring the ecosystems which have been damaged by human activities to their natural state of health and sustainability. Humans will be required to move forward with an attitude of responsibility, duty and obligation rather than human rights.¹⁸ Once society will develop an environmental ethic – once it can view itself as a trustee, not owner, of the environment and nature, with an obligation to protect, preserve and maintain nature – this environmental ethic discussed by Thomas Berry will be mirrored in the environmental laws we pass.

While most environmental legislation will initially be based on a human-benefit approach, a growing shift in community acceptance of inherent rights of nature should be reflected in environmental law. Legislation passed will need to resonate those recognized, inherent, natural rights. The intrinsic right of a river does not exist merely because of its value to the human community that surrounds it; a river should have the right to flow freely because it is part of the natural world which benefits from its very existence.

Environmental laws currently exist on international, federal, state and local levels. The United Nations has adopted The World Charter for Nature.¹⁹ The United States Congress has established the Environmental Protection Agency.²⁰ The State of Florida Constitution provides a "polluters will pay" provision²¹ in connection with the Comprehensive Everglades Protection Plan. While each of these efforts have succeeded in creating a growing awareness which will

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ The World Charter for Nature, G.A. Res. 37/7, Annex, U.N. Doc. A/Res/37/7 (Oct. 28, 1982).

²⁰ 33 U.S.C. § 1251 (2000).

²¹ FLA. CONST art. II, §7.

become the foundation for legislating rights of nature, they often fail to protect, maintain and preserve the resources and ecosystems they were enacted to benefit.

Legislating rights of nature should start at state and local levels where lawmakers can respond more immediately to grass root campaigns and citizen initiatives, and where more effective enforcement options exist.

The World Charter for Nature

The United Nations has recognized that the benefits which could be obtained from nature depend on the maintenance of natural processes and on the diversity of life forms and that those benefits are jeopardized by the excessive exploitation and the destruction of natural habitats.²² It further recognized the need for appropriate safeguards at national and international levels to protect nature and promote international co-operation in that field.²³ The destruction of ecosystems due to excessive consumption and abuse of natural resources has led to competition for scarce resources, resulting in economic, social and political conflicts.²⁴ To preserve peace, humankind must conserve and maintain natural resources for the benefit of present and future generations.²⁵

In an effort to further the principles stated, the United Nations determined that each State shall implement laws which reflect these fundamental beliefs and protect the environment, provide funding and administrative structures to achieve the objectives of conservation, and establish regulatory standards for the production and manufacturing of natural resources.²⁶

²² The World Charter for Nature, G.A. Res. 37/7, ¶ 24, U.N. Doc. A/Res/37/7 (Oct. 28, 1982).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

The World Charter is a reaffirmation of the commitment of the United Nations to the preservation of international peace by living in harmony with nature²⁷, thereby living in harmony with all humankind. This approach to preserving nature is still fundamentally anthropocentric, or based on the philosophy that human needs are the center of all decision-making. While it serves a great purpose in developing a global awareness of the need to preserve our natural world, it does not have any legal authority and therefore carries no measure of enforcement for violations of its tenets.

International Treaties

In an effort to address global environmental issues, nation-states have entered into more than 250 international environmental contracts, or treaties.²⁸ The majority of international environmental law is treaty-based.²⁹ However, several inherent elements of international treaties hinder compliance and enforcement efforts. While the United Nations' "universal membership and extremely broad mandate has allowed it to take up many issues of global concern...it is constrained by powers which are limited to making recommendations that are not binding on its Member States."³⁰ Treaties are only binding on participating national members. Sanctions and penalties for non-compliance of standards set forth in the agreement are restricted to parties of the agreement. Consequently, if a nation does not want to be subject to the terms of the agreement, it refuses to become a party to the agreement. The international community can try to coerce cooperation through publicly denouncing a country's refusal to enter into an agreement, but it has little, if any, authority to enforce compliance.

²⁷ *Id.*

²⁸ JOSEPH F. C. DIMENTO, *THE GLOBAL ENVIRONMENT AND INTERNATIONAL LAW* 17 (2003).

²⁹ *Id.* at 17.

³⁰ *Id.* at 39.

Often the language contained in the agreement is subject to different interpretation by the parties to the agreement. Many terms in international law are often imprecise.³¹ This complicates the issue of establishing agreed upon principles, norms, rules and decision making procedures ("regimes") among the varied participants.³²

Principle Twenty-One of the Stockholm Declaration addressed protecting the global commons.³³ There were no agreed upon norms regarding liability, who represented the international community, which tribunal would hear claims, what defined a "compensable injury," the beneficiary of compensation, how to enforce a decision and remedies that are available.³⁴ The effect of such ambiguous, undefined terms is the unenforceability of the agreement.

One form of enforcement used with international group agreements is the expulsion of a non-complying member, but this power is seldom used.³⁵ There are too many political and economic issues that may be impacted by such a stringent measure. In cases of non-compliance, suspension of a violating member's privileges, such as voting, is more common.³⁶ It is argued that sanctions are not an effective deterrent as they do not prevent an unlawful activity (e.g., violating speed limits) unless the law-breaker considers the activity to be inherently wrong.³⁷ Once again, we see the necessity of an underlying social environmental ethic in order to make compliance and enforcement effective.

³¹ *Id.* at 43.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 51.

³⁶ *Id.*

³⁷ *Id.* at 52.

The United States distinguishes treaties that require the advice and consent of the Senate³⁸ from executive agreements in which the president may bind a nation without the legislature's consent.³⁹ This distinction has led to controversy over whether an instrument has actually been entered into with the United States. In many instances a treaty that has not been ratified by the Senate is deemed unenforceable. Such is the case with the Kyoto Protocol.

The Kyoto Protocol

The Kyoto Protocol is an international agreement negotiated in December of 1997 which seeks to reduce the emission of greenhouse gases by the year 2012.⁴⁰ More than 160 countries have committed to the agreement by ratification.⁴¹ The participating nations have agreed to develop national inventories of greenhouse gas emissions, establish national programs to reduce emissions, and mitigate climate change.⁴² The protocol identified the United States, former Soviet Union and Eastern Europe countries as "Annex I Parties" subject to reducing their greenhouse gas emissions to 1990 levels by the end of 2000.⁴³ Disagreements arose where a number of large developing nations, especially China and India, refused to make binding commitments to similarly reduce emissions.⁴⁴ Another concern was the extent that industrialized nations could offset reducing emissions by planting forests and other greenhouse gas and carbon removal methods.⁴⁵ Although the President of the United States signed the Kyoto Protocol on December 11, 1998, it has not been ratified by the United States Senate.⁴⁶ Furthermore, on July

³⁸ U.S. CONST., art. II, §2.

³⁹ *Id.*

⁴⁰ Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 2, Dec. 11, 1997,

⁴¹ *Id.* (last modified July 10, 2006).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Environmental Literacy Council, Kyoto Protocol, www.enviroliteracy.org/article.php/278.html (last visited Sept. 26, 2007).

⁴⁵ *Id.*

⁴⁶ *Id.*

21, 1997, Senators Byrd and Hagel co-sponsored a resolution proposing that the Senate not ratify the Kyoto Protocol.⁴⁷ The Resolution stated that these developing countries, including China, Mexico, India, Brazil, and South Korea, were expected to increase greenhouse emissions which cumulatively would surpass emissions of the United States and other Annex I Parties by 2015.⁴⁸ It further argued that this disparity of treatment between Annex I Parties and developing countries would result in economic harm to the United States.⁴⁹ Resolution No. 98 passed unanimously by a vote of 95-0.⁵⁰

The EPA: Federal and State Enforcement of the Clean Water Act

The Federal Water Pollution Control Act was originally enacted on June 30, 1948.⁵¹ The Clean Water Act (CWA) was enacted by extensive amendment, reorganization and expansion of the Act's provisions in 1972 to restore and maintain the chemical, physical, and biological integrity of the nation's waters and to eliminate the discharge of pollutants into navigable waters by 1985.⁵² In effect, the CWA prohibits the discharge of pollutants into navigable waterways except in compliance with the Act.⁵³ The CWA allows for the discharge of pollutants if the discharger obtains a National Pollution Discharge Elimination System (NPDES) permit by the Administrator of the United States Environmental Protection Agency (EPA).⁵⁴

The EPA provides that any state may administer its own permitting program for discharges into navigable waters by submitting a description of the program it proposes to

⁴⁷ S. Res. 98, 105th Cong. (1997).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 80 Cong. Ch. 758; 80 P.L. 845; 62 Stat. 1155 (1948).

⁵² 33 U.S.C. § 1251 (2000).

⁵³ 33 U.S.C. § 1311 (2000).

⁵⁴ 33 U.S.C. § 1342 (2000).

establish and administer under State law.⁵⁵ However, the EPA's data-management systems for NPDES permits are out of date and inadequate, allowing compliance by polluters to continue largely unmonitored.⁵⁶ Data was missing from EPA databases for 96 percent of dischargers, resulting in ineffective federal agency monitoring of state enforcement.⁵⁷ The EPA's reliance on State administration of NPDES permits has allowed the illegal discharge of pollutants into the nation's waterways to continue in non-compliance with NPDES standards for water quality.⁵⁸

The Center for Progressive Regulation (CPR) conducted a survey of state environmental agencies which revealed an overall failure of state enforcement.⁵⁹ Inadequate federal funding for NPDES permit enforcement was cited by eleven of seventeen states reporting.⁶⁰ Sufficient federal funds were reported by only five states, which heavily supplemented federal funds with state permitting fees.⁶¹ Additional research evidenced the lack of federal funds slowed the state renewal of NPDES permits, resulting in facilities operating under expired permits.⁶²

The EPA allows a facility to continue operating under an expired permit if the facility has filed a renewal application within the appropriate time frame.⁶³ A review by the U.S. Public Interest Research Group (PIRG) in 2001 found that approximately 30 percent of major discharge facilities were in significant noncompliance for at least three months between January 2000 and March 2001.⁶⁴ A subsequent analysis conducted by the EPA in 2003 revealed approximately 25

⁵⁵ 33 U.S.C. § 1342(b) (2000).

⁵⁶ Clifford Rechtschaffen, *Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight*, 55 ALA. L. REV. 775 (2004).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ 5 U.S.C. § 558(c) (2000).

⁶⁴ Richard Caplan, U.S. Pub. Interest Research Group, *Permit to Pollute: How the Government's Lax Enforcement of the Clean Water Act is Poisoning Our Waters* (2002). available at <http://homepage.mac.com/oscura/ctd/docs/08xx04permittopollute.pdf>.

percent of major discharge facilities were in significant noncompliance with their CWA permits.⁶⁵ Significant noncompliance for toxic pollutants is defined as exceeding an average monthly limit by 20 percent or more in any two months of a six-month period, and for conventional pollutants as an excess of 40 percent for the same time period.⁶⁶ However, the same EPA 2003 study showed declining levels of CWA enforcement activity between 1999 and 2001.⁶⁷

State enforcement issues include failure to conduct inspections, failure to take timely enforcement action and failure to obtain significant penalties.⁶⁸ Maryland negotiated thirteen Clean Water Act consent orders with violators which resulted in five violators failing to take corrective action at no additional state penalties; and one promise to submit a corrective plan and pay a \$100 per day fine for each day the plan was late, ultimately producing no plan and no state fine. This same facility was charged with thirteen additional violations over the next two and a half years before the state finally took additional enforcement action.⁶⁹

In contrast to the above, in recent years some states have heightened their enforcement and compliance laws.⁷⁰ California enacted laws requiring agencies to impose penalties for repeat, serious violation of water pollution requirements in 1999.⁷¹ An analysis prepared by

⁶⁵ U.S. Env'tl. Protection Agency, Off. of Enforcement & Compliance Assurance, A Pilot for Performance Analysis of Selected Components of the National Enforcement and Compliance Assurance Program (Feb. 2003).

⁶⁶ U.S. GEN. ACCT. OFF., Water Pollution: Many Violation Have Not Received Appropriate Enforcement Attention, CAO/RCED-96-23 at 3 (1996).

⁶⁷ See A Pilot for Performance Analysis, *supra* note 65, at 6-7.

⁶⁸ See Clifford Rechtschaffen, *Competing Visions: EPA and the States Battle for the Future of Environmental Enforcement* 30 ENVTL. L. REP. 10803, 10807-09 (2000), for a general discussion about state enforcement issues.

⁶⁹ Tony Dutzik, CoPIRG Foundation, *The State of Environmental Enforcement: The Failure of State Governments to Enforce Environmental Protections and Proposals for Reform*, 19 (Oct. 2002).

⁷⁰ Rechtschaffen, *supra* note 56, at 779.

⁷¹ Cal. Water Code §§ 13385(h)-(i) (West 1999).

Environment California between 2000 and 2002 showed a 41 percent reduction in the number of clean water permit violations.⁷²

The Clean Water Act was enacted to restore our nation's waterway and prohibit further contamination by the discharge of pollutants into navigable waters. The federal government relied on state administration, monitoring, and enforcement to advance these goals. The states have failed to pursue enforcement of the federal standards due to inadequate federal funding for permit enforcement, insufficient penalties for violations, political and economic conflicts, as well as a general apathetic attitude toward environmental concerns. However, some states are achieving success through recently enacted legislation providing increased fines for violations and state permitting fees to fund monitoring and enforcement. These new strategies, coupled with public awareness and intervention, have the potential to improve compliance with the CWA and meet the designed environmental objectives.

EPA on Environmental Justice

President Clinton issued an Executive Order requiring each federal agency to "make achieving environmental justice part of its mission," and specifically applied this mandate to Native Americans.⁷³ The EPA defines "environmental justice" as:

"[t]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies."⁷⁴

⁷² Assembly Floor Analysis, AB 1541, available at http://info.sen.ca.gov/pub/bill/asm/ab_1501-1550/ab_1541_cfa_20030910_014035_asm_floor.html.

⁷³ Exec. Order No. 12, 989, 3 C.F.R. 859 (1994), reprinted in 42 U.S.C. § 4321 (2000).

⁷⁴ United States Environmental Protection Agency, Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis 7-8 (1998), available at <http://www.epa.gov/compliance/resources/policies/ej/>.

Unfortunately, the Supreme Court has failed to address the environmental justice impact in its recent decisions regarding the Miccosukee Tribe of Indians and the South Florida Water Management District. Citing environmental justice as part of any subsequent enforcement argument may force the Supreme Court to render an opinion on the issue. However, in 2007 the Supreme Court ruled that the EPA not only had the right, but the obligation, to regulate automobile emissions, carbon dioxide and other greenhouse gas emissions, in contrast to White House/Bush opposition.⁷⁵ These opinions may establish the foundation for the environmental justice argument, as well as natural rights of nature.

The State of Florida and the Florida Everglades

The Florida Constitution was amended in 1996 to reflect the State's commitment to protect its natural resources and scenic beauty.⁷⁶ The amendment states that "adequate provision shall be made by law for the abatement of air and water pollution...and for the conservation and protection of natural resources."⁷⁷ Most importantly, the amendment requires that any entity in the Everglades Agricultural Area that "causes water pollution within the Everglades Protection Area...shall be primarily responsible for paying the costs of the abatement of that pollution."⁷⁸ This Amendment to the Florida Constitution originated from a grass roots, citizens initiative petition filed with the Secretary of State and championed by the Miccosukee Tribe of Indians.⁷⁹

⁷⁵ *Massachusetts v. EPA*, 127 S.Ct. 1438 (U.S. 2007).

⁷⁶ FLA. CONST. art. II, § 7 (1996).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See History, Florida Constitution, Article II, Section 7.

The Miccosukee Tribe of Indians, related to the Seminole Nation, did not originally reside in Florida; they moved there after the arrival of Spanish settlers.⁸⁰ In 1817 and 1821 the United States tried to relocate the tribe to Oklahoma and west of the Mississippi.⁸¹ While by 1859, most of the Indians had relocated to Oklahoma, a few remained and retreated to the Everglades.⁸² In 1934, the United States government established a reservation within the Everglades National Park for the Miccosukee tribe.⁸³

The tribe maintained a close relationship to the Everglades, relying on the land for hunting, fishing and trading.⁸⁴ The 1920's population explosion in South Florida altered the tribe's lifestyle and traditions irreparably.⁸⁵ The Everglades were drained and farmed to accommodate the invasion of tourists and businesses.⁸⁶

After federal government efforts to terminate the status of Indians in the 1950's, the Miccosukee Tribe of Indians of Florida was officially recognized in 1962.⁸⁷ The Seminole and Miccosukee live on reservations that abut the Everglades Agricultural Area.⁸⁸ The tribes depend on a sustainable use of the reservation land, the Everglades, for agriculture, aquaculture and livestock business.⁸⁹ Traditional Seminole cultural, religious and recreational activities are dependent on the health of the Everglades ecosystem.⁹⁰ Their traditions and livelihood are

⁸⁰ Stacey Dietrich, *The Miccosukee Indians and Their Struggle to Clean Up the Everglades*, June 11, 1999, available at <http://jrscience.wcp.muohio.edu/FieldCourses99/MarineEcologyArticles/TheMiccosukeeIndiansandthA.html>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Seminole Tribe of Florida, *Seminole and the Land*, www.seminoletribe.com/culture/seminole_land.shtml (last viewed Sept. 21, 2007).

intertwined with the land, such that destruction of the Everglades ecosystem, their home, will forever alter the culture, traditions and earning resources.

In 1949, the Florida Legislature created the Central and Southern Florida Flood Control District, the predecessor to the South Florida Water Management District, to manage the huge canal and levee project being designed and built by the U.S. Army Corps of Engineers.⁹¹ In 1972, with the Florida Water Resources Act, the state created five water management districts, with expanded responsibilities for regional water resource management and environmental protection.⁹² The District, a division of the State of Florida, operates the canals, levees, water storage areas, and pumps to prevent flooding as part of the Central and South Florida Flood Control Project. That same year, Congress enacted the Clean Water Act (CWA) to restore and maintain national navigable waters and prohibit the pollution of those waters.⁹³ However, although Congress had enacted the CWA to prevent pollution of our Nation's waters, some 30 years later the Federal Government, as *amicus*, joined the State of Florida and the District arguing against the Miccosukee Tribe of Indians' effort to establish that the CWA required a point source discharge permit for pump S-9.⁹⁴

The Miccosukee Tribe of Indians (the "Tribe") and Friends of the Everglades filed a *citizen suit* in district court under the CWA, alleging that the District violated the CWA by back-pumping phosphorus-laden water into the Everglade ecosystem without a National Pollution

⁹¹ Chapters 25209 and 252270, Laws of Florida (1949).

⁹² FLA. STAT. § 373 (2006).

⁹³ 33 U.S.C. § 1251 (2000).

⁹⁴ *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

Discharge Elimination System (NPDES) permit.⁹⁵ The district court found in favor of the Tribe and enjoined the District from operating the pump station until a NPDES permit was obtained.⁹⁶

In 2004, the Supreme Court decided whether the South Florida Water Management District (the "District") under the CWA⁹⁷ must obtain a NPDES discharge permit before pumping phosphorous laden water from area canals into the Everglade ecosystem.⁹⁸ The District argued that the pump station did not add pollutants to the water, which would constitute "discharge of a pollutant" as defined in the Clean Water Act in 33 U.S.C.S. § 1362(12).⁹⁹ The Federal Government argued that a decision in favor of the Tribe could result in the requirement of thousands of new NPDES permits by water supply networks.¹⁰⁰ These permits may require expensive water treatment to meet water quality standards, raising the cost of water distribution prohibitively.¹⁰¹ The Court acknowledged a possible violation of Congress' instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act.¹⁰² On the other hand, the Court further acknowledged that permitting may be necessary to protect water quality and the Federal Government could control costs by other means.¹⁰³

The Court found in favor of the Tribe by determining that the definition of "discharge of a pollutant" included point sources that did not generate or add pollutants.¹⁰⁴ The Court reasoned that the District represents a "point source" which, while not adding pollutants to the water, is

⁹⁵ *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, 2006 U.S. Dist. LEXIS 89450 (D. Fla. 2006).

⁹⁶ *Id.*

⁹⁷ 33 U.S.C. §§ 1251-1367 (2000).

⁹⁸ *Miccosukee Tribe of Indians*, 541 U.S. at 95.

⁹⁹ *Id.* at 104.

¹⁰⁰ *Id.* at 108.

¹⁰¹ *Id.* at 108.

¹⁰² 33 U.S.C. §1251(g) (2000).

¹⁰³ *Miccosukee Tribe of Indians*, 541 U.S. at 108.

¹⁰⁴ *Id.*

subject to NPDES permitting requirements. However, the case was remanded to the district court for further proceedings concerning whether the canal and the Everglades were "distinct water bodies."¹⁰⁵ While the Eleventh Circuit vacated the injunction on appeal, stating practical necessity, it affirmed the district court's ruling that a NPDES permit was required.¹⁰⁶

This is a mixed victory, as it only addresses the issue of permitting. Once the erroneous permitting issue is corrected, the back-pumping of already-polluted water into the Everglade ecosystem will continue. However, the NPDES permit places limits on the type and quality of pollutants that can be released into the Nation's water.¹⁰⁷ Unfortunately, these standards will not take effect until the district court rules on the outstanding issue regarding "distinct water bodies." Further, the State of Florida Department of Environmental Protection is currently requesting the Court to issue an Emergency Final Order authorizing the operation of 14 un-permitted temporary pumps to provide relief from specific regulatory requirements in response to the drought conditions in South Florida.¹⁰⁸

Citizen Action and the Amendment Process

Florida is one of 24 states that guarantee democracy by giving citizens direct access to the ballot.¹⁰⁹ The Florida Constitution provides five methods to amend the State Constitution: (1) by the Florida Legislature, with a three-fifths vote of the membership of both houses, (2) by a Constitutional Revision Committee, consisting of 37 members, (3) by the Taxation and Budget Commission, consisting of 22 members, (4) by voter initiative, and after a simple majority approval by voters in an election, to call a Constitutional Convention to consider and propose

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 95.

¹⁰⁷ 33 U.S.C. § 1311 (2000).

¹⁰⁸ State of Fla. Dept. of Env'tl. Prot. OGC No. 07-0456, Emergency Final Order (March 2007).

¹⁰⁹ Save the Voters' Voice Endorsement Statement: Defending the Right to Direct Democracy (<http://www.savevotersvoice.org/index>) (2005).

amendments, and (5) by voter initiative, as a proposed amendment to appear on the ballot (limited to a single subject).¹¹⁰ The Florida Constitution had one of the most citizen accessible amendment processes in the country.¹¹¹ It provided approval of ballot initiatives by a simple majority of 50 percent plus one. However, in 2006 Amendment #3 requiring broader public support for constitutional amendments or revisions was approved increasing the votes needed to approve ballot initiatives from a simple majority to 60 percent.¹¹² While proponents of the amendment argue that an increased consensus requirement will deter special interest groups from using the amendment process to achieve the individual interests, critics of the amendment argue the increased voting requirement only serves to restrict the ability for citizens to be heard.¹¹³

Legislators have a tendency to get into office and forget what their citizens find important. But when faced with a Legislature that refuses to address their concerns, citizens have an alternative to insure their voices are heard. While enacting legislation is the duty of the Legislature, state constitutions can empower citizens to enact changes through a citizen initiative that will directly change their state constitution. It was to this initiative process that Floridians turned to compel adoption of Florida's Sunshine Laws; to force Everglades clean up and require polluters pay the tab; to make it harder to raise taxes; and to reduce school overcrowding.¹¹⁴ When the Legislature refused to heed the desire of its citizens by adopting these changes through statute, public support and grass-root campaigns made sure these issues got on the ballot. It is critical that citizens maintain this ability to be heard.

¹¹⁰ FLA. CONST. art. XI, §§ 1-3 (2006).

¹¹¹ Vote Smart Florida, <http://www.votesmartflorida.org/mx/hm.asp?id=amendment3> (last visited Sept. 26, 2007).

¹¹² FLA. CONST. art. XI, § 5 (2006).

¹¹³ Vote Smart Florida, <http://www.votesmartflorida.org/mx/hm.asp?id=amendment3> (last visited Sept. 26, 2007).

¹¹⁴ *Id.*

Personal Observations

As a native Floridian, these are issues that touch me personally. I grew up in South Florida. My father took me on airboat rides through the Everglades. I attended summer camp at the Florida Everglades Youth Conservation Camp, sponsored by the Florida Fish and Wildlife Conservation Commission. These issues have also touched me professionally while working with the State of Florida Department of Environmental Protection to acquire environmentally sensitive land in Florida for preservation. Making a concentrated effort to spend time in nature this past semester has been a journey of mixed emotions. I remember what I loved so much growing up in South Florida. I also see how quickly it is disappearing. A "Coming Soon" sign appeared on a forested lot announcing the imminent threat of yet another drug store and in less than a month almost ten acres of surrounding property had been cleared of every tree and shrub. Two weeks later we lost another ten acres to the construction of a home improvement warehouse.

Deer still wander through my backyard because, until recently, this was their backyard. Soon fences and construction will continue to push them further and further away from their natural home. But these last few months I have noticed something else. I have become aware of growing concern for the environment. I still have faith that we, as a community, will eventually do the right thing. It is no longer a fad or fashionable to be environmentally aware, it is becoming part of our social ethic. Our children are learning to become environmentally sensitive. Through our influence as consumers, we will insist automobile manufacturers provide gas alternative vehicles, real estate developers build "green" homes, and retail businesses incorporate environmentally conscious products. Finally, I do believe that as a society we will insist that necessary laws are passed to protect, preserve and restore our environment.