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Environmental Law: The Applicability of the Special Injury Rule to the Florida Environmental Protection Act

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CASE COMMENTS

ENVIRONMENTAL LAW: THE INAPPLICABILITY OF THE SPECIAL INJURY RULE TO THE FLORIDA ENVIRONMENTAL PROTECTION ACT*

Florida Wildlife Federation v. State Department of Environmental Regulation, 390 So. 2d 64 (Fla. 1980)

Petitioner, Florida Wildlife Federation,[1] filed suit under the Florida Environmental Protection Act (EPA)[2] to enjoin[3] the Department of Environmental Regulation (DER)[4] and the Florida Water Management District from maintaining and operating a spillway which polluted an adjacent canal and surrounding waters. Although petitioner alleged no special injury to its members, it claimed standing under the EPA's citizen suit provision.[5] The circuit court, finding the EPA's abrogation of the special injury rule[6] an unconstitutional invasion into the supreme court's power to adopt rules of practice and procedure,[7] dismissed the action for lack of standing.[8] On direct appeal,[9] the Florida supreme court reversed and HELD, that the EPA was not a procedural

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1. 390 So. 2d 64 (Fla. 1980). The Florida Wildlife Federation is a nonprofit corporation, and frequent environmental litigant. *Id.* See note 20 *infra.*

2. FLA. STAT. §403.412(2)(a) (1979) provides in relevant part: "The department of legal affairs, any political subdivision or municipality of the state, or a citizen of the state may maintain an action for injunctive relief against: (1) Any governmental agency or authority charged by law with the duty of enforcing laws, rules and regulations for the protection of the air, water, and other natural resources of the state to compel such government authority to enforce such laws . . . (2) Any person, natural or corporate, governmental agency or authority to enjoin such persons . . . from violating any laws, rules or regulations for the protection of the air, water and other natural resources of the state."

3. The petitioner also sought money damages and attorney fees. 390 So. 2d at 66. FLA. STAT. §403.412(2)(f) (1980) grants attorney fees to the prevailing party, but makes no provision for pecuniary relief. *Id.* §403.412(2)(a). See note 2 *supra.*

4. Although joined as a defendant under FLA. STAT. §403.412(2)(a)(1), the DER was aligned with the petitioner federation in arguing that the constitutionality of the statute should be upheld. 390 So. 2d at 66.

5. 390 So. 2d at 65-66. In the instant case appellant utilized the two statutory provisions in order to bring suit against both the pollutor (Florida Water Management District) and the authority charged with the duty to enforce pollution control laws (State Department of Environmental Protection). *Id.*

6. The special injury rule was originally formulated as a means of forestalling a multiplicity of suits. Brown v. Florida Chautauqua Ass'n, 59 Fla. 447, 451, 52 So. 802, 804 (1910). Special injury has been defined as an injury different in kind, not merely in degree, from that suffered by the public at large. Jacksonville, T. & K. W. Ry. v. Thompson, 34 Fla. 346, 16 So. 282 (1894).

7. FLA. CONST. art. V, §2(a) provides in pertinent part: "The supreme court shall adopt rules for the practice and procedure in all courts. . . ." *See, e.g.,* Avila South Condo. Ass'n, Inc. v. Kappa Corp., 347 So. 2d 599 (Fla. 1976) (supreme court found statute at issue to be an impermissible attempt to define proper parties rather than to set out substantive rights).

8. 390 So. 2d at 66.

9. *See* FLA. CONST. art V, §3(b)(1) (1972).

law but, instead, created a new cause of action which conferred upon Florida citizens the substantive right to enjoin environmental nuisances without a showing of special injury.[10]

At common law, environmental protection was accomplished primarily through the tort of nuisance.[11] The nuisance doctrine first appeared in thirteenth century England as an action to remedy interferences with the use and enjoyment of land.[12] From this common origin emerged two distinct legal concepts, the private and public nuisance.[13] The former was a civil wrong based on an interference with private rights, while the latter constituted a criminal offense.[14] Because of the criminal nature of the public nuisance, redress lay exclusively in the hands of the crown.[15] Private citizens lacked standing to bring public nuisance actions absent a showing of injury different in kind from that suffered by the public at large.[16]

Judicial adoption of this special injury rule[17] in the United States[18] resulted

10. 390 So. 2d at 67. The Court also held that corporations may be treated as citizens under the EPA. *Id.* at 68. *See, e.g.*, Orange County Audobon Soc'y Inc. v. Hold, 276 So. 2d 542 (Fla. 4th D.C.A. 1973).

11. Trespass is another common law doctrine utilized by private persons for environmental protection. *See, e.g.*, Martin v. Reynolds Metal Co., 221 Or. 86, 342 P.2d 790 (1959), *cert. denied*, 362 U.S. 918 (1960) (floride intrusion constituted a trespass). The trespass action lies for an invasion of exclusive possession of land whereas a nuisance involves an intrusion into the use and enjoyment of the land. RESTATEMENT OF TORTS, Introductory Notes §822, at 224-25 (1939).

12. W. PROSSER, THE LAW OF TORTS §86 (4th ed. 1971). "Nuisance" is borrowed from the french expression meaning harm, annoyance or inconvenience. *Id.* at 571-72 n.7.

13. This parallel development led to the modern day confusion that necessarily results when two dissimilar fields of tort liability are given the same name. *Id.* at 573. *See* Carroll v. New York Pie Baking Co., 215 A.D. 240, 213 N.Y.S. 553 (App. Div. 1926). Plaintiff sued a baker for selling a pie with several cockroaches embedded in its crust. The court held this disagreeable sight to be a nuisance, although not connected either with land or with any public right. *Id.* at 241, 213 N.Y.S. at 554.

14. W. PROSSER, *supra* note 12, §86.

15. *Id.* The earliest cases involved purprestures, which are obstructions of public highways. For modern examples of purprestures *see, e.g.*, Adams v. Commissioners of Trappe, 204 Md. 165, 102 A.2d 830 (1954); Sloan v. City of Greenville, 235 S.C. 277, 111 S.E.2d 573 (1959). *See also* W. PROSSER, *supra* note 12, §86. The public nuisance action today has expanded to include such diverse interests as public health, safety, morals, peace, comfort and convenience. *Id.* §88.

16. The injury must be different in kind, not merely greater in degree. *See, e.g.*, Jacksonville v. T. & K.W. Ry. v. Thompson, 34 Fla. 346, 16 So. 282 (1894). In *Thompson*, an owner-resident of land abutting a public highway was denied standing to sue for a highway obstruction which blocked plaintiff's ingress and egress to and from his residence. The court noted that this obstruction inconvenienced all citizens of the community, and held that the plaintiff's proximity to the highway increased only the degree of his damages. *Id.* at 347, 16 So. at 283-84. *See also* O'Dell v. Walsh, 81 So. 2d 554, 555 (Fla. 1955); Rou v. Bravo, 338 So. 2d 45 (Fla. 1st D.C.A. 1976); Freeman v. McIntosh, 338 So. 2d 538 (Fla. 4th D.C.A. 1976).

17. According to some authorities, the special injury rule is a misnomer because it invokes connotations of defamation actions where special damage must be pleaded and proved. In the public nuisance case, only particular damage must be proven. *See* Smith, *Private Action for Obstruction of Public Right of Passage*, 15 COLUM. L. REV. 1, 9-11 (1915). *See also* Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966).

18. The special injury rule was applied to nuisance actions in the United States as part

in the frequent dismissal of environmental nuisance suits,[19] on the grounds that the litigant[20] lacked standing to sue. As a result, even where the plaintiff had actually been injured by a nearby nuisance, relief was unavailable. For example, in the Florida case of *Garnett v. Jacksonville, St. A. & H.R. Ry. Co.*,[21] the plaintiff parents were denied standing to enjoin construction of a steam railway that threatened to endanger the health and safety of their children and to destroy their neighborhood aesthetically. Although conceding that the railway might in fact be a nuisance,[22] the court held that a private citizen could not bring a suit for abatement without a showing of special injury.[23] Ownership of land adjacent to the nuisance site was found insufficient to constitute such injury.[24]

In Florida, this historic strict application of the special injury rule[25] had only recently been relaxed by the district courts of appeal.[26] This trend, however, was abruptly halted by the supreme court's decision in *United States v. Save Sand Key*.[27] The court held that because the members of the plaintiff nonprofit corporation failed to demonstrate injuries different from those suffered by the general public, it lacked standing to enjoin development of the island of Sand Key.[28]

Florida decisions illustrate that it is the state, not the individual, that has traditionally been entrusted with responsibility for the protection of the environment.[29] Frequently, however, the appropriate agencies have been either lax in, or incapable of enjoining such nuisances, particularly where the

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of the English common law. It was officially accepted by the Supreme Court in 1838. Mayor of Georgetown v. Alexandria Canal Co., 37 U.S. 91, 99 (1838).

19. *See, e.g.*, Pace v. Niagara Chem. Div., 68 So. 2d 382 (Fla. 1953) (relief denied to worker whose health was adversely affected by fumes and smoke from neighboring factory). *See also* International Shoe Co. v. Heatwole, 126 W. Va. 888, 30 S.E.2d 537 (1944) (frequent users of public waters lacked standing to enjoin its pollution).

20. Most citizen suits are brought by public interest organizations on behalf of affected citizens rather than by individuals. *E.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972).

21. 20 Fla. 889 (1884).

22. *Id.* at 904.

23. *Id.* at 901. *Accord*, O'Dell v. Walsh, 81 So. 2d 554 (Fla. 1955); H. Doherty & Co. v. Joachim, 146 Fla. 50, 200 So. 238 (1941); Robbins v. White, 52 Fla. 613, 42 So. 841 (1907); Thomas v. Wade, 48 Fla. 311, 37 So. 743 (1904). *But cf.* Lulterlon v. Mayor of Cedar Key, 15 Fla. 306 (1875) (any person injured by the city's appropriation of public streets for uses other than travel has standing to sue).

24. 20 Fla. at 905 (1884).

25. *See, e.g.*, Sarasota County Anglers Club, Inc. v. Burns, 200 So. 2d 178 (Fla. 1967) (private nonprofit corporation denied standing to contest filling operations on Longboat Key).

26. *E.g.*, Town of Surfside v. County Line Land Co., 340 So. 2d 1287 (Fla. 3d D.C.A. 1977); Save Our Bay, Inc. v. Hillsborough County Pollution Control Comm'n., 285 So. 2d 447 (Fla. 2d D.C.A. 1973).

27. 303 So. 2d 9 (Fla. 1974).

28. *Id.* at 12.

29. *See, e.g.*, United States Steel Corp. v. Save Sand Key, Inc., 303 So. 2d 9 (Fla. 1974); Sarasota County Angler's Club, Inc. v. Kirk, 200 So. 2d 178 (Fla. 1967) (adopting Sarasota County Anglers Club, Inc. v. Burns, 193 So. 2d 691 (Fla. 1st D.C.A. 1967)). *See also* Boyer & Cooper, *Real Property*, 28 U. MIAMI L. REV. 1, 20 (1973).

offending party was a government entity.[30] This administrative ineffectiveness, coupled with the citizens' lack of standing under the special injury rule, left the private litigant without a forum for redress of environmental abuses.[31]

Prompted in part by this dilemma, the federal government enacted the National Environmental Protection Act (NEPA).[32] NEPA declared as national policy the promotion of a harmonious relationship between man and his environment.[33] Although not specifically providing for citizen suits, NEPA permitted private parties to enforce its provisions as private attorney generals.[34] More importantly, NEPA established a national standard for the protection and enhancement of environmental quality.[35]

Congress also afforded citizens a greater enforcement role in subsequent environmental legislation.[36] The Clean Air[37] and Federal Water Pollution Control Acts[38] contained citizen suit provisions that empowered private persons

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30. Boyer & Cooper, *supra* note 29, at 20.

31. *See, e.g.*, Askew v. Hold the Bulkhead — Save Our Bay, Inc., 269 So. 2d 696 (Fla. 2d D.C.A. 1972). Plaintiffs, a private citizen and a nonprofit corporation, brought suit to enjoin construction on a public park site alleging that the development would destroy the park as a wildlife sanctuary. The court dismissed both plaintiffs, holding that neither had suffered special injury and, therefore, neither had standing. *Id.* at 698. The court refused to consider the fact that, by precluding these parties from maintaining an action, they foreclosed the possibility of any suit that would adequately represent the plaintiffs' interests. Boyer & Cooper, *supra* note 29, at 20.

32. 42 U.S.C. §§4321-4361 (1976).

33. *Id.* §4321. The purposes of the bill include promotion of efforts to prevent or eliminate damage to the environment, to stimulate the health and welfare of mankind, to enrich the ecological system, and to establish a council on environmental quality. *Id.*

34. *See* Rucker v. Willis, 358 F. Supp. 425 (E.D.N.C. 1973).

35. *Id.* 42 U.S.C. §4331 (1976). The laws, regulations and policies of the United States are to be interpreted and administered to the fullest extent possible in accordance with the policies of NEPA. *Id. See* F. GRAD, 2 ENVIRONMENTAL LAW §8.03 (2d ed. 1978). NEPA also led to the establishment of the Environmental Protection Agency, Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1966-1970 Compilation), and created the Council on Environmental Quality (CEQ) 42 U.S.C. §§4341-4347 (1976). Further, the Act requires the filing of environmental impact statements before any federal projects that may adversely affect the environment may be undertaken. This provision has become the most significant part of NEPA. 42 U.S.C. §4332 (1976).

36. An alternative, widely advocated but nowhere adopted, is the prospect of conferring standing on the natural objects of the environment themselves. *See* C. STONE, SHOULD TREES HAVE STANDING? (1974). This idea is not as novel as it seems; other inanimate objects, such as municipalities and corporations already have the power to sue in their own right. *Id.* at 10, 17. *See also* Sierra Club v. Morton, 405 U.S. 727, 749-50 (1972) (Douglas J., dissenting).

37. The Clean Air Act of 1970, 42 U.S.C. §§1857-1858 (1976), provides for a combined federal-state effort to abate air pollution. The federal government determines the kind and amount of pollutants that should be controlled, leaving to the states the responsibility for implementing the federal standards. 42 U.S.C. §7401 (Supp. I 1977).

38. The Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§1251-1376 (1976) (FWPCA) mark a change in regulatory philosophy from previous water pollution control legislation. Instead of relying on water quality standards established by states, the legislation takes a novel "clean waters" approach which strives "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. §§1251-1376 (Supp. II 1972).

to enforce their regulatory requirements.[39] Similar provisions were included in the Federal Noise Control Act of 1972[40] and the Resource Conservation and Recovery Act of 1976.[41] These statutes were enacted in response to growing concern over the ineffectiveness of state environmental regulation.[42] The statutes authorized the Environmental Protection Agency[43] to promulgate federal environmental quality standards. Further, with the exception of the Federal Noise Control Act, the statutes required state implementation of pollution control plans.[44]

Many states followed the federal scheme in enacting their own environmental legislation.[45] The first action taken by the Florida legislature was adoption of the 1969 constitutional amendment declaring it the policy of the state "to conserve and protect its natural resources and scenic beauty."[46] Two years later, passage of the Florida Environmental Protection Act (EPA) implemented this political mandate.[47] The EPA empowers private citizens to bring

39. *E.g.*, 42 U.S.C. §7604(a) (Supp. III 1979). "[A]ny person may commence a civil action of his own behalf— (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency . . .) who is alleged to be in violation of (A) an emission standard . . . or (B) an order issued . . . with respect to such a standard or limitation." *Id.* For similar provisions see FWPCA, 33 U.S.C. §1365 (1976); Noise Control Act, 42 U.S.C. §4911 (1976); RCRA, 42 U.S.C. §6972 (1976).

40. 42 U.S.C. §§4901-4918 (1976). Although not as comprehensive as the Clean Air Act or the FWPCA, the Noise Control Act of 1972 represents a major effort to define the federal role in this arena. The Act authorizes federal regulation of such major areas as: construction, transportation, electrical equipment, aircraft noise and sonic boom. *Id. See generally* Note, *The Noise Control Act of 1972 — Congress Acts to Fill the Gap in Environmental Legislation*, 58 MINN. L. REV. 273 (1973).

41. 42 U.S.C. §§6901-6987 (1975). The Resource Conservation and Recovery Act (RCRA) represents the federal government's first major attempt to control solid wastes and recycling programs. RCRA regulations include a qualified prohibition on the open dumping of solid wastes, and a comprehensive program aimed at management of hazardous wastes. *Id. See generally* W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW §6.3 (1977).

42. See F. GRAD, *supra* note 35, §1.02. The long-standing tradition of controlling pollution at the source has led to unfortunate jurisdictional impediments, particularly in the control of air and water pollution where the point of emission may be substantially removed from the polluted area. *Id.*

43. *Id.* The Environmental Protection Agency, as established by NEPA, is actually a reorganization into one agency of environmental regulatory activities previously scattered in many departments and agencies. 42 U.S.C. §4321 (1976).

44. Not all pollution control plans required state-implementation. 42 U.S.C. §7401 (Supp. 1978), 33 U.S.C. §1251 (1976). Additionally, even those plans specifically mandating state implementation may not be monitored closely. *See, e.g.*, Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975). The Supreme Court allowed Georgia to include in its plan a sweeping variance procedure authorizing relaxation of standards when compliance became unreasonable, unduly burdensome, or impractical. *Id.* at 69-70.

45. *E.g.*, CAL. PUB. RES. CODE §§21190-21193 (West Supp. 1980); MD. NAT. RES. CODE ANN. §§1-301 to 1-305 (1974); MICH. COMP. LAWS §§691.1201-.1207 (West Supp. 1980); MINN. STAT. §§116B.01-.13 (1978); N.J. STAT. ANN. §§2a:35a-1 to :35a-14 (West Supp. 1980). *See generally* Maloney, *More Heat Than Light: Thermal Pollution Versus Heat Energy Utilization*, 25 U. FLA. L. REV. 693, 697 (1973).

46. FLA. CONST., art. II, §7. *See also id.* art. VI, §14 (bonds for pollution control and abatement facilities).

47. FLA. STAT. §403.412 (1979).

direct actions against either state agencies for failure to enforce, or against private parties for violation of any environmental "law, rule, or regulation of Florida."[48]

The Florida district courts of appeal initially interpreted this provision expansively, in accord with the apparent legislative intent.[49] In *Save Our Bay Inc. v. Hillsborough County Commission*,[50] the Second District Court of Appeal based its decision, in part,[51] on the assumption that the EPA had eliminated the necessity of proving special injury in environmental litigation.[52] Thus, the plaintiff nonprofit corporation was granted standing to contest the polluting activities of the defendant without a showing of an injury different in kind from that suffered by the public.[53]

Standing, without special injury, however, did not assure that the environmental litigants would be awarded relief. To win an injunction, *Brown v. Florida Chautauqua Association*[54] required that the plaintiff demonstrate, *inter alia*, irreparable injury.[55] Because damages are unavailable under the EPA,[56] this restriction significantly limited the citizen suit provision's utility.[57]

Notwithstanding the EPA's history in the lower courts,[58] it was unclear whether the Florida supreme court, traditionally conservative in environmental matters,[59] would construe the statute similarly. This uncertainty was intensified

48. *Id.*

49. *See, e.g.*, Save Our Bay, Inc. v. Hillsborough County Pollution Control Comm'n., 285 So. 2d 447 (Fla. 2d D.C.A. 1973); Orange County Audobon Soc'y. v. Hold, 276 So. 2d 542 (Fla. 4th D.C.A. 1973).

50. 285 So. 2d 447 (Fla. 2d D.C.A. 1973).

51. The court held that the appellant nonprofit corporation had standing to enjoin pollution of waters without a showing of special injury. The decision was based not only on the authority of the EPA, but also on the "well-reasoned" opinion of the same court in Save Sand Key, Inc. v. United States Steel Corp., 281 So. 2d 572 (Fla. 3d D.C.A. 1973). *Id.* at 499. The supreme court granted a writ of certiorari and unfortunately, reversed the decision. 303 So. 2d 9 (Fla. 1974).

52. 285 So. 2d at 449.

53. *Id.*

54. 59 Fla. 447, 52 So. 802 (1910). Appellants brought suit for the removal of obstructions from a public highway that bordered their hotel. The court held that, where the unlawful obstruction not only injures the right of an individual in common with the public, but also causes peculiar and special injury to him, that individual has a private cause of action for the redress of his special injury. *Id.* at 451, 52 So. at 804.

55. *Id.* The injury to plaintiff's business was characterized as the kind for which an action at law for damages would provide inadequate redress. *Id.* at 454-55, 52 So. at 805.

56. See note 2 *supra*. FLA. STAT. §403.412(2)(a) provides: "a citizen may maintain an action for *injunctive* relief. . . ."

57. *See* Florida E. Coast Ry. Co. v. City of Miami, 299 So. 2d 152 (Fla. 3d D.C.A. 1974). The city brought suit to enjoin the landowner from proceeding with fill operations. The court reversed the lower court's granting of a temporary injunction, finding that the complaint did not set out facts from which irreparable harm could be found. *Id.* at 154.

58. *See, e.g.*, Save Our Bay v. Hillsborough County Comm'n., 285 So. 2d 447 (Fla. 2d D.C.A. 1973).

59. *See generally* United States Steel Corp. v. Save Sand Key, Inc., 303 So. 2d 9 (Fla. 1974); Sarasota County Angler's Club, Inc. v. Burns, 193 So. 2d 691 (1st D.C.A.), *cert. denied*, 200 So. 2d 178 (Fla. 1967); Flagler Beach v. Green, 83 So. 2d 598 (Fla. 1955); Henry L. Doherty & Co. v. Joachim, 146 Fla. 50, 200 So. 238 (Fla. 1941).

by the superficial resemblance between EPA citizen suits and public nuisance actions. The crucial distinction between the remedies was recognized by the Third District Court of Appeal in *Town of Surfside v. County Line Land Co.*[60] In that case, a landowner brought suit to enjoin the emittance of noxious odors from the town dump.[61] Although the plaintiff lacked standing under the EPA citizen suit provision[62] for failure to exhaust administrative remedies,[63] the court ruled that the availability of the common law remedy remained unaffected.[64] Despite the holding in *Town of Surfside,* there remained doubt over whether the supreme court would blur the distinction between the two remedies and require satisfaction of public nuisance's special injury rule as a prerequisite to standing in an EPA citizen's suit.

The instant case presented the supreme court with the opportunity to clarify the EPA's citizen suit standing requirements.[65] Before addressing the standing issue, the court found it necessary to reject appellee's contention[66] that the statute was an unconstitutional[67] infringement upon the court's powers to regulate procedure.[68] The EPA citizen suit provision was instead characterized as a conferral of a new substantive cause of action.[69]

Having disposed of this issue, the court shifted its attention to whether the statute abrogated the special injury rule.[70] Upon finding it within the legislature's discretion to dispense with the rule,[71] the court focused on the legislative intent underlying the creation of a new cause of action for environmental in-

60. 340 So. 2d 1287 (3d D.C.A.), *cert. denied,* 352 So. 2d 175 (Fla. 1977).

61. Plaintiff, an adjacent property owner, sued to enjoin the town from accepting refuse in its dump from outside corporations, municipalities or entities. *Id.*

62. See note 2 *supra.*

63. The EPA lists three conditions precedent to the bringing of a citizens' suit. FLA. STAT. §403.412(2)(c) (1979). The first provides that the complaining party must file a duly verified complaint with the governmental agencies authorized to regulate or prohibit the act or conduct complained of, setting out the facts giving rise to the complaint and designating the manner in which the complainant has been affected. *Id.* §403.412(2)(a).

64. 340 So. 2d at 1289. *See also* Wetzel v. A. Duda & Sons, 306 So. 2d 533 (4th D.C.A.), *cert. denied,* 316 So. 2d 289 (Fla. 1975). Appellants, riparian property owners, sued to abate alleged pollution caused by appellee's discharge of noxious chemicals into Lake Apopka. The court held that appellant's failure to lodge a timely complaint did not preclude an action based on the common law right to abate nuisances and continuing trespasses. *Id.* at 533-34.

65. FLA. STAT. §403.412(2)(a) (1979).

66. Appellee argued that the EPA sought to grant procedural rights of standing to persons who would not otherwise be able to maintain the action. Brief for Appellee at 6, 390 So. 2d 64 (Fla. 1980). The instant court, however, held the EPA to be a definition and regulation of rights and, therefore, substantive in nature. 390 So. 2d at 66. *Cf.* State v. Garcia, 229 So. 2d 236, 238 (Fla. 1969) (supreme court rule regarding waiver of jury trial is a procedural matter).

67. FLA. CONST. art. V, §2(a) (1972).

68. 390 So. 2d at 67. *See, e.g.,* Avila South Condo. Ass'n, Inc. v. Kappa Corp., 347 So. 2d 599 (Fla. 1977). The court found the statute defective because it sought to define proper parties rather than set out substantive rights. Accordingly, it was held an impermissible invasion into the court's powers. *Id.* at 608. See text accompanying note 85, *infra.*

69. 390 So. 2d at 66. By the enactment of the EPA, Florida citizens have been given standing to protect their rights to a clean environment, a right not previously afforded them directly. *Id.*

70. *Id.* at 67.

71. *Id.*

juries.[72] The EPA, the court noted, implemented the 1969 Florida constitutional amendment which proclaims as state policy the conservation and protection of natural resources.[73] Presuming congressional knowledge of public nuisance and policy, the court held that the special injury rule was not to be read into the EPA's citizen suit provision.[74]

Nonetheless, the court recognized[75] that the EPA's procedural requirements[76] may act as a barrier to private litigation.[77] The conditions precedent to a successful citizen's suit include both notice to the appropriate agency and an opportunity for the defendant to remedy the violation.[78] More importantly, the plaintiff must delineate the manner in which he or she has been affected, thus ensuring that injury and redress, the fundamental components of standing,[79] are present.[80]

The court noted that only equitable relief is available under the EPA.[81] Because damages are not recoverable, plaintiff must meet the requirements of *Brown*[82] and, therefore, introduce evidence of irreparable injury to secure an injunction.[83] Consequently, the court concluded that abrogation of the special

72. Enactment of a statute allowing citizens to bring an action where an action already existed upon a showing of special injury suggests that the legislature did not intend that the special injury rule be carried over to suits brought under the EPA. *Id.* at 67.

73. FLA. CONST. art. II, §7 (1969) provides: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise."

74. 390 So. 2d at 67.

75. *Id.*

76. FLA. STAT. §403.412(2)(c) (1979).

77. *See, e.g.*, Furnans v. Santa Rosa Island Auth., 315 So. 2d 481 (Fla. 1st D.C.A. 1975) (affirmed dismissal for failure to comply with these statutory conditions). *See also* Town of Surfside v. County Line Land Co., 340 So. 2d 1287 (Fla. 3d D.C.A. 1977).

78. FLA. STAT. §403.412(2)(c) (1979).

79. *See* Sierra Club v. Morton, 405 U.S. 727 (1972). In legislating this new cause of action, the only constitutional requirement is that plaintiff must show 'injury in fact.' This standard, significantly different from the common law special injury standard, is based on the fact that courts do not decide issues in the abstract. A showing of injury in fact is necessary to assure that plaintiff has a direct stake in the outcome of the controversy and will litigate all issues fully and fairly. *Id.* at 731-35. A mere interest in a problem, such as that demonstrated by the Sierra Club regarding the commercial exploitation of Mineral King Valley, is not sufficient to bring an action under the provisions of the Administrative Procedure Act (APA). *Id.* at 739. *Cf.* State Dept. of Health & Rehab. Serv. v. Alice P., 367 So. 2d 1045 (Fla. 1st D.C.A. 1979) (interprets comparable state statute, FLA. STAT. §120.52(10) (Supp. 1979), as requiring injury in fact)).

80. 390 So. 2d at 67.

81. *Id.* at 67-68. *See* FLA. STAT. §403.412(a) (1979).

82. A mere allegation of irreparable injury will not ordinarily warrant injunctive relief. See note 55 *supra*.

83. Permanent damages are sometimes granted in place of injunctive relief, particularly where the activity is suitably located, advantageous to the community, and operated in a technologically acceptable manner. Granting such damages gives the defendant a *de facto* power of eminent domain. W. RODGERS, *supra* note 40, §2.3. *See* Boomer v. Atlantic Cement, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). In *Boomer*, dirt, smoke and vibration from a cement plant inflicted damages upon neighboring landowner. The court granted an injunction which the cement company could vacate upon payment of permanent damages to compensate plaintiffs for their estimated past, present and future losses. *Id.* at 225, 257 N.E.2d

injury rule in EPA suits would not open Florida courts to an unmanageable volume of environmental litigation.[84]

Appellee's reliance on the special injury rule in defending an EPA action was both creative and perplexing. In characterizing the citizen suit provision as a rule of procedure,[85] appellee urged that, by abrogating the special injury rule, the legislature had sought to define the proper parties to a common law nuisance action.[86] From this, appellee argued persuasively in the lower court that the EPA was an impermissible invasion into the exclusive rulemaking powers of the judiciary.[87]

The instant court's treatment of the special injury rule, therefore, arose in an unusual context. Rather than address the scope and purpose of the EPA directly, the court was forced to evaluate the constitutional consequences of the legislature's action. By rejecting appellee's constitutional argument, the court unequivocally declared the special injury rule inapplicable to EPA citizen suits.[88] This latter ruling, however, was reached without a comprehensive examination of its ramifications on environmental litigation.[89]

On the surface, the decision seems merely to differentiate between EPA suits and public nuisance actions on the basis of the special injury rule,[90] thus creating alternative theories of relief in Florida. Closer analysis, however, raises doubts as to whether the two theories are really distinct.

The EPA casts the environmental litigant in the role of a private attorney general empowered to enforce those Florida "law[s], rule[s], or regulation[s]" relating to the environment.[91] This language could reasonably be interpreted as incorporating the public nuisance doctrine.[92] If such an approach is fol-

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at 875, 309 N.Y.S.2d at 317. *But cf.* Spur Indus., Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (1972) (land developer, whose sales were adversely affected by odors from a nearby cattle feed lot, was granted an injunction conditioned on plaintiffs payment of the reasonable costs of closing and moving the nuisance site).

84. 390 So. 2d at 68. The deterrence of a multiplicity of suits leading to judicial inefficiency and ineffectiveness, has been the traditional justification for the special injury rule. *See* Brown v. Florida Chautauqua Ass'n, 59 Fla. 447, 52 So. 802 (1910). This argument was rejected by the Supreme Court in Flast v. Cohen, 392 U.S. 83 (1968). The Court, emphasizing the adversarial nature of the dispute, rather than the injury suffered by the individual, granted a taxpayer standing to challenge federal spending. *Id.* at 101. *See generally* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

85. *See* State v. Garcia, 229 So. 2d 236, 238 (Fla. 1969) (discussion of the distinction between substantive and procedural law in Florida).

86. Appellees argument was that the EPA, instead of conferring new substantive rights upon Florida citizens, subverted the supreme court's holding in *Save Sand Key* by granting standing to private citizens in public nuisance actions without a showing of special injury. *See* Brief for Appellee at 8, 390 So. 2d 64 (Fla. 1980).

87. See note 7 *supra.*

88. 390 So. 2d at 66.

89. See note 99 *infra.*

90. 390 So. 2d at 67.

91. FLA. STAT. §403.412(a) (1979). See note 2 *supra.*

92. *See* United States v. Solvents Recovery Serv. of New England, 496 F. Supp. 1127 (D. Conn. 1980). The Environmental Protection Agency instituted an action on behalf of the United States pursuant to the Resource, Conservation and Recovery Act (RCRA), 42 U.S.C. §7003, see note 41 *supra*, to enjoin allegedly unlawful groundwater pollution. Defendants

lowed, not only would the special injury rule no longer be necessary in public nuisance actions,[93] but the need for an applicable statute or regulation upon which to predicate the citizen suit would be obviated. The courts, using the EPA's relaxed standing requirements could, in common law tradition, fashion necessary relief in accord with both the public nuisance doctrine and the environmental policies of the Florida Constitution. This flexibility in the judicial framework would assure greater access to the courts for private environmental plaintiffs.[94]

Relaxed standing alone, however, does not assure relief. The instant court stated clearly that mere allegations of irreparable injury without supporting

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contended that because the alleged pollution did not meet the interstate effects requirement of section 7003, the Environmental Protection Agency could not maintain the action. The court found, however, that section 7003 was primarily a jurisdictional statute providing a forum for U.S. environmental suits, and held actions under the statute were governed by the common law of public nuisance. As no allegations of interstate effect are required by the common law, the Environmental Protection Agency was permitted to procede with the action. 496 F. Supp. at 1125. For a discussion of the federal common law and its development in the context of pollution of interstate and navigable waters, *see* Note, *Federal Common Law Remedies for the Abatement of Water Pollution*, 5 FORDHAM URB. L.J. 549 (1977). *See also* Milwaukee v. Illinois & Michigan, 101 S. Ct. 1784 (1981), which has limited the viability of the federal common law in environmental actions, leaving the continued significance of the *Solvents Recovery* decision as applied to other federal legislation, questionable. RCRA, like the Federal Water Pollution Control Act construed in *Milwaukee*, has an imminent hazards provision which, as the Court in *Milwaukee* has held, preempts the federal common law of nuisance. *Id.* at 1792. The reasoning of the district court in *Solvents Recovery* is nevertheless appropriate and applicable to the Florida statute which, unlike RCRA, incorporates all environmental laws, rules, or regulations.

93. The instant court recognized that some exceptions to the special injury rule have been already carved out by both the judiciary and the legislature. 390 So. 2d at 67. *See. e.g.*, Brown v. Firestone, 382 So. 2d 654 (Fla. 1980); Department of Ad. v. Horne, 269 So. 2d 659 (Fla. 1972) (taxpayers need not show special injury when challenging provisions of the General Appropriations Act, but the *Brown* court reaffirmed the necessity of special injury in other causes of action); Renard v. Dade County, 261 So. 2d 832 (Fla. 1972) (zoning). *See also* FLA. STAT. §60.05 (1979) (any citizen of the county may sue in the name of the state to enjoin any nuisance); FLA. STAT. §823.05 (1979) (establishes as a nuisance any use of property which tends to annoy the community or injure its health . . . or become injurious to the morals or manners of the people). For an interpretation of these statutes, *see* State *ex rel.* Gardner v. Sailboat Key, Inc., 295 So. 2d 658 (Fla. 3d D.C.A. 1974). Individuals brought suit to enjoin construction on the undeveloped island of Sailboat Key. The court held that the complaint was sufficient to state a cause of action despite the citizen relator's failure to demonstrate an injury different in kind from the injury to the public at large. 295 So. 2d at 662. Defendant's compliance with municipal zoning ordinances did not prohibit the court from abating the construction as a nuisance. *See also* FLA. STAT. §120.52(10)(c) (Supp. 1979) (defining parties empowered to petition for judicial review of administrative actions as "any other person . . . allowed by the agency to intervene or participate in the proceeding as a party"). For an interpretation of this statute, *see* City of Key West v. Askew, 324 So. 2d 655 (Fla. 1st D.C.A. 1975).

94. An expansion in available private causes of action may lessen the impact of the anticipated diminished federal role in environmental protection. *See* Wall St. J., Jan. 30, 1981, at 23, col. 4. By interpreting public nuisance as a "law, rule, or regulation" FLA. STAT. §403.412(2)(a) (1979), the courts would be, in accord with the broad standing provisions of the EPA, allowing environmental litigants greater access to the courts. This mirrors the national policies embodied in the federal common law of nuisance. See note 92 *supra*.

allegations of fact will not state a cause of action under the EPA.[95] This common law standard[96] contravenes legislative intent by making a private citizen's right to enforce Florida's environmental laws on behalf of the general public contingent on the extent of his injury.

A fair reading of the statute would support injunctive relief upon a mere showing that the defendant had violated an environmental law, rule, or regulation.[97] By relying on *Brown*,[98] the court may, in effect, have reintroduced a concept not unlike that of special injury by requiring the plaintiff to demonstrate irreparable injury, the common law standard for injunctive relief.[99] Manifestly, the *Brown* standard is inapposite to the instant case and may severely limit the scope of available relief under the EPA. Its application in the context of a private attorney general statute is regrettable; the statute was designed, in part, to enable the private litigant to aid in the enforcement of environmental laws. Were the attorney general to seek the same injunction, no showing of irreparable injury would be required.[100] Therefore, the court incorrectly employed the private remedy standard to what was essentially a public lawsuit.

With the recent change in administrations, federal regulation may play a less significant role in environmental protection,[101] thus placing a greater burden on the states. The instant decision, by upholding the constitutionality of the EPA, and interpreting it in a manner consonant with legislative intent,[102] has removed a major obstruction to the success of citizen suit litigation. If the statute is further interpreted as encompassing common law public nuisance, special injury will be de facto eliminated from environmental actions, thereby giving private litigants greater access to Florida courts. However, unless subsequent decisions hold the common law standard for injunctive relief inapplicable to EPA citizen suits, special injury may emerge in new form to deny aggrieved parties relief from environmental nuisances.

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95. See notes 54-57 and accompanying text, *supra*.

96. See text accompanying note 82, *supra*.

97. The statute, by its language, empowers the citizen/plaintiff to sue for an injunction to compel the defendant to comply with the measure at issue. FLA. STAT. §403.412(2)(a) (1979). See note 2 *supra*.

98. See note 54 *supra*.

99. The instant court, after finding for appellants on the standing issue, remanded the case for determination of the merits. 390 So. 2d at 68. Whether appellants will be able to meet the *Brown* standard is unclear from the opinion.

100. State v. Samscot, 297 So. 2d 69 (Fla. 4th D.C.A. 1974); Pompano Horse Club Co. v. State, 93 Fla. 415, 111 So. 801 (Fla. 1927).

101. See Wall St. J., *supra* note 93.

102. For an analysis of the intent of the Florida legislature in enacting the EPA, *see* Note, *The Florida Environmental Protection Act of 1971: The Citizens Role in Environmental Management*, 2 FLA. ST. L. REV. 736, 752 (1974).