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Environmental Stewardship of Florida Shooting Ranges

The State of Florida estimates that there are more than 400 sport shooting ranges in the state and that approximately one million shooting sport enthusiasts visit these ranges each year.¹ Shooting ranges in Florida have received increased attention recently as a result of certain high-profile cases that have raised the regulatory agencies' interest. This, in turn, has triggered the involvement of such influential national organizations as the National Rifle Association (NRA) and National Sports Shooting Foundation (NSSF), as well as public and private gun clubs in Florida. The upshot of this increased attention has been the passage of new laws and the development of new environmental stewardship practices that are applicable to Florida shooting ranges. This article will explain the background of these developments and discuss the legal and scientific issues associated with shooting ranges in Florida.

Legal Background

In Florida, discharges or releases of pollutants from facilities are heavily regulated and liability is imposed generally under F.S. Chs. 376 and 403. 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...."² 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."³

In 2003, the Florida Legislature enacted F.S. §376.30701, which is the codification of the principles of risk-based corrective action (RBCA). RBCA utilizes site-specific data, modeling results, risk assessment studies, institutional, and engineering controls to develop a unique remediation strategy for the site that considers the intended use of the property and which is protective of human health and safety and the environment.⁴ Under this law, shooting ranges in Florida are eligible to follow the RBCA approach to site rehabilitation.

The Florida Department of Environmental Protection (FDEP) is authorized to file a civil suit against any person who caused a discharge of pollutants or hazardous substances, or who owned or operated a facility at which the discharge occurred. F.S. §376.308(1). Individuals who have suffered damages resulting from a discharge or condition of pollution are also covered by these statutes. F.S. §376.313(3). In *Aramark Uniform and Career Apparel v. Easton*, 894 So. 2d 20 (Fla. 2004), the Florida Supreme Court held that F.S. §376.313(3) creates a private cause of action imposing strict liability for damages against an adjoining landowner without proof that the defendant actually caused the pollution. In addition, the court held that the defendant is limited to the statutory defenses found in F.S. §376.308.⁵

Under the statutory and judicial authority set forth above, shooting ranges in Florida are potentially liable to the State of Florida and third parties for causing any pollution or

discharging pollutants or hazardous substances into the environment. In response to reports of violations, in recent years, the FDEP stepped up its investigation and enforcement of these laws at several shooting ranges in Florida.⁶ In response to the increased enforcement by the FDEP, gun clubs in Florida, many of them allied with the NRA and NSSF, counterattacked by introducing 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 targeted shooting ranges for enforcement.⁷ After much debate, the legislature enacted F.S. §790.333, relating to "Sports Shooting and Training Range Protection, Liability, and Penalties." The statute generally directs that sports shooting range owners, operators, tenants, or occupants implement site-specific appropriate environmental management practices, utilizing as guidance the FDEP's *BMP Manual*.

The shooting range law includes a specific finding that these facilities "are widely used and enjoyed by the residents of this state and are a necessary component of the guarantees of the Second Amendment to the United States Constitution and of s. 8, Art. I of the State Constitution." F.S. §790.333(1)(b). F.S. §790.333(1)(d) says that it is state policy "to encourage the safe handling and operation of firearms and mandates appropriate training in the safe use and handling of firearms...." In addition, the law finds that:

over years of operation, 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 human health depends on factors that are site-specific. Therefore, sport shooting and training ranges must be allowed flexibility to apply appropriate environmental management practices at ranges. The use of environmental management practices can be implemented to avoid or reduce any potential for adverse environmental impact. F.S. §790.333(1)(f).

The legislative intent of the shooting range law is to

protect public and private sport shooting or training range owners, operators, users, employees, agents, contractors, customers, lenders, and insurers from lawsuits and other legal actions by the state, special purpose districts, or political subdivisions and to promote maximum flexibility for implementation of environmental management practices and of the principles of risk-based corrective actions, pursuant to s. 376.30701. F.S. §790.333 (2).

The most controversial aspect of the shooting range law is the immunity from lawsuits provided therein. Under this law, owners, operators, and any other persons associated with a shooting range are immune from lawsuits from the state and its political subdivisions "for any claims of any kind associated with the use, release, placement, deposition, or accumulation of any projectile in the environment, on or under that sport shooting or training range or any other property over which the range has an easement, leasehold, or other legal right of use..." if the owner or operator has made a good faith effort to comply with the requirement that they implement appropriate environmental management practices. F.S. §790.333(5).

Perhaps even more explosive are the penalties for violation of this law by governmental officials. The law provides that

any official, agent, or employee of a county, municipality, town, special purpose district, or other political subdivision or agent of the [s]tate, while he or she was acting in his or her official capacity and in the scope of his or her employment or office, who intentionally and maliciously violates the provisions of this section or is party to bringing an action in violation of this section commits a misdemeanor of the first degree.... F.S. §790.333(7).

In response to the shooting range

law and the ominous penalty provision contained therein, the FDEP and other governmental officials have understandably been somewhat reluctant to put shooting ranges in their enforcement crosshairs. As a result, it is difficult to evaluate the degree of compliance with the shooting range law which is occurring at Florida ranges. Although the shooting range law does not eliminate the state's enforcement of environmental laws outlined above, it does restrict such enforcement and creates a "chilling effect" on the governmental officials' enthusiasm for such actions for obvious reasons.

The Federal Scheme

Notwithstanding the immunities and other protections afforded to sport shooting range owners and operators by the Florida law discussed above, major federal regulatory programs administered by the U.S. Environmental Protection Agency (EPA) in conjunction with the FDEP still have shooting ranges in their sights. Most significant of these are the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901, *et seq.*, the Clean Water Act (CWA), National Pollutant Discharge Elimination System (NPDES), 33 U.S.C. 1362, *et seq.*, and the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. 9601, *et seq.* A brief discussion of each of these laws in the context of shooting ranges follows.

• **RCRA** — RCRA is a "cradle to grave" regulatory scheme which proscribes the generating, storing, transporting, treating, and disposing of solid and hazardous wastes. The FDEP is fully authorized to administer the RCRA program. F.S. Ch. 403, part IV; F.A.C. Ch. 62-730. Lead found in soils at shooting ranges may be considered under certain circumstances to be a hazardous waste subject to regulation under RCRA. However, firing lead shot may not constitute "disposal" of a solid waste and, therefore, may not be subject to RCRA.⁸ Under *Connecticut Coastal Fishermen's Association v. Remington Arms Co., et al.*, 989 F.2d 1305 (2d Cir. 1993), lead materials left

to accumulate in the environment are considered abandoned and discarded, and, therefore, may be subject to RCRA. However, a shooting range owner or operator may limit or eliminate their exposure under RCRA by implementation of the BMPs and other practices including, but not limited to, timely separation of lead shot and bullets from soil and recycling of the lead, and range management including reclaiming lead, and other practices.⁹ To date, the FDEP has not pursued shooting ranges under RCRA. However, shooting range owners and operators should be well aware of RCRA.

• **NPDES** — Under the NPDES program of the Clean Water Act (CWA), it is illegal to "discharge" any "pollutant" from a "point source" into "waters of the United States" without an NPDES permit.¹⁰ A "discharge" means "any addition of any pollutant to navigable waters from any point source."¹¹ A "point source" is defined as any conveyance from which pollutants are or may be discharged.¹²

Several courts in the U.S. have considered whether shooting ranges are subject to NPDES. No case in the 11th Circuit has considered this issue, therefore, it is an open question in Florida. However, authority outside of the 11th Circuit holds that shooting ranges are considered point sources and are subject to NPDES permitting and other regulations.¹³

Although courts outside of Florida have required an NPDES permit to operate a shooting range where surface waters and/or wetlands are within the line of fire, the FDEP has not yet issued an NPDES permit for a shooting range, nor has it officially stated its intent in this regard. However, as indicated in the discussion of RCRA above, shooting range owners and operators should be mindful of these NPDES issues.¹⁴

• **CERCLA** — CERCLA is a liability statute for releases or threatened releases of hazardous substances into the environment. 42 U.S.C. §9601, *et seq.* Because lead is a hazardous substance under CERCLA, the EPA may take action against a shooting range owner or opera-

tor to compel cleanup or recover costs for such cleanup under CERCLA. 42 U.S.C. §9607. There have been limited actions brought under CERCLA across the U.S. against shooting ranges. The EPA has been successful in some cases in pursuing costs against shooting ranges under CERCLA.¹⁵ Again, as with RCRA and NPDES discussed above, shooting range owners and operators should be fully cognizant of their potential liability under CERCLA.

• *Implementation of BMPs* — The Florida shooting range law required the FDEP, no later than January 1, 2005, to make a good faith effort to provide copies of the *BMP Manual* to all owners or operators of sports shooting or training ranges. The law also required the FDEP to provide technical assistance with implementing environmental management practices if requested by any owner or operator. F.S. §790.333(4). The FDEP met this obligation by mailing out hundreds of *BMP Manuals* and by conducting workshops and providing technical assistance to owners and operators throughout Florida. In addition, the law required sports shooting or training range owners, operators, tenants, or occupants to implement appropriate environmental management practices by January 1, 2006. F.S. §§790.333(4)(a) and (b). These BMPs are set forth in an environmental stewardship plan (ESP) discussed more fully below.

If contamination is identified at a range, the FDEP is directed to apply RBCA principles to any corrective action required. The law specifically provides that “risk-based corrective action plans used for these cleanups shall be based upon the presumption that the sport shooting or training range is an industrial use and not a residential use and will continue to be operated as a sport shooting or training range.” F.S. §790.333(4)(e).

Achieving Environmental Compliance

The FDEP *BMP Manual* provides for the development by shooting ranges of an ESP. The purpose of an ESP is to identify issues of potential environmental concern that may ex-

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ist; evaluate and prioritize appropriate actions to manage these issues; list short- and long-term action items and the steps needed for implementation; develop and implement the schedules to meet short- and long-term action items; and identify ways to measure the ESP's success.¹⁶

A typical ESP prepared pursuant to the *BMP Manual* will include several components. The ESP should include a site assessment that describes the range and support facilities. The ESP should also include a discussion of environmental conditions, including land use; annual precipitation, physiographic setting, ecological communities, surface water classification and quality; surface water flow; soil classification; and geohydrology. Furthermore, the ESP should include a background environmental assessment of the most potentially significant environmental issues. This includes an analysis of soils, surface water, and sediments where applicable.

With respect to environmental impacts typically associated with shooting ranges, the primary constituent of concern is lead.¹⁷ Arsenic is also often associated with shooting ranges. The majority of lead contamination associated with shooting ranges is normally limited to surface and near surface soils. Lead can be dispersed into the environment in a number of ways: Oxidized lead shot on the surface can dissolve when exposed

to moisture; lead can be found in stormwater run-off and erosion and wind-blown particulates; dissolved lead can migrate into groundwater; certain plants can uptake lead and this lead can be introduced into the food chain; and wildlife can directly ingest lead shot in contaminated soils. When lead shot is exposed to the atmosphere and moisture, weathering of the shot occurs resulting in products that can include lead oxides, sulfates, carbonates, and others. The rate of weathering depends on various physical and chemical factors.

As indicated above, the majority of lead contamination associated with shooting ranges is normally limited to surface and near surface soils primarily through erosion. Erosion occurs primarily through wind and precipitation. Wind erosion occurs most often with barren soil surfaces. This is often the case where there are berms that do not support a vegetative cover. In addition, water from precipitation can transport lead through the dissolved phase or in metallic form. The ability for stormwater runoff to transport lead is determined by several factors, including intensity of rainfall. A great volume of rainfall during a short event can result in a large volume of runoff and high velocity of runoff capable of transporting more lead. Topography is also a factor as steeper slopes result in greater velocity for surface waters. Vegetation present at a range stabilizes the soils and reduces sheet flow. In addition, soil type is a factor in erosion. If underlying soils are porous, more rainfall can infiltrate and less rain will run off the surface. Transport of lead and other contaminants can also occur through groundwater. Groundwater pathways may also be investigated as part of the preparation of the ESP.

A variety of management alternatives are available to a shooting range pursuant to the *BMP Manual*. The manual itself includes case studies and model ranges, an example self-inspection check list, a template for an ESP, a summary of key BMPs, and other helpful guidance. Selected

management alternatives include removal of lead shot and/or clays that have accumulated at the range; amending soils by the application of lime or phosphate induced metal stabilization to control pH and the continued monitoring of soil pH; construction of berms, backstops, traps, and/or other containment mechanisms; monitoring of surface water discharges, if any; regular mowing of the range to discourage wildlife from foraging; and monitoring of flora and fauna. The shooting range owner or operator is not required to, but should, evaluate all of these management options and others which are relevant to its specific operations to ensure that appropriate environmental stewardship programs are in place. An ESP which incorporates these concepts should pass muster under the shooting range law with the FDEP.

Conclusion

As discussed above, numerous laws and regulations on the federal and state levels impose responsibility and potential liability on shooting range owners and operators for environmental impacts associated with such activities. However, in Florida, due to strong public policy favoring gun ownership and safety, shooting ranges do not find themselves on the wrong end of the governmental gun. If shooting ranges follow the FDEP *BMP Manual* and implement good environmental stewardship practices at their facilities, it is unlikely that they would be subject to enforcement action. However, it is still important

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for shooting range owners and operators in Florida to be fully apprised of the various federal and state laws and regulations that may impact their activities. □

¹ Florida Department of Environmental Protection, *Best Management Practices for Environmental Stewardship of Florida Shooting Ranges*, BMP MANUAL 7 (Oct. 2004) available at www.floridadep.org/waste/quick_topics/publications/shw/hazardous/shootingrange/FloridaBMP-2004reducedsize.pdf. See also U.S. E.P.A., *Best Management Practices for Lead at Outdoor Shooting Ranges* (June 2005).

² "Pollutants" are defined in F.S. §§376.301(36), (21).

³ "Pollution" is defined in F.S. §403.031(7).

⁴ RBCA implementation rules are found at F.A.C. Ch. 62-780.

⁵ See DeMeo, Eldred, Feuerstein, *Florida Supreme Court Takes Property Owners to the Cleaners: The Impact of Aramark v. Easton*, 79 FLA. B.J. 66 (June 2005).

⁶ See Florida Department of Environmental Protection, *Lead Management at Florida Shooting Ranges* at www.dep.state.fl.us/waste/categories/hazardous/pages/lead.htm (Apr. 17, 2006).

⁷ See Senate Bill 1156, "Sport Shooting and Training Ranges" (2004).

⁸ See *Long Island Soundkeeper Fund, Inc. v. New York Athletic Club*, 94 Civ. 0436 (S.D.N.Y. March 20, 1996); cf. *Connecticut Coastal Fishermen's Association v. Remington Arms Co., et al.*, 989 F.2d 1305 (2d Cir. 1993).

⁹ See Florida Department of Environmental Protection, BMP MANUAL, Appendix B.

¹⁰ See, e.g., 33 U.S.C. §1342.

¹¹ 33 U.S.C. §1362.

¹² *Id.*; 33 U.S.C. §1342.

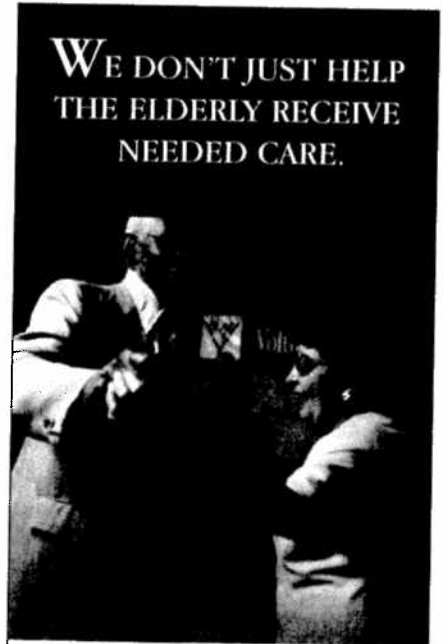
¹³ See *Long Island Soundkeeper Fund, Inc. v. New York Athletic Club*, 1996 WL 131863 (S.D.N.Y. 1996); see also *Stone v. Naperville Park District*, 38 F. Supp. 2d 651 (N.D. Ill. 1999).

¹⁴ See also FDEP, BMP MANUAL, Appendix B.

¹⁵ See *Southern Lakes Trap and Skeet Club Site, Lake Geneva, WI, et al.*; *Walter L. Kamb v. U.S. Coast Guard, et al.*; see BMP MANUAL, Appendix B-4.

¹⁶ The authors acknowledge the assistance of Satish Kastury and Merlin Russell of WRS Infrastructure and Environment, Inc., in the preparation of this article.

¹⁷ See Lena Q. Ma, Willie G. Harris & Jerry Sartain, *Environmental Impacts of Lead Pellets at Shooting Ranges and Arsenical Herbicides at Golf Courses in Florida*, Report #00-03, Florida Center for Solid and Hazardous Waste Management, University of Florida (June 2000) available at www.floridacenter.org/publications/ma_00-03.pdf.



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