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# The Second Amendment v. The Environment: Florida's Transformation of Gun Range Environmental Liability

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This Article focuses on Florida's statutory provisions regulating gun ranges; those provisions provide a stark contrast to traditional environmental regulation. In 2004, Florida enacted legislation that makes lawsuits and other legal actions against gun ranges a "last-resort option" for addressing environmental impacts at the ranges and creates a rule that relies on the industry to define the standards for performance of gun range owners and operators. This legislation provides a good example for examining potential limits to self-regulation, which is important to understand in the current era of rolling back governmental mandates. Evaluating Florida's environmental regulation of gun ranges also examines the tension created when a constitutional right is invoked to protect a specific activity and the extent to which deference is required when other obligations and rights are impacted. In this situation, it is the obligation of local governments to protect the health, safety and welfare of their citizens and the right of citizens to the beneficial use and enjoyment of their property.

Florida's legislation gives the ranges immunity from all state and local governmental legal actions if the range has made a good faith effort to implement site specific management plans based on a best practices manual issued in 2004, regardless of the environmental impact. The best practices manual was issued by Florida's Department of Environmental Protection in

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consultation with the U.S. Environmental Protection Agency (“EPA”) and industry stakeholders including the National Rifle Association.<sup>1</sup> This manual, however, did not go through any kind of regulatory review process. In addition, there is no constitutional or legislative guidance for determining what the terms “best management practices” and “good faith efforts” mean in an environmental regulatory process. Moreover, it is unclear who will be responsible for cleaning up contamination when “good faith efforts” with “best management practices” are insufficient to protect the environment. Florida citizens may retain the ability to bring lawsuits to enforce federal laws in the absence of state action, but those actions are costly and the lack of judicial precedent makes their success uncertain.

It is important to understand the implications for the environment in Florida, as well as the health and safety of its citizens, when ambiguous terms are incorporated into legislation that also preempts local and state agency governance and enforcement. In the case of gun ranges and use of firearms, the legislation’s ambiguity is compounded by additional legislation that subjects state and local officials to sanctions for actions that violate Florida Legislature’s “occupation of the whole field of firearms and ammunition.”<sup>2</sup> The result is that regulators are prohibited from taking actions to clarify or interpret the ambiguities. The lack of support for the legislative findings for preempting all state agency and local governmental actions to protect the environment from the impact of gun ranges and the law’s ambiguity undermine the preservation of Florida’s natural resources and protection of its environment.

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<sup>1</sup> See BUREAU OF SOLID AND HAZARDOUS WASTE, FL. DEP’T OF ENVTL. PROT., BEST MANAGEMENT PRACTICES FOR ENVIRONMENTAL STEWARDSHIP OF FLORIDA SHOOTING RANGES (2004) [hereinafter FLORIDA BMP MANUAL]; ENVTL. PROT. AGENCY REGION 2, EPA-902-B-01-001, BEST MANAGEMENT PRACTICES FOR LEAD SHOOTING RANGES (2001) [hereinafter EPA BMP MANUAL].

<sup>2</sup> FLA. STAT. § 790.33(3)(a) (2017). See also FLA. STAT. § 790.333(7) (2017).

## Table of Contents

|                                                                                                                                                                        |     |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| INTRODUCTION .....                                                                                                                                                     | 83  |
| I. GUN RANGE ENVIRONMENTAL IMPACT .....                                                                                                                                | 84  |
| II. FLORIDA SHOOTING RANGE ENVIRONMENTAL LIABILITY<br>PROTECTION.....                                                                                                  | 88  |
| III. FEDERAL STATUTORY LAW .....                                                                                                                                       | 95  |
| A. The Application of RCRA to Gun Ranges: Abandoned Lead<br>Can Be a Hazardous Waste but Gun Ranges Are Not<br>Subject to Permitting Requirements for Operations ..... | 96  |
| B. CERCLA .....                                                                                                                                                        | 101 |
| C. Clean Water Act .....                                                                                                                                               | 103 |
| D. The EPA's BMP Manual for Gun Ranges .....                                                                                                                           | 106 |
| IV. IMPACT AND IMPLICATIONS FOR THE ENVIRONMENT OF FLORIDA'S<br>GUN RANGE ENVIRONMENTAL IMMUNITY LAW .....                                                             | 108 |
| CONCLUSION .....                                                                                                                                                       | 113 |

## INTRODUCTION

This Article explores legislation enacted in Florida over ten years ago that set up a unique regime for the environmental management of gun ranges. The law essentially exempts gun ranges from environmental liability. In Part I, this Article discusses the environmental impacts associated with gun range operations. It then discusses the Florida legislation for environmental management of gun ranges in Part II. Because the ranges are still potentially subject to federal pollution control laws, Part III discusses the application of those laws to shooting ranges. Finally, Part IV discusses the law's impact on environmental regulation and the extent to which rights under the Second Amendment override health and safety and environmental concerns of the general public and of individual citizens impacted by gun ranges. The Article concludes by recommending that the Florida Legislature re-evaluate its action in taking away basic protections for the health, safety and welfare of all citizens.

## I. GUN RANGE ENVIRONMENTAL IMPACT

The environmental hazards presented by the operation of gun ranges are well documented.<sup>3</sup> There are an estimated 9,000 nonmilitary outdoor shooting ranges in the United States<sup>4</sup> and another 16,000 to 18,000 indoor ranges.<sup>5</sup> In Florida, a State Senate legislative analysis estimated that there were over 400 public and private sport shooting ranges in 2003.<sup>6</sup> Florida is considered to have the most guns in the country, based on concealed weapon permits, and that number increased from over 1.3 million in 2015 to 1.9 million in early 2016.<sup>7</sup> In addition to private ranges, Florida law allows virtually anyone to “recreationally” discharge firearms in residential areas.<sup>8</sup> This led several people to engage in target shooting on

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<sup>3</sup> See, e.g., Christopher J. Schmitt, Editorial, Editor’s Note, *BULLETIN OF ENVTL. CONTAMINATION AND TOXICOLOGY*, Dec. 28, 2016; EPA BMP MANUAL, *supra* note 1, at I-1.

<sup>4</sup> EPA BMP MANUAL, *supra* note 1, at I-1.

<sup>5</sup> Catherine Beaucham et al., Indoor Firing Ranges and Elevated Blood Lead Levels—United States, 2002-2013, *CTR. FOR DISEASE CONTROL AND PREVENTION* (Apr. 25, 2014), [https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6316a3.htm?s\\_cid=mm6316a3\\_w](https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6316a3.htm?s_cid=mm6316a3_w).

<sup>6</sup> S. Staff, Analysis and Economic Impact Statement, S.B. 1156, at 5 (Fla. 2004) [hereinafter Senate Analysis], <http://archive.flsenate.gov/data/session/2004/Senate/bills/analysis/pdf/2004s1156.ap.pdf>.

<sup>7</sup> Vanessa Nason, The gunshine state: nobody knows how many firearms are in Florida, *MUCKROCK* (MAR. 8, 2017), <https://www.muckrock.com/news/archives/2017/mar/08/florida-guns/>.

<sup>8</sup> See, e.g., Cammy Clark, Big Pine Key homeowner has gun range in his yard, and it’s totally legal, *MIAMI HERALD* (Jan. 26, 2014, 8:53 PM), <http://www.miamiherald.com/news/local/community/florida-keys/article1959645.html>; Susannah Bryan, Law Allowing Backyard Gun Ranges Needs to be Changed, South Florida officials say, *SUN SENTINEL* (Feb. 13, 2014), [http://articles.sun-sentinel.com/2014-02-13/news/fl-gun-range-backyard-20140213\\_1\\_gun-owners-local-gun-laws-gun-use](http://articles.sun-sentinel.com/2014-02-13/news/fl-gun-range-backyard-20140213_1_gun-owners-local-gun-laws-gun-use); Martha Neil, Want a Backyard Shooting Range? Florida Law Makes it Easy, *ABA JOURNAL* (Mar. 6, 2014, 11:40 PM), [http://www.abajournal.com/news/article/want\\_to\\_set\\_up\\_a\\_back\\_yard\\_shooting\\_range\\_florida\\_law\\_makes\\_it\\_easy\\_restric/](http://www.abajournal.com/news/article/want_to_set_up_a_back_yard_shooting_range_florida_law_makes_it_easy_restric/). In response to this publicity and at least two cases of accidental deaths caused by adjacent landowners using their guns, an amendment to Florida’s law making it a misdemeanor to recreationally discharge a firearm “in an area that the person knows or reasonably should know is primarily residential in nature and that has a residential density of one or more dwelling units per acre. . . . [unless] under the circumstances, the discharge does not pose a reasonably foreseeable risk to life, safety, or property.” *FLA. STAT.* §790.15(4) (2017). Beth Kassab, Latest Home Gun Range Spurs Call for Common Sense, *ORLANDO SENTINEL* (Feb. 9, 2015), <http://www.orlandosentinel.com/opinion/os-backyard-gun-range-beth-kassab-20150209-column.html>; Arek Sarkissian, St. Pete Backyard Gun Range Spurs New State Law, *TAMPA BAY TIMES* (Feb. 26, 2016) <http://www.tbo.com/news/politics/st-pete-backyard-gun-range-spurs-new-state-law-20160226/>.

their own property.<sup>9</sup>

Contamination is a significant issue at shooting ranges. The primary contaminant is lead, but other heavy metals such as copper, zinc and antimony also often occur at high levels.<sup>10</sup> More recently, the presence of mercury has been found, particularly at ranges that were in operation in the 1960s.<sup>11</sup>

The U.S. Environmental Protection Agency (“EPA”) has estimated that much of the 80,000 tons of lead made into bullets and shot each year “finds its way into the environment at ranges,”<sup>12</sup> in the form of lead shot fragments and spent pellets.<sup>13</sup> While much of the lead and other metals remains in the soil, some of those metals migrate and contaminate groundwater and surface water.<sup>14</sup> The exposure pathways include lead-contaminated soil and dissolved lead in acidic waters that can move through the environment in storm water run-off and migration through soils to groundwater.<sup>15</sup> In fact, the most common nonoccupational exposure to lead comes from shooting firearms.<sup>16</sup> The Center for Biological Diversity estimates that as many as 20 million birds and animals die each year from lead shot and fishing tackle,<sup>17</sup> which also means that birds and animals killed for food contain levels of lead.

Florida’s Department of Environmental Protection (“FDEP”) has also recognized the environmental impacts of shooting ranges. The FDEP webpage for Lead Management at Florida Shooting Ranges states, “Florida depends on groundwater for its drinking water supply, and on surface water for the outdoor recreation industry. High rainfall and acidic conditions, typical in Florida, cause lead to be more mobile in the

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<sup>9</sup> See, e.g., Clark, *supra* note 8; Bryan, *supra* note 8; Neil, *supra* note 8.

<sup>10</sup> Schmitt, *supra* note 3. See also FLORIDA BMP MANUAL, *supra* note 1, at 7 (“Lead accounts for “92-98% of the weight of most bullets and shot,” which leads to an accumulation of lead in “range backstops, berms and shortfall zones.”).

<sup>11</sup> See Schmitt, *supra* note 3.

<sup>12</sup> EPA BMP MANUAL, *supra* note 1, at I-1.

<sup>13</sup> See Patrick Reilly, Lead Shot OK’ed for Federal Lands: What Does this Mean for Conservation?, THE CHRISTIAN SCIENCE MONITOR (Mar. 3, 2017), <http://www.csmonitor.com/Environment/2017/0303/Lead-shot-OK-d-for-federal-lands-what-does-that-mean-for-conservation>.

<sup>14</sup> Schmitt, *supra* note 3.

<sup>15</sup> See EPA BMP MANUAL, *supra* note 1, at I-2.

<sup>16</sup> Adult Blood Lead Epidemiology and Surveillance—United States, 2008-2009, CTR. FOR DISEASE CONTROL AND PREVENTION (July 1, 2011), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6025a2.htm>.

<sup>17</sup> Get the Lead Out, CTR. FOR BIOLOGICAL DIVERSITY (Mar. 2, 2017), [http://www.biologicaldiversity.org/campaigns/get\\_the\\_lead\\_out/](http://www.biologicaldiversity.org/campaigns/get_the_lead_out/); see also Reilly, *supra* note 13.

environment. Therefore, proper management of outdoor shooting ranges is especially important in the Sunshine State.”<sup>18</sup>

At indoor shooting ranges, both employees and people who visit these ranges have a significant exposure risk to lead.<sup>19</sup> There is evidence that many of the nonoccupational exposures to lead occur in indoor shooting ranges, where lead can accumulate if these facilities are not properly maintained.<sup>20</sup>

Lead exposure at gun ranges is “a serious problem and we think it could be quite widespread,” said Dr. Elana Page, medical officer for The National Institute for Occupational Safety and Health.

“The risk isn’t limited to range employees,” Page added.

“Some firing ranges cater to children, they have birthday parties and special events,” she said.

“I think it’s really important that people are aware they can have significant exposure at a firing range, even for members of the general public.”<sup>21</sup>

Because lead accumulates in the indoor facilities, further environmental exposure can occur when indoor facilities are closed without remediation.<sup>22</sup> In one case, a facility that was assessed fines for violations for excess lead levels kept operating for two more years, until the building was demolished and a new McDonald’s restaurant was built on the site. Workers at the facility had been exposed to 12 times the permissible airborne limit.<sup>23</sup>

Some users of shooting ranges contend that lead exposure is not a significant concern and that governments and anti-gun advocates are using environmental exposures as an excuse to infringe on gun owners’ rights.<sup>24</sup>

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<sup>18</sup> Lead Management at Florida Shooting Ranges, FLA. DEP’T OF ENVT’L PROTECTION, <https://floridadep.gov/waste/permitting-compliance-assistance/content/lead-management-florida-shooting-ranges> (last visited Nov. 22, 2016).

<sup>19</sup> See Christine Willmsen et al., Loaded with Lead: How Gun Ranges Poison Workers and Shooters, SEATTLE TIMES (Oct. 17, 2014), <http://projects.seattletimes.com/2014/loaded-with-lead/1/>.

<sup>20</sup> See *id.*

<sup>21</sup> *Id.*

<sup>22</sup> See Willmsen et al., *supra* note 19.

<sup>23</sup> *Id.*

<sup>24</sup> See *id.* (“It’s a pervasive problem across the country — the lack of awareness and a belief that people and governments are trying to infringe on a gun owner’s rights and ability to shoot,” [Bob Godlove] said.”); Victoria Colliver, Shooters Turn Out at Chabot Gun Club, Closing after 52 years, SF GATE (Sept. 5, 2016), <http://www.sfgate.com/bayarea/article/Shooters-turn-out-at-Chabot-Gun-Club-closing-9204131.php>

However, the Best Management Practices for Lead at Outdoor Shooting Ranges manual issued by EPA included the participation of two prominent gun advocacy groups, the National Rifle Association of America and the National Shooting Sports Foundation.<sup>25</sup> That manual acknowledges the environmental issues associated with the operation of outdoor shooting ranges and gives guidance on how best to manage the risk.<sup>26</sup> Florida's legislature also explicitly acknowledged environmental concerns when it made a legislative finding in the law that gives shooting ranges liability protection for environmental impacts that "projectiles have accumulated in the environment at many ranges. Whether this projectile accumulation has caused or will cause degradation of the environment or harm to health depends on factors that are site specific."<sup>27</sup> In fact, in the legislative history for this law, both the Florida Department of Health and the Environmental Protection Department reported explicit findings on the dangers associated with gun range operations.

The [Department of Health] reports that

[i]ndoor shooting ranges are known to be a source of lead poisoning for children and employees, and possibly customers, of shooting ranges. There are also data that show lead contamination in soil greater than 400 parts per million can result in lead poisoning of some children. Contamination of the soil at an outdoor range that was later used for residential uses would represent a risk of lead poisoning to children living on that land.

The [Department of Environmental Protection] reports that '[e]nvironmental data from many ranges indicates significant lead and arsenic contamination of soils (so much so that many soils fail the federal hazardous waste leaching test for a hazardous waste), groundwater contamination, and, in some cases, off-site surface water contamination.'<sup>28</sup>

There have been some efforts to decrease the use of lead shot. In 1984, the National Wildlife Federation, a pro-hunting group, asked the United States Fish and Wildlife Service ("FWS") to impose an immediate ban on the use of lead in certain areas to protect eagles and waterfowl from lead poisoning, to be followed by expanding the ban in several other

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("It's a bias against guns plain and simple," said Bob Low. . . "They're just using the lead as an excuse."").

<sup>25</sup> See EPA BMP MANUAL, *supra* note 1, acknowledgements.

<sup>26</sup> See *id.*, at I-2.

<sup>27</sup> FLA. STAT. § 790.333(1)(f) (2017).

<sup>28</sup> Senate Analysis, *supra* note 6.

impacted areas.<sup>29</sup> This request followed the release of a federal report in the mid-1970's that between 1.6 and 2.4 million waterfowl died each year from swallowing lead shot.<sup>30</sup> In 1991, the FWS issued a ban on the use of lead shot for waterfowl.<sup>31</sup> In 2011, the FWS claimed that this ban saved one to one and a half million ducks from death by lead poisoning each year.<sup>32</sup> California's legislature recently enacted a lead shot ban due to take effect in 2019.<sup>33</sup>

Earlier this year, in a highly publicized action, the new Interior Secretary, Ryan Zinke, revoked a last minute attempt by the outgoing director of the FWS to ban lead shot and fishing tackle on all federal lands.<sup>34</sup> Gun rights advocates claimed that nontoxic rounds cost more and kill less effectively.<sup>35</sup> That claim has been evaluated and disputed by at least two major reports, including a 2012 study by the Royal Swedish Academy of Sciences after evaluating ammunition in both the United States and Europe.<sup>36</sup>

## II. FLORIDA SHOOTING RANGE ENVIRONMENTAL LIABILITY PROTECTION

Florida has been nicknamed the "Gunshine State" because the National Rifle Association (NRA) focused its efforts to establish gun rights legislation first in Florida.<sup>37</sup> In fact, the Tampa Bay Times stated in an editorial that the NRA "owns the Florida Legislature lock, stock and barrel."<sup>38</sup> In 1987, the Florida state legislature expressly preempted the

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<sup>29</sup> Reilly, *supra* note 13.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See Sec'y of the Interior, Order No. 3346 (Mar. 2, 2017) (revoking the U.S. Fish and Wildlife Service Director's Order No. 219); Reilly, *supra* note 13.

<sup>35</sup> Reilly, *supra* note 13.

<sup>36</sup> *Id.*

<sup>37</sup> David Cole, How the NRA Made Florida the Gunshine State, ZOCOLO PUBLIC SQUARE (June 16, 2016), <http://www.zocalopublicsquare.org/2016/06/16/how-the-nra-made-florida-the-gunshine-state/ideas/nexus/>. The NRA's efforts led to the establishment of shooting range protection acts in at least 47 states. John R. Remakel, A Minnesota Armistice? The Enactment and Implementation of the Minnesota Shooting Range Protection Act, 31 HAMLINE L. REV. 197, 200 (2008).

<sup>38</sup> Editorial, Putman Aims to be Florida's Gun Governor, TAMPA BAY TIMES (July 21, 2017), <http://www.tampabay.com/opinion/editorials/editorial-putnam-aims-to-be-floridas-gun-governor/2331117>.



“whole field of regulation of firearms and ammunition . . . to the exclusion of all existing and future county, city, town, or municipal ordinances or regulations relating thereto,” except as expressly provided by the State Constitution and general law.<sup>39</sup> The general law, which still applied to gun ranges, included environmental laws. Florida Statutes Chapter 376, Pollutant Discharge Prevention and Removal, and Chapter 403, Environmental Control, regulate discharges and releases of pollutants and impose liability for pollution.<sup>40</sup> These laws authorize the Florida Department of Environmental Protection (FDEP) to file civil lawsuits “against any person who caused a discharge of pollutants or hazardous substances, or who owned and operated a facility at which the discharge occurred.”<sup>41</sup> Florida Statute section 376.313(3) also permits individuals to bring actions for damages under these statutes, and the Florida Supreme Court has held that this provision “creates of private cause of action imposing strict liability for damages against an adjoining landowner without proof that the defendant actually caused the pollution.”<sup>42</sup>

These statutes and relevant case law subjected gun ranges to potential liability to the state, local governments and third parties. In response to concerns about environmental violations, the FDEP began to exercise its authority against gun clubs.<sup>43</sup> This led certain Florida gun clubs, some of which were allied with the National Rifle Association and the National Shooting Sports Foundation, to propose legislation in 2004 “intended to prohibit state enforcement of these environmental laws at shooting ranges and imposing severe criminal penalties on any governmental officials who

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<sup>39</sup> FLA. STAT. § 790.333(8) (2017). There are a few other states that have enacted similar legislation, although one author found that Montana went further than the Florida Legislature in proscribing state agency and local governmental actions relating to the operation of gun ranges. See Remakel, *supra* note 37, at 222–23. Florida’s legislation imposes civil and, in some cases, criminal fines on any governmental official who does anything to try to restrict gun ranges. This has resulted in local officials stating that they have no power to intervene in operation of guns on private property. See, e.g., Clark, *supra* note 8; Bryan, *supra* note 8; Neil, *supra* note 8. See also Authority of County to Enact Ordinance Prohibiting Discharge of Firearm, Fla. Att’y Gen. Op. 40 (2015), 2005 WL 1650327.

<sup>40</sup> Ralph DeMeo & Karyl Alderman, Environmental Stewardship of Florida Shooting Ranges, 80 FLA. B. J. 76, 76 (2006) (“Specifically, F.S. §376.302 provides that ‘it shall be prohibited for any reason: to discharge pollutants or hazardous substances into or upon the surface or ground waters of the state or lands. . . .’ In addition, F.S. §403.161(1) provides that ‘it shall be prohibited for any person: to cause pollution . . . so as to harm or injure human health or welfare, animal, plant, or aquatic life or property.’”).

<sup>41</sup> *Id.*; FLA. STAT. § 376.308(1) (2017).

<sup>42</sup> DeMeo & Alderman, *supra* note 40 (citing *Aramark Uniform and Career Apparel v. Easton*, 894 So.2d 20, 24 (Fla. 2004)).

<sup>43</sup> DeMeo & Alderman, *supra* note 40.

targets shooting ranges for enforcement.”<sup>44</sup> The Florida Legislature enacted Florida Statute section 790.333 that same year, explicitly preempting regulation of “the environmental effects of projectile deposition at sport shooting and training ranges,” stating that this law supersedes conflicting provisions of the Florida Statutes Chapters 376 and 403.<sup>45</sup> To ensure the preemption further, the Legislature declared that section 790.333 should be “liberally construed to effectuate its remedial and deterrent purposes.”<sup>46</sup>

The Legislature expressly declared that it intended to protect gun ranges and all persons and entities associated with the operation of gun ranges, including lenders and insurers, from “lawsuits and other legal actions by the state, special purpose districts, or political subdivisions” and that legal action should only be used as a last resort option after all other efforts had been attempted.<sup>47</sup> The Legislature also explicitly sought “to promote maximum flexibility for implementation of environmental management practices and of the principles of risk-based corrective action. . . .”<sup>48</sup>

Section 790.333 creates unique environmental regulatory rules for gun ranges. Section 790.333(4)(a) requires the FDEP to “make a good faith effort to provide copies of the Best Management Practices for Environmental Stewardship of Florida Shooting Ranges to all owners or operators of sport shooting or training ranges.”<sup>49</sup> The definition of “Environmental management practices” in section 790.333(3)(e) includes “Best Management Practices for Environmental Stewardship of Florida Shooting Ranges as developed by the Department of Environmental Protection.”<sup>50</sup> Presumably section 790.333(4)(a) refers to this same publication (published October 2004). FDEP stated that the content “was developed by many authors and contributors” and included portions taken from publications by the U.S. EPA and the National Sports Shooting Foundation.<sup>51</sup> There is no requirement in the law for updating this manual or for redistributing it, nor is there any definition provided for “a good

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<sup>44</sup> Id.

<sup>45</sup> FLA. STAT. § 790.333(8)–(9) (2017).

<sup>46</sup> Id. § 790.333(10).

<sup>47</sup> Id. § 790.333(2).

<sup>48</sup> Id.

<sup>49</sup> Id. § 790.333(4)(a).

<sup>50</sup> Id. § 790.333(3)(e).

<sup>51</sup> FLORIDA BMP MANUAL, *supra* note 1, at ii.

faith effort.”<sup>52</sup> FDEP is also required to provide “technical assistance” to ranges for implementing best management practices.

The sole requirement for range owners, operators, tenants, or occupants is to “implement situation appropriate environmental management practices.”<sup>53</sup> There is no definition, explanation or other guidance for what constitutes “situation appropriate” practices or how those practices should be determined.

The remainder of section 790.333(4) is devoted to contamination issues. If a range owner, operator, tenant or occupant suspects there is contamination, that person may ask FDEP to assist with or to perform an assessment.<sup>54</sup> If a third party or adjacent property owner suspects or identifies contamination at a range and notifies FDEP, the department will give the range 60-days’ notice of its intent to investigate potential contamination.<sup>55</sup> Again, the range owner, operator, tenant or occupant may request FDEP assistance with or performance of the investigation.<sup>56</sup>

If contamination at a range is confirmed, the statute requires the application of risk-based corrective action principles, which are set forth in section 376.30701 of the Florida Statutes. The Florida risk-based rules consider “site-specific data, modeling results, risk assessment studies, institutional, and engineering controls to develop a unique remediation strategy for the site.”<sup>57</sup> In developing the remediation strategy, intended use of the property is considered, and section 790.333(4)(e) states that the cleanup plans shall presume industrial rather than residential use.<sup>58</sup> This provision also has an unusual provision that states, “[a]pplication of the minimum risk-based corrective action principles shall be the primary responsibility of the sport shooting range or training range owner or operator for implementation.”<sup>59</sup> What “minimum” means in this context is unclear.

The most unusual provision of this section, however, is that this law effectively makes the State of Florida responsible for cleaning up lead pollution from bullets at gun ranges. A gun range owner or operator need only make a “good faith effort” to comply with the statutory provisions of section 790.333(4) (described above). If a good faith effort is made, the

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<sup>52</sup> See FLA. STAT. § 790.333(3)–(4) (2017).

<sup>53</sup> Id. § 790.333(4)(b).

<sup>54</sup> Id. § 790.333(4)(c).

<sup>55</sup> Id. § 790.333(4)(d).

<sup>56</sup> Id.

<sup>57</sup> DeMeo & Alderman, *supra* note 40.

<sup>58</sup> FLA. STAT. § 790.333(4)(e).

<sup>59</sup> Id.

gun range and “any public and private owner, operator, employee, agent, contractor, customer, lender, insurer, or user” of a gun range in Florida becomes immune from legal action by the state or any political subdivision for “any claims of any kind” associated with “any projectile in the environment.”<sup>60</sup> “Projectile” is broadly defined as “any object expelled, propelled, discharged, shot, or otherwise released from a firearm, BB gun, airgun, or similar device, including, but not limited to, gunpowder, ammunition, lead, shot, skeet, and trap targets and associated chemicals, derivatives, and constituents thereof.”<sup>61</sup>

This law also imposes significant disincentives on state agencies and other political subdivisions to dissuade them from making claims against gun ranges or anyone involved in the operation of a gun range. It subjects individual officials, agents and employees of counties, cities and other political subdivisions of the state to the possibility of misdemeanor charges. An official, agent or employee acting in his or her official capacity and within the scope of employment or office, and who “intentionally and maliciously” violates the provisions of section 790.333 or is a party bringing an action in violation of this section, commits a misdemeanor in the first degree.<sup>62</sup> Potential penalties include imprisonment for up to one year and a \$1,000 fine.<sup>63</sup>

The term “maliciously” is not defined for the purposes of this statute, and it appears that there is no general definition for this term in Florida’s Standard Jury Instructions for Criminal Cases, nor are there any instructions for crimes under this statute.<sup>64</sup> One appellate court decision that extensively discussed the meaning of the term “maliciously” concluded that it meant “wrongfully, intentionally, without legal justification.”<sup>65</sup> The Supreme Court subsequently adopted a similar definition, “wrongfully, intentionally, without legal justification or excuse,” in its standard instructions for the crime of aggravated stalking.<sup>66</sup>

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<sup>60</sup> Id. § 790.333(5). The law also required the state and any political subdivisions to withdraw all claims and actions against gun ranges within 90 days of the effective date of the law, which was May 13, 2004. Id. § 790.333(6).

<sup>61</sup> Id. § 790.333(3)(d).

<sup>62</sup> Id. § 790.333(7).

<sup>63</sup> Id. §§ 775.082(4)(a), 775.083(1)(d), 790.333(7).

<sup>64</sup> See Standard Jury Instructions, Criminal Cases, FLA. SUPREME COURT, [http://www.floridasupremecourt.org/jury\\_instructions/instructions-ch29.shtml](http://www.floridasupremecourt.org/jury_instructions/instructions-ch29.shtml) (last visited May 18, 2017).

<sup>65</sup> *Seese v. State*, 955 So.2d 1145, 1149 (Fla. Dist. Ct. App. 2007).

<sup>66</sup> Florida Supreme Court, Standard Jury Instructions, Criminal Cases, *supra* note 64, at 8.7(b). The committee making the recommendation to add this definition cited the

Regarding the definition of “intentionally,” a crime under this section would probably be considered a “general intent” rather than a “specific intent” crime because there is no statutory requirement that the act be done with the specific intent to injure or damage property.<sup>67</sup> Therefore, an official could be charged if he or she took any action to protect the local environmental against a gun range, regardless of the circumstances and regardless of whether he or she intended to damage the gun range. The law also allows gun range defendants to recover all expenses from “the government body, person, or entity” bringing an action filed in violation of the act.<sup>68</sup>

The justification for this law was that

unnecessary litigation and unnecessary regulation by governmental agencies of sport shooting ranges and training ranges impairs the ability of residents of this state to ensure safe handling of firearms and to enjoy the recreational opportunities ranges provide. The cost of defending these actions is prohibitive and threatens to bankrupt and destroy the sport shooting and training range industry.<sup>69</sup>

The legislative history for this law is not extensive and does not include any significant evidence to provide the basis for these statements.<sup>70</sup> Given the proliferation of gun ranges and gun use in Florida described above,<sup>71</sup> the impact of this law could have actually facilitated that growth because the liability potential for operators is so small compared to all other states. Whether this growth is beneficial to the state, or the extent to which it creates additional responsibility, remains to be seen.

In addition to sanctions imposed in 790.333, section 790.33(3) makes “[a]ny person, county, agency, municipality, district, or other entity that violates the Legislature’s occupation of the whole field of regulation of firearms and ammunition” liable.<sup>72</sup> This section invalidates any rule, regulation, or ordinance deemed to regulate firearms or ammunition, even if enacted “in good faith or with the advice of counsel.”<sup>73</sup> Further, it

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Seese case. See *In re Standard Jury Instr. in Crim. Cases*, 131 So.3d 755 app. at 762 (Fla. 2013).

<sup>67</sup> *M.H. v. State*, 936 So.2d 1, 3 (Fla. Dist. Ct. App. 2006).

<sup>68</sup> FLA. STAT. § 790.333(6)(b).

<sup>69</sup> Id. §790.333(1)(i).

<sup>70</sup> Senate Analysis, *supra* note 6.

<sup>71</sup> See text accompanying notes 6–9.

<sup>72</sup> FLA. STAT. § 790.33(3)(a).

<sup>73</sup> Id. §790.33(3)(b).

instructs courts to impose a civil fine of up to \$5,000 for knowing violations against the elected or appointed local government official, officials, or administrative agency head under whose jurisdiction the violation occurred.<sup>74</sup>

Both the courts and the Florida Attorney General's Office have given broad deference to the state in regulating all aspects of guns. While the provisions of section 790.333 have not been challenged in court as of the date of this writing, provisions similar to some of the provisions in this law have been the subject of court review (e.g., the provisions preempting local ordinances and actions by local officials deemed contrary to section 790.33).<sup>75</sup> In addition, there is one attorney general opinion discussing section 790.333 and two more attorney general opinions discussing the similar provisions in section 790.33.<sup>76</sup>

One court decision in Florida involving the preemption provisions similar to section 790.333 dismissed a case brought by the mayor of Miami-Dade County, Alexander Penelas, and the county itself, against gun manufacturers based on common law claims for defective products, ultra-hazardous activity, and public nuisance.<sup>77</sup> The court held that the Florida Statute 790.33 expressly preempts local governments from the entire field of firearm and ammunition regulation.<sup>78</sup> The decision also stated that local governments could not request the judiciary to enact regulations through requests for injunctive relief.<sup>79</sup>

A subsequent court decision concerning the scope of section 790.33 came to the same conclusion regarding the ability of a municipality to regulate guns. In that case, the City of South Miami issued an ordinance

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<sup>74</sup> Id. §790.33(c).

<sup>75</sup> See, e.g., *Florida Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452 (Fla. Dist. Ct. App. 2017); *Dougan v. Bradshaw*, 198 So. 3d 878 (Fla. Dist. Ct. App. 2017); *Florida Carry, Inc. v. Univ. of Florida*, 180 So. 3d 137 (Fla. Dist. Ct. App. 2015); *Florida Carry, Inc. v. Univ. of North Florida*, 133 So. 3d 966 (Fla. Dist. Ct. App. 2013); *Nat'l Rifle Ass'n v. City of South Miami*, 812 So. 2d 504 (Fla. Dist. Ct. App. 2002).

<sup>76</sup> See Fla. Att'y Gen., *Authority of County to Enact Ordinance Regulating Discharge of Firearms Pursuant to Section 790.33* (Sept. 21, 2011); Fla. Att'y Gen. Off. July 2015 Opinion Letter, *supra* note 39 (Section 790.33 prohibits local government from enacting ordinances that prohibits the discharge of a firearm if it endangers the health, safety or welfare of citizens of the county.).

<sup>77</sup> *Penelas v. Arms Technology, Inc.*, 778 So. 2d 1042 (Fla. Dist. Ct. App.), *rev'd*, 799 So.2d 218 (Fla. 2001).

<sup>78</sup> Id. at 1045.

<sup>79</sup> Id.

requiring locking devices on guns stored within the city.<sup>80</sup> A state senator from another jurisdiction asked the Florida Attorney General for an opinion whether such an ordinance was permitted under section 790.33.<sup>81</sup> The attorney general opined that the ordinance was permitted because it related to the storage of firearms rather than the right to own guns, and the ordinance did not conflict with any other state legislation relating to gun safety.<sup>82</sup> The National Rifle Association brought a lawsuit against the city to declare the ordinance invalid based on the preemption language in section 790.33.<sup>83</sup> The trial court granted summary judgment in favor of the city on the basis that the action was not ripe for a declaratory judgment.<sup>84</sup> The appellate court reversed, citing the Penelas case mentioned above.<sup>85</sup>

The 2005 Attorney General opinion categorically states that local governments do not have any authority to regulate the discharge of firearms even for the health, safety, and welfare of citizens. In response to a request from the sheriff of Indian River County for clarification of the scope of section 790.33, the Attorney General concluded, “Accordingly, it is my opinion that a county ordinance prohibiting the discharge of a firearm in proximity to persons or property when such discharge endangers the health, welfare, and safety of the citizens of such county would be preempted by section 790.33, Florida Statutes.”<sup>86</sup>

### III. FEDERAL STATUTORY LAW

While Florida’s legislature has established a unique regime for environmental regulation of gun ranges, the application of three federal laws must also be considered<sup>87</sup>: the Resource Conservation and Recovery

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<sup>80</sup> See Fla. Att’y Gen., Opinion Letter on Authority of Municipality to Enact Ordinance Requiring Locking Devices on all Firearms in the City (July 11, 2000), 2000 WL 972870.

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

<sup>82</sup> Fla. Att’y Gen., Opinion Letter on Storage Requirements for Weapons and Municipality Authority (July 11, 2000).

<sup>83</sup> Nat’l Rifle Ass’n of America, Inc. v. City of South Miami, 812 So. 2d 504 (Fla. Dist. Ct. App. 2002).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 505–06.

<sup>86</sup> In re Authority of County to Enact Ordinance Prohibiting Discharge of Firearm, Fla. Att’y Gen. Op. 40 (2015), 2005 WL 1650327 (emphasis added) (Section 790.33 prohibits local government from enacting ordinances that prohibits the discharge of a firearm even to protect the health, safety or welfare of citizens of the county).

<sup>87</sup> FLORIDA BMP MANUAL, *supra* note 1, at 7.

Act (“RCRA”),<sup>88</sup> the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA” or the “Superfund Act”),<sup>89</sup> and the Clean Water Act (“CWA”).<sup>90</sup>

#### A. The Application of RCRA to Gun Ranges: Abandoned Lead Can Be a Hazardous Waste but Gun Ranges Are Not Subject to Permitting Requirements for Operations

The application of RCRA’s requirements to gun ranges provides a good case study for interpreting complex statutory and regulatory language. The key questions for making a determination are what the definitions for “solid waste” and “hazardous waste” are under RCRA and its regulations.<sup>91</sup> In *Connecticut Coastal Fishermen’s Association v. Remington Arms Company*, Judge Cardamone of the Second Circuit Court of Appeals analogized the court’s effort to Lewis Carroll’s Alice in Wonderland.<sup>92</sup>

Defining what Congress intended by these words is not child’s play, even though RCRA has an “Alice in Wonderland” air about it. We say that because a careful perusal of RCRA and its regulations reveals that “solid waste” plainly means one thing in one part of RCRA and something entirely different in another part of the same statute.

“When I use a word,” Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”<sup>93</sup>

The Remington Arms case remains the decision that most extensively analyzes these terms in the context of gun club operations. The court examined whether a gun range that had been operating for over 70 years was required to obtain a RCRA permit for the operation of a hazardous

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<sup>88</sup> 42 U.S.C. §§ 6901–6992 (2012).

<sup>89</sup> 42 U.S.C. §§ 9601–9675 (2012).

<sup>90</sup> 33 U.S.C. §§ 1251–1388 (2012).

<sup>91</sup> *Conn. Coastal Fishermen’s Ass’n v. Remington Arms Co.*, 989 F.2d 1305 (2d Cir. 1993) [hereinafter *Remington Arms*].

<sup>92</sup> *Id.* at 1308.

<sup>93</sup> *Id.* (emphasis in original) (citation omitted).



waste treatment, storage, or disposal facility and whether the gun club could be required to clean up scattered lead shot and clay fragments that had accumulated on the property.<sup>94</sup> The court held that the club was not required to obtain a permit, but did hold the club responsible for cleaning up the lead shot and clay debris.<sup>95</sup>

The decision was based on applying two different definitions for the term “solid waste.” The court explained that solid waste is governed by subchapter IV of the statute and that “hazardous waste” is a subset of “solid waste” and governed by subchapter III.<sup>96</sup> The definition of “solid waste” in RCRA includes “discarded material,”<sup>97</sup> and the court focused on this term in reaching its decision.<sup>98</sup> The court framed its analysis by asking two questions: “At what point after a lead shot is fired at a clay target do the materials become discarded? Does the transformation from useful to discarded material take place the instant the shot is fired or at some later time?”<sup>99</sup>

After determining that the language was ambiguous and the legislative history did not address the current issue, the court considered the EPA’s interpretation of the statute, pursuant to the second step of the Chevron analysis.<sup>100</sup> In an amicus curiae brief requested by the court,<sup>101</sup> the EPA explained that the statutory definition of “discarded material” was broader than the definition of “solid waste” under the RCRA permitting regulations issued pursuant to subchapter III.<sup>102</sup> The definition in the EPA’s regulation states that “solid waste” includes discarded materials that are abandoned, and therefore disposed of.<sup>103</sup> However, the EPA also pointed out that this regulatory definition only applies to the definition of “solid waste” under the subchapter III regulations;<sup>104</sup> the statutory

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<sup>94</sup> Id. at 1310–11 (also discussing whether the club was required to obtain a permit under the Clean Water Act, which will be discussed *infra*).

<sup>95</sup> Id. at 1308.

<sup>96</sup> Id. at 1313.

<sup>97</sup> 42 U.S.C. § 6903(27) (2012).

<sup>98</sup> *Remington Arms*, 989 F.2d at 1313.

<sup>99</sup> Id. at 1314–15; see *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984) (establishing a two-step process, first to evaluate whether Congress has “directly spoken to the precise question at issue,” in either the statute or the legislative history, and second, if the statute is ambiguous whether there is an agency construction that is reasonable).

<sup>100</sup> *Remington Arms*, 989 F.2d at 1314–16.

<sup>101</sup> Id. at 1307.

<sup>102</sup> Id. at 1314.

<sup>103</sup> Id.

<sup>104</sup> Id.; see 40 C.F.R. § 261.1(b)(1) (2017).

definition of “discarded material” is broader and applied to lawsuits brought by the government for imminent hazards.<sup>105</sup> While the regulatory provision referring to government lawsuits did not explicitly mention citizen lawsuits, the decision explains that the regulatory language for government imminent hazard lawsuits must also apply to citizen imminent hazard lawsuits because the statutory language for those two provisions contain virtually identical requirements.<sup>106</sup> The court concluded, “Consequently, the broader statutory definition of solid waste applies to citizen suits brought to abate imminent hazard to health or the environment.”<sup>107</sup>

The court acknowledged the “anomaly” of using dual definitions for the term “solid waste” and the difficulty such application presents to an “already complex statute” but nevertheless stated that the EPA’s interpretation was reasonable and entitled to deference.<sup>108</sup> The court also explained why it thought the dual definitions were also contemplated by the language and structure of RCRA, further bolstering its decision to apply the two different definitions.<sup>109</sup>

The application of the dual definitions for “solid waste” has been particularly important for cases involving the application of RCRA to gun ranges. In deciding claims asserting that gun ranges were storage or disposal facilities, and therefore subject to RCRA hazardous waste permitting requirements, the courts have uniformly dismissed such claims under the narrower definition of “solid waste.”<sup>110</sup> In *Cordiano v. Matacon Gun Club Inc.*, a different panel of judges from the Second Circuit explained:

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<sup>105</sup> *Remington Arms*, 989 F.2d at 1314.

<sup>106</sup> *Id.*; See 42 U.S.C. §§ 7002(a)(1)(B), 7003 (repealed 1992).

<sup>107</sup> *Remington Arms*, 989 F.2d at 1314.

<sup>108</sup> *Id.* at 1314–15.

<sup>109</sup> *Remington Arms*, 989 F.2d 1305, 1314–15 (“Congress in Subchapter III isolated hazardous wastes for more stringent regulatory treatment. Recognizing the serious responsibility that such regulations impose, Congress required that hazardous waste[—]a subset of solid waste as defined in the RCRA regulations[—]be clearly identified. The statute directs the EPA to develop specific ‘criteria’ for the identification of hazardous wastes as well as to publish a list of particular hazardous wastes. 42 U.S.C. § 6921(a) & (b). By way of contrast, Subchapter IV that empowers the EPA to publish ‘guidelines’ for the identification of problem solid waste pollution areas, does not require explanation beyond RCRA’s statutory definition of what constitutes solid waste.”).

<sup>110</sup> See *id.* at 1316; see also *Cordiano v. Matacon Gun Club Inc.*, 575 F.3d 199, 208 (2d Cir. 2009); *Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club of the City of N.Y.*, No. 94 Civ. 0436, 1996 WL 131863, at \*3 (S.D.N.Y. Mar. 22, 1996).

Here, the agency reasonably determined that lead shot put to its ordinary, intended use, i.e., discharged at a shooting range, is neither “material which is . . . abandoned by being . . . [d]isposed of,” nor “[a]ccumulated . . . before or in lieu of being abandoned by being disposed of.” 40 C.F.R. § 261.2(a)(2)(i), (b). The EPA’s distinction between “abandonment” of lead shot, which falls within the regulatory definition of solid waste, and the normal, intended use of lead shot at a shooting range, which does not, is consistent with related RCRA regulations.<sup>111</sup>

In this case, the court also deferred to the EPA’s interpretation because the agency was interpreting its own regulation and that interpretation was consistent over time.<sup>112</sup> Interestingly, the Cordiano court also cited the EPA’s BMP Manual as support for its decision on this issue.<sup>113</sup>

Courts considering citizen lawsuit claims for imminent and substantial endangerment, however, have come to different conclusions about whether to allow such claims to proceed. In each case, the appellate court affirmed the lower court’s determination based on the evidence presented. In *Remington Arms*, the Second Circuit applied the broader definition of “solid waste,” using the statutory term “discarded,” to determine that the lead shot and clay debris from the gun club met the statutory definition.<sup>114</sup> The court relied on the fact that these materials had been left to accumulate for up to 70 years.<sup>115</sup> In its amicus brief, the EPA took the position that the debris was solid waste because it was left to accumulate long enough after its intended purpose, and the court agreed.<sup>116</sup> The court however expressly declined to decide what length of time was sufficient for this kind of material to become waste.<sup>117</sup>

The next question the *Remington Arms* court addressed was whether the discarded material was a “hazardous waste” under RCRA. RCRA defines “hazardous waste” as “a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may . . . (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise

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<sup>111</sup> Cordiano, 575 F.3d at 208.

<sup>112</sup> Id. at 206–07.

<sup>113</sup> Id. at 205.

<sup>114</sup> *Remington Arms*, 989 F.2d at 1316.

<sup>115</sup> Id. at 1309.

<sup>116</sup> Id. at 1316.

<sup>117</sup> Id.

managed.”<sup>118</sup> The court affirmed the district court’s determination on the summary judgment motion that the lead shot was hazardous, and that there was insufficient information in the record to determine whether the clay target debris had become hazardous waste because it may have contained hazardous substances.<sup>119</sup>

In the Cordiano case, the court focused on whether the lead shot presented an imminent and substantial endangerment.<sup>120</sup> Based on the record in that case, the court affirmed the lower court decision granting summary judgment in favor of the gun club defendant, determining that there was no basis in the record for a reasonable jury to conclude an imminent and substantial endangerment existed.<sup>121</sup> The court reviewed the case law on imminent and substantial endangerment, noting at the outset that the Second Circuit has defined this standard as a broad one.<sup>122</sup> The court concluded that the “imminency” requirement is met if there is a present risk of harm;<sup>123</sup> “substantial” means serious;<sup>124</sup> and “endangerment” is a threatened or potential harm and does not require actual harm.<sup>125</sup> The court then reviewed the evidence presented on the motion for summary judgment and affirmed the lower court’s decision dismissing the claim for imminent and substantial endangerment because the plaintiff’s evidence “indicated only a speculative prospect of future harm” and did not include sufficient evidence of a serious endangerment.<sup>126</sup>

In its BMP Manual, the EPA takes the position that spent lead shot and bullets are considered a hazardous waste that can present “an actual or potential imminent and substantial endangerment,”<sup>127</sup> subjecting such waste to the statutory requirements of RCRA. However, the EPA does not consider shooting ranges to be waste treatment, storage or disposal facilities whose operations are subject to RCRA permitting regulation.<sup>128</sup>

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<sup>118</sup> 42. U.S.C. § 6903(5) (2012).

<sup>119</sup> Remington Arms, 989 F.2d at 1317–18.

<sup>120</sup> Cordiano v. Metacon Gun Club Inc., 575 F.3d 209, 209–216 (2d Cir. 2009).

<sup>121</sup> Id. at 209.

<sup>122</sup> Id. at 210.

<sup>123</sup> Id.

<sup>124</sup> Id.

<sup>125</sup> Id. at 211.

<sup>126</sup> Id. at 214. See also Potomac Riverkeeper, Inc. v. Nat’l Capital Skeet and Trap Club, Inc., 388 F. Supp. 2d 582, 587 (D.Md. 2005) (court found previously discarded lead subject to RCRA but denied summary judgment on plaintiff’s imminent and substantial endangerment claim).

<sup>127</sup> EPA BMP MANUAL, *supra* note 1, at I-9.

<sup>128</sup> Id. at I-7.

To the extent that spent lead is collected and recycled or reused, it may be considered a scrap metal and therefore excluded from RCRA's requirements and, in its manual, the EPA encourages gun ranges to engage in regular reclamation of lead shot.<sup>129</sup> This practice has been acknowledged by two courts in discussing RCRA claims at gun ranges, but the only decision to discuss the liability impact was vacated by the appellate court.<sup>130</sup> In addition, the EPA BMP Manual states that any spent lead shot remaining on the gun range property is considered solid waste and subject to the cleanup provisions under sections 7002 and 7003 of RCRA.<sup>131</sup> The EPA, states, and citizens can file civil lawsuits to compel a cleanup if the spent lead "may present an imminent and substantial endangerment to health or the environmental."<sup>132</sup> Such actions may be filed against current and former owners and operators of shooting ranges. Because lead can migrate, older ranges and ranges that are not recycling or reusing the lead face a greater risk of action under RCRA.<sup>133</sup>

## B. CERCLA

There have been three cases, all in California, discussing the application of CERCLA's Superfund liability to gun ranges.<sup>134</sup> The first case to discuss CERCLA liability for shooting ranges is *Kamb v. United States Coast Guard*.<sup>135</sup> In that case, the district court examined the language of CERCLA and noted that the definition of facility includes "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."<sup>136</sup> The court then examined the definition of "hazardous substance" and the evidence demonstrating that there was lead at the site in concentrations that are considered to be hazardous. The court concluded, "Based on this evidence,

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<sup>129</sup> *Id.* at I-7.

<sup>130</sup> *Cordiano*, 575 F.3d at 204; *Otay Land Co. v. U.E. Ltd., L.P.*, 440 F. Supp. 2d 1161 (S.D. Cal. 2006), vac'd sub nom. *Otay Land Co. v. United Enters. Ltd.*, 338 Fed. Appx. 689 (9th Cir. 2009) (in considering the impact of lead shot reclamation activities, "the conclusions suggest that the spent ammunition is not a 'solid waste' under the statutory definition of RCRA").

<sup>131</sup> EPA BMP MANUAL, *supra* note 1, at I-8.

<sup>132</sup> 42 U.S.C. § 6972(a)(1)(B) (2012).

<sup>133</sup> EPA BMP MANUAL, *supra* note 1, at I-8.

<sup>134</sup> See *Calmat Co. v. San Gabriel Valley Gun Club*, 809 F. Supp. 2d 1218 (C.D. Cal. 2011); *Otay Land Co.*, 440 F. Supp. 2d at 1161; *Kamb v. U.S. Coast Guard*, 869 F. Supp. 793 (N.D. Cal. 1994).

<sup>135</sup> 869 F. Supp. at 793.

<sup>136</sup> *Id.* at 797; see 42 U.S.C. § 9601(9) (2012).

it is indisputable that a hazardous substance which meets the statutory definition has come to be located at the Site, thus classifying it as a ‘facility’ under CERCLA.”<sup>137</sup>

In *Calmat Co. v. San Gabriel Valley Gun Club*,<sup>138</sup> the court denied a claim by the owner of property formerly leased to a gun club for many years under CERCLA.<sup>139</sup> The court discussed that gun club’s contention that it was not a “facility” under CERCLA. The club argued that bullets are a consumer product in consumer use, and therefore are excluded from liability based on the language in the definition of “facility” in the statute.<sup>140</sup> After describing the gun club’s position, the court did not rule on that issue; instead the court found that the plaintiff had not presented evidence that it had paid any money for “response costs” as defined in and required by the statute for the recovery of remediation funds under CERCLA.<sup>141</sup> The court did note that there was very little authority on the question about exclusions for gun ranges as facilities, and declined to resolve that “novel question of law” because it was unnecessary for the decision in this case.<sup>142</sup>

In the last case, *Otay Land Co. v. United Enterprises. Ltd.*,<sup>143</sup> which was mentioned by the Calmat court, the judge extensively discussed the “facility” exclusion for gun ranges described above. That judge concluded that lead shot was a consumer product when used by sportspeople, and therefore excluded owners and operators of gun ranges from liability under CERCLA.<sup>144</sup> The court noted, however, that military and government shooters might not be consumers and therefore ranges used by those people might be subject to CERCLA liability.<sup>145</sup> The Ninth Circuit Court of Appeals vacated this decision<sup>146</sup> because the case was not ripe as the plaintiffs had not paid for any “response costs” as defined in CERCLA.<sup>147</sup> There was no discussion of the lower court’s “facility” analysis. The Otay

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<sup>137</sup> Kamb, 869 F. Supp. at 798.

<sup>138</sup> 809 F. Supp. 2d at 1218.

<sup>139</sup> *Id.* at 1219.

<sup>140</sup> 42 U.S.C. § 9601(9) (2012).

<sup>141</sup> *Calmat Co.*, 809 F. Supp. 2d at 1223–25.

<sup>142</sup> *Id.* at 1221.

<sup>143</sup> 440 F. Supp. 2d 1152 (SD Cal. 2006).

<sup>144</sup> *Id.* at 1161.

<sup>145</sup> *Id.* at 1161–62.

<sup>146</sup> See *Otay Land Co. v. United Enterprises Ltd.*, 338 Fed. Appx. 689 (9th Cir. 2009).

<sup>147</sup> *Id.* at 690–92.

court did mention the Kamb decision, but stated that it was not persuasive because it did not discuss the consumer product exemption.<sup>148</sup>

The EPA states in its BMP Manual that shooting ranges are subject to CERCLA, which requires past and present owners and operators to clean up a site contaminated with a hazardous substance, or to pay for such cleanups. Because lead is a hazardous substance, shooting ranges risk liability for all governmental costs incurred, natural resource damages and health assessments, as well as the cleanup costs.<sup>149</sup> In addition to paying remediation costs under CERCLA, the potential to incur natural resource damages is a particularly significant risk for shooting ranges because there are several studies that link lead shot at shooting ranges to injuries to bird and animal populations.<sup>150</sup>

### C. Clean Water Act

There have been a few cases in which plaintiffs claimed that gun ranges should be required to obtain permits under the CWA, because there is the potential for discharge of lead and other contaminants to reach navigable waters of the United States,<sup>151</sup> the trigger for requirement of a permit under the CWA.<sup>152</sup> The CWA prohibits all discharges of “any pollutant” in navigable waters without a permit.<sup>153</sup>

In *Long Island Soundkeeper v. N.Y. Athletic Club of the City of N.Y.*, the Federal Court for the Southern District of New York found mechanized target throwers, concrete shooting platforms and the shooting range itself to be point sources and that all expended shot, whether or not it was lead, and target debris left in any water body of the United States is covered by the CWA.<sup>154</sup> Therefore, the court held that the New York Athletic Club was required to obtain a permit to continue to operate.<sup>155</sup> The court noted,

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<sup>148</sup> See *Otay Land Co.*, 440 F.Supp 1163.

<sup>149</sup> 42 U.S.C. §§ 9601–9675 (2012); EPA BMP MANUAL, *supra* note 1, at I-11.

<sup>150</sup> See CTR. FOR DISEASE CONTROL AND PREVENTION, *supra* note 16; Reilly, *supra* note 13.

<sup>151</sup> See, e.g., *Cordiano v. Metacon Gun Club Inc.*, 575 F.3d 199 (2d Cir. 2009); *Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club of the City of N.Y.*, No. 94 Civ. 0436, 1996 WL 131863, at \*3 (S.D.N.Y. Mar. 22, 1996) (including a second CWA claim under section 404 of the Clean Water Act, that the gun range failed to get a dredge and fill permit. The court dismissed this claim and it has not been raised by plaintiffs in other cases.)

<sup>152</sup> EPA BMP MANUAL, *supra* note 1, at I-9; 33 U.S.C. §§ 1341(a)(1), 1362(7) (2012).

<sup>153</sup> 33 U.S.C. §§ 1311(a), 1342(a) (2012).

<sup>154</sup> *Long Island Soundkeeper*, 1996 WL 131863 (S.D.N.Y. Mar. 22, 1996).

<sup>155</sup> *Id.* at \*15.

In its Amicus brief, the EPA—the agency to which Congress gave substantial discretion in administering the CWA—submits to the Court that “point sources” include “all discrete, identifiable sources from which pollutants are emitted or conveyed into United States waters.”<sup>156</sup>

The court explained that

[t]he trap shooting range operated by Defendant, which is designed to concentrate shooting activity from a few specific points and systematically direct it in a single direction—over Long Island Sound—is an identifiable source from which spent shot and target fragments are conveyed into navigable waters of the United States. As such, the Range constitutes a point source within the meaning of the CWA.<sup>157</sup>

In another district court case, *Stone v. Naperville Park District*,<sup>158</sup> the United States District Court for the Northern District of Illinois also found that the gun range, in addition to each firing station, constituted point sources under the CWA.<sup>159</sup>

We believe that the trap shooting range, as well as each firing station, constitutes a “point source” as defined by the Act. The whole purpose of the facility is to “discharge pollutants” in the form of lead shot and shattered clay targets. In fact, within the shotfall zone, no other activity occurs. Furthermore, the facility is certainly “discernible, confined and discrete.”

The defendants appear to argue that the facility and the firing stations do not constitute “conveyances” in that individual shooters actually deliver the lead shot into the shotfall zone: “the range is a place, wholly unlike a discrete item like a pipe or container, that does not discharge or channel anything.” This argument is simply wrong. The range “channels” shooting by providing a facility at which individuals may shoot; it channels the discharge of pollutants by inviting individuals to come shoot at airborne clay targets that land in the water with lead shot that also lands in the water.

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<sup>156</sup> *Id.* at \*13.

<sup>157</sup> *Id.* at \*14.

<sup>158</sup> 38 F. Supp. 2d 651 (N.D. Ill. 1999).

<sup>159</sup> *Id.* at 655.



In this case, the parties agreed that the range activities did impact navigable waters under the CWA.<sup>160</sup> It is also worth noting that after the lawsuit was filed, the EPA sent a letter advising the defendants that a CWA permit was required for their operations.<sup>161</sup>

In the subsequent *Cordiano* case, however, the Second Circuit Court of Appeals concluded that neither the shooting range itself nor its parts were point sources, and therefore the range was not subject to CWA jurisdiction.<sup>162</sup> The court described the specific geographical details of the range in detail, noting the marginal connections between the shooting activities and any jurisdictional wetlands under the CWA.<sup>163</sup> In contrast to the situation in *Long Island Soundkeeper* and *Stone*, the two point sources identified by the plaintiffs in *Cordiano*, the berm and the shooting range itself, were not located where shooting would take place over or into water or jurisdictional wetlands.<sup>164</sup> A further distinction is that both the *Long Island Soundkeeper* and *Stone* plaintiffs identified shooting platforms, as well as the targets, as point sources, because the activity that led to contamination was concentrated in a few specific areas targeted over or into clearly jurisdictional bodies of water.<sup>165</sup> The court then examined whether these two areas—the shooting platforms and targets—could be considered point sources that discharge into two areas that were arguably jurisdiction wetlands.<sup>166</sup> The court decided, however, that the plaintiff did not provide sufficient evidence to support its claim that the lead present in the potential jurisdictional wetlands leached from either the berm or the firing line rather than being a product of runoff, as the defendant gun club’s expert suggested.<sup>167</sup> Because runoff is considered a nonpoint source pollution, it is not covered by the CWA.<sup>168</sup> Interestingly, the court did not cite to either the *Long Island Soundkeeper* or *Stone* cases in its CWA

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 653–54.

<sup>162</sup> *Cordiano v. Metacon Gun Club Inc.*, 575 F.3d 199, 209–16 (2d Cir. 2009). Not all water bodies are covered by the CWA, only discharges to wetlands connected to “navigable waters,” 33 U.S.C. §1362(12), deemed jurisdictional wetlands in the Supreme Court’s decision in *Rapines v. United States*, 547 U.S. 715, 723 (2006).

<sup>163</sup> *Cordiano*, 575 F.3d at 215–18.

<sup>164</sup> *Id.* at 216.

<sup>165</sup> *Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club of the City of N.Y.*, No. 94 Civ. 0436, 1996 WL 131863 at \*14 (S.D.N.Y. Mar. 22, 1996); *Stone v. Naperville Park Dist.*, 38 F. Supp. 2d 651 (N.D. Ill. 1999).

<sup>166</sup> *Cordiano*, 575 F.3d at 222–25.

<sup>167</sup> *Id.* at 224–25.

<sup>168</sup> *Id.* at 221.

discussion, but it did cite the Long Island Soundkeeper case in its RCRA discussion.<sup>169</sup>

The EPA's position on the application of the CWA to gun ranges is stated in the BMP Manual. The EPA advises that gun ranges may be required to obtain a permit under the CWA. The Manual discusses the Remington Arms and Long Island Soundkeeper cases but not the Stone case—although it was also decided before this version of the Manual was produced. The Cordiano decision was later.<sup>170</sup> The EPA mainly relies on the Long Island Soundkeeper case to explain its position that target throwers, shooting platforms and the ranges themselves can be point sources under the CWA. The EPA recognizes that this decision is not controlling law in any district outside of the Southern District of New York, but it advises gun ranges to consider whether their operations may require a permit, depending on where the shooting takes place and the possibility of that activity to impact navigable waters and their related waterbodies.<sup>171</sup> The EPA acknowledged that some shooting organizations disagree with its position on the applicability of the CWA,<sup>172</sup> but the EPA points out that at least one court adopted the EPA's interpretation.<sup>173</sup> Application of the CWA to a shooting range only requires the range to get a permit for discharges over or into navigable waters; it does not prohibit those discharges.<sup>174</sup> However, the EPA also noted that remediation may be required and strongly advised ranges to avoid shooting over water bodies and wetlands, and to reclaim and recycle lead when possible.<sup>175</sup>

#### D. The EPA's BMP Manual for Gun Ranges

One factor that deserves discussion is the extent to which the courts relied on EPA's interpretation of the relevant statutes and regulations as applied to gun ranges. Some courts requested the EPA to file an amicus

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<sup>169</sup> See *id.* at 208.

<sup>170</sup> EPA BMP Manual, *supra* note 1, at I-9 to I-11.

<sup>171</sup> *Id.* at I-9 to I-10.

<sup>172</sup> *Id.*, at I-9.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at I-9 to I-11.

<sup>175</sup> *Id.* at I-11.

brief<sup>176</sup> and some cite to the EPA BMP Manual.<sup>177</sup> While the citations to amicus briefs filed in a case are not unusual, citations to a best practices manual that was prepared by one region of the EPA in collaboration with gun rights organizations, as well as states and other organizations, raises the question about what weight should be given to such a manual.

In the Cordiano decision, the Second Circuit noted that the court below had cited to the manual as support for its position on RCRA's definition of solid waste with respect to gun ranges.<sup>178</sup> As in two previous cases, *Remington Arms and Long Island Soundkeeper*,<sup>179</sup> the court once again asked for an amicus brief from the EPA on whether lead shot discharged at gun ranges falls within the definition of solid waste in the hazardous waste permitting regulations for operation of a hazardous waste facility.<sup>180</sup>

In the Otay lower court decision, the judge discussed the EPA's BMP Manual at some length because the plaintiff cited the manual as support for its position that the gun range was a CERCLA facility.<sup>181</sup> The court noted that the EPA manual said that gun ranges might be liable under CERCLA, but the manual did not discuss whether a commercial range was a facility.<sup>182</sup> The court also noted that the manual itself states that it does not constitute rulemaking.<sup>183</sup>

The EPA Region 2 Best Management Practices manual is admittedly advisory, does not constitute official rulemaking, and at best is entitled to slight deference. *A & W Smelter*, 146 F.3d at 1112 ("Ad hoc agency action . . . is entitled to some deference, but not all deference is created equal. . . . How much deference an agency is due depends in part on such factors as how much deliberation went into reaching it and whether the

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<sup>176</sup> E.g., *Cordiano v. Metaco Gun Club Inc.*, 575 F.3d 199, 207 (2d Cir. 2009); *Conn. Coastal Fisherman's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1310 (2d Cir. 1993); *Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club of the City of N.Y.*, No. 94 Civ. 0436, 1996 WL 131863, at \*2 (S.D.N.Y. Mar. 22, 1996).

<sup>177</sup> E.g., *Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club Inc.*, No. 3:04cv803(JBA), 2005 WL 1413183, at \*4 (D. Conn. June 14, 2005); *Otay Land Co. v. United Enters. Ltd.*, 440 F. Supp. 2d 1152, 1164–65 (S.D. Cal. 2006).

<sup>178</sup> *Cordiano*, 575 F.3d at 207.

<sup>179</sup> *Remington Arms*, 989 F.2d at 1310; *Long Island Soundkeeper Fund*, 1996 WL 131863, at \*2.

<sup>180</sup> *Cordiano*, 575 F.3d at 207.

<sup>181</sup> *Otay Land Co.*, 440 F. Supp. 2d at 1164–65, 1177.

<sup>182</sup> *Id.* at 1165.

<sup>183</sup> *Id.* at 1164.

decision fits with a policy the agency has consistently followed.”).<sup>184</sup>

With respect to the BMP Manual, however, it appears that a significant amount of deliberation went into the creation of the manual. The EPA region that prepared the manual worked with other EPA offices and sent the RCRA portion of the manual for review to all 50 states, 40 of which concurred and consented at the time of printing.<sup>185</sup> The manual also “acknowledge[s] the support of . . . The National Rifle Association of America [and] the National Shooting Sports Foundation” for providing valuable information and peer review.<sup>186</sup> Therefore, the manual would appear to meet the A&W Smelter standard cited by the court. In the Otay case, however, the specific issue of whether a gun range is a “facility” is not addressed in the BMP Manual,<sup>187</sup> and therefore the EPA’s conclusion that gun ranges “may” be covered by CERCLA is not as definitive an interpretation as the interpretations cited above regarding RCRA.

#### IV. IMPACT AND IMPLICATIONS FOR THE ENVIRONMENT OF FLORIDA’S GUN RANGE ENVIRONMENTAL IMMUNITY LAW

In the legislative history of section 790.333 of the Florida Statutes, exempting gun ranges from environmental liability, the Senate Staff Analysis and Economic Impact Statement acknowledged that gun ranges do have an environmental impact.<sup>188</sup> The Senate Analysis also recognized that ranges were subject to environmental regulation by federal and local governments.<sup>189</sup> The analysis further noted that the FDEP is the delegated authority for enforcing the federal laws, including RCRA which governs the management of hazardous waste as outlined above.<sup>190</sup> The analysis then noted the efforts of FDEP to address environmental issues concerning gun ranges through a series of workshops between FDEP staff and industry stakeholders.<sup>191</sup> Unlike the EPA Manual that was sent out to states for

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<sup>184</sup> Id. at 1164–65.

<sup>185</sup> EPA BMP MANUAL, *supra* note 1, at Notice.

<sup>186</sup> Id. at Acknowledgement.

<sup>187</sup> *Otay Land Co. v. United Enters. Ltd.*, 440 F. Supp. 2d 1152, 1165 (S.D. Cal. 2006).

<sup>188</sup> Senate Analysis, *supra* note 6.

<sup>189</sup> Id.

<sup>190</sup> Id.

<sup>191</sup> Id.

review, there is no mention of participation by local governments in Florida or other stakeholders such as citizens living near gun ranges. This effort resulted in the Florida BMP Manual mentioned above.<sup>192</sup>

The intent of section 790.333 was to prohibit “any judicial or administrative claim . . . associated with the intentional or unintentional placement or accumulation of projectiles in the environment on or under the range and any other property over which the range has a leasehold, easement, or legal right to use.”<sup>193</sup> The analysis listed the following bases as the rationale for granting such immunity:

- Over 400 public and private ranges exist in the state.
- Citizens use and enjoy ranges.
- Ranges are a necessary component of the guarantees of the right to bear arms under the Florida Constitution and U.S. Constitution.
- Ranges are used in training, practice and qualification by law enforcement; in teaching safe use and handling of firearms to those seeking hunting licenses or licenses to carry concealed firearms; by collegiate and Olympic shooting teams; and by ROTC programs.
- Projectiles are integral to range operations.
- Environmental litigation by state and local agencies is cost-prohibitive to defend and threatens the viability of the shooting range industry which would affect a citizen’s constitutional right to keep and bear arms.<sup>194</sup>

The Senate Analysis noted several issues presented by the then-proposed legislation. It recognized that this action by the legislature may affect the authority granted to FDEP to enforce federal laws such as RCRA. “This pre-emption could affect the approval of Florida’s hazardous waste program under the federal Resource Conservation and Recovery Act of 1976 (relating to hazard and solid waste management).” In fact, the Senate Analysis noted that “[t]he pre-emption as stated may also implicitly designate the Legislature as the enforcement entity for the regulation of environmental laws,” because the legislature is preempting actions by all other state and local entities.<sup>195</sup> Therefore, state officials are no longer authorized to enforce any federal laws that are connected with

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<sup>192</sup> Id.

<sup>193</sup> Id.

<sup>194</sup> Id.

<sup>195</sup> Id.

projectiles in the environment and face criminal and civil liability for any attempt to do so.<sup>196</sup>

The report noted four constitutional issues raised by the legislative language as initially proposed. There appears to have been an attempt to address the first two—(1) denial of the right to access courts for common law and other claims for injuries and (2) denial of due process by forcing all pending environmental claims against gun ranges to be withdrawn—by adding a provision that nothing in this legislation is intended to impair or diminish the rights of private property owners whose property adjoins gun ranges.<sup>197</sup> However, that provision does not address the rights of non-

adjacent landowners whose properties may be impacted by the gun ranges, nor does it address the rights of the general public to protection of the environment and preservation of natural resources. Given the intent of the legislature to have the courts broadly interpret this law, and the fact that

only certain private property owners were mentioned in the law as retaining certain rights, does this mean that non-adjacent landowners and the general public are not recognized as having any rights? If so, the constitutional concerns about right to court access and due process remain.

The next constitutional consideration raised by the Senate Analysis was the right to bear arms under both the federal and state constitutions.<sup>198</sup>

“Although the right to bear arms is protected under the U.S. Constitution and the Florida Constitution, it is not an absolute right for which the Florida Supreme Court has held that the right may be legislatively constrained to promote the health, morals, safety and general welfare of the people.”<sup>199</sup> After this analysis was written, the U.S. Supreme Court issued two important decisions regarding Second Amendment rights: *District of Columbia v. Heller*<sup>200</sup> and *McDonald v. City of Chicago*.<sup>201</sup> The *Heller* decision established the principles that the Second Amendment gives individuals the right to keep and bear arms and that the right to self-defense has been “central to the Second Amendment right,” in striking down a statutory ban against the possession of handguns in the home and rendering any lawful firearm in the home inoperable because it would interfere with the right to self-defense.<sup>202</sup> These rights were also deemed

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<sup>196</sup> *Id.*

<sup>197</sup> FLA. STAT. § 790.333(5)(b) (2004).

<sup>198</sup> Senate Analysis, *supra* note 6.

<sup>199</sup> *Id.* (citing *Rinzler v. Carson*, 262 So.2d 661 (Fla. 1972)).

<sup>200</sup> 554 U.S. 570 (2008).

<sup>201</sup> 561 U.S. 742 (2010).

<sup>202</sup> *Heller*, 554 U.S. at 628.

fully applicable to the states through the application of the Fourteenth Amendment in *McDonald*.<sup>203</sup>

This incorporation of the right to self-defense was further considered by the Seventh Circuit Court of Appeals in two cases called *Ezell v. City of Chicago*,<sup>204</sup> both relating to shooting range location. In *Ezell I*, the court struck down a ban on shooting ranges in Chicago as incompatible with the Second Amendment.<sup>205</sup> The second *Ezell* decision addressed the replacement zoning regulation for the operation of gun ranges, which limited the places where gun ranges could be located in the city.<sup>206</sup> At issue was whether the ordinance placed too significant a burden on the rights of Chicagoans to maintain proficiency in fire arm use.<sup>207</sup> The court held that restrictions on training for firearms is directly tied to firearm use and self-defense; thus restrictions on firing ranges are restrictions on the Second Amendment.<sup>208</sup> The court also held that the city only presented speculative concerns about public health and safety, and those concerns were not sufficient to overcome the heightened scrutiny required for placing burdens on Second Amendment rights.<sup>209</sup>

The final Florida constitutional consideration of the staff analysis is section 7 of Article II, added by voters in 1998, which establishes the public policy to “conserve and protect the natural resources and scenic beauty” and to provide adequately in state law “for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.”<sup>210</sup> The analysis states that the constitutional provisions are not self-executing, but notes that there are many state laws and regulations implementing these provisions. However, the analysis concluded that section 790.333 overrides the primary state laws implementing these provisions in addition to subjecting any state official or entity applying these laws to gun ranges to misdemeanor charges and fines.<sup>211</sup>

As mentioned above, the Florida Legislature stated that environmental litigation by state and local governments threatened the

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<sup>203</sup> 561 U.S. 742 (2010).

<sup>204</sup> *Ezell v. City of Chicago*, 651 F.3d 684, 709 (7th Cir. 2011) [hereinafter *Ezell I*]; *Ezell v. City of Chicago*, 846 F.3d 888, 893 (7th Cir. 2017) [hereinafter *Ezell II*].

<sup>205</sup> *Ezell II*, 651 F.3d at 684; see also *Ezell III*, 846 F.3d at 888–90.

<sup>206</sup> *Ezell III*, 846 F.3d at 888.

<sup>207</sup> *Id.* at 889–90.

<sup>208</sup> *Id.* at 889.

<sup>209</sup> *Id.* at 889–91.

<sup>210</sup> Senate Analysis, *supra* note 6.

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

“viability of the shooting range industry.”<sup>212</sup> It is this statement that formed the rationale for the immunity given to shooting ranges from state and local action. If viability for meeting environmental requirements was not a concern, then there would be no interference with the rights enunciated as the additional bases for this legislation. However, there is no factual information to support this finding that the viability of the industry itself is threatened and that no range is capable of managing its activities in an environmentally responsible way. This raises the question about how to balance environmental rights and requirements against the Second Amendment’s right to training at shooting ranges.

While not explicit nor addressed in the Senate Analysis, this legislation shifts the responsibility for cleaning up gun ranges to the state. The law mentions that ranges are required to implement “situationally appropriate environmental practices” by 2006.<sup>213</sup> It also requires FDEP to assist or to perform contamination assessment activities if requested by any “owner, operator, tenant, or occupant of sport shooting or training ranges,” including instances where the investigation is initiated by a third-party complaint.<sup>214</sup> Once it is decided that some action is necessary, the law also prescribes that the “minimum risk-based” principles be applied based on the presumption of industrial use rather than the higher risk standards for residential or commercial properties.<sup>215</sup> While the law states that cleanup implementation is the primary responsibility of the gun range, or owner or operator of the range, it also states that FDEP “may” assist in these efforts.<sup>216</sup> The release from liability is conditioned upon making “good faith efforts” to comply with implementing those practices, but there is no definition for what constitutes “good faith efforts” nor any consequences for ranges that are deemed not to have made such efforts.<sup>217</sup>

Given the prohibition on all government officials from taking any other actions against owners, operators and others associated with the ownership and operation of gun ranges for environmental conditions at gun ranges, the conclusion must be drawn that FDEP must perform all actions not taken by the gun ranges themselves, once a plan of corrective action is established. Otherwise, there would be no recourse for addressing a confirmed environmental hazard. The Senate Analysis, however, did not

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<sup>212</sup> Id.

<sup>213</sup> FLA. STAT. § 790.333(4)(b) (2004).

<sup>214</sup> Id. §790.333(4)(c)–(d).

<sup>215</sup> Id. §790.333(e).

<sup>216</sup> Id.

<sup>217</sup> Id.



make any mention of the cost required for FDEP to comply with the law.<sup>218</sup>

Nevertheless, the possibility remains for citizens to bring lawsuits to enforce RCRA and CWA requirements. Moreover, under CERCLA, a person may face cleanup costs resulting from gun range contamination. However, the more recent federal court decisions appear to shy away from establishing clear precedents, preferring instead to rely on specific facts<sup>219</sup> or finding that the cases are not ripe for decision.<sup>220</sup>

## CONCLUSION

Florida's law governing environmental regulation for gun ranges raises the question about the extent to which rights under the Second Amendment override environmental, health, and safety concerns of the general public and individual citizens impacted by gun ranges. The stories in Florida about accidental deaths and near-misses from people shooting guns on their own property, and the failure to analyze the current and future environmental impacts of gun ranges, highlights the failure of the legislature to adequately consider the competing concerns.<sup>221</sup> As noted above, the Florida Attorney General opined that any county ordinances to

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<sup>218</sup> Senate Analysis, *supra* note 6.

<sup>219</sup> See, e.g., *Cordiano v. Metacon Gun Club Inc.*, 575 F.3d 199, 209–16 (2d Cir. 2009).

<sup>220</sup> See, e.g., *Calmat Co. v. San Gabriel Valley Gun Club*, 809 F. Supp. 1218 (C.D. Cal. 2011).

<sup>221</sup> While the Florida legislature did pass a law in 2016, to place some restrictions on the use of firearms on private property, this law is not considered adequate nor does it address any environmental concerns – concerns that were explicitly recognized by the legislature. See, e.g., FLA. STAT. § 790.15(4) (2016); Lee Williams, “Backyard Range” Law Explained, *THE GUN WRITER* (Mar. 1, 2016), <https://www.thegunwriter.com/2015/column-backyard-range-law-explained/>; Beth Kassab, Still No Charges After Deltona Man Killed In Yard On Christmas Day, *ORLANDO SENTINEL* (MAY 12, 2014), [http://articles.orlandosentinel.com/2014-05-12/news/os-bruce-fleming-shooting-beth-kassab-20140512\\_1\\_deltona-man-florida-law-gun-owner](http://articles.orlandosentinel.com/2014-05-12/news/os-bruce-fleming-shooting-beth-kassab-20140512_1_deltona-man-florida-law-gun-owner); 9 Investigates: Loophole In Florida Law Banning Backyard Gun Ranges, *WFTV9* (Apr. 26, 2016), <http://www.wftv.com/news/9-investigates/9-investigates-loophole-in-florida-law-banning-backyard-gun-ranges/243651290>; Arek Sarkissian, St. Pete Backyard Gun Range Spurs New State Law, *TAMPA BAY TIMES* (Feb. 26, 2016), <http://www.tbo.com/news/politics/st-pete-backyard-gun-range-spurs-new-state-law-20160226/>; Jim Turner, Scott signs ‘backyard gun range’ measure, 8 other bills into law, *PALM BEACH POST* (Feb. 24, 2016), <http://www.palmbeachpost.com/news/state—regional-govt—politics/scott-signs-backyard-gun-range-measure-other-bills-into-law/jikBy7CtenXhptHqenE2qO/>.

protect the health, safety and welfare of citizens are preempted,<sup>222</sup> and, as explained above, this is also true for all state officials as well.<sup>223</sup>

In preempting all gun range regulation and reserving that sphere for itself, the legislature should also be responsible to all citizens for ensuring their safety and protecting their legitimate property interests. The legislature claims that protection of gun ranges is necessary for training people to safely handle firearms.<sup>224</sup> However, statistics about gun accidents undermine the legislature's "findings" in section 790.333(1). According to a 2013 report, the rate of accidental non-fatal gunshot wounds was double the national average for the preceding three years.<sup>225</sup> Fatal gun shooting accidents have also soared.<sup>226</sup> The Florida Supreme Court has held that the right to bear arms is not absolute,<sup>227</sup> and the Florida Senate's analysis of section 790.333 declared that legislation regarding the operation of gun ranges is permitted to "promote the health, morals, safety and general welfare of the people."<sup>228</sup> Adding environmental damage and imposing cleanup costs on Florida taxpayers is simply not justifiable.

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<sup>222</sup> In re Authority of County to Enact Ordinance Prohibiting Discharge of Firearm, Fla. Att'y Gen. Op. 40 (2015), 2005 WL 1650327 (Section 790.33 prohibits local government from enacting ordinances that prohibits the discharge of a firearm even to protect the health, safety or welfare of citizens of the county).

<sup>223</sup> Senate Analysis, *supra* note 6.

<sup>224</sup> FLA. STAT. § 790.333(1)(b)-(c) (2004).

<sup>225</sup> Rene Stutzman, Gun Accidents In Florida Are Double The National Average, THE FLORIDA TIMES-UNION (Dec. 20, 2013, 6:11 PM), <http://jacksonville.com/breaking-news/2013-12-19/story/gun-accidents-florida-are-double-national-average>.

<sup>226</sup> Rene Stutzman, Fatal Accident Shootings Soar In State, PRESS READER (DEC. 15, 2013), <http://www.pressreader.com/usa/orlando-sentinel/20131215/281728382332249>.

<sup>227</sup> *Rinzler v. Carson*, 262 So.2d 661 (Fla. 1972).

<sup>228</sup> Senate Analysis, *supra* note 6.