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Florida's Third District Court of Appeal Decision In *Shands v. City of Marathon* Departs From Regulatory Takings Precedent & Calls Into Question the Value Of Transferable Development Rights[1]

By: University of Florida Levin College of Law Environmental and Community Development Clinic: Erica Clements, Summer Garrison, Thomas Hawkins, Julia Kitt, Buffy Snider, Julian Spiro, Leah West and Julian Ziaggi

A recent Third District Court of Appeal decision, *Shands v. City of Marathon*, has upended regulatory takings precedent by categorically stating that the economic *value* of transferable development rights is not appropriate to consider when evaluating whether a land use regulation imposes a regulatory taking on property.

The dispute in the case, a battle over a 7.9-acre offshore island in the Florida Keys—*Shands* Key—began over fifty years ago when Dr. *Shands* purchased the property in 1956.[2] In 1986, Monroe County downzoned *Shands* Key from General Use to "Conservation Offshore Island" and placed the property in the "conservation" future land use category under Monroe County's Comprehensive Plan.[3] Six years later, the county developed a competitive permit allocation system designed to facilitate safe hurricane evacuations and preserve environmentally sensitive areas, including areas like *Shands* Key.[4] This system, along with a basis point allocation system, comprise the city's transferable development rights program.

In 2004, the City of Marathon, which incorporated and adopted Monroe County's zoning designations, denied the *Shands*'s request to construct a dock on the property, and the *Shands* eventually took the city to court after the city rejected the *Shands*'s Beneficial Use Determination application.[5] After two decades and two appeals, the trial court concluded that the downzoning did not amount to a categorical taking under *Lucas v. South Carolina Coastal Council* because of the remaining economic *value* of the property's transferable development rights (TDRs). [6] However, in a now withdrawn opinion, *Shands v. City of Marathon*,[7] the Third District Court of Appeal of Florida concluded that the downzoning of *Shands* Key effected a taking. Recently, the Third District Court of Appeal substituted a new opinion after granting rehearing en banc.[8]

In reaching the conclusion that the zoning rules established a taking, the Third District relied on the Supreme Court's holding in *Lucas v. South Carolina Coastal Council*,[9] which held that government regulations that deprive property owners of *all* economically beneficial use of their land constitute a per se regulatory taking under the Fifth Amendment. However, the majority's "trailblazing decision,"[10] misconstrues the *Lucas* holding and rewrites the Supreme Court's seminal decision, *Penn Central Transportation Co. v. City of New York*.[11] While conceding that transferable development rights may have relevance in a takings analysis, the Third District relies primarily on a decades-old concurring Supreme Court opinion to conclude that transferable development rights worth three or six times the original

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INSIDE:

From the Chair

Greetings ELULS Members,

This year is off to a great start for the Section as we continue to focus on connection, education, and scholarship. We have several committees that are hard at work advancing the Section's work in these areas, and I want to take some time to highlight that work.

First, two of our committees are hard at work on strengthening connections between Section members. The Events Committee recently hosted an event at Tall Timbers research station in Tallahassee and has several events planned for this spring and summer, including a tour of Boyd Hill Nature Preserve, a happy hour series with the Florida Brownfields association at different locations around the state, and another happy hour series with the Administrative Law Section in Southeast Florida. The Website, Social Media, and Technology committee established a section Discourse webpage, which section members are using to discuss upcoming events and topics related to environmental and land use law. I encourage you to check it out!

On the continuing education front, our excellent CLE Committee has organized seminars addressing public beach access and the state stormwater rules for this spring. They are also planning for our in-person CLE event at the Florida Bar Annual Convention in June and other CLE offerings this fall.

Finally, several of our committees are focusing their attention on scholarship. The Section Reporter is going strong, as you can see in this issue, and the Treatise Committee is starting to evaluate what the next edition of our section treatise should look like. The Public Interest Committee is working to identify candidates for the Section's scholarship to the University of Florida's annual Natural Resources Leadership Institute program, and our Law Schools Subcommittee continues to coordinate with law schools around the state for events related to our practice areas.

For those of you who are not actively participating on one of our committees, please reach out to myself or Whitney Bledsoe and we can help you get more involved.

I look forward to seeing more of you at our events at the Annual Convention in June in Boca Raton. In the interim, please feel free to contact me any time with your thoughts and ideas for the Section.

Sincerely,
Malcolm Means

Trump's Evisceration of Environmental Regulation, Justice and Renewable Energy

By Derek Howard, Senior Assistant County Attorney, Monroe County

Note: This update (as of March 3, 2025) endeavors to provide a comprehensive summary of the numerous seismic and controversial actions that President Trump has taken relating to environmental law and policy since he took office for a second term on January 20, 2025. Many of these actions are the subject of litigation resulting in injunctions that are not analyzed in this update. Readers are encouraged to advise the author of any developments that should be included in the next issue of the Reporter (howard-derek@monroecounty-fl.gov)

Executive Order 14154, *Unleashing American Energy*, 90 Fed. Reg. 8353, Signed Jan. 20, 2025

The stated purpose of Executive Order 14154 is in part "to encourage energy exploration and production on Federal lands and waters, including on the Outer Continental Shelf, in order to meet the needs of our citizens and solidify the United States as a global energy leader long into the future." It contains a broad array of provisions to revoke President Bidens' environmental initiatives and accelerate energy production by expediting and streamlining applicable permitting processes.

For example, Section 5 of the order revokes Executive Order 11991 of May 24, 1977 (Relating to protection and enhancement of environmental quality), which had directed the Council for Environmental Quality (CEQ) to issue regulations implementing the National Environmental Policy Act of 1969 (NEPA) and required Federal agencies to comply with those regulations. Executive Order 14154 directs CEQ to provide guidance on implementing NEPA, 42 U.S.C. 4321 *et seq.,* and propose rescinding CEQ's NEPA regulations found at 40 CFR 1500 *et seq*. It further directs the Chairman of CEQ to convene a working group to coordinate the revision of agency-level NEPA implementing regulations for consistency.

Executive Order 14154 revokes Biden's Executive Order 14037 and eliminates his "electric vehicle (EV) mandate" that sought to ensure 50% of all new passenger cars and light trucks sold in 2030 be zero-emission vehicles, including battery electric, plug-in hybrid electric, or fuel cell electric vehicles. Executive Order 4154 seeks to "promote true consumer choice, which is essential for economic growth and innovation, by removing regulatory barriers to motor vehicle access; by ensuring a level regulatory playing field for consumer choice in vehicles; by terminating, where appropriate, state emissions waivers that function to limit sales of gasoline-powered automobiles; and by considering the elimination of unfair subsidies and other ill-conceived government-imposed market distortions that favor EVs over other technologies and effectively mandate their purchase by individuals, private businesses, and government entities alike by rendering other types of vehicles unaffordable."

Section 7 of the order is called "Terminating the Green New Deal." It instructs agencies to immediately pause the disbursement of funds appropriated through the Inflation Reduction Act of 2022 (Public Law 117-169) or the Infrastructure Investment and Jobs Act (Public Law 117-58), including but not limited to funds for electric vehicle charging stations made available through the National Electric Vehicle Infrastructure Formula Program and the Charging and Fueling Infrastructure Discretionary Grant Program.

Section 9 of the order is called "Restoring America's Mineral Dominance." It instructs agencies to identify "actions that impose undue burdens on the domestic mining and processing of non-fuel minerals and undertake steps to revise or rescind such actions."

***Removal of National Environmental Policy Act Implementing Regulations*, 90 Fed. Reg. 10610 (February 25, 2025) (CEQ Interim Final Rule)**

This interim rule carries out Executive Order 14154 and Trump's direction for CEQ to propose rescinding NEPA implementing regulations. It removes all iterations of its NEPA implementing regulations, including

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40 CFR parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508.

CEQ has also concluded that it may lack authority to issue binding rules on agencies in the absence of the now-rescinded E.O. 11191. CEQ cited E.O. 11991 as authority in 1978 when it first issued its NEPA regulations. The interim final rule requests comments by March 27, 2025, to inform CEQ's decision making.

By way of background, NEPA is arguably one of the most important environmental laws in the country. It was enacted by Congress to declare a national policy "to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and [to] fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. 4331(a).

NEPA, as amended by the Fiscal Responsibility Act of 2023 (FRA), Public Law 118-5, furthers this national policy by requiring Federal agencies to prepare a "detailed statement" for proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). This statement must address: (1) The reasonably foreseeable environmental effects of the proposed agency action; (2) the reasonably foreseeable adverse environmental effects that cannot be avoided; (3) a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal; (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action. 42 U.S.C. 4332(2)(C).

NEPA further mandates that Federal agencies ensure the professional and scientific integrity of environmental documents; use reliable data and resources when carrying out NEPA; and study, develop, and describe technically and economically feasible alternatives. 42 U.S.C. 4332(2)(D)-(F). NEPA provides procedures for making threshold determinations about whether an environmental document must be prepared and the appropriate level of environmental review. 42 U.S.C. 4336(a)-(b).

NEPA does not mandate particular results or substantive outcomes. Rather, NEPA requires Federal agencies to consider the environmental effects of proposed actions as part of agencies' decision-making processes. As amended by the FRA, NEPA provides additional requirements to facilitate timely and unified Federal reviews, including provisions clarifying lead, joint lead, and cooperating agency designations, generally requiring the development of a single environmental document, directing agencies to develop procedures for project sponsors to prepare environmental assessments and environmental impact statements, and prescribing page limits and deadlines. 42 U.S.C. 4336a. NEPA also sets forth the circumstances under which agencies may rely on programmatic environmental documents, 42 U.S.C. 4663b, and adopt and use another agency's categorical exclusions. 42 U.S.C. 4336c.

NEPA established CEQ as an advisory agency within the Executive Office of the President to assist and advise the President on certain environmental matters and the implementation of NEPA's national policy. 42 U.S.C. 4342. Specifically, NEPA charges CEQ with the duty and function to: (1) to assist and advise the President in the preparation of the Environmental Quality Report; (2) to gather, analyze, and interpret information concerning the conditions and trends in the current and prospective quality of the environment for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of NEPA's national policy, and to compile and submit to the President studies on such conditions and trends; (3) to review and appraise Federal programs and activities for the purpose of determining the extent to which such programs and activities contribute to the achievement of NEPA's national policy, and to make relevant recommendations to the President; (4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals; (5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality; (6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes; and (7) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request. 42 U.S.C. 4344.

NEPA further emphasizes these advisory functions by requiring appointed members of CEQ to be exceptionally well-qualified to analyze and interpret environmental trends and information; to appraise Federal programs and activities in the light of NEPA's national policy; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment. 42 U.S.C. 4342. NEPA authorizes CEQ to employ personnel necessary to carry out these statutory functions. 42 U.S.C. 4343.

In addition, NEPA provides that all Federal agencies must consult with CEQ while identifying and developing methods and procedures to ensure that unquantified environmental

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The Property Line—Florida's Rural and Family Land Protection Program

By Randall Raban[1]

Introduction

For the past several years, the State of Florida has experienced tremendous population growth.[2] As a consequence of this growth, portions of Florida's landscape that have historically been used for agriculture are being sold, subdivided, and developed to meet the residential, commercial, and recreational needs of these new residents.[3] Recognizing the vital economic and environmental benefits that agricultural lands provide, the State of Florida has created programs designed to slow the rate at which agricultural land is lost to real estate development. One such program is called the Rural and Family Lands Protection Program ("RFLPP"). This article provides a brief overview of the RFLPP and discusses how the landowners can "cash in" by committing to agriculture for good.

Program Overview

The RFLPP was created in 2001 when the Florida State Legislature passed the Rural and Family Lands Protection Act (the "Act").[4] The administration of the program is overseen by the Florida Department of Agriculture and Consumer Services ("FDACS") with the goals of "enhancing the ability of rural landowners to obtain economic value from their property, protecting rural character, controlling urban sprawl, and providing necessary open space for agriculture and the natural environment[.]"[5] The stated purpose of RFLPP is to limit the "conversion of agricultural and natural areas that provide economic, open space, water, and wildlife benefits by acquiring land or related interests in land such as perpetual, less-than-fee acquisitions[.]"[6] In sum, the Act authorizes FDACS (on behalf of the Board of Trustee's of the Internal Improvement Trust Fund), to allocate money for the acquisition of easements and to otherwise enter into agreements with private landowners that prevent the conversion of agricultural lands to more intensive land uses (i.e. residential, commercial, industrial, etc.).[7]

There are four (4) basic contract products that are available to agricultural landowners under the RFLPP: (i) conservation easements, (ii) rural land protection easements, (iii) resource conservation agreements, and (iv) agricultural protection agreements.[8] While each product is ultimately designed to achieve the state's conservation goals, each of these products differs slightly in its applicability and approach. One element that is common among them, however, is that a landowner (and the landowner's successors and assigns) in most cases is able continue engaging in agricultural activities on the land even after the conservation easement or agreement is put into place. Since the needs and demands of each agricultural operation differ from one farm to the next, understanding and selecting the right product under the RFLPP is important.

Conservation Easements

One of the products available to landowners under the RFLPP is a conservation easement. Conservation easements are perpetual in nature, which means that they do not expire overtime. They also run with the land, meaning that any subsequent purchaser of the land will also be subject to the limitations, restrictions, and requirements of the conservation easement. Conservation easements are governed by Florida Statutes § 704.06, and are generally considered to be more restrictive in nature.[9] For example, agricultural activities are allowed on land that is subject to a conservation easement only "if such activity is a current or historic use of the land placed under the easement."[10] Thus, if a property has not been used for agricultural production in the past, a landowner may be precluded from ever doing so once a conservation easement is put into place. A landowner that grants a conservation easement receives a one-time, lump sum payment, which is paid at the time the landowner enters into the conservation easement.[11]

Rural Land Protection Easements

Similar to conservation easements, rural land protection easements ("RLPE") are also perpetual in nature and run with the land. RLPEs are intended to preserve the land in "predominately its current state and prevent the subdivision and conversion of such land into other uses."[12] Similar to conservation easements, a landowner that grants a rural land protection easement receives a one-time, lump sum payment at the time the landowner enters into the RLPE. Although very similar in applicability, the RLPE is generally considered to be slightly more flexible than conservation easements with respect to the types of agricultural activities that may be allowed on the property once the RLPE is in place. For example, a landowner may be able to engage in new or different agricultural activities on land where an RLPE is already in place (regardless of whether the land has been used for that purpose in the past), so long as the new agricultural activity is consistent with the established scope of the RLPE and does not otherwise violate the specific prohibitions described in Florida Statutes Section 570.71(3).

Resource Conservation Agreements

A resource conservation agreement ("RCA") is considered, a "contract for services" under which a landowner agrees to provide services that actively improve habitat and water restoration or conservation on his land beyond that which is already required by law.[13] An RCA is designed to last for a relatively short period of time (cannot exceed a term greater than ten years), and is only available to landowners that have already entered into either a conservation easement or an RLPE.[14] Unlike conservation easements and RLPEs, however, payments due to a landowner under an RCA are made in equal, annual installments over the course of the term.[15]

Agricultural Protection Agreements

An agricultural protection agreement ("APA") is an agreement that prohibits, among other things, the conversion of agricultural land to a more intensive land use and the construction of certain improvements for a period of thirty (30) years. At the end of the thirty-year period, the state has the right to purchase a conservation easement or RLPE.[16] A landowner that has entered into an APA may sell his property, but the terms of the APA will be binding upon the subsequent landowner (i.e. purchaser), meaning that the purchaser will be subject to the duties, responsibilities, and obligations agreed upon by the original

owner under the APA.

Conclusion

As population figures continue to increase in Florida, and as the pressure for private landowners to sell their property to real estate developers continues to rise, the RFLPP provides an opportunity for agricultural landowners and producers to receive compensation for preserving the current status and use of their land. Because the specific needs of each agricultural operation are likely to vary considerably, it is important for a landowner to choose a contract product under the RFLPP that best suits his or her needs and circumstances.

[1]Randall Raban is an attorney at Holtzman Vogel Baran Torchinsky & Josefiak PLLC in Tallahassee; rraban@holtzmanvogel.com

[2]According to Florida's Demographic Estimating Conference, which most recently met in July of 2024, Florida expects to see more than 300,000 people move into the state each year for the next several years. To put this into perspective, St. Petersburg, Florida currently has a population of less than 300,000. If this trend holds, Florida (with a current population of approximately 23,088,994) is expected to reach a population of 25 million by 2031 and 26 million by 2036. Demographic Estimating Conference Executive Summary, July 9, 2024. https://edr.state.fl.us/content/conferences/ population/demographicsummary.pdf

[3]The University of Florida's Center for Landscape Conservation Planning estimates that, if population growth estimates hold, the amount of agricultural land that is at risk of being lost to development could reach 400,000 acres by 2040 and 2 million acres by 2070. Boisseau, Charles. Thirty-Six-Million-Acre Balancing Act. November 18, 2024. University of Florida, Warrington College of Business. https://warrington.ufl.edu/due-diligence/2024/11/18/thirty-six-million-acre-balancing-act/.

[4]Fla. Stat. § 570.70; Rule 5I-1, F.A.C.

[5] Fla. Stat. § 570.70(4).

[6] Fla. Stat. § 570.70(5).

[7] Fla. Stat. § 570.71(1).

[8] Fla. Stat. § 570.71(1)-(5).

[9] Fla. Stat. § 704.06.

[10] Fla. Stat. § 704.06(13).

[11] Fla. Stat. § 570.71(6).

[12] Fla. Stat. § 570.71(3).

[13] Fla. Stat. § 570.71(4).

[14] Id.

[15] Fla. Stat. § 570.71(8).

[16] Under Fla. Stat. § 570.71(5)(b), the purchase price of the conservation easement or RLPE is based on the value of the easement at the time the APA is entered into, plus a reasonable escalator multiplied by the number of full calendar years following the commencement date of the APA. The statute also provides that the landowner will be released from the APA if the state fails to timely exercise its right to purchase a conservation easement or RLPE.

Coastal Conservation Corner: An Op-Ed Report on Florida's Ocean, Coasts, and Protecting the State's Blue Economy- A Conservationist's Reflections on the Upcoming 2025 Legislative Session

By Jon Paul "J.P." Brooker, Esq*

As a conservationist practicing in my beloved home state of Florida, I must steel myself up with a hearty dose of hope every day. One must remain optimistic when it comes to protecting Florida's beautiful and iconic nature, even in the face of rampant development, thousands of new residents moving here daily, repeated environmental calamities, and regulatory shifts and rollbacks in an increasingly politically partisan and volatile climate in Washington, D.C.. Spending time out on Florida's ocean, in the Everglades, in the pine flatwoods—or anywhere in Florida's majestic nature— is a grounding force that makes that search for optimism urgent and worthwhile. It is hard enough on an average day, but never is that steeling up needed more than during the annual legislative session. This one may be a doozy.

To state the obvious, even a casual observer has probably noticed that Governor DeSantis and the Legislature are not getting along. We have never seen the legislature override a Governor's veto the way we did this past January in the battle over the legislative budget. Continued combat between the legislative and executive branches is likely to impede progress on a great range of legislative issues, including marine conservation issues. At stake are water quality improvements, reductions to harmful algal blooms, and protections for marine wildlife.

I suspect that we will see continued increases in funding for things like Everglades restoration and Indian River Lagoon water quality projects. The Governor has proposed more than $800 million towards Everglades and water quality projects. That funding is certainly welcome, especially in the wake of the vast list of water projects that the governor vetoed last June. But what about other pressing issues such as addressing marine debris and plastics? I am concerned that these issues will fall to the wayside.

Microplastics and microfibers are just one of the many issues threatening Florida's oceans and meriting legislative attention. For a breakdown of this issue, visit

https://oceanconservancy.org/blog/2024/08/27/what-microplastics-microfibers/

Incoming House Speaker Daniel Perez has Biscayne Bay in his district's backyard. Nowhere is the health of the ocean more important than South Florida where the beaches drive the coastal economy and tourism thrives. Perez surely holds Florida's marine health close to his heart, but it will be interesting to see how he prioritizes conservation issues throughout his leadership, especially as other social issues dominate the political landscape this year. We have already seen battles over implementation of President Trump's immigration reform dominate the political discourse in Florida. Now more than ever, it is incumbent on conservation advocates to beat the drum to make sure water quality and other issues do not get drowned out. That is going to be a tall task this session, making that daily dose of hope essential.

Incoming Senate President Ben Albritton has been vocal on the need for comprehensive water quality reforms. During his swearing in late last year, Albritton correctly commented:

"We also know the droves of people coming to Florida for freedom and opportunity pose a serious risk to the health and supply of our state's water. Our water is invaluable. It's invaluable to our residents, our businesses, our economy, and our precious ecosystems. It's invaluable to Florida's DNA. We must continue to develop and advance solutions to rid Florida's waterways of excessive nutrients from urban areas, septic tanks, wastewater, stormwater, and any other source harmful to nature.

Few can deny we need more data about water. A renewed, data-driven

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March 2025 Florida Legislative Update

By: Gary K. Hunter, Jr., Holtzman Vogel, P.A.

Florida's 2025 legislative session will begin on March 4 and is scheduled to end May 2nd. As I previewed back before the 2024 elections, Ben Albritton (a citrus farmer from Bartow) and Danny Perez (a lawyer from Miami) are the Senate President and House Speaker, respectively. After the November election, they both lead republican super-majorities in each chamber (28-11 in the Senate with one vacancy and 86-34 in the House). That super-majority will make it challenging for Democrat members in either chamber to advance policy. That said, I genuinely believe that President Albritton and Speaker Perez will be receptive to good ideas, regardless of political affiliation.

Candidly, this has been one of the slower pre-session group of committee weeks in recent memory. Things often start more slowly following elections due to the changing of leadership/members in both chambers of the Florida legislature; however, the progress to file and hear bills in committees before the actual start of the "session" is far behind a normal pace. Much of that can be attributed to the special sessions convened over January and February to address the immigration issue as well as the scheduled committee week which became snow/ice holidays due to the storm in north Florida. That leaves many bills filed which are awaiting committee assignments, much less making an agenda and progressing through the legislative committee process. As of February 28, 2025, there are approximately 1600 total bills filed, which is on pace with sessions over the last few years.

In recent legislative sessions, Florida has passed more than 300 bills with most of those becoming law after signature by Governor DeSantis. This may prove inaccurate, but I will be surprised if 300 (or more) bills make it to the Governor for consideration in 2025. While there are good reasons attributable to the late start of bills making their way through the process, my suspicion is that Speaker Danny Perez and President Ben Albritton, respectively, have no ambition to break records in the number of bills passed. Rather, both are true believers that less government is better for the citizens of Florida, and that is likely to equate to an approach toward a legislative agenda which is less robust than has become our standard of late. Expect a focus on hurricane assistance, citrus recovery, insurance and less government.

That said, there are a remarkable number of bills filed which impact environmental and land use practitioners throughout Florida. Because of the aforementioned late start, none of those have really started to advance in either chamber. But be assured that at least a few will make it through the process. At the time of writing this column with several days remaining to file bills, there are approximately 45 bills filed which directly impact environmental and growth management subjects. It seems early to identify the ones most likely to pass both chambers, and amendments are likely to occur throughout the 9 week session, but be assured that subjects relevant to your practice area will likely be impacted by pending legislation. If you would like a preview of what is out there, Janet Bowman and I provided an overview to the ELULS on February 26th. It covers most of the bills filed to date and generally provides a summary of what each bill (as initially filed) is intended to accomplish. I believe that program is available on the Florida Bar CLE page.

That is it for now. I look forward to a busy few months and reporting to you in the summer on any changes made to state policy impacting our practice area.

Coastal Conservation Corner: An Op-Ed Report on Florida's Ocean, Coasts, and Protecting the State's Blue Economy - A Conservationist's Reflections on the Upcoming 2025 Legislative Session

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focus on water will give us a close look at where we actually are, instead of where we think we might be. Fresh, accurate data will drive the solutions we need for the future."

As a conservationist who has been working on water quality issues for years, this quote from the incoming Senate President is music to my ears. It gives me hope that notwithstanding a harsh political climate, there is still an untapped political will to enact meaningful change that will protect our oceans and coasts that are an intrinsic part of our unique identity.

We are at an inflection point in Florida's history. Our population has swollen, our political influence has bloomed, and yet our regulatory drive to meaningfully and significantly protect our water and ocean and coastal resources has not kept pace. I think we Floridians have the will to see these protections put into place, but do our politicians have the wherewithal, gumption, and fortitude to make it happen without getting mired in the political muck that can bog down even the noblest conservation intentions?

I am going to stay optimistic, keep the hope alive, and keep urging our leaders to do what is best for the Sunshine State.

* Jon Paul "J.P." Brooker, Esq is the Director of the Florida Conservation Program at Ocean Conservancy, the world's oldest marine conservation non-profit. He is a sixth generation Floridian living in St. Petersburg.

ON APPEAL

by Larry Sellers, Holland & Knight LLP

Note: Status of cases is as of February 25, 2025. Readers are encouraged to advise the author of pending appeals that should be included.

FIRST DCA

Carney, Collier and Sparks v. City of Cape Coral and FDEP, Case No. 1D2024-3084. Petition for a ruling that the ALJ is without jurisdiction to award or consider the award of attorneys' fees against the petitioners as a sanction, because the City failed to obtain a timely order from the ALJ awarding fees, reserving jurisdiction to award fees, or containing the necessary factual findings for an award of fees. Status: Petition filed December 2, 2024; on January 24, 2025, the court issued an order requiring the respondents to file a response and staying the proceeding below pending further order from the court.

Florida Defenders of the Environment v. Lee, et al., Case No. 1D2022-3463. Appeal from the same final order as in Florida Wildlife Federation, above: Status: Affirmed as moot on February 14, 2024; notice to invoke discretionary jurisdiction filed in Florida Supreme Court on April 16, 2024, Case No. SC2024-0551; review denied on October 14, 2024.

Florida Wildlife Federation, Inc., et al. v. The Florida Legislature, et al., Case No. 1D2022-3142. Appeal from order dismissing case as moot and order allowing automatic statutory continuance as to the Legislature, as well as the associated order on reconsideration, the order on motion to tax costs and the final judgment. This appeal stems from a challenge to numerous 2015 legislative appropriations from the Land Acquisition Trust Fund, in which appellants assert that the Legislature had violated the constitutional restriction that money from the Fund could be appropriated "only for" specifically listed purposes. The complaint alleged that about $300 million of the Fund had been appropriated for impermissible purposes. The challenged order dismissed the case based on its finding that the appellants could have but did not reach judgment before the end of fiscal year 2015-16. Status: Affirmed as moot on February 14, 2024; notice to invoke discretionary jurisdiction filed in Florida Supreme Court on April 16, 2024, Case No. SC2024-0556; review denied on October 14, 2024.

SECOND DCA

Michael Hutchinson, Eileen Fitzgerald v. LWR Communities, LLC, Sarasota County, Florida Case No. 2D2024-0783. Appeal from final order determining comprehensive plan amendments to be in compliance. Status: Affirmed per curiam on January 29, 2025.

Liberty Hospitality Management, LLC v. City of Tampa, Case No. 2D2024-2035 and *City of Tampa v. Liberty Hospitality Management, LLC,* Case No. 2D2024-2082. Petitions for review of a circuit court order on Liberty's petition for certiorari to review the city council's quasi-judicial decision denying Liberty's application to rezone its property for the development of a hotel. The circuit court, sua sponte, entered an order dismissing Liberty's petition for certiorari for lack of subject matter jurisdiction. The circuit court found as a matter of law that (1) Florida's circuit courts lack jurisdiction to issue writs of certiorari directed to local government legislative bodies, such as the city council in this case, and (2) under the Florida Constitution and its separation of powers, the city council does not have (and has never had) the authority to conduct itself in a quasi-judicial manner, or to render quasi-judicial decisions. Liberty seeks a writ of certiorari quashing the order only if the order is construed to permit the city council to conduct site-specific rezonings of Liberty's property via the legislative (as opposed to quasi-judicial) process. Status: Petitions filed August 29, 2024 and September 4, 2024. The appellate court has determined that the cases will travel together, but they are not consolidated.

Reed Fischbach, Christopher W. McCullough and Joseph B. Sumner, III v. Hillsborough County, Case No. 2D2022-3270. Appeal from final order determining Hillsborough County Comprehensive Plan Amendment HC/CPA 20-11 to be "in compliance." The Plan Amendment amends the County's Comprehensive Plan by replacing the text of the Future Land Use Element Residential Plan-2 ("RP-2") category and changing the requirements necessary to obtain an increased density level per acreage in the RP-2 category. Status: Notice of appeal filed October 6, 2022; oral argument stayed on September 14, 2023, pending the filing of a joint status report.

THIRD DCA

Tropical Audubon Society, et al v. Miami-Dade County, et al, Case No. 3D2021-2063, and *Limonar Development LLC v. Miami-Dade County,* Case No. 3D2021-2077. Appeals from final order of the Administration Commission determining comprehensive plan amendment for the construction of the Kendall Extension in Miami-Dade County to be in compliance. Status: Affirmed on June 26, 2024; motion for clarification, rehearing, rehearing en banc and certification denied on August 23, 2024; notice to invoke discretionary jurisdiction of Florida Supreme Court filed by Limonar Development on September 24, 2024, Case No. SC2024-1395; notice of voluntarily dismissal filed on October 7, 2024; order of dismissal entered on October 31, 2024.

FOURTH DCA

Testa v. Jupiter Island Compound and Department of Environmental Protection, Case No. 4D2023-3070. Appeal from final order denying Jupiter Island Compound's application for coastal construction control line permit to construct a single-family dwelling and pool seaward of the coastal construction control line. Status: Notice of appeal filed December 19, 2023.

FIFTH DCA

S. R. Perrott, Inc. v. Belvedere Terminals Company and FDEP Case No.

5D2024-1336. Appeal from final order dismissing petition for hearing as being untimely filed. Status: Notice of appeal filed April 17, 2024.

Bear Warriors United, Inc., et al. v. Florida Department of Transportation and St. Johns River Water Management District, Case No. 5D2024-0958. Appeal from a SJRWMD final order issuing an environmental resource permit to construct and operate, including a stormwater management system, a project known as Pioneer Trail/I-95 Interchange, notwithstanding a contrary recommendation by the Administrative Law Judge. Status: Notice of appeal filed April 11, 2024.

City of Titusville v. Speak Up Titusville, Inc., Case No. 5D2023-3739. Appeal from amended order granting final summary judgment in favor of defendant, determining the Right to Clean Water Charter Amendment approved by voter initiative is validly enacted and in effect. The challenged Amendment establishes the Right to Clean Water and authorizes any resident of the city to bring a legal action in the name of the resident or in the name of the waters in Titusville, to enjoin violations of the Right to Clean Water. The trial court rejected arguments that the title and summary of the amendment failed to comply with s. 101.161, Florida Statutes, and that the substance of the initiative is preempted by s. 403.412(9)(a), Florida Statutes. In addition, the trial court rejected claims that the preemption statute is unconstitutional. Status: On December 26, 2024, the court issued an opinion in which it held that the City charter amendment conflicts with, and thus is preempted by, section 403.412(9)(a). The court therefore reversed the summary judgment entered in favor of Speak Up Titusville and remanded with instructions to enter summary judgment in favor of the City on its claim of express preemption.

Mansoor "John" Ghaneie v. Andy Estates LLC and Florida Department of Environmental Protection, Case No. 5D2023-3156. Appeal from final order issuing a consolidated environmental resource permit and letter of consent for use of sovereignty submerged lands to Andy Estates, for a 692 square-foot private, and multi-family dock in the Banana River Aquatic Reserve, Merritt Island, Brevard County, Florida. Status: Notice of appeal filed October 23, 2023.

SIXTH DCA

WW SSIR Owner v. Captiva Civic Association, Case No 6D25-0268. Appeal from Final Summary Judgment declaring, among other things, that a 2003 settlement agreement limits the total number of dwelling units on South Seas Resort to 912 and that such provision is valid and enforceable. Status: Notice of Appeal filed February 6, 2025.

Captiva Civic Association v Lee County, et al. Case No. 6D2025-0271. Appeal from ALJ's final order concluding that Lee County's Ordinance No. 23-22 is consistent with the Lee County Comprehensive Plan, as is defined in § 163.3213(1), Florida Statutes. The challenged ordinance is drafted in part to accommodate redevelopment plans within South Seas Island Resort. Status: Notice of appeal filed February 12, 2025.

Lake Pickett North LLC et al. v Orange County, Florida, et al. Case No.: 6D2024-2109. Appeal from order denying plaintiff, Lake Pickett North, LLC's motion for temporary injunction relating to the proposed Rural Boundary Charter Amendment Ordinance and the Municipal Annexation Charter Amendment Ordinance. The plaintiff sought a temporary and permanent injunction enjoining placing the proposed charter amendments on the ballots for the November General Election or a temporary and permanent injunction enjoining Orange County from enforcing the charter amendments. because the County failed to prepare or post a business impact estimate prior to the adoption of the ordinances as required by section 125.66(3)(a), Florida Statutes. Status: Notice of appeal filed September 24, 2024.

Lightsey Cattle Company v. Florida Fish and Wildlife Conservation Commission, Case No.: 6D2023-0587. Appeal from final order renewing license for private hunting preserve and refusing to continue to grant exemption from fencing requirement. Status: On July 12, 2024, the court issued an opinion concluding that it lacks jurisdiction because the Commission is not an "agency" subject to the APA, because the Commission was acting pursuant to powers derived from Article IV, Section 9 of the Florida Constitution. Accordingly, the court directed that the case be transferred to the Ninth Circuit Court in and for Osceola County.

11th CIRCUIT COURT OF APPEAL

Shawn Buending, et al v. Town of Redington Beach, Case No. 24-12896. Appeal from final judgment finding that the Town had adequately shown a history of "customary use" by the public of parts of the beach that are privately owned. Status: Notice of appeal filed September 10, 2024.

Lionel Alford, et al v. Walton County, Case No. 21-13999. Appeal from a federal judge's ruling in a dispute about whether waterfront property owners should receive compensation after Walton County temporarily closed beaches early in the COVID-19 pandemic. Status: Oral argument held November 17, 2022.

In Re: ACF Basin Water Litigation, Case No. 21-13104. Appeal from ruling that allows Atlanta-area cities to take more water from the Chattahoochee River upstream from Alabama and Florida's Apalachicola Bay. The order dismisses claims by the National Wildlife Federation, the Florida Wildlife Federation and the Apalachicola Riverkeeper that the Army Corps of Engineers is holding back too much water in federal reservoirs upstream from Florida's Apalachicola River. Status: Notice of appeal filed October 6, 2021.

D. C. CIRCUIT COURT OF APPEAL

Center for Biological Diversity et al v. Michael Regan, et al, Case No. 24-5101. Appeal from district court's order vacating EPA approval of Florida's assumption of the Section 404 wetlands permitting program. Status: Notice of appeal filed April 23, 2024; motion for stay pending appeal denied on May 20, 2024.

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ON APPEAL
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UNITED STATES SUPREME COURT

In Re Kelsey Juliana, Case No. 24-0298. Petition for writ of mandamus to void the 9th Circuit's mandamus writ directing the district court to end the so-called "Kids Climate Case," a novel lawsuit by 21 young people claiming the U.S. Government's energy policies violate their rights to be protected from climate change. Status: Petition denied on November 12, 2024.

Diamond Alternative Energy LLC v. Environmental Protection Agency, Case No. 24-0007. The petitioners are challenging the EPA's grant of a waiver of preemption to California's low-emission vehicle regulations. The D.C. Circuit rejected the challenge without reaching the merits, concluding that fuel producers' injuries were not redressable because they had not established that vacating EPA's waiver would have any effect on automakers. Issue: Whether a party may establish the redressability component of Article III standing by relying on the coercive and predictable effects of regulation on third parties. Status: Review granted on December 13, 2024.

EPA v. Calumet Shreveport Refining, LLC, Case No 23-1229: Issue: Whether the venue for challenges by small oil refineries seeking exemptions from the requirements of the Clean Air Act's Renewable Fuel Standard Program lies exclusively in the U.S. Court of Appeals for the D.C. Circuit because the agencies' denial actions are "nationally applicable" or, alternatively, are "based on a determination of nationwide scope or effect." Status: Petition for writ of certiorari granted on October 21, 2024.

G-Max Management, Inc. v. New York, et al., Case No. 23-1148 and *Building and Realty Institute of Westchester and Putnam Counties, Inc. v. New York,* Case No. 23-1220. Both petitioners seek to challenge the constitutionality of New York's rent stabilization laws, primarily on Fifth Amendment Takings Clause grounds. Status: Petition denied on November 12, 2024.

PacifiCorp v. EPA, Case No. 23-1068. Issue: whether EPA's disapproval of a state implementation plan may only be challenged in the U.S. Court of Appeals for the D.C. Circuit if the agency packages that disapproval with disapprovals of other states' plans and purports to use a consistent method in matter of the state-specific determinations in those plans. Status: Petition for writ of certiorari granted on October 21, 2024.

Oklahoma v. EPA, Case No. 23-1067. Issue: Whether a final action by EPA taken pursuant to its Clean Air Act authority with respect to a single state or region may be challenged only in the U.S. Court of Appeals for the D.C. Circuit because the agency published the action in the same Federal Register notice as actions affecting other states or regions and claimed to use a consistent analysis for all states. Status: Petition for writ of certiorari granted on October 21, 2024.

Seven County Infrastructure v. Eagle County, Colo., Case No. 23-0975. Issue: Whether the National Environmental Policy Act requires an agency to study environmental impacts beyond proximate effects of the action over which the agency has regulatory authority. Status: Review granted June 24, 2024.

Sunoco LP v. City and County of Honolulu, Hawaii, Case No. 23-0947. Petition for writ of certiorari to review decision by the Hawaii Supreme Court. Issue: Whether federal law precludes state-law claims seeking redress for injuries allegedly caused by the effects of interstate and international greenhouse gas emissions on the global climate. Status: Petition denied January 13, 2025.

City and County of San Francisco v. EPA, Case No. 23-0753. Issue: Whether the Clean Water Act allows the Environmental Protection Agency (or an authorized state) to impose generic prohibitions in National Pollutant Discharge Elimination System permits that subject permit-holders to enforcement for violating water quality standards without identifying specific limits to which their discharges must conform. Status: Review granted on May 28, 2024.

Ohio v. EPA, Case No. 23A349, consolidated with: *Kinder Morgan, Inc v. EPA,* Case No. 23A350, *American Forest & Paper Ass'n v. EPA*, Case No. 23A351 and *U.S. Steel Corp. v. EPA,* Case No. 23A384. Issue: Whether the court should stay the EPA's federal "Good Neighbor Plan" of the 2015 "Ozone National Ambient Air Quality Standards." Status: On June 27, 2024, the Court issued an opinion in which it held: The applications for a stay are granted; enforcement of EPA's rule against the applicants shall be stayed pending the disposition of the applicants' petition for review in the D. C. Circuit and any petition for writ of certiorari, timely sought.

State of Alabama, et al. v State of California, et al., Case No. 22O158. A group of 19 states, including Florida, petitioned the U.S. Supreme Court to block lawsuits from five other states seeking massive climate damages

Continued on page 13

In the Circuit Courts

By Amelia M. Ulmer*

Note: Status of cases as of February 05, 2025. Readers are encouraged to advise the author of pending or newly filed trial court cases which may be of interest to the environmental and land use law practitioner for inclusion in future installations of In the Trial Courts. Please send cases of interest to aulmer@orlandolaw.net.

***Bear Warriors United, Inc., v. Hamilton,* Case No. 6:22-cv-2048-CEM-LHP, 2024 WL 5279321 (M.D. Fla. Sept. 18, 2024).**

This suit, brought by the environmental group Bear Warriors United against the Florida Department of Environmental Protection, will be of interest to environmental attorneys who deal with Endangered Species Act litigation. Bear Warriors alleges that the Department's wastewater discharge regulatory scheme and enforcement thereof constitute an unlawful taking of West Indian manatees under the Endangered Species Act. The group alleges, more specifically, that improperly regulated sewage discharge into the North Indian River Lagoon has led to increased nitrogen levels in the lagoon, causing eutrophication and hyper-eutrophication, which in turn depletes seagrass and other manatee food sources, thus causing malnourishment of manatees which may lead to starvation and even death. Bear Warriors seek injunctive relief, a declaration that the Department has violated the Endangered Species Act, and a prohibition on the Department's authorization of nitrogen discharge from septic tanks into the Indian River Lagoon.

The Middle District's September 2024 Order in this case resulted from the Department's motion to dismiss the case for lack of subject matter jurisdiction and failure to state a claim. The court denied this motion.

Most interesting perhaps is the court's discussion on standing, finding in favor of the Plaintiffs. In analyzing subject matter jurisdiction, the court determined that Bear Warriors did have standing to bring an Endangered Species Act claim against the Department. Bear Warriors' allegation of an imminent injury in fact to its members was not disputed. The court found further that the Department's actions in regulating, permitting, and revoking on-site treatment and disposal systems and other wastewater treatment facilities were fairly traceable to the harms alleged. Inadequate regulation and a failure to regulate wastewater in a way that protects the environment, the court reasoned, is causally connected to the alleged harm to manatees and thus the harm to the Plaintiffs. Finally, the court determined that the injuries alleged were redressable by the court, as a finding that the Department violated the Endangered Species Act would likely result in fewer protected manatees being harmed by pollutive sewage.

Photo Credit: Volusia County Government

The court went on to determine: that the Ex parte Young doctrine applies in this case and the case is not barred by Eleventh Amendment sovereign immunity; that the Tenth Amendment's anticommandeering doctrine does not preclude the continuation of this lawsuit; and that because Bear Warriors alleges that the Department's actions are directly killing manatees in violation of the Endangered Species Act, the Plaintiffs have not failed to state a claim. The court further declined to abstain under Burford, thus finally denying the Department's motion to dismiss, allowing the case to proceed.

***Bear Warriors United, Inc. v. Hamilton,* Case No. 6:22-cv-2048-CEM-LHP, 2024 WL 5279337 (M.D. Fla. Dec. 18, 2024).**

Following the Middle District's September 2024, Order on Defendant the Department of Environmental Protection's Motion to Dismiss, the court considered each party's Motion for Summary Judgment, denying Defendant's Motion and granting in part and denying in part Plaintiff's Motion. The court's ruling is memorialized in a December 2024, Order.

The Endangered Species Act makes it unlawful for any person to take any listed species. A taking may include an act which results in significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including feeding. This is the crux of Bear Warriors' argument – that the Department's failure to properly staunch the flow of nitrogen into the Indian River Lagoon caused eutrophication which lead to habitat degradation and the death of seagrasses, thus impairing

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IN THE CIRCUIT COURTS

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manatee feeding patterns and leading to injury and death.

The court determined that Plaintiffs had established that (A) the Department has regulatory authority over wastewater discharge and (B) deprived of their primary food source, manatees have starved to death in unusually high numbers in recent years. The causal links between point A and point B remain in dispute, however. Plaintiffs argue that the Department's actions at point A lead directly to manatee deaths at point B because (1) discharges made pursuant to Department regulations have resulted in an excess of nutrients being discharged into the Indian River Lagoon and (2) those nutrients have led to the death of seagrasses and an increase in harmful algae blooms. Defendants, naturally, disagree with this chain of causation. A dispute remains as to whether the Department's regulations have directly lead to an increase in nitrogen levels in the Indian River Lagoon and whether the increase in nitrogen levels is to blame for seagrass die off and the resulting manatee deaths.

Due to the dispute over facts material to the Plaintiff's Endangered Species Act claim, and because it is not clear at this point in the litigation that the Department's actions constitute an ongoing violation of federal law, the Defendant's motion for summary judgment was denied and the Plaintiffs' motion for summary judgment was denied in part. This case will continue and regardless of its ultimate result will present an interesting addition to Endangered Species Act jurisprudence concerning the relationship between environmental protection and government regulation.

*Amelia M. Ulmer is an attorney at the firm Garganese, Weiss, D'Agresta & Salzman, P.A., in Orlando, Florida, where she practices land use and local government law. Ms. Ulmer is a graduate of the Florida State University College of Law's Environmental, Energy, and Land Use Law program.

ON APPEAL

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from major fossil fuel companies. Status: Motion for leave to file bill of complaint filed May 22, 2024.

Montana Supreme Court

State of Montana v. Rikki Held, Case No. DA23-0575. Appeal from various orders, including order determining that youth plaintiffs have a fundamental constitutional right under the Montana state constitution to a clean and healthful environment and that the Montana Environmental Policy Act, which forbids the state and its agents from considering the impacts of greenhouse gas emissions or climate change in their environmental reviews, violates their right to a clean and healthful environment and is unconstitutional on its face. Status: Affirmed on December 18, 2024.

Florida State University College of Law Winter 2025 Update

By Erin Ryan, Associate Dean for Environmental Programs

Happy New Year to all, from FSU! As we welcome 2025, we want to formally welcome our new Program Associate, Madison Maurer, who has fast become an integral member of our team. Madison graduated from Sarah Lawrence in 2020 with a degree in literature and creative writing, and she recently moved back to the US from Berlin, where she worked in Communications. She has already brightened our halls with enthusiasm and dedication to our mission, students, and events. Outside of work, Madison enjoys writing, growing flowers and vegetables on her South Georgia farm, and witnessing the constant surprises that nature provides. Madison, we are lucky to have you with us!

We also want to invite all of you to join us for another stirring programmatic series this semester, headlined by our Spring 2025 Distinguished Lecturer, Professor John Leshy of the UC College of Law in San Francisco, who presents America's Public Lands: What Will Donald Trump's Legacy Be? on Feb. 26, 2025. We are also honored to be joined by Professors William Eskridge of Yale Law School, Kristin Hickman of the University of Minnesota Law School, and FSU's own Mark Seidenfeld and Brian Slocum for a Zoom event on Jan. 29, exploring the significance of the Supreme Court's decision last Term in Loper Bright Enterprises v. Raimondo. All events are open to the public and registration information is offered below.

Finally, we invite students to mark your calendars for our Spring '25 Environmental Course Tasting Menu on March 19, to learn about our Fall 2025 offerings over lunch, and to join us on a walking field trip to the Elinor Klapp-Phipps Park on April 2, to explore the magical forests, wetlands, and wildlife of the Red Hills region. Look for more on how to register in the coming months! Sending warm wishes for all good things in the year to come. –Erin Ryan

Faculty Scholarship and News

Shi-Ling Hsu,

D'Alemberte Professor

Carbon Pricing: History and Context, Ch. __ in Institutions for Effective Climate Action (Metcalf, C. and S. Stern, eds., forthcoming 2025).

Climate Resilience: A Typology, __ UMKC. L. Rev. __ (*forthcoming symposium*, 2025).

Recruiting Capitalism for Environmental Protection, in Can Democracy Be Reconciled? (Milkis, S. and S. Miller, eds, forthcoming 2024).

Supplying Life Necessities in a Climate-changed Future, in Adapting to High-Level Warming: Equity, Governance, and Law (Kuh, K. and Roesler, S.N., eds., 2024).

Western Water Rights in a 4°C Future, in Adapting to High-Level Warming: Equity, Governance, and Law (Kuh, K. and Roesler, S.N., eds., forthcoming 2023) (with Kevin Lynch and Karrigan Bork).

Non-market Values in the Draft Update of Circular A-4, Yale J. Reg. Notice & Comment (2023).

Erin Ryan,

Elizabeth C. & Clyde W. Atkinson Professor

Environmental Law and the New Separation of Powers after West Virginia, Sackett, Loper-Bright, and Corner Post, 109 Minn. L. Rev. ___ (2025).

Saving Mono Lake: The Prologue, Epicenter, and Implementation of the Landmark Audubon Society Public Trust Litigation, 58 U.C. Davis. L. Rev. ___ (2025).

Public Trust Principles and Environmental Rights: The Hidden Duality of Climate Rights Advocacy and the Atmospheric Trust, 49 Harv. Envt'l. L. Rev. ___ (2024).

Sackett vs. EPA and the Regulatory, Property, and Human Rights Based Strategies for Protecting American Waterways, 74 Case Western Res. L. Rev. 281 (2023).

Privatization, Public Commons, and the Takingsification of Environmental Law, 171 U. Penn. L. Rev. 617 (2023).

How the Successes and Failures of the Clean Water Act Fueled the Rise of the Public Trust Doctrine and Rights of Nature Movement, 73 Case Western Res. L. Rev. 475 (2022).

Mark Seidenfeld, Patricia A. Dore Professor of Administrative Law

Conceptions of Sovereignty and American Federalism, ___ FSU L. Rev ___ (forthcoming 2025).

Rethinking the Good Cause Exception to Notice and Comment Rulemaking in Light of Interim Final Rules, 75 Admin. L. Rev. 787 (2023).

The Limits of Deliberation about the Public's Values: Reviewing Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy, 119 Mich. L. Rev. 1111 (2021) (Book Review).

Textualism's Theoretical Bankruptcy and Its Implications for Statutory Interpretation, 100 B.U.L. Rev. 1817 (2020).

The Bounds of Congress's Spending Power, 61 Ariz. L. Rev. 1 (2019).

continued...

The Problem with Agency Guidance – or Not, 36 Yale J. Reg. Notice & Comment (May 3, 2019).

Brian Slocum, Stearns Weaver Miller Professor

Corpus-Linguistic Approaches to Lexical Statutory Meaning: Extensionlist VS. Intensionalist Approaches, 4 Applied Corpus Linguistics ___ (2023) (with Kevin Tobia and Stefan Th. Gries).

Major Questions, Common Sense?, 97 S. Cal. L. Rev 5. (2023) (with Kevin Tobia & Daniel Walters).

The Linguistic and Substantive Canons, 137 Harvard L. Rev. For. 70 (2023) (with Kevin Tobia).

Textualism's Defining Moment, 123 Colum. L. Rev. 1611 (2023) (with William N. Eskridge Jr. & Kevin Tobia).

Ordinary Meaning and Ordinary People, 171 U. Penn. L. Rev. 365 (2023) (with Kevin Tobia & Victoria Nourse).

Unmasking Textualism: Linguistic Misunderstanding in the Transit Mask Order Case and Beyond, 122 Colum. L. Rev. For. 192 (2022) (with Stefan Th. Gries, Michael Kranzlein, Nathan Schneider & Kevin Tobia).

Tisha Holmes, Courtesy Professor of Law, Assistant Professor, Department of Urban & Regional Planning

Grants:

Uejio, C., Holmes, TJ., and Powell, E. 2023-2025. Center for Disease Control and Prevention. Building Resilience Against Climate Effects Program. Award: $1 million.

Can Florida's Coast Survive Its Reliance on Development? Fiscal Vulnerability and Funding Woes under Sea Level Rise. J. of Am. Planning Assoc. (in press) (with Shi, L., Butler, W., et al.).

Evaluating Public Health Strategies for Climate Adaptation: Challenges and Opportunities from the Climate Ready States and Cities Initiative. PLOS Clim 2(3): e0000102 (2023) (with Joseph HA, Mallen E, McLaughlin M, Grossman E, Locklear A, et al.).

Spatial Disparities in Air Conditioning Ownership in Florida, United States, J. of Maps, 19: (2023) (with Yoonjung Ahn, Christopher K. Uejio, Sandy Wong, and Emily Powell).

What's Slowing Progress on Climate Change Adaptation?: Evaluating Barriers to Planning for Sea Level Rise in Florida, 28 Mitigation & Adaptation Strategies for Global Change, 42 (2023) (with Milordis, A., and Butler, W.).

Rural Communities Challenges and ResilientSEE: Case Studies from Disasters in Florida, Puerto Rico, and North Carolina, 7 Soc. Sci. & Human. Open (2023) (with Ivis Garcia Zambrana and Shaleen Miller).

UPCOMING EVENTS

Spring '25 Lunch & Learn Environmental Course Tasting Menu

On March 19th, the FSU Environmental, Energy, and Land Use Law Faculty will be hosting students for lunch and to learn about the exciting classes we are offering in Fall 2025! We'll introduce the courses, answer your questions, and share some local pizza pies. More info to come!

Trip to Elinor Klap-Phipps Park

Stay tuned for news on how to join the biannual FSU law field trip on Wednesday, April 2nd, 2025, to the Elinor Klapp-Phipps park, where we will explore the magical forests, wetlands, and wildlife of the Red Hills region.

RECENT EVENTS

Fall '24 Distinguished Environmental Lecture

On October 30th, 2024, the Center hosted Gerald Torres, Professor of Environmental Justice, Yale School of the Environment, and Professor of Law, Yale Law School, on Environmental Justice: Environmental Joy.

Torres explored how environmental and climate justice initiatives not only aim to alleviate suffering but also to

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improve overall well-being. He discussed how environmental law can play a pivotal role by creating and enforcing legal structures that mitigate harm and promote the restoration of both ecosystems and communities. Torres argued that the broader aim of Environmental Justice is to foster human and environmental well-being by supporting efforts that make the concept of "Environmental Joy" a practical reality.

FSU Law Alumni Environmental Career Panel

On November 13th, 2024 the Center for Environmental, Energy, and Land Use Law held a career panel featuring FSU Alumni practicing Environmental, Energy, and Land Use Law in government, industry, NGO, and private practice jobs.

James Parker-Flynn, our Director of the Center for Environmental, Energy, and Land Use Law moderated our panelists Janet Bowman, Senior Policy Advisor at the Nature Conservancy, Matt Knoll, Deputy Director of the Division of Water Resource Management at the Florida Department of Environmental Protection, and Joseph Ullo, Shareholder at Carlton Fields.

Student Organization Spotlight

Samantha Joles, President of SALDF, is a 2L working for Pets Ad Litem, a nonprofit animal welfare and activism organization founded by FSU Animal Law Professor, Ralph DeMeo. Samantha is also the owner and director of a nonprofit 501(c)(3) cat rescue, Feline Fine Animal Rescue. She hopes to continue her work in animal welfare throughout her law school career.

Karelis Albornoz, Vice President of SALDF, is a 2L working for the Medical Prosecution Unit at the Department of Health. She spent her summer with her 3 dogs, interning at DOAH, and doing a study abroad in Italy. She hopes to continue with her passion of trial advocacy and to grow her fur family in the future.

Julia Willis, Secretary of SALDF, is a 2L who spent her summer working at the Public Defender for the 3rd Circuit, where she sharpened her legal research skills and solidified her interest in a career in litigation. Next summer, she plans to explore civil litigation as a Summer Associate at RumbergerKirk in Orlando, Florida.

Cate Coates, Treasurer of SALDF, is a 2L who spent the summer working at Gray Robinson, P.A. in Tallahassee, where she conducted legal research and drafted motions on a variety of civil litigation matters such as administrative and regulatory litigation. She is an avid animal lover and is excited for the upcoming legislative session and the opportunities it brings to advocate on behalf of animals.

Alumni Spotlight

Jacob Cremer, FSU Law JD, MSP 2010 was selected by **The Best Lawyers in America®** as Lawyer of the Year, Litigation - Land Use and Zoning (Tampa), 2025!

Jacob is a shareholder at Stearns Weaver Miller in Tampa, where he has been lead counsel on a variety of complex permitting and economic development matters. He excels in complicated matters requiring both environmental and land use permitting, including brownfield designations, urban redevelopment, and master-planned communities. He has extensive experience protecting environmental and land use permits against challenges, defending against government compliance and enforcement issues, and litigating property rights issues, including before the United States Supreme Court.

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Watch Our Previous 2024 Events

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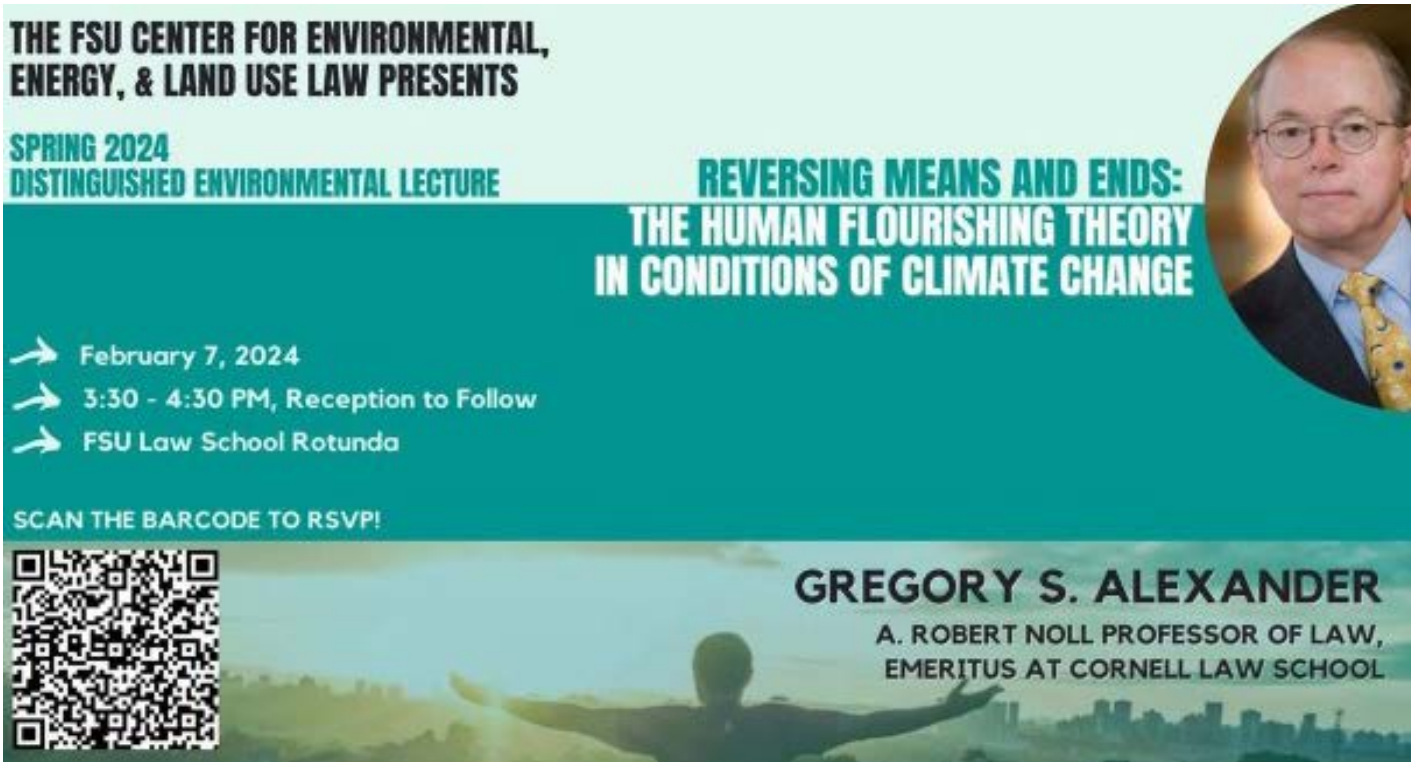

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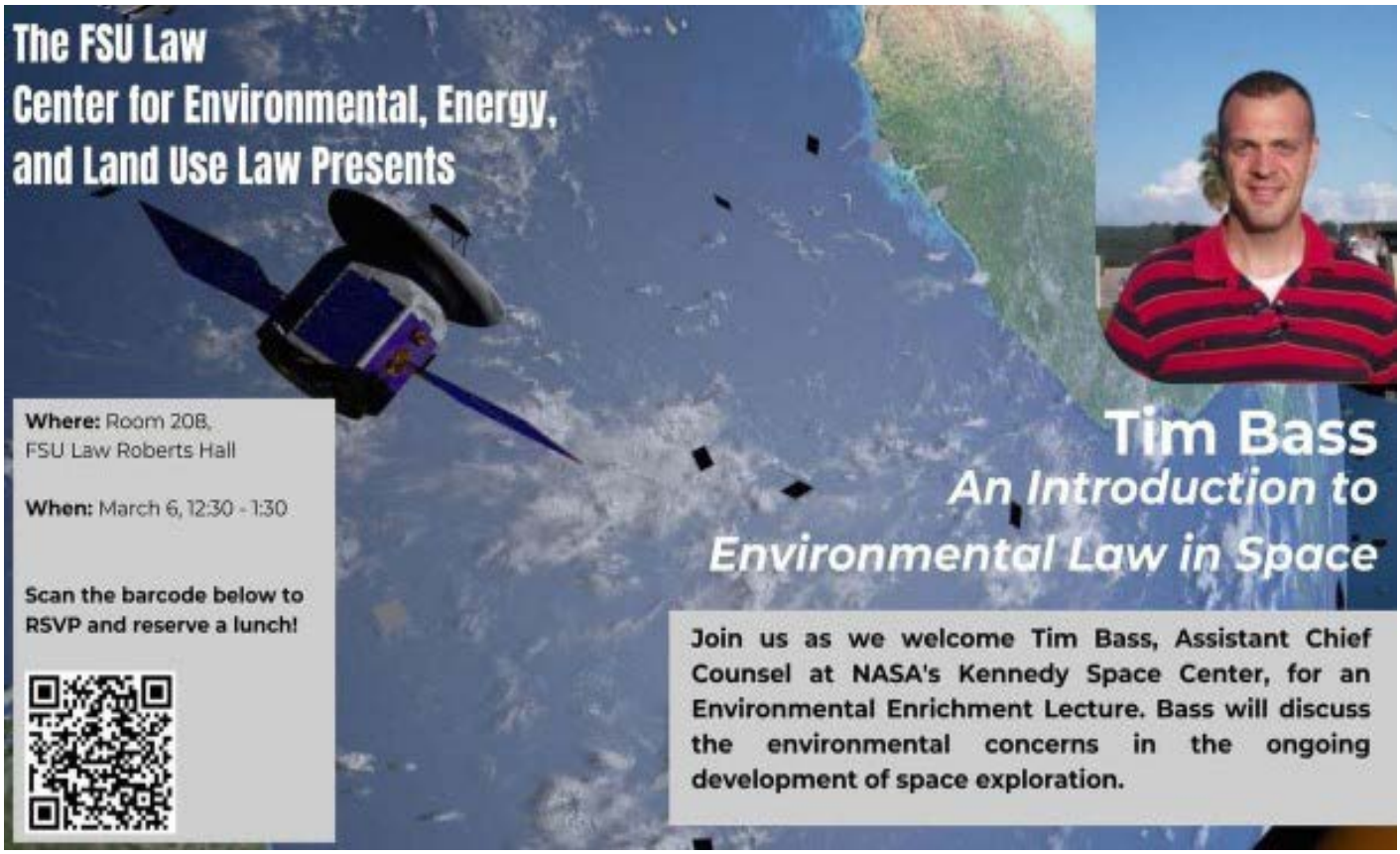

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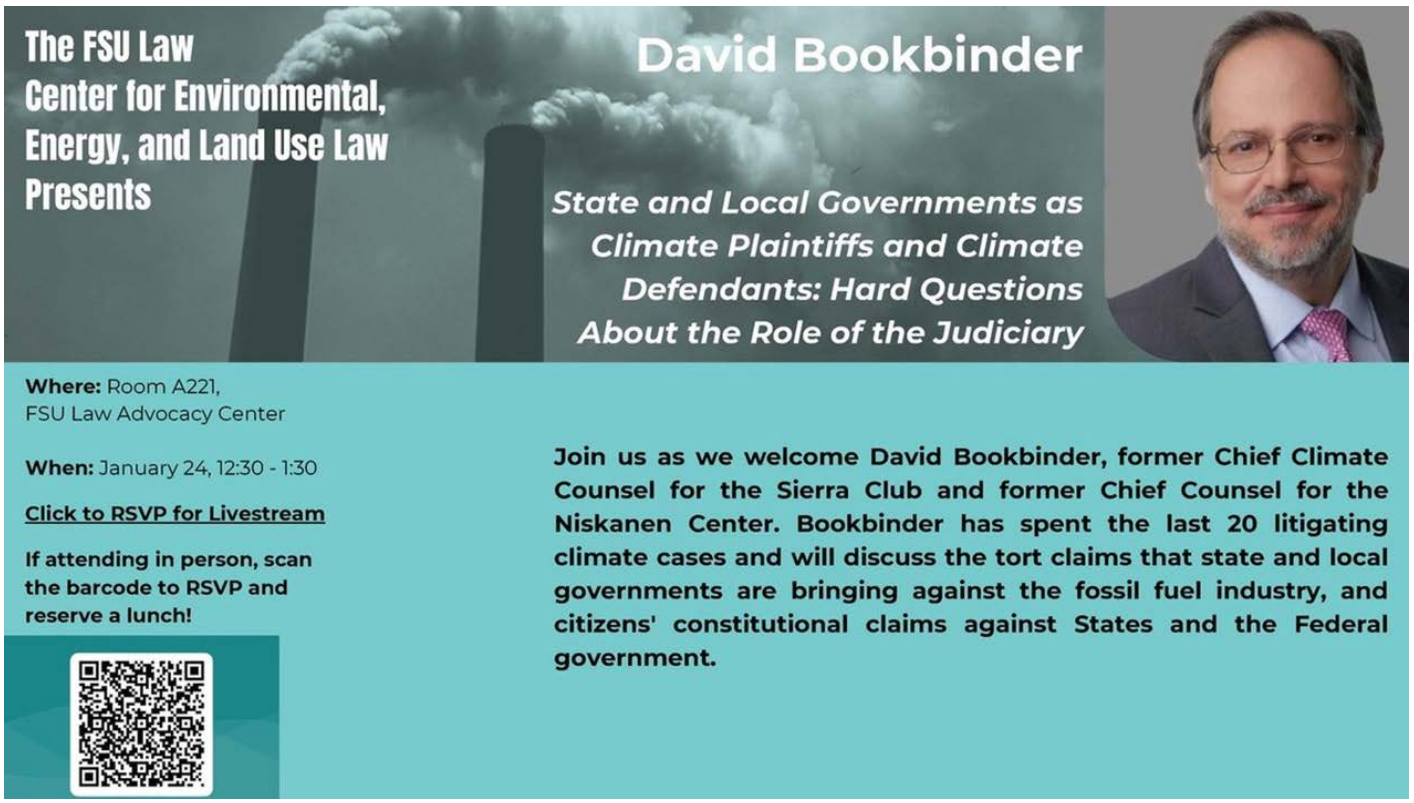

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TRUMP'S EVISCERATION OF ENVIRONMENTAL REGULATION
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amenities and values may be given appropriate consideration in the decision-making process, 42 U.S.C. 4332(2)(B), and to otherwise provide assistance to CEQ, 42 U.S.C. 4332(2)(B). CEQ may also designate a lead agency for environmental review of a proposed action when agencies are unable to reach agreement. 42 U.S.C. 4336a(a)(4)-(5).

Status: The interim rule is effective April 11, 2025. Comments are due by March 27, 2025.

Executive Order 14162, *Putting America First in International Environmental Agreements*, 90 Fed. Reg. 8455, Signed Jan. 20, 2025

E.O. 14162 directed the U.S. Ambassador to the United Nation to immediately submit formal written notification of the U.S.'s withdrawal from the Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC), as well as from any similar climate-related agreements made under the UNFCCC. The order also terminated any financial commitments relating to the UNFCCC, rescinding pledges to provide financial and material support to mitigation efforts in a set of primarily developing nations. In addition, the order revoked the U.S. International Climate Finance Plan, a Biden Administration plan intended to double the United States' annual public contribution to mitigation and adaptation efforts in developing countries. Trump also withdrew from the Paris Agreement during his first term

The order states it is the policy of the Trump Administration "to put the interests of the United States and the American people first in the development and negotiation of any international agreements with the potential to damage or stifle the American economy." The order directs all cabinet officials involved in planning or executing international energy agreements to "prioritize economic efficiency, the promotion of American prosperity, consumer choice, and fiscal restraint" in future agreements.

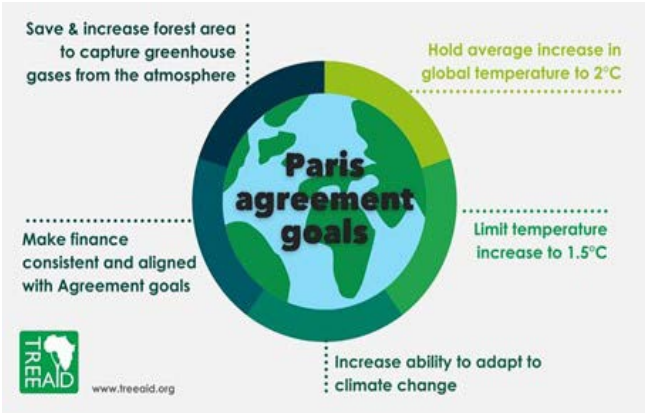
By way of background, the Paris Agreement is a legally binding

international treaty to address climate change that was adopted by 196 parties at the UN Climate Change Conference (COP21) in Paris, France, on December 12, 2015. Earth is experiencing unprecedented rapid warming from human activities that are generating greenhouse gas emissions, including carbon dioxide and methane, that act like a blanket wrapped around the planet, trapping the sun's heat and raising temperatures. The main culprit is the burning of fossil fuels. Clearing land and forests also release carbon dioxide. 2024 was the hottest year ever recorded on Earth, according to the National Oceanic and Atmospheric Association (NOAA), NASA and Copernicus (the EU's meteorological association.) that found the planet has warmed roughly 1.5°C above temperatures in the 1800s, before humans began burning vast reserves of fossil fuels. *See* https://www.npr.org/2025/01/10/nx-s1-5232139/2024-hottest-year-human-history-global-warming

The impacts of human-caused climate change are already being felt across the globe. These impacts include sea level rise due to melting ice and thermal expansion; extreme weather and climate events such as heatwaves, droughts, heavy precipitation/flooding and hurricanes; wildfires; loss of terrestrial and aquatic ecosystems and biodiversity; destruction of communities, infrastructure and homes; occurrences of disease; food insecurity; water scarcity; and associated human mortality, mental health decline, loss of livelihoods and culture, and population displacement. *See* IPCC, *2023: Summary for Policymakers. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001.

The overarching goal of the Paris Agreement is to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels" and pursue efforts "to limit the temperature increase to 1.5°C above pre-industrial levels." The international scientific consensus is that limiting warming to 1.5°C is a crucial benchmark for avoiding the most severe climate impacts and maintaining a livable climate. *See* IPCC, 2018: Summary for Policymakers. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]; https://unfccc.int/process-and-meetings/the-paris-agreement.

The agreement works on a five-year cycle of increasingly ambitious



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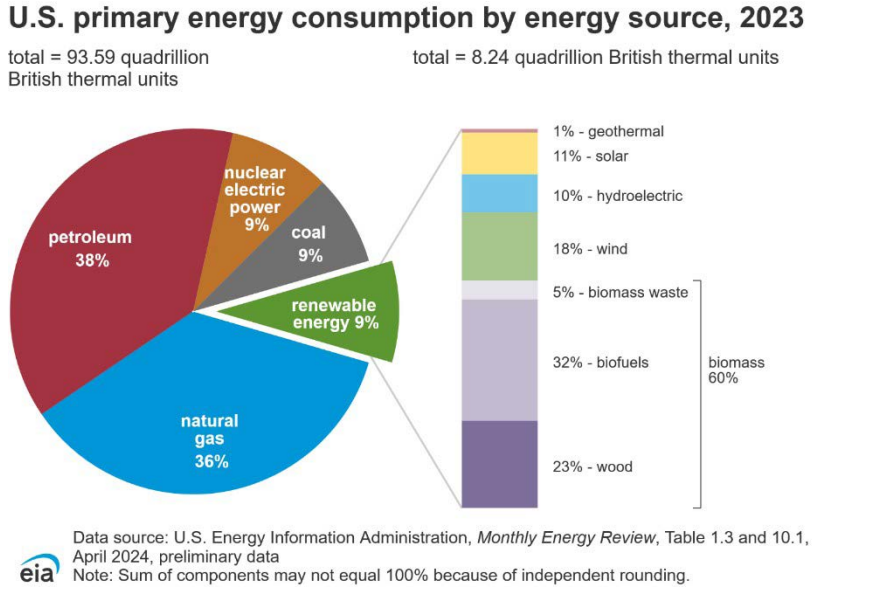
climate action carried out by countries. Since 2020, countries have been submitting their national climate action plans, known as nationally determined contributions (NDCs). In their NDCs, countries communicate the actions that they will take to reduce their greenhouse gas emission and to build resilience to adapt to the impacts of climate change. *See* https://unfccc.int/process-and-meetings/the-paris-agreement.

In 2021, President Biden submitted an NDC with a target of reducing U.S. greenhouse gas emission 50-52 percent from 2005 levels in 2030. In 2024, President Biden announced that the U.S. continued to accelerate the transition to a clean energy economy and was setting a new climate target of a 61-66 percent reduction in 2035. *See* https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/12/19/fact-sheet-president-biden-sets-2035-climate-target-aimed-at-creating-good-paying-union-jobs-reducing-costs-for-all-americans-and-securing-u-s-leadership-in-the-clean-energy-economy-of-the-future/

Executive Order 14156, *Declaring a National Energy Emergency*, 90 Fed. Reg. 8433, Signed Jan. 20, 2025

Section 1 of E.O. 14156 declares in part that "[t]he United States' insufficient energy production, transportation, refining, and generation constitutes an unusual and extraordinary threat to our Nation's economy, national security, and foreign policy." Notably, the order at Section 8 defines "energy" or "energy resources" to mean "crude oil, natural gas, lease condensates, natural gas liquids, refined petroleum products, uranium, coal, biofuels, geothermal heat, the kinetic movement of flowing water, and critical minerals." It does not include solar or wind.

Section 2 requires agency and department heads to use all available emergency powers to expedite domestic energy production. Section 3 requires agencies to expedite the completion of energy infrastructure, and specifically to facilitate the supply of energy on the West Coast, in the Northeast, and in Alaska. The order calls out "dangerous state and local policies" in the nation's Northeast and West Coasts that "devastate the prosperity" of local residents and the nation at large. Section 4 calls for the use of emergency permitting provisions under the Clean Water Act, 33 U.S.C. 1344, the Rivers and Harbors Act of March 3, 1899, 33 U.S.C. 403, and the Marine Protection Research and Sanctuaries Act of 1972, 33 U.S.C. 1413. Section 5 calls for the use of regulation on consultations in emergencies, 50 CFR 402.05, promulgated by the Secretary of the Interior and the Secretary of Commerce pursuant to the Endangered Species Act ("ESA"), 16 U.S.C. 1531 *et seq.*. Section 6 requires the Secretary of the Interior to convene the Endangered Species Act Committee not less than quarterly to review applications submitted by an agency, the Governor of a State, or any applicant for a permit or license who submits for exemption from obligations imposed by Section 7 of the ESA. The committee is also directed "to identify obstacles to domestic energy infrastructure specifically deriving from implementation of the ESA or the Marine Mammal Protection Act, to include regulatory reform efforts, species listings, and other related matters with the aim of developing procedural, regulatory, and interagency improvements." Finally, Section 7 requires the Secretary of Defense to collaborate with the Secretaries of Interior and Energy to conduct an assessment of the Department of Defense's ability to acquire and transport the energy, electricity, or fuels needed to protect the homeland and conduct operation abroad.



***Temporary Withdrawal of All Areas on the Outer Continental Shelf From Offshore Wind Leasing and Review of the Federal Government's Leasing and Permitting Practices for Wind Projects*, 90 Fed. Reg. 8363, Memorandum Signed Jan. 20, 2025**

In Section 1, the memorandum orders the withdraw from disposition for wind energy leasing all areas within the Offshore Continental Shelf (OCS) as defined in section 2 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1331. The basis of presidential authority is section 12(a) of the Act, 43 U.S.C. 1341(a). "This withdrawal temporarily prevents consideration of any area in the OCS for any new or renewed wind energy leasing for the purposes of generation of electricity or any other such use derived from the use of wind. This withdrawal does not apply to leasing related to any other purposes such as, but not limited to, oil, gas, minerals, and environmental conservation. Nothing in this withdrawal affects rights under existing leases in the withdrawn areas." The purported rationale of the action is "the need to foster an energy economy capable of meeting the country's growing demand for reliable energy, the importance of marine life, impacts on ocean

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currents and wind patterns, effects on energy costs for Americans—especially those who can least afford it—and to ensure that the United States is able to maintain a robust fishing industry for future generations and provide low cost energy to its citizens."

In Section 2, the memorandum in part prohibits the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Energy, the Administrator of the Environmental Protection Agency, and the heads of all other relevant agencies, from issuing "new or renewed approvals, rights of way, permits, leases, or loans for onshore or offshore wind projects pending the completion of a comprehensive assessment and review of Federal wind leasing and permitting practices." The purported rationale for the action are "alleged legal deficiencies underlying the Federal Government's leasing and permitting of onshore and offshore wind projects, the consequences of which may lead to grave harm—including negative impacts on navigational safety interests, transportation interests, national security interests, commercial interests, and marine mammals—and in light of potential inadequacies in various environmental reviews required by the National Environmental Policy Act to lease or permit wind projects[.]"

The 132-MW South Fork Wind Farm, which began operating in December 2023 and was fully commissioned in March 2024, became the first operational commercial-scale wind farm in the United States. The 12-turbine project is estimated to provide clean energy to over 70,000 homes in the New York area. South Fork is the third operational offshore wind farm in America, preceded by the 12-MW Coastal Virginia Offshore pilot project in 2020, and the 30-MW Block Island Wind Farm in 2016. As of August 1, 2024, there were approximately 60 offshore wind projects in various stages of development across the United States. *See* U.S. Department of Energy, https://www.energy.gov/eere/wind/articles/top-10-things-you-didnt-know-about-offshore-wind-energy

Executive Order 14153, *Unleashing Alaska's Extraordinary Resource Potential*, 90 Fed. Reg. 8347, Signed Jan. 20, 2025

E.O. 14153 makes it the policy of the United States to: "(a) fully avail itself of Alaska's vast lands and resources for the benefit of the Nation and the American citizens who call Alaska home; (b) efficiently and effectively maximize the development and production of the natural resources located on both Federal and State lands within Alaska; (c) expedite the permitting and leasing of energy and natural resource projects in Alaska; and (d) prioritize the development of Alaska's liquified natural gas (LNG) potential, including the sale and transportation of Alaskan LNG to other regions of the United States and allied nations within the Pacific region." The rationale of this policy is to "deliver price relief for Americans, create high-quality jobs for our citizens, ameliorate our trade imbalances, augment the Nation's exercise of global energy dominance, and guard against foreign powers weaponizing energy supplies in theaters of geopolitical conflict."

The order directs numerous specific agency actions. In general, it directs department and agency heads to rescind or amend prior restrictions that constrain resource development on Alaska's federal and state lands, including orders restricting drilling in the Arctic National Wildlife Refuge (ANWR). It also reinstates a number of prior orders and decision from Trump's first term, including those related to oil and gas leasing, conservation programs, and resource management programs in Alaska. Additionally, the order requires immediate review of all Department of the Interior guidance designating Alaska Native lands into trust and all public land orders withdrawing lands for selection by Alaska Native corporations to ensure consistency with the Alaska Statehood Act of 1958 and other identified laws. Finally, the order denies a pending request to the Fish & Wildlife Service to establish an indigenous sacred site in the coastal plain of the ANWR.

Arctic National Wildlife Refuge. Photo credit: U.S. Fish & Wildlife Service

Executive Order 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*, 90 Fed. Reg. 8339, Signed Jan. 20, 2025

Section 1 of the E.O. 14151 declared the "diversity, equity, and inclusion" (DEI) programs under the Biden Administration to be "illegal and immoral discrimination programs."

Section 2 of the order rescinds the requirement (established in Biden's E.O. 13985 and follow-on orders) for federal agencies to submit "equity action plans" establishing DEI programs. The Office of Management and Budget (OMB) is further directed to coordinate the termination of all diversity, equity, inclusion, and accessibility (DEIA) mandates, policies, programs, preferences, and activities. This EO also directs the federal government to terminate (to the extent allowed by law), all DEI, DEIA, and environmental justice offices and positions, all equity action plans, equity actions, initiatives, programs, or grants.

Federal agencies and entities are to provide the director of the OMB with a list of all DEI, DEIA, or "environmental justice" positions, committees, programs, services, activities, budgets, and expenditures in existence as of November 4, 2024 that have been relabeled for evaluation under this order. In addition, the order requires each entity or agency to assess the operational impact (e.g., the number of new DEI hires) and cost of the prior Administration's DEI, DEIA,

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and environmental justice programs and policies.

By way of background, the concept of "environmental justice" that Trump deems immoral holds "everyone—regardless of race, color, national origin, or income—has the right to the same environmental protections and benefits, as well as meaningful involvement in the policies that shape their communities." It reflects the reality that "to this day, majority-white and wealthy communities are where investments into infrastructure are more likely to be made, where environmental laws are more likely to be property enforced, and where polluters are more likely to be held accountable or kept away entirely. By comparison, the most marginalized communities are routinely treated as the areas where highways can be built, waste can be stored, industrial warehouses and facilities can be concentrated, and where natural resources can be readily exploited or destroyed." *See* Renee Skelton and Vernice Miller, *The Environmental Justice Movement*, August 22, 2023, https://www.nrdc.org/stories/environmental-justice-movement

Protesters in September 1982 preventing trucks filled with soil contaminated by polychlorinated biphenyl (PCB) from reaching the proposed Warren County landfill in Afton, North Carolina—a rural, poor, and overwhelmingly Black community. Marches and nonviolent street protests against the landfill lasted for six weeks garnering national attention. More than 500 were arrested—the first arrests in U.S. history over the siting of a landfill. The people of Warren County ultimately lost their battle and the toxic soil was deposited in the landfill. Their fight, however, is regarded as the first major milestone in the national movement for environmental justice. *Id.* Photo Credit: *Ricky Stilley/Henderson Dispatch*

Environmental justice considerations at the federal level first took root under President Clinton's first term. On February 11, 1994, Clinton signed Executive Order 12898 "directing federal agencies to identify and address the disproportionately high adverse health or environmental effects of their policies or programs on low-income people and people of color. It also directed federal agencies to look for ways to prevent discrimination by race, color, or national origin in any federally funded programs dealing with health or the environment." *Id.*

President Biden also made environmental justice an important consideration during his term. On April 21, 2023, he issued Executive Order 14096, *Revitalizing Our National's Commitment to Environmental Justice* (88 FR 25251) that built on Clinton's Executive Order 12898, and Biden's prior 2021 E.O. 14008 (Tackling the Climate Crisis at Home and Abroad). The order stated that "Restoring and protecting a healthy environment—wherever people live, play, work, learn, grow, and worship—is a matter of justice and a fundamental duty that the Federal Government must uphold on behalf of all people. We must advance environmental justice for all by implementing and enforcing the Nation's environmental and civil rights laws, preventing pollution, addressing climate change and its effects, and working to clean up legacy pollution that is harming human health and the environment." It defined "Environmental justice" to mean "the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment so that people: (i) are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and (ii) have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices." It established commitments and processes to (a) incorporate environmental justice into missions of all executive branch agencies; (b) examine how agencies can address the adverse cumulative impacts of pollution, climate change, and other burdens that disproportionately impact marginalized communities; (c) strengthen crisis communications between agencies and communities in the event of toxic substances releases; (d) strengthen agency-community engagement to address legacy barriers to participation embedded in injustices; (e) create a new Environmental Justice Subcommittee within the National Science and Technology Council and address data and research gaps in environmental justice to address cumulative impacts and make findings accessible to the public; (f) create an Office of Environmental Justice within the White House Council on Environmental Quality (CEQ) and advance a whole-government approach to address environmental injustices; and (g) require federal agencies to develop and regularly update assessments of their environmental justice efforts.

The soil at the former West Calumet Housing Complex in East Chicago, Indiana, was found to contain high levels of lead and arsenic, putting residents' health at risk. It has since been demolished. Photo credit: Joshua Lott/Getty Images.

***Putting People Over Fish: Stopping Radical Environmentalism to Provide Water to Southern California*, 90 Fed. Reg. 8479, Memorandum Signed Jan. 20, 2025**

This memorandum directs "the Secretary of Commerce and Secretary of the Interior, in consultation with the heads of other departments and

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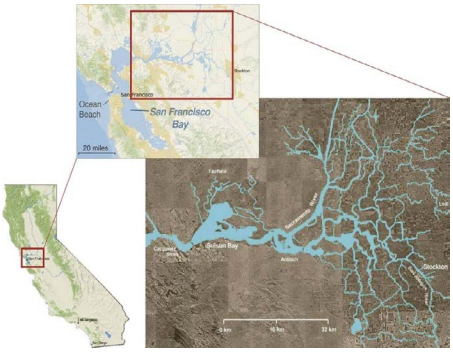
agencies of the United States as necessary, to immediately restart the work from my first Administration by the National Marine Fisheries Service, U.S. Fish and Wildlife Service, Bureau of Reclamation, and other agencies to route more water from the Sacramento-San Joaquin Delta to other parts of the state for use by the people there who desperately need a reliable water supply." It notes that during Trump's first term, the State of California filed a lawsuit to stop his "Administration from implementing improvements to California's water infrastructure" and argues his Administration's plan "would have allowed enormous amounts of water to flow from the snow melt and rainwater in rivers in Northern California to beneficial use in the Central Valley and Southern California. This catastrophic halt was allegedly in protection of the Delta smelt and other species of fish. Today, this enormous water supply flows wastefully into the Pacific Ocean." It further argues "[t]he recent deadly and historically destructive wildfires in Southern California underscore why the State of California needs a reliable water supply and sound vegetation management practices in order to provide water desperately needed there, and why this plan must immediately be reimplemented."



Sacramento-San Joaquin Delta. Credit: U.S. Geological Survey

By way of background, the Delta smelt is a small, three-inch-long fish native to California's San Francisco Estuary. Its habitat is dictated by water flows through the estuary since it cannot thrive when sea water makes up more than one third of the total. It was once abundant, supporting a diverse array of predators, including striped bass. It is now listed as endangered under state and federal laws due to habitat changes, reduced freshwater outflows and environmental pressures. See https://www.newsweek.com/trump-newsom-delta-smelt-california-la-wildfires-2019123

Delta smelt. Photo credit: U.S. Fish & Wildlife Service

Although southern California is currently experiencing drought conditions, its reservoirs remain well stocked due to consecutive years of heavy rainfall and snow. Experts have disputed Trump's claims, noting that water allocation from the Delta plays little role in firefighting efforts. *Id.* Following this issuance of Trump's memorandum, Governor Newsom stated "[t]he only thing fishy are Trump's facts. California pumps as much water now as it could under prior Trump-era policies. And there is no shortage of water in Southern California." *Id.*

Executive Order 14148, *Initial Rescissions of Harmful Executive Orders and Actions*, 90 FR 8237, Signed Jan. 28, 2025

The stated purpose of Executive Order 14148 is to rescind what it describes as the "deeply unpopular" and "radical" practices of President Biden, including those relating to the environment and climate crisis. Many of these recissions are also addressed in specific "day one" orders signed by President Trump.

The orders rescinded that relate to the environment and climate crisis include: E.O. 13985 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government); E.O. 13990 (Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis); E.O. 14007 (President's Council of Advisors on Science and Technology); E.O. 14008 (Tackling the Climate Crisis at Home and Abroad); E.O. (Rebuilding and Enhancing Programs To Resettle Refugees and Planning for the Impact of Climate Change on Migration); E.O. 14027 (Establishment of the Climate Change Support Office); E.O. 14030 (Climate-Related Financial Risk); E.O. 14035 (Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce); E.O. 14037 (Strengthening American Leadership in Clean Cars and Trucks); E.O. 14052 (Implementation of the Infrastructure Investment and Jobs Act); E.O. 14057 (Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability); E.O. 14082 (Implementation of the Energy and Infrastructure Provisions of the Inflation Reduction Act of 2022); E.O. 14091 (Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government); The Presidential Memorandum of March 13, 2023 (Withdrawal of Certain Areas off the United States Arctic Coast of the Outer Continental Shelf from Oil or Gas Leasing); E.O. 14096 (Revitalizing Our Nation's Commitment to Environmental Justice for All); The Presidential Memorandum of January 3, 2025 (Designation of Officials of the Council on Environmental Quality to Act as Chairman); The Presidential Memorandum of January 6, 2025 (Withdrawal of Certain Areas of the United States Outer Continental Shelf from Oil or Natural Gas Leasing); and The Presidential Memorandum of January 6, 2025 (Withdrawal of Certain Areas of the United States Outer Continental Shelf from Oil or Natural Gas Leasing).

Executive Order 14192, *Unleashing Prosperity Through Deregulation*, 90 Fed. Reg. 9065, Signed January 31, 2025

Executive Order 14192 requires that for every new rule promulgated, an agency must identify at least 10 existing rules, regulations or guidance to repeal.

The stated purpose of the order: "The ever-expanding morass of complicated Federal regulation imposes massive costs on the lives of millions of Americans, creates a substantial restraint on our economic growth and ability to build and innovate, and hampers our global competitiveness. Despite the magnitude of their impact, these measures are often difficult for the average person or business

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TRUMP'S EVISCERATION OF ENVIRONMENTAL REGULATION
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to understand, as they require synthesizing the collective meaning not just of formal regulations but also rules, memoranda, administrative orders, guidance documents, policy statements, and interagency agreements that are not subject to the Administrative Procedure Act, further increasing compliance costs and the risk of costs of non-compliance. It is the policy of my Administration to significantly reduce the private expenditures required to comply with Federal regulations to secure America's economic prosperity and national security and the highest possible quality of life for each citizen. To that end, it is important that for each new regulation issued, at least 10 prior regulations be identified for elimination. This practice is to ensure that the cost of planned regulations is responsibly managed and controlled through a rigorous regulatory budgeting process.

Established in 1946, the Bureau of Land Management (BLM) is the nation's largest land manager, managing 245 million acres of public lands. Photo credit: BLM

Executive Order –*, *Immediate Expansion of American Timber Production*, Signed March 1, 2025

*****At the time of writing, this executive order was not yet published in the Federal Register.

The purpose of this order is to deregulate and streamline permitting under the ESA to increase domestic timber production. Section 1 more fully states the purpose as follows: "The production of timber, lumber, paper, bioenergy, and other wood products (timber production) is critical to our Nation's well-being. Timber production is essential for crucial human activities like construction and energy production. Furthermore, as recent disasters demonstrate, forest management and wildfire risk reduction projects can save American lives and communities."

The United States has an abundance of timber resources that are more than adequate to meet our domestic timber production needs, but heavy-handed Federal policies have prevented full utilization of these resources and made us reliant on foreign producers. Our inability to fully exploit our domestic timber supply has impeded the creation of jobs and prosperity, contributed to wildfire disasters, degraded fish and wildlife habitats, increased the cost of construction and energy, and threatened our economic security. These onerous Federal policies have forced our Nation to rely upon imported lumber, thus exporting jobs and prosperity and compromising our self-reliance. It is vital that we reverse these policies and increase domestic timber production to protect our national and economic security."

Section 2 of the order provides various agency directives. First, within 30 days, the Secretaries of the Interior and Commerce are required to "issue new or updated guidance regarding tools to facilitate increased timber production and sound forest management, reduce time to deliver timber, and decrease timber supply uncertainty, such as the Good Neighbor Authority described in 16 U.S.C. 2113a, stewardship contracting pursuant to 16 U.S.C. 6591c, and agreements or contracts with Indian tribes under the Tribal Forest Protection Act as contemplated by 25 U.S.C. 3115a. The Secretary of the Interior and the Secretary of Agriculture shall also each submit to the Director of the Office of Management and Budget any legislative proposals that would expand authorities to improve timber production and sound forest management. Second, within 60 days, the Secretaries of the Interior and Commerce "shall complete a strategy on USFS and BLM forest management projects under section 7 of the Endangered Species Act (ESA) (16 U.S.C. 1536) to improve the speed of approving forestry projects. The Secretary of the Interior, through the Director of the FWS, shall also examine any applicable existing authorities that would permit executive departments and agencies (agencies) to delegate consultation requirements under section 7 of the ESA to other agencies and, if necessary, provide a legislative proposal to ensure consultation is streamlined." Third, within 90 days, the Secretaries of the Interior and Agriculture "shall together submit to the President, through the Assistant to the President for Economic Policy, a plan that sets a target for the annual amount of timber per year to be offered for sale over the next 4 years from Federal lands managed by the BLM and the USFS, measured in millions of board feet." Fourth, within 120 days, the Secretaries of the Interior and Agriculture "shall complete the Whitebark Pine Rangewide Programmatic Consultation under section 7 of the ESA." Fifth, within 180 days, the Secretaries of the Interior and Agriculture "shall consider and, if appropriate and consistent with applicable law, adopt categorical exclusions administratively established by other agencies to comply with the National Environmental Policy Act and reduce unnecessarily lengthy processes and associated costs related to administrative approvals for timber production, forest management, and wildfire risk reduction treatments." Finally, within 280 days, the Secretary of the Interior "shall consider and, if appropriate and consistent with applicable law, establish a new categorical exclusion for timber thinning and re-establish a categorical exclusion for timber salvage activities."

Section 3, entitled "Streamlined Permitting," requires agencies to eliminate " all undue delays within their respective permitting processes related to timber production. Additionally, all relevant agencies shall take all necessary and appropriate steps consistent with applicable law to suspend, revise, or rescind all existing regulations, orders, guidance documents, policies, settlements, consent orders, and other agency actions that impose an undue burden on timber production."

Section 4, entitled "Endangered Species Committee," directs agencies to use "the ESA regulations on consultations in emergencies to facilitate the Nation's timber production." It also directs members of the Endangered Species Committee to identify "obstacles to domestic timber production infrastructure specifically deriving from implementation of the ESA and recommends procedural, regulatory, and interagency improvements."

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TRUMP'S EVISCERATION OF ENVIRONMENTAL REGULATION
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Executive Order –*, *Addressing the Threat to National Security from Imports of Timber, Lumber*, Signed March 1, 2025

*****At the time of writing, this executive order was not yet published in the Federal Register.

Section 1 of this order states in part "it is the policy of the United States to ensure reliable, secure, and resilient domestic supply chains of timber, lumber, and their derivative products. Unfair subsidies and foreign government support for foreign timber, lumber, and their derivative products necessitate action under section 232 of the Trade Expansion Act to determine whether imports of these products threaten to impair national security."

Section 2 requires the Secretary of Commerce to "initiate an investigation under section 232 of the Trade Expansion Act to determine the effects on the national security of imports of timber, lumber, and their derivative products. The following factors must be considered: "(i) the current and projected demand for timber and lumber in the United States; (ii) the extent to which domestic production of timber and lumber can meet domestic demand; (iii) the role of foreign supply chains, particularly of major exporters, in meeting United States timber and lumber demand; (iv) the impact of foreign government subsidies and predatory trade practices on United States timber, lumber, and derivative product industry competitiveness; (v) the feasibility of increasing domestic timber and lumber capacity to reduce imports; and (vi) the impact of current trade policies on domestic timber, lumber, and derivative product production, and whether additional measures, including tariffs or quotas, are necessary to protect national security."

Section 2 requires the Secretary of Commerce to consult with the Secretary of Defense "to evaluate the national security risks associated with imports of timber, lumber, and their derivative products."

U.S. Environmental Protection Agency (EPA) Shakeups and Shifts

On January 24, 2025, Acting EPA Administrator James Payne issued a directive for EPA staff to halt all communications with external parties.

On January 28, 2025, the U.S. Senate voted 56-42 to confirm former New York Republican Congressman Lee Zeldin as the 17th Administrator of the EPA that had 15,123 full-time employees as of December 2024.

On January 28, 2025, over 2 million federal employees, including those at the EPA, received an email from the Office of Personnel Management (OPM) with the subject line "Fork in the Road." The email highlighted President Trump's directives regarding the federal workforce, including the requirement that employees return to in-person work, and stated "we cannot give you full assurance regarding the certainty of your position or agency." It introduced a "deferred resignation program" promising employees full pay and benefits and exemption from return-to-work programs until Sept. 30. https://www.opm.gov/fork/original-email-to-employees/

On January 28, 2025, more than 1,000 EPA employees received an additional email stating that they are "likely on a probationary/trial period" and "as a probationary/trial period employee, the agency has the right to immediately terminate you." https://thehill.com/policy/energy-environment/5123348-epa-employees-facing-immediate-firing/

"Powering the Great American Comeback"—In a February 4, 2025, press release, the EPA announced its "Powering the Great American Comeback" initiative to guide the agency "to protect public health and the environment while restoring the greatness of the American economy for the first 100 days and beyond." The initiative includes five pillars: 1. Clean Air, Land, and Water for Every American; 2. Restore American Energy Dominance; 3. Permitting Reform, Cooperative Federalism, and Cross-Agency Partnership; 4. Make the United States the Artificial Capital of the World; and 5. Protecting and Bringing Back American Auto Jobs. https://www.epa.gov/newsreleases/icymi-administrator-zeldins-powering-great-american-comeback-unveiled-epa

On February 11, 2025, the EPA announced that as a result of Executive Order 14151, it had "placed 171 employees in Diversity, Equity, Inclusion, and Accessibility and Environmental Justice on administrative leave." https://www.epa.gov/news-releases/epa-places-171-deia-and-environmental-justice-employees-administrative-leave

On February 12, 2025, Administrator Zeldon stated he will rescind $20 billion in grants awarded by the Biden administration for climate and clean-energy projects approved under the 2022 Inflation Reduction Act. https://apnews.com/article/green-bank-epa-zeldin-climate-clean-energy-191b394cda251ef772867369f61f07b7

On February 27, 2025, White House spokeswoman Taylor Rogers stated "President Trump, DOGE, and Administrator Zeldin are committed to cutting waste, fraud, and abuse" and that Zeldin "is committed to eliminating 65% of the EPA's wasteful spending." https://apnews.com/article/epa-budget-staffing-cuts-doge-9260514fd1be2397d39a80dc054d19df

purchase price of the property[12] left the *Shands* "only a token interest in the property."[13]

This article describes the proper role of transferable development rights in a regulatory takings analysis, first, by describing Florida's long-term use of transferable development rights as an important land use regulatory tool to protect property rights and conserve the environment consistent with United States Supreme Court precedents and, second, by reviewing applicable case law to make clear the *Penn Central* ad hoc balancing test is the appropriate test to determine whether a regulation that grants economically beneficial transferable development rights is a regulatory taking.

Introduction To Regulatory Takings and TDRs

Through land use regulation, governments protect our homes, communities, and environment. As with any government power, land use regulation also affects individual rights. The Takings Clause in the United States Constitution[14] is perhaps the most important protection for property rights against government's power to regulate land use.

The Supreme Court first recognized that land use regulation can violate the Takings Clause in the landmark case *Pennsylvania Coal v. Mahon*.[15] The Court said, "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[16]

The *Shands* opinion conflicts with decisions of the Supreme Court of the United States, of the Florida Supreme Court, and of Florida courts of appeal to expand what a regulation going "too far" means. The decision limits local government use of transferable development rights—a sound and widely adopted land use regulation tool that protects property rights.

Transferable development rights are permissions to use land that a government allows property owners or permit holders to exchange.[17] Local and state governments in the United States have used transferable development rights for more than half a century as a tool to protect property rights, facilitate building on land appropriate for development, and conserve sensitive areas.[18] These programs essentially make real estate development permits marketable to create *value* for landowners and market efficiencies in real estate development.

In evaluating the "transferable development rights afforded"[19] to the property owner, the *Penn Central* decision unambiguously considered those rights as relevant to whether a regulatory taking had occurred and to whether New York City had appropriately compensated the property owner. The Court said, "these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation."[20]

Finally, adherence to precedent is a cornerstone of the law. The Florida Supreme Court has said, the "doctrine of stare decisis, or the obligation of a court to abide by its own precedent, is grounded on the need for stability in the law and has been a fundamental tenet of Anglo–American jurisprudence for centuries."[21] Adopting the *Shands* holdings and reasoning would destabilize regulatory takings law and create uncertainty around transferable development rights, a land use regulation tool the state has embraced for five decades.

Florida's Legislative and Executive Branches Have Made TDRs an Important Land Use Regulation Tool

Florida first embraced transferable development rights in 1974.[22] Today, Florida has some of the oldest and most notable transferable development rights programs in the country.[23] Thirty-one different transferable development rights programs exist across twenty counties, as some counties have multiple programs covering different geographic areas.[24] Relying on judicial precedent, both the legislature and the executive branch have endorsed, promoted, and approved of these programs.[25]

Florida Legislature's Embrace of TDRs

The Florida Legislature explicitly recognizes the utility of transferable development rights programs numerous times in Florida Statutes. The Florida Community Planning Act—the state law establishing rules for local government planning and land development regulation—encourages local governments to adopt transferable development rights programs. The Legislature says it "encourage[s] the use of innovative land development regulations which include provisions such as transfer of development rights . . . ."[26]

Within the Agricultural Lands and Practices Act, the Legislature says transferable development rights are "appropriate" for local governments to use to "discourage urban sprawl while protecting landowner rights."[27] Moreover, the Legislature has incentivized local governments to use transferable development rights.[28] in plans for developing agricultural enclaves by creating a presumption that development of those enclaves is not suburban sprawl if the local government uses transferable development rights. This presumption streamlines government review of real estate development plans by limiting the number of provisions a local government must consider when determining whether its comprehensive plan complies with the Community Planning Act.[29]

The Legislature also explicitly requires local governments to use transferable development rights when planning for development of a rural land stewardship area.[30] The Legislature designed the rural land stewardship area program to "protect[] the natural environment, stimulate economic growth and diversification, and encourage the retention of land for agriculture and other traditional rural land uses."[31]

Finally, the Legislature promotes transferable development rights through appropriations. The Florida Communities Trust, a division of the Florida Department of Environmental Protection, has broad powers to fund or undertake projects related to resource enhancement and preservation.[32]

For the Florida Communities Trust to fund a local government project, the local government project must utilize "innovative approaches

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that will assist in the implementation of the conservation, recreation and open space, or coastal management elements of . . . local comprehensive plan[s]."[33] Transferable development rights are one of only two examples the Legislature lists as qualifying innovative approaches.[34] Similarly, the Legislature requires the Florida Communities Trust to use and promote transferable development rights and other "creative land acquisition methods" when collaborating with local governments to reserve lands for purposes like parks, wildlife habitat, historical preservation, or scientific study.[35]

Florida Executive Branch's Embrace of TDRs

Like the Legislature, Florida's executive branch has embraced transferable development rights in several ways. Significantly, the state land planning agency—currently named the Florida Department of Commerce—has approved several local government transferable development rights programs within designated areas of critical state concern.

An area of critical state concern is a region the Legislature has identified as important for the entire state and as particularly vulnerable because of its environmental, historical, or economic characteristics.[36] Once the Legislature has designated an area of critical state concern, the state land planning agency must engage in heightened supervision of local government land development ordinances within the area.[37] Specifically, the department must approve or reject land-development regulations that any local government proposes in an area of critical state concern.[38]

Florida created the areas of critical state concern program in 1972.[39] Since then, the state land planning agency has reviewed and embraced the transferable development rights programs of multiple Florida local governments within multiple areas of critical state concern.[40]

In one recent example from 2019, the state land planning agency approved an Islamorada, Village of Islands ordinance updating the city's existing transferable development rights program and found the ordinance furthered statutory objectives.[41] This approval followed a 2015 department finding that an expansion of eligibility for Islamorada's transferable development rights program would "ensure the maximum well-being of the Florida Keys and its citizens through sound economic development."[42]

These approvals are the product of a meaningful review process, as evidenced by the Department of Commerce's rejection of transferable development rights proposals that would not serve the Legislature's goals. In 2023, for example, the department rejected a City of Marathon proposal that would have made the city's transferable development rights standards less stringent because the weaker standard would not have adequately empowered the city to protect its resources. [43]

In another 2023 example, the department rejected a City of Marathon proposal that would have, inter alia, allowed the city to permit property owners to transfer liveaboard rights from one marina site to another, thereby failing to provide "adequate alternatives for the protection of public safety and welfare in the event of a natural … disaster."[44] Compared to these rejections, the state land planning agency's otherwise consistent approval of transferable development rights ordinances across decades and across counties is an endorsement of transferable development rights as a helpful land use regulation tool for achieving state goals in critical areas.

The rationale of the *Shands* decision would require governments to compensate property owners for some land use regulations that authorize economically beneficial transferable development rights. This new application of the Takings Clause upends long-standing policy decisions the legislative and executive branches of Florida government made in reliance on binding judicial precedent.

When a Regulation Authorizes Economically Beneficial TDRs, The Appropriate Test To Determine Whether That Regulation Violates the Takings Clause Is The *Penn Central Ad* Hoc Balancing Test

In the years since the Supreme Court of the United States recognized a regulation could violate the Takings Clause, it has organized the concept of regulatory takings into a few tests. The Court's 2017 decision in the case *Murr v. Wisconsin* summarizes two tests for evaluating whether a regulation violates the Takings Clause.

> First, with certain qualifications a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause. Second, when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on a complex of factors, including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment backed expectations; and (3) the character of the governmental action. [45]

These two tests, in the order presented above, also have the names *Lucas* test and *Penn Central* ad hoc balancing test for the cases in which the Court articulated them.

The Florida Third District Court of Appeal should have concluded that the *Penn Central* ad hoc balancing test, not the *Lucas* test, is the appropriate test to apply when a regulation grants economically beneficial transferable development rights that do not result in a total regulatory taking. The *Shands* decision disregards two regulatory takings principles. First, the *Penn Central* ad hoc balancing recognizes transferable development rights can be an economically beneficial property interest, in addition to possibly being compensation for a regulatory taking if one exists. Second, the *Lucas* test recognizes a regulation that deprives a property of all economic *value* is a regulatory taking. The *Lucas* test does not depend on whether a regulation limits the allowed uses of property.

TDRs Are Development Rights In Property That Can Be Economically Beneficial

The *Shands* decision relies heavily on a concurring opinion to the United States Supreme Court decision *Suitum v. Tahoe Regional Planning Agency* for the principle that transferable development rights are "limited to the compensation side of the takings analysis."[46] However, that principle conflicts with the majority opinion of Penn Central and ignores

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SHANDS DECISION *continued from prior page*

that transferable development rights are development rights in property.

The *Penn Central* ad hoc balancing test is a factual inquiry requiring consideration of the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" as well as the "character of the governmental action."[47] A court weighs these factors to determine whether the regulation is a regulatory taking.

According to the Court's *Penn Central* analysis, when evaluating whether a regulation effects a taking, a court must consider the *value* of transferable development rights as one part of a regulation's economic impact. Florida courts have considered and followed this oft-cited and relied-upon regulatory takings principal.

In one case, *Hollywood* v. *Hollywood*, the Fourth District Court of Appeals applied *Penn Central* to a developer's claim that a zoning ordinance worked a taking.[48] The ordinance at issue created transferable development credits which allowed a developer to significantly increase housing density in exchange for dedicating land to the city as open space.[49]

When the court evaluated the regulation's economic impact on the appellant developer it said the following:

> As to the economic impact of the transfer, it involves the loss of the right to build 79 single family units vis-a-vis the gain of 368 more multi-family units on adjoining land, both parcels already owned by the developer. We cannot quarrel with the economics of that exchange especially when the *value* of all the multi-family units will be enhanced because the buildings will have an uninterrupted ocean-front position and view.[50]

The role that the transferable development rights played in this analysis clearly served as part of the court's assessment of whether a regulatory taking had occurred.

The *Shands* opinion also conceptualizes transferable development rights as something other than a right in property the owner of the property can use. However, "Florida law in this regard is in accord with the general understanding that transferable development rights are an interest in real estate while attached to real estate."[51] In a concurring opinion to *Shands*, Judge Scales demonstrates this fundamental misunderstanding of transferable development rights. Describing the role that Judge Scales believes transferable development rights should play in compensating a property owner for a regulatory taking, when one occurs, the opinion states:

> TDR offers from government should be generous because TDRs, like the regulations from which TDRs provide valuable relief, are creations of government. Not only do TDRs require no appropriation of taxpayer funds, but the development occasioned by TDRs generally results in more ad valorem tax revenue for the government.[52]

This description of transferable development rights as something that governments create, ad hoc, and then offer to private parties to invent and transfer *value* is not only wrong, but the system Judge Scales describes would also violate constitutional protections against unlawful exactions.

The City of Marathon evaluates whether development rights exist, and whether a property owner may transfer them, by reviewing the character of land. The city's land development regulations take into account the zoning designation of land, the land's area, and other physical characteristics of the land to determine development potential.[53] Then, if a property owner desires to transfer development rights, the development rules provide "sender site density may be transferred, in whole or in part, only from areas identified as Class I habitat type . . . subject to groundtruthing by the City Biologist."[54] In other words, these transferable development rights relate specifically to land.

If the city instead permitted development through individual negotiation with a property owners—within the context of a regulatory takings claim or not—those permissions would no longer relate to the land and the government's legitimate interest in regulating land development. That approach violates U.S. Constitutional protections for property rights as clearly as uncompensated takings.

The U.S. Supreme Court warned of separating land use regulation from the legitimate exercise of local government police powers in the recent *Sheetz v. County of El Dorado, California* opinion.

> The bargain takes on a different character when the government withholds or conditions a building permit for reasons unrelated to its land-use interests. Imagine that a local planning commission denies the owner of a vacant lot a building permit unless she allows the commission to host its annual holiday party in her backyard (in propertyspeak, granting it a limited-access easement). The landowner is likely to accede to the government's demand, no matter how unreasonable, so long as she *value*s the building permit more. So too if the commission gives the landowner the option of bankrolling the party at a local pub instead of hosting it on her land. Because such conditions lack a sufficient connection to a legitimate land-use interest, they amount to an out-and-out plan of extortion.[55]

Judge Scales' proposal for government to create property rights for the sole purpose of having something of *value* to then give away is irredeemably far from a framework in which the city conditions building permit approval only on factors related to government's land use interests.

The *Lucas* Test Finds A Regulation Has Violated The Takings Clause Only When The Regulation Has Rendered Property Entirely Without *Value*

The *Shands* opinion conflicts with Florida and federal precedent by recasting the bright-line *Lucas* test as one that hinges on the uses the government allows a given property. Contrary to the *Shands* decision, the *Lucas* test concludes a regulatory taking exists when a regulated property has no objective economic *value*.

The *Shands* decision relies on the fact that the property owner could not engage in "economically productive" activities given the property had to remain in its natural state and that the *value* of the property in the form of transferable development rights reflected a token interest resulting in a total taking under *Lucas*.[56] In a dissenting opinion, Chief Judge Logue points out that the majority opinion applies a series of "inapposite"

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precedents in which no competitive market existed "among private buyers for the subject properties held in their natural state."[57] The dissenting opinion also points out that the majority muddies regulatory takings analysis under *Lucas* by switching "the focus from objective 'market *value*' to subjective 'productive use.'"

Despite its error, the majority's substitution of use for *value* is at first glance understandable because in *Lucas* the Court stated the rule that regulations which "deny all economically beneficial or productive use of land"[58] are takings. The phrase 'economically beneficial or productive use of land' fails to clearly distinguish between *value* and use. But the facts of *Lucas* itself and the *ratio decidendi* of other regulatory takings decisions make clear that the *Lucas* test depends on whether a regulation denies a landowner all *value* in property.

In the *Lucas* decision, the Court repeatedly and in a variety of phrases describes regulations which meet the *Lucas* rule as regulations which eliminate a property's economic *value*. The Court says regulations meeting the *Lucas* test: "affect property *value*s,"[59] "rendered *value*less"[60] property, "affect property *value*s by regulation," [61] "wholly eliminated the *value* of the claimant's land,"[62] or cause "regulatory diminution in *value*."[63] None of these restatements of the rule support the characterization of the *Lucas* holding that the Third District Court of Appeal asserted.

Beyond *Lucas*, the Supreme Court has affirmed that the *Lucas* categorical rule applies to regulations that eliminate all *value* of land. In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,[64] the Court explained that "the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of *all value*."[65] In his dissent to *Tahoe-Sierra*, Justice Rehnquist made clear that the Court majority did not assert this point idly. Justice Rehnquist criticized the Court for describing *Lucas* "as being fundamentally concerned with *value*."[66]

Florida, for her part, has correctly described the *Lucas* rule as recognizing regulations which deprive property of all *value* as takings. *In Joint Ventures, Inc. v. DOT,* the Florida Supreme Court asserted, "The modern, prevailing view is that any substantial interference with private property which destroys or lessens its *value* . . . is, in fact and in law, a 'taking' in a constitutional sense."[67]

District courts in Florida have likewise restated the *Lucas* rule as concerning *value*. In *Lost Tree Vill. Corp. v. City of Vero Beach,* the Fourth District Court of Appeal evaluated a property owner's claim that a set of local government regulations effected a taking of their property.[68] Quoting Tahoe–Sierra the decision stated "[a]nything less than a 'complete elimination of *value*,' or a 'total loss' . . . would require the kind of analysis applied in Penn Central."[69]

In *Hunt v. State*, after the Florida Legislature outlawed bump stocks, owners of bump stocks sued the state alleging a categorical taking.[70] The First District Court of Appeal dismissed this claim, stating that this was not a taking because owners could sell their property. The court said that the law "allowing owners to avoid a total loss in economic *value* by selling their bump-fire stocks supports dismissal of a categorical takings claim."[71]

Finally, in *Gulf Coast Transp., Inc. v. Hillsborough Cnty.,* the Second District Court of Appeal stated that property owners have suffered a regulatory taking and "must be compensated if and when future legislative amendments eliminate or reduce the *value* of their rights or privileges."[72] Although that decision found no regulatory taking could exist in the facts before the court because no cognizable property right exists in a taxi medallion,[73] the decision is yet another statement that the *Lucas* rule hinges on the *value* of the property.

In sum, the Third District Court of Appeal misconstrues an entire body of takings jurisprudence to reach the novel conclusion that a property with *value* in a competitive marketplace still may be the subject of a regulatory taking because it lacks a subjective "economic use."

Conclusion

A Florida trial court has already rejected the *Shands* holding. In *Key Haven Associated Enterprises, Inc. v. Department of Economic Opportunity* the Second Judicial Court in and for Leon County addressed the withdrawn *Shands* opinion.[74] Pointing out flaws in the withdrawn *Shands* opinion's conclusion that transferable development rights are not relevant to evaluating whether a land use regulation causes a regulatory taking, the circuit court declined to adopt similar reasoning. Nonetheless, by departing from binding precedent of Florida and federal courts—including and especially decisions of the United States Supreme Court—the *Shands* opinion risks confusing governments and landowners alike as to whether a regulation granting transferable development rights might be a regulatory taking.

That confusion frustrates the state's ability to protect our environment and regulate land use, priorities of the people of Florida and of the state government. The Florida Constitution establishes that the policy of the state is to "conserve and protect its natural resources."[75] And the Florida Legislature has created a coordinated system of planning and land use regulation to enable local governments to "encourage the most appropriate use of land, water, and resources"[76] and "deal effectively with future problems that may result from the use and development of land within their jurisdictions."[77]

The Florida Legislature credits transferable development rights them with "protecting landowner rights"[78] while addressing these important public goals. Through law and executive action, the state has made transferable development rights a part of statewide efforts like the areas of critical state concern program that protect Florida's environment while promoting our economy.

Florida's courts should reject the *Shands* decision, should reaffirm the Penn Central ad hoc balancing test as the appropriate framework for evaluating whether a regulation that grants economically beneficial transferable development rights is a taking, and should reaffirm that the *Lucas* test categorizes regulations that deny a property all economic *value* as regulatory takings.

[1]Reporter Editors' Note: The City of Marathon filed a motion for certification in the Third District on March 5, 2025.

[2]*Shands* v. *City of Marathon,* No. 3D21-1987, at 4 (Fla. 3d DCA Feb. 5, 2025).

[3]*Id.*

[4]*Id.* at 5.

[5]*Id.* at 6.

[6]*Id.* at 6–7.

[7]48 Fla. L. Weekly D907 (Fla. 3d DCA May 3, 2023).

[8]No. 3D21-1987 (Fla. 3d DCA Feb. 5, 2025).

[9]505 U.S. 1003, 1019 (1992).

[10]*Shands*, No. 3D21-1987 at 31 (Scales, J., concurring).

[11]438 U.S. 104 (1978).

[12]*Shands*, No. 3D21-1987 at 44 (Logue, C.J., dissenting).

[13]*Id.* at 27 (majority opinion).

[14]"[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend V, cl. 2.

[15]260 U.S. 393 (1922).

[16]*Id.* at 415 (emphasis added).

[17]Virginia McConnell & Margaret Walls, *U.S. Experience with Transferable Development Rights,* 3 REV. OF ENVT'L ECON. & POL. 288, 288 (2009).

[18]*Id.*

[19]*Id.* at 129.

[20]*Id.* at 137.

[21]*Strand v. Escambia Cnty.*, 992 So. 2d 150, 159 (Fla. 2008) (citing N. *Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 637 (Fla. 2003)).

[22]Evangeline Linkous et al., *Why do counties adopt transfer of development rights programs?* 62 J. OF ENV'TL PLANNING AND MGMT. 2352, 2360 (2019).

[23]*Id.* at 2354.

[24]Evangeline R. Linkous & Timothy S. Chapin, *TDR Program Performance in Florida*, 80 J. OF AM. PLAN. ASS'N 253, 256 (2014).

[25]§ 163.3203(3), Fla. Stat. (2024)

[26]*Id.*

[27]*Id.* at § 163.3162(4).

[28]*Id.*

[29]*See generally* § 163.3164, Fla. Stat. (2023); § 163.3177, Fla. Stat. (2023).

[30]*Id.* at § 163.3148(7).

[31]*Id.* at § 163.3148(1).

[32]*See Id.* at § 380.504 (defining the Florida Communities Trust); *Id.* at § 380.507 (defining the Florida Communities Trust's powers to undertake projects and other activities).

[33]*Id.* at § 380.503(6).

[34]*Id.*

[35]*Id.* at § 380.508(4)(g).

[36]*See Id.* at § 380.05 (providing criteria for designating areas of critical state concern); *Id.* at § 380.055 (designating the Big Cypress Area as an area of critical state concern); *Id.* at § 385.0551 (designating the Green Swamp Area); *Id.* at § 380.0552 (designating the Florida Keys Area).

[37]*See generally Id.* at § 380.05 (outlining the role of the state land planning agency).

[38]*Id.* at § 380.0552.

[39]Ch. 72-317, Laws of Fla.

[40]*See, e.g.,* Dep't of Cmty. Affs., Div. Of Cmty. Plan. DCA Order No.

DCA08-OR-048, 35 Fla. Admin. W. No. 8 at 1029–30 (Feb. 27, 2009) (Islamadora, in the Florida Keys Area); Dep't of Cmty. Affs., Div. Of Cmty. Plan. DCA Order No. DCA09-OR-065, 35 Fla. Admin. W. No. 11 at 1364 (March 20, 2009) (City of Marathon, in the Florida Keys Area); Dep't of Cmty. Affs., Div. Of Cmty. Dev. Order No. DEO-13-043, 39 Fla. Admin. W. No. 34 at 2597–98 (May 14, 2013) (City of Auburndale, in the Green Swamp Area).

[41]Dep't of Econ. Opportunity, Div. Of Cmty. Dev. Final Order No.

DEO-19-015, 45 Fla. Admin. R. No. 117 at 2683 (June 17, 2019).

[42]*See* Commerce Final Order No. COM-23-026, 49 Fla. Admin. Reg. No. 175 at 3308–09 (Sept. 8, 2023).

[43]*See* Commerce Final Order No. COM-23-026, 49 Fla. Admin. Reg.

No. 175 at 3308–09 (Sept. 8, 2023).

[44]*See* Commerce Final Order No. COM-23-027, 49 Fla. Admin. Reg.

No. 175 at 3309–10 (Sept. 8, 2023).

[45]*Murr v. Wisconsin*, 582 U.S. 383, 393 (2017) (internal citations, quotation marks, and ellipses removed).

[46]No. 3D21-1987, at 18–19 (Fla. 3d DCA Feb. 5, 2025) (*citing Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 750 (1997)).

[47]*Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1978).

[48]*Hollywood v. Hollywood,* 432 So. 2d 1332 (Fla. 4th DCA 1983), rev. denied, 441 So. 2d 632 (Fla. 1983).

[49]*Id.* at 1333.

[50]*Id.* at 1338.

[51]*Shands v. City of Marathon,* No. 3D21-1987, at 56 (Fla. 3d DCA Feb. 5, 2025) (Logue, C.J., dissenting).

[52]*Id.* at 32 (Scales, J., concurring).

[53]*See* City of Marathon Land Dev. Reg., Table 103.15.2.

[54]City of Marathon City Land Dev. Regs § 107.19.A.1.

[55]*Sheetz v. Cnty. of El Dorado*, California, 601 U.S. 267, 275 (2024) (internal citations and quotation marks omitted).

[56]*Shands* v. City of Marathon, No. 3D21-1987, at 20–21(Fla. 3d DCA Feb. 5, 2025).

[57]*Id.* at 46 (Logue, C.J., dissenting).

[58]*Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

[59]*Id.* at 1018.

[60]*Id.* at 1020.

[61]*Id.* at 1023.

[62]*Id.* at 1026.

[63]*Id.*

[64]535 U.S. 302 (2002).

[65]*Id.* at 332 (emphasis added).

[66]*Id.* at 350.

[67]*Joint Ventures, Inc. v. DOT,* 563 So. 2d 622, 624 n.6 (Fla. 1990) (quoting J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 6.09 (rev. 3d ed. 1985)) (emphasis added).

[68]*See Lost Tree Vill. Corp. v. City of Vero Beach*, 838 So. 2d 561, 572 (Fla. Dist. Ct. App. 2002).

[69]*Id.* (emphasis in original) (footnote omitted).

[70]*Hunt v. State,* 310 So. 3d 1123, 1126 (Fla. 1st DCA 2021).

[71]*Id.* at 1127 (emphasis added).

[72]*Gulf Coast Transp., Inc. v. Hillsborough Cnty.,* 352 So. 3d 368, 377 (Fla. 2d DCA 2022).

[73]*Id.* at 371 (emphasis added).

[74]*Key Haven Associated Enterprises, Inc. v. Dept. of Economic Opportunity,* No. 2021 CA 001613, at 27 (Fla. 2d DCA Oct. 11, 2024).

[75]Art. II, § 7(a), Fla. Const.

[76]§ 163.3161(4), Fla. Stat. (2024).

[77]*Id.*

[78]*Id.* at § 163.3162(4).

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