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• Robert D. Fingar, Chair • Enola T. Brown, Editor •

FDEP Briefs the ERC on Global RBCA

by Chris Saranko, Ph.D., DABT

On December 7, 2004, the Florida Department of Environmental Protection (DEP) briefed the Environmental Regulation Commission (ERC) on its controversial proposed cleanup rules including Chapters 62-780 (Global RBCA), 62-713 (HS), 62-770 (Petroleum), 62-777 (Cleanup Criteria), 62-782 (Dry Cleaning), and 62-785, F.A.C. (Brownfields). This ERC Briefing had been delayed several months due to extensive public comments, largely pertaining to the "Notice" provisions written into the rules immediately prior to the August 3, 2004 workshop. Many of the comments on this issue raised concerns about the DEP's authority to develop new notice requirements and the potential for these requirements to attract third party lawsuits.

Based on the uproar at the August public Rule Workshop on August 3rd the DEP revised the "Notice" provisions and also convened a meeting of the Methodology Focus Group of the Contaminated Soils Forum to discuss a number technical comments offered by interested parties. These technical comments focused on the "apportionment" of cleanup target levels to address cumulative risk targets of 1x10 – 6 for carcinogens and a hazard quotient of 1.0 for non-carcinogens, guidelines on the sampling requirements for soil investigations, and the so-called "3X rule", which limits the maximum concentrations of soil contaminants left unaddressed by site cleanup activities.

A fourth Rule Workshop was held on October 28th. Although the crowd of interested parties was smaller, DEP was again regaled with largely negative comments regarding the notice provisions and the many of the same technical issues. However, the DEP indicated that it had nearly exhausted the concessions it was willing to make and stated its intention to take the Rules to the ERC for briefing and adoption without any further workshops. Accordingly, changes to the Rules between the October 28th Workshop and the December 7th ERC Briefing were relatively minor.

At the December 7th ERC Briefing, representatives from the DEP gave a slide presentation that provided a historical perspective on the

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From the Chair

by Robert D. Fingar

As I noted in the last Chair's Column, one of the goals of our Executive Council is enhancement of the relationship between the Section and the state's law schools and increased participation by law students and faculty in Section activities. To accomplish this goal, a re-structuring of the Law School Liaison Committee is in order. One or two Executive Council members or other Section members will be appointed as liaisons to each law school. Each representative will contact the dean and environmental law faculty at each school. We will ask that each school appoint at least one environmental law faculty member and student to serve as the school's liaison to the ELULS.

By establishing this structure, we would like to accomplish a number of objectives:

- Establish roles for students and faculty in the development of the Treatise, Section *Reporter* and Bar *Journal* columns.
- Integrate faculty into seminars and workshops

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FROM THE CHAIR

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- Encourage law students to join the Section as affiliate members and become involved in Section activities. We can use our website and Listserve as a means of enhancing communication between the law schools and the Section and also provide a forum for discussion of environmental issues and activities.
- Create on-campus lecture or "Brown-Bag" programs using Section members, government officials, and faculty as participants.
- Determine whether any changes need to be made to the Dean Maloney writing competition in order to boost participation.
- Explore the possibility of expanding the University of Florida's Public Interest Conference or creating other environmental issue-based conferences at other law schools.

Please let me know of any thoughts you have regarding our activities in association with the law schools or, even better, if you have any interest in participating.

GLOBAL RCBA

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use of RBCA in contaminated site management in Florida, a discussion of the newly incorporated RBCA provisions common to all of the rules, and an overview of the unresolved and/or controversial issues raised by interested parties over the course of the four Rule Workshops. A number of interested parties also took the opportunity to address the commissioners with their concerns related to the proposed Rules.

During the five hour meeting, the ERC members engaged the DEP representatives and other interested parties in discussions about several of the key rule provisions. There was a significant amount of discussion related to the statutory authority for the Notice provisions. The commissioners also queried DEP representatives on the rational behind the selection of a 3-fold bioavailability factor for arsenic, when the Methodology Focus Group had specifically recommended a 4-fold factor based on data from the DBF-funded bioavailability study conducted by Dr. Steve Roberts at the University of Florida.

Since the December 7th Briefing, the DEP has floated a potential compromise proposal to several industry organizations to allay their concerns over the Notice provisions. This compromise would require responsible parties to provide actual notice to the DEP and the local County Health Department within ten days of the discovery of off-site contamination that has migrated from the source property. The task of notifying adjacent property owners would presumably fall to the DEP.

This late-breaking compromise may clear one of the major hurdles to Rule adoption. However, many interested parties still have concerns over the restrictions placed on specific elements of risk assessment by the proposed Rules. If strictly enforced by DEP officials, the Rule provisions related to cleanup target level apportionment, 3X "not to exceed" criteria, and more onerous sampling requirements will provide technical and financial obstacles to legitimate risk-based evaluations, particularly for soil contamination. These obstacles will create uncertainty for responsible parties about a successful outcome from these risk-based evaluations. As a result, responsible parties will increasingly choose the more costly, but more certain, path of managing the site to the default cleanup target levels.

The ERC Rule Adoption Hearing is currently scheduled for February 2, 2005 in Tallahassee. Copies of the Rules and related materials from the December 7th ERC Briefing can be downloaded from the DEP website at: *http://www.dep.state.fl.us/waste/categories/wc/pages/ERCBriefingl20704_Information.htm*

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THE FLORIDA BAR

On Appeal

by Susan L. Stephens, Lawrence E. Sellers, Jr., and Douglas E. Walker

Note: Status of cases is as of December 22, 2004. Readers are encouraged to advise the authors of pending appeals that should be included.

FLORIDA SUPREME COURT

Daniels v. Department of Health, Case No. SC04-230. Petition to review a *per curiam* affirmance of a DOAH order denying Daniels' amended petition for attorney's fees based on the administrative law judge's finding that she is an individual, not a "small business party" as defined by section 57.111(3)(d), F.S. 868 So. 2d 551 (Fla. 3d DCA 2004). Status: Oral argument held November 5.

City of Miami Beach v. Royal World Metropolitan, Inc., Case No. SC04-233. Petition to review a Third DCA opinion holding that a section of the Bert J. Harris, Jr., Private Property Rights Protection Act that states "this section does not affect the sovereign immunity of government" does not bar a private property rights claim against the City. 863 So.2d 320 (Fla. 3d DCA 2003), *reh'g denied* (2004). Status: Petition for review filed February 19.

Crist v. Department of Environmental Protection, Case No. SC03-844. Petition by the Attorney General to review a First DCA decision holding that the trade secrets exemption in what is now section 812.045, F.S., should be read to exempt from disclosure as public records all trade secrets meeting the definition in section 812.081, regardless of whether such documents are stored on or transmitted by computers, to the extent those documents were submitted to a public agency under a written claim of confidentiality. The court held that the exemption applied to public records disclosures even though it is contained in a chapter entitled "Computer-Related Crimes" and not the Public Records Law, Chapter 119, F.S. *SePro Corp. v. Department of Environmental Protection,* 839 So. 2d 781 (Fla. 1st DCA 2003), *reh'g denied* (2003). Status: Petition filed May 7, 2003. The original parties filed notices of non-participation because their dispute had been resolved, and the court removed them as parties on September 25, 2003. The Department of Environmental Protection (DEP) filed a motion to realign the parties on October 20, 2003, to show its support of the Attorney General's position, which would effectively leave no respondents in the case. On March 9, the Court issued an order to show cause why the case should not be dismissed as moot, since the parties in interest were gone. Crist and DEP filed responses to the order on March 24.

Aramark Uniform & Career Apparel, Inc. v. Easton, Case No. SC02-2190. Petition to review a First DCA decision reversing a trial court ruling in favor of Aramark on Easton's suit against Aramark for the migration of environmental contamination from Aramark's property to Easton's property. The First DCA held that Easton had a strict liability cause of action against Aramark. 825 So. 2d 996 (Fla. 1st DCA 2002), *reh'g denied* (2002). Status: The Court affirmed on October 7. 29 F.L.W. S551. Motion for rehearing is pending.

FIRST DCA

Ernie Mosley v. DEP, Case No. 1D04-1614. Appeal of a DEP final order dismissing Mosley's petition for administrative hearing as being untimely filed two days after the extension of time that Mosley had requested. Mosley had argued that he should be allowed additional time for mailing. Status: Fully briefed; request for oral argument denied November 24.

Save the Manatee Club, Inc. v FWCC, Case No. 1D04-3903. Appeal of a declaratory statement issued by FWCC. Petitioner requested that FWCC issue a declaratory statement describing: the criteria required for counties to adopt manatee protection plans; the criteria that FWCC will apply to review and approve manatee protection plans; the criteria that FWCC will use to designate "substantial risk counties for manatee mortality" in the event that rules are not adopted; the criteria that FWCC will use for approval of manatee protection plans in substantial risk counties in the event that rules are not adopted; and whether FWCC considers review and approval of County manatee protection plans to be "agency action" as defined by Section 120.52(2), Florida Statutes (2003). FWCC's declaratory statement denied Petitioner's request for a declaratory statement except as to the last inquiry (i.e., whether FWCC considers review and approval of County manatee protection plans to be "agency action"). Status: Notice of appeal filed September 1; fully briefed; no oral argument requested or set.

Save the Manatee Club, Inc. v. FWCC, Case No. 1D04-4274. Appeal of a Final Order dismissing a petition for hearing on FWCC's approval of the Lee County Manatee Protection Plan. Status: Notice of appeal filed September 24; request for stay denied November 1.

Butler Chain Concerned Citizens, Inc. v. DEP, Case No. 1D04-3941. Appeal of a DEP final order holding that petitioner failed to prove standing to challenge a consent agreement between DEP and the developer that allowed dredging and filling of sovereign submerged lands in Lake Butler, as the developer's removal of muck and a tussock in the cove would improve water quality in the lake. Status: Notice of appeal filed September 1; motion to dismiss is pending. Oral argument requested.

Bay Point Club, Inc. v. Bay County, et al, Case No. 1D03-1240. Appeal from a Florida Land and Water Adjudicatory Commission final order holding that a proposed non-substantial change to the Bay Point DRI development order must be consistent

continued...

with the Bay County Comprehensive Plan. Status: The Court affirmed October 25. 29 F.L.W. D2375. Suggestion to certify pending.

City of Hallandale Beach v. Broward County, et al, Case No. 1D03-4472. Appeal of a text amendment to the Broward County comprehensive plan limiting the densities in the coastal high hazard areas as exceeding the county's charter authority and arguing that the amendment discourages urban infill and redevelopment. The Appellees' position is that even if urban infill and redevelopment is discouraged in the coastal high hazard areas, the remaining urban area is not impacted by the amendment and therefore urban infill and redevelopment can continue. Status: The Court affirmed without opinion on October 20. 884 So. 2d 938.

Florida Public Interest Research Group v. Florida Department of Community Affairs, Case No. 1D03-5025. Appeal of a Department of Community Affairs final order dismissing a petition to set new energy efficiency standards for ten products sold in Florida. Status: Per curiam dismissed October 28. 2004 WL 2402691.

Lambou v. Wakulla County, Case No. 1D04-422. Appeal of a circuit court order dismissing with prejudice the Petitioners' verified complaint seeking declaratory and supplemental relief regarding the County's adoption of an ordinance amending the Wakulla County Comprehensive Plan. Status: Oral argument held September 14; motion to dismiss is pending.

Dillard & Associates Consulting, Inc. v. Department of Environmental Protection, Case No. 1D03-3279. Appeal of DEP's final order dismissing Dillard's petition challenging the consent order between DEP and the Florida Department of Transportation. DOT and DEP had entered into the consent order to address certain wastewater violations at one of the DOT's wastewater treatment plants; the consent order required DOT to pay a certain amount in penalties for the violations. Dillard operated the DOT wastewater facility under contract with DOT, and the contract provided that Dillard would pay any penalties DOT incurred for any noncompliance at the facility. Dillard filed a petition asking for a hearing on the amount of penalties and alleging financial harm, since it, not the DOT, would be paying the penalties. DEP dismissed the petition on the basis that Dillard had no standing under the APA to challenge the consent order, because financial interests are not within the zone of interest protected by Chapter 403, F.S., which governs wastewater permits. Status: Oral argument held July 21.

Department of Environmental Protection v. Save Our Suwannee, Inc., Case No. 1D04-1258. Appeal of a second circuit court decision holding that large dairies in Florida must apply for wastewater discharge permits to comply with both federal and state clean water laws and stating that the DEP has only partially performed its duties to adopt and enforce the federal NPDES permitting program in Florida by entering into consent agreements with some dairy farms that have the practical effect of exempting those farms from permitting. The judge ordered DEP to immediately require all dairy animal feeding operations with more than 700 mature cattle to apply for permits or to demonstrate that the operation is entitled to an applicable exemption. The DEP was specifically enjoined from relying on section 403.0611, F.S., as authority to use an alternative scheme to traditional permitting for dairies. Case No. 2001-CA-001266 (Fla. 2nd Cir. Mar. 5, 2004). Status: Oral argument scheduled for February 22, 2005.

Environmental Confederation of Southwest Florida, Inc. v. IMC Phosphates Co. and DEP, 1D03-1717. Appeal of a DEP final order dismissing ECOSWF's petition challenging DEP's decision to issue an ERP to IMC to authorize mining and reclamation activities on property known as the Ona Mine, on the ground that ECOSWF alleged standing only as a citizen pursuant to section 403.412, without alleging that a substantial number of its members would be substantially affected by issuance of the permit. The final order noted that section 403.412, as amended in 2002, only allows citizens to intervene in an ongoing administrative proceeding and does not allow a citizen to initiate an administrative action without showing that his or her substantial interests would be affected. Status: Motions to dismiss the appeal were denied on July 31, 2003 (857 So. 2d 207). On October 28, the Court held that the appeal was not moot because the statutory reenactment did not apply retroactively to bar the challenge, but that the amendment did not violate the single subject rule. 29 F.L.W. D2421 (consolidated with Case No. 1D03-784, below).

Environmental Confederation of Southwest Florida, Inc. v. Charlotte County and DEP, 1D03-784. Appeal of a DEP final order dismissing ECOSWF's petition challenging DEP's decision to issue a Class I underground injection permit to Charlotte County, on the ground that ECOSWF alleged standing only as a citizen pursuant to section 403.412, without alleging that a substantial number of its members would be substantially affected by issuance of the permit. The order noted that section 403.412, as amended in 2002, only allows citizens to intervene in an ongoing administrative proceeding and does not allow a citizen to initiate an administrative action without showing that his or her substantial interests would be affected. On appeal, the appellants argue that the 2002 amendment is unconstitutional because it violates the single subject requirement. Status: The Court affirmed on October 28. 29 F.L.W. D2421 (consolidated with 1D03-1717, above).

SECOND DCA

IMC Phosphates Co. v. Department of Environmental Protection, Case No. 2D03-4682. Appeal of a DEP final order denying IMC an ERP permit and conceptual reclamation plan approval for phosphate mining and reclamation of an area known as the Altman Tract. Status: Oral argument is scheduled for February 8, 2005.

FOURTH DCA

WCI Communities, Inc. v. City of Coral Springs, Case No. 4D03-1901. Appeal of a final judgment entered in favor of the City on WCI's complaint

alleging that the City's nine-month temporary moratorium on processing site plan applications for townhouse and multi-family developments constituted substantive and procedural due process violations and a regulatory taking. Status: The Court affirmed on September 29. 29 F.L.W. D2196.

FIFTH DCA

Thomas Kerper & All Salvaged Auto Parts, Inc. v. Florida Department of Environmental Protection, Case No. 5D04-1182. Appeal of DEP Final Order requiring assessment and remediation of an alleged discharge of used oil in compliance with DEP's directives under "Corrective Actions for Contaminated Site Cases" ("CACSC"). DEP brought an administrative action pursuant to an eight-count Notice of Violation ("NOV"). After a formal administrative hearing the ALJ dismissed seven of eight counts but found that Appellants were liable to assess and remediate a small portion of the used oil discharge for which DEP sought cleanup. The ALJ denied Appellants' motion for attorneys fees despite his finding that DEP had "unnecessarily litigated" the dismissed counts of the NOV. DEP affirmed the ALJ's recommended order. Appellants appealed claiming that the CACSC is unenforceable as an unpromulgated rule and that Section 376.305, F.S., requiring remediation "to the satisfaction of the Department" is unconstitutional, as it violates the nondelegation doctrine. Appellants also contest the denial of attorneys fees. Status: Oral argument was held December 9.

St. Johns River Water Management District v. Womack, Case No. 5D03-2493. Appeal of a circuit court decision ordering the District to pay Womack $262,383 in damages pursuant to 42 U.S.C. s. 1983, for denying Womack equal protection under the laws and holding that the District's action constituted an unreasonable exercise of police power in violation of s. 373.617, F.S. Womack had filed an application for a MSSW permit to allow subdivision and development of his property along the Wekiva River, a portion of which lay within the Riparian Habitat Protection Zone of the River. Over the course of two years, Womack and his engineer submitted six separate development plans, all of which were denied by the District. Womack's neighbor, Patricia Harden, who openly opposed the development, was the chair of the Governing Board of the District at the time, and the District, while denying Womack's plans, had in the meantime approved construction of a number of other structures within the RHPZ. The court held that the only reasonable conclusion for the continued denial of Womack's application was Harden's control of District personnel and collusion of the District Board and staff at her request. Status: Motion to dismiss denied June 3. Notice of cross appeal filed July 2. Oral argument requested.

U.S. SUPREME COURT

Kelo, et al. v. New London, CT, Case No. 04-108. Petition to review a decision of the Connecticut Supreme Court holding that the City of New London is entitled to take property by eminent domain to facilitate the development of a new major drug research complex; the Fifth Amendment's public use requirement authorizes eminent domain of property for the sole purpose of "economic development" to potentially increase tax revenues and improve the local economy. 843 A.2d 500 (Ct. 2004). Status: Petition granted September 28.

Appolo Fuels v. U.S. Petition to review a Federal Circuit decision rejecting a coal mining company's claim that an Interior Department determination that company land was unsuitable for mining constituted a taking requiring compensation. 381 F.3d. 1338 (Fed. Cir. 2004). Status: Petition filed.

Nebraska v. EPA, Case No. 03-1640. Petition to review a D.C. Circuit case dismissing a petition filed in 2002 by Nebraska that challenged the Safe Water Drinking Act's constitutionality and the new drinking water standards for arsenic promulgated in 2001 pursuant thereto by alleging the SWDA exceeds the authority of the commerce clause of the U.S. Constitution, as well as the First and Tenth amendments. The court held that the state did not meet the burden of proof required for a facial constitutional challenge and that the SWDA comports with both the Commerce Clause and the Tenth Amendment. 331 F.3d 995 (D.C.Cir. *reh'g en banc denied* (Aug 22, 2003). Status: Review denied October 4.

Cooper Industries Inc. v. Aviall Services, Inc., Case No. 02-1192. Petition to review a Fifth Circuit decision holding that Aviall, purchaser of contaminated land, could sue the former owner under the Superfund law to share in the costs of a voluntary cleanup that is not being ordered by the government. 312 F.3d. 677 (5th Cir. 2002). Status: On December 13, the Court reversed, holding that the contribution provisions of CERCLA do not authorize a private party to sue for contribution unless an enforcement action is filed against that party first. 2004 WL 2847713.

Alabama v. North Carolina, Case No. 220132, original jurisdiction. Motion for leave to file bill of complaint to settle a dispute among the seven member states of the Southeastern Low-Level Radioactive Waste Compact pursuant to the Court's original jurisdiction, regarding North Carolina's withdrawal from the Compact in 1999 and liability for $90 million in sanctions based on that withdrawal. Status: The Court agreed to hear the bill on June 16, 2003. On November 17, 2003, the Court appointed a special master to mediate the suit.

FIRST CIRCUIT

Rhode Island v. EPA. Challenge filed by six northeastern states to EPA's rules governing cooling water intake structures associated with power plants; EPA's "Phase II" performance standards, issued July 9, require power plants withdrawing large amounts of water for cooling to significantly reduce the number of organisms sucked in or impinged against intake screens. Status: Challenge filed July 26. Author's Note: *See related suit filed in the Second Circuit, infra.*

SECOND CIRCUIT

New York and Connecticut v. EPA. Petition by two states challenging EPA's decision not to finalize proposed effluent guidelines governing stormwater runoff from the construction and development industry, on the ground that EPA has failed to

continued...

perform a nondiscretionary duty under the CWA to set the guidelines. Status: Challenge filed September 7. Author's Note: *See related suit filed in the Ninth Circuit.*

Waterkeeper Alliance et al. v. EPA, Case No. 03-4470. Petition challenging EPA's rule governing wastewater discharges from concentrated animal feeding operations (CAFOs), which became effective February 26, 2003. Status: Oral argument held December 13..

Riverkeeper v. EPA. Suit by coalition of environmental groups challenging EPA's rules governing cooling water intake structures associated with power plants; EPA's "Phase II" performance standards, issued July 9, require power plants withdrawing large amounts of water for cooling to significantly reduce the number of organisms sucked in or impinged against intake screens. Status: Challenge filed July 26. Author's Note: *See related suit filed in the First Circuit.*

FOURTH CIRCUIT

Ohio Valley Environmental Coalition, et al. v. Bulen, et al., Case No. 04-2129. Appeal of a district court decision barring the U.S. Army Corps of Engineers from issuing general discharge permit Nationwide 21 (NWP 21) for mountaintop mining in the southern district of West Virginia, on the ground that the permits unlawfully allow placement of mining debris into streams below (a practice called "valley fills") using procedures Congress never intended for general permits under section 404 of the CWA. The Justice Department is arguing that the decision will lead to inconsistent application of the NWP 21 nationwide. *Ohio Valley Environmental Coalition v. Bulen,* Case No. CIV.A.3:03-2281, 34 ELR 201048 (July 8, 2004), *modified in part,* 2004 WL 2384841 (August 13, 2004), *reconsideration denied* (August 31, 2004). Status: Notice of appeal filed September 13.

NINTH CIRCUIT

Natural Resources Defense Council and Waterkeeper Alliance v. EPA, Case No. 04-74479. Petition filed by environmental groups challenging EPA's decision not to finalize proposed effluent guidelines governing stormwater runoff from the construction and development industry. Status: Voluntarily dismissed December 15. Author's Note: *See related suit filed in the Second Circuit.*

TENTH CIRCUIT

Sierra Club v. Seaboard Farms, Inc., Case No. 03-6104. Appeal of a district court's grant of summary judgment to the defendants, owners and operators of a pig-farming operation in western Oklahoma. Sierra Club had filed suit alleging that the operation had violated section 103 of CERCLA by failing to report the release of hazardous substances above the reportable quantity from a "facility," i.e., ammonia emissions. The district court defined "facility" to apply narrowly to each individual barn, lagoon, and land application area, holding that the "reportable quantity" threshold was not reached at each area. 2002 WL 32443305 (W.D.Okla 2002), *modified on reconsideration,* 2002 WL 32443304 (2002). Status: On October 29, the Court reversed and remanded, holding that the term "facility" should be defined broadly to include the entire farm site, and the ammonia emissions from the entire site must be aggregated. 387 F.3d 1167.

Utah v. Norton, Case No. 03-4147. Challenge to an agreement reached in April between the Department of the Interior and Utah that reduces the amount of federal land eligible for designation as "wilderness areas" protected from logging, mining, drilling, and other development. This case could impact future designations of "wilderness areas." Status: Hearing set for January 2005 session.

ELEVENTH CIRCUIT

Florida Public Interest Research Group et al. v. EPA, Case No. 03-13810. Appeal of a district court order granting summary judgment in favor of the EPA and intervenor Florida Department of Environmental Protection on FPIRG's suit alleging that EPA violated the CWA by failing to review Florida's Impaired Waters Rule, Chapter 62-303, Florida Administrative Code, as a revision to Florida's water quality standards. D.C. N.Fla. No. 02-408-CV. Status: The Court reversed and remanded on October 4, holding that EPA should have reviewed the Rule as to its practical effect on Florida's water quality standards and should not have relied on FDEP's representations that the Rule did not change any standards. 386 F.3d 1070.

Parker v. Scrap Metal Processors, Inc., Case No. 03-14516. Appeal of a federal district court decision finding that owners and operators of a scrap metal business were liable under the Clean Water Act (CWA) and Resource Conservation and Recovery Act (RCRA) for contamination of property adjoining the scrap metal yard and awarding compensatory and punitive damages and attorneys fees. Status: On September 28, the Court affirmed the jury's verdict of liability under the CWA and RCRA claims and the award of attorney's fees and contribution under a related Georgia statute, but reversed the jury's award of compensatory and punitive damages under Georgia nuisance law. 386 F.3d 993.

DLX, Inc. v. Commonwealth of Kentucky, Case No. 03-5528. Appeal of a district court decision barring DLX from bringing a suit alleging a regulatory taking in federal court because of sovereign immunity from suit granted by the 11th Amendment to the U.S. constitution. Status: The Court affirmed on August 26; rehearing *en banc* denied October 28. 381 F.3d 511.

D.C. CIRCUIT

Honeywell Internat'l v. EPA, Case No. 02-1294. Challenge to a 2002 EPA rule approving additional acceptable substitutes for ozone-depleting hydrochlorofluorocarbon, on the grounds that EPA erroneously considered economic factors in deciding whether the substitutes are acceptable. Status: On July 23, the Court vacated the rule. 374 F.3d 1363.

Natural Resources Defense Council v. EPA, Case No. 04-1323. Challenge to emission limits issued on July 30 for hazardous air pollutants from makers of plywood and composite wood products, particularly focusing on provisions exempting facilities found to present a low risk to human health; the challengers have also

filed a petition with EPA requesting reconsideration of the rulemaking. Status: Challenge filed September 28.

New York v. EPA, Case No. 03-1380. Challenge to EPA's New Source Review rule amendments published on October 27, 2003, which expands the "routine maintenance/equipment replacement" exclusion from review under the New Source Review/Prevention of Significant Deterioration (NSR/PSD) programs. The rule amendments were scheduled to take effect on December 26, 2003. Status: A motion to stay the equipment replacement rule was granted December 24, 2003. EPA to convene proceeding on reconsideration. Status report due March 17, 2005.

New York v. EPA, Case No. 02-1387. Challenge to EPA rule amendments granting additional exemptions from NSR/PSD requirements. Status: Notice of appeal filed December 31, 2002. EPA published notice of its final reconsideration of the rules on November 7. A renewed motion to stay the NSR rule amendments was denied December 24, 2003. A motion to consolidate with Case No. 03-1380 (above) was denied. Oral argument scheduled for January 25, 2005.

American Iron & Steel v. EPA, Case No. 00-1435. Petition to review EPA's final air pollution monitoring rule and performance standard published August 10, 2000, for requiring use of continuous opacity monitors. Status: Oral argument held February 25, 2003. Status report due January 4, 2005.

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FSU College of Law Hosts Leading Environmental Law Scholars as Part of Spring 2005 Symposium

by Profs. Donna Christie, J.B. Ruhl, and David Markell

In recent years, the FSU College of Law environmental law program has offered a substantial number of programs on important environmental issues through its *Environmental Forum* series (held each semester) and through lectures by distinguished environmental law professors from around the country who visit the law school to share their ideas about the current state of the law and its likely future directions. We've been very pleased with the reception to these programs - there is clearly a great deal of interest in the State about environmental issues, and we have a sense that our programs have helped to educate the public and advance the debate about the future of environmental protection in a constructive way. We've been very fortunate to include leading members of the Section in our *Environmental Forum* series and we look forward to continuing to do so in the future.

This spring, in addition to our *Environmental Forum* and a distinguished lecture by Professor Rob Fischman of Indiana University Law School, the College of Law is hosting an innovative Symposium that will feature an extraordinary array of leading scholars, including Dan Farber from the University of California-Berkeley, John Ferejohn, of Stanford, Brad Karkkainen from the University of Minnesota, and John Scholz, the Eppes Professor of Political Science at FSU who also has an appointment with the College of Law.

The Symposium, *Default Rules in Private and Public Law,* will address some of the central issues of environmental and administrative law, such as the role of courts in interpreting ambiguous statutes, the utility and function of the "delegation doctrine," and the weight that should be given to the precautionary principle and other theories for determining appropriate levels of environmental protection. These issues are of importance to scholars as well as to policy makers and practitioners.

For those interested in exploring these issues in detail, FSU's law review will be publishing the proceedings of the Symposium in a special issue. In addition, FSU Professor Jim Rossi, the College of Law's Harry M. Walborsky Professor and Associate Dean for Research, has written a book. *Regulatory Bargaining and Public Law* (Cambridge University Press, forthcoming this spring), which addresses the kind of default rules that should guide courts in reviewing regulations.

Please visit our web site, *http://www.law.fsu.edu/,* for more information on the upcoming Symposium, as well as for information about Professor Fischman's lecture and for updates concerning our spring *Forum.*

Florida Caselaw Update

by Gary K. Hunter, Jr. and D. Kent Safriet

Statutory Strict Liability for Environmental Contamination: Florida Supreme Court interprets §376.313(3), F.S., to create a new cause of action. *Aramark Uniform and Career Apparel, Inc. v. Easton,* 29 Fla. L. Weekly S551 (Fla. 2004).

On October 7, 2004, the Florida Supreme Court held that §376.313 (3), F.S. - which allows private parties to sue for damages resulting from a discharge or other condition of pollution - created a new cause of action for strict liability, regardless of causation. In this case, a private landowner sued Aramark for damages arising out of past and ongoing migration of contaminated groundwater from commercial property that Aramark purchased in 1986.

The Court reasoned that because the statute departs from the common law by providing a damages remedy for the non-negligent discharge of pollution, the Legislature intended to create a new cause of action rather than modifying existing ones. The Court stated further that the statute's enumeration of specific and exclusive defenses provides additional evidence that the Legislature intended to place the burden on the owner of polluting property to demonstrate their non-liability by establishing one of the limited affirmative defenses set forth in the statute. Finally, the Court relied on the title of the section, *"Non-exclusiveness of Remedies and Individual Cause of Action for Damages Under ss. 376.30 - 376.319,"* and the statute's provision of attorney fees as evidence of the Legislature's intent to create a new cause of action.

The Marketable Record Title Act (MRTA) cannot be used to extinguish statutory ways of necessity. *Blanton v. City ofPinellas Park,* 29 Fla. L. Weekly S614 (Fla. 2004).

The Florida Supreme Court held that the Marketable Record Title Act (MRTA) cannot be used to extinguish statutory ways of necessity. The Fifth DCA reached the same conclusion in *Cirelli v. ENT, 29* Fla. L. Weekly D2350 (Fla. 5th DCA 2004), which was decided the same week as *Blanton.* The MRTA provides that "any person.. .vested with any estate in land of record for 30 years or more, shall have a marketable record title... free and clear of all claims."

In prior rulings, the court had held that MRTA can be used to extinguish common law ways of necessity. Therefore, in this opinion, the court distinguished common law ways of necessity from the statutory ways of necessity at issue in *Blanton.* Common law ways of necessity are established at the time of the transfer of title that creates the landlocked property. And, if that title transfer occurrs prior to the root of title, MRTA extinguishes any common law way of necessity. However, a statutory way of necessity is "more akin to a privilege than to an interest in land, unless and until an action in the circuit court results in the establishment of an easement." Common law ways of necessity are discovered by researching the history of the title and require "unity of title." In contrast, the existence of a statutory way of necessity depends only on the current status of the property (whether it is landlocked, outside a municipality, and used for a particular purpose). The court held, noting that its holding was consistent with public policy, that MRTA cannot be used to extinguish statutory ways of necessity.

DRI changes, including those that do not constitute a "substantial deviation," are subject to consistency with local comprehensive plans. *Bay Point Club, Inc. v. Bay County,* 29 Fla. L. Weekly D2375 (1st DCA 2004).

In its en bane opinion issued on October 25, 2004, the First DCA affirmed an order of the Florida Land and Water Adjudicatory Commission (FLWAC) which held that once a DRI has been approved by a regional planning agency, any proposed changes do not become vested development rights (even though the changes are not substantial deviations) and are not exempt from local government review and approval. This case involved a proposed change to a longstanding but continually evolving DRI development order. The proposed change would have altered the use of several parcels, added 66 units to the parcels at issue and allowed a taller high-rise than was approved in the original development order.

Vested rights, according to the Court, do not, and cannot, create entitlement to greater rights than those originally obtained in the DRI. Accordingly, a proposed change jeopardizes vested rights because, by definition, the change seeks different development rights than those originally approved. In other words, DRIs previously authorized may be completed, but changes, even those which are not a "substantial deviation," are subject to approval and must comply with the local comprehensive plan.

While the First DCA's decision will generally be applicable to administrative reviews of DRI issues (the case was filed as an administrative challenge to FLWAC pursuant to Section 380.07, F.S.), it leaves open the question of whether a §163.3215, F.S., challenge might be available outside the APA process to prevent the DRI development order from being authorized by the local government (§163.3215, F.S., allows suits to "prevent" the local government from taking action on a development order.) This may open the door under §163.3215, F.S., to an attack on proposed changes to a DRI development order by a party who may otherwise lack standing under §163.3187(8), F.S., and chapter 380, F.S.

Statutory amendment limiting standing, which was included in environmental legislation, did not apply retroactively and did not violate single subject requirement in Article III, Section 6 of the Florida Constitution. *Environmental Confederation of*

***Southwest Florida v. DEP,* 29 Fla. L. Weekly D2421 (Fla. 1st DCA Oct. 28, 2004).**

The First DCA preserved the standing of public interest groups challenging an injection well permit where the proceeding was initiated during the period of time between the adoption of a statutory amendment restricting standing and codification of the amendment in the Florida Statutes. The amendment to §403.412, F.S., limited a citizens' ability to initiate a proceeding to those persons with "substantial interest." The amendment also defined "intervene" to mean that a citizen could join an ongoing proceeding only where another party has raised an appropriate challenge. Prior to the amendment, a citizen could "intervene" by filing a pleading stating the permit at issue "would have the effect of impairing, pollution, or otherwise injuring the air, water, or other natural resources of the state." § 403.412(5) (2001).

The court determined that the statute did not apply retroactively. "In order for a law to apply retroactively, the court must determine (1) if there is evidence that the legislature clearly intended for the law to be applied retroactively, and (2) if so, whether the retrospective application of that law is constitutionally permissible." (citing *Pondella Hall for Hire v. Lamar,* 866 So. 2d 719, 722 (Fla. 5th DCA 2004). Generally, "procedural statutes apply retroactively and substantive statutes apply prospectively." The court found that the statute did not apply retroactively because the Legislature did not clearly intend such an application and retroactive application would leave the aggrieved party without a remedy. As a result, the court concluded that public interest groups retained standing to challenge the injection well permit because their claim was filed before the amendment limiting standing was codified in the Florida Statutes.

The public interest groups also challenged the amendment as a violation of Article II, section 6 of the Florida Constitution, which provides that laws "shall embrace but one subject and matter directly related to that subject." In reviewing such a challenge, the court must determine the subject of the statute, and then whether all provisions are "properly connected" to the single subject. The First District found that the statutory provisions "relate to the protection of the environment and to the policies and practices of the DEP." In addition, "[i]t is logical for the Legislature to amend the standing requirements defining who may initiate a proceeding when it foresees a possibility for large amounts of litigation concerning the permits." Thus, the amendment is valid and does not violate the single subject requirement.

In an action to void a deed restriction, a property owner cannot rely on changes that took place before acquisition of the property, but instead must prove the deed restrictions "no longer confer substantial value on the dominant estate." *Marco Island Civic Assoc; Inc. v. Mazzini,* 881 So. 2d 99 (Fla. 2d DCA Aug. 27, 2004).

The Second DCA held that a party must show that deed restrictions "no longer confer substantial value on the dominant estate" in order to demonstrate that the deed restriction is void. Here, the Petitioner, who wanted to construct a medical building on his three adjoining lots, sought to void deed restrictions limiting the development of each lot to one detached single- family dwelling not to exceed two stories in height. The trial court found the restrictions void because "there had been many changes in the character of the surrounding neighborhood that materially affected the restricted land and frustrated the object of those restrictions." The trial court based its finding on the fact that the Petitioner's lots were situated between two commercial properties at the edge of the subdivision on a busy thoroughfare and the medical building would function as an intermediate buffer between more intense commercial activity and the residential areas.

The Second DCA disagreed, finding that "a property owner clearly cannot rely on changes that took place before his or her acquisition of the property when seeking to remove a deed restriction... He should seek to have the deed restriction removed before purchasing the property." (citing *Wood v. Dozier,* 464 So. 2d 1168, 1170 (Fla. 1985). "The test to be applied is whether or not the original intent of the parties to the restrictive covenants can be reasonably carried out or whether the changed conditions are such as to make ineffective the original purpose of the restrictions." (citing *Wahrendorffv. Moore,* 93 So. 2d 720, 722 (Fla. 1957). The court found the "highest and best use.. .is of little consequence" because the focus is on the dominant, rather than the servient estate when considering whether deed restrictions are no longer of substantial value.

City of Pompano Beach could avoid referendum requirement of conveyance of recreational property by redesignating the property prior to conveyance. *Shulmister v. City of Pompano Beach,* 29 Fla. L. Weekly D2603 (Fla. 4th DCA 2004).

The Fourth DCA, in an opinion that withdrew and replaced its August opinion in this same case, found that the City could convey recreational property – even though the City Charter required approval in a referendum – by redesignating the property before the conveyance. The City Charter required that certain classes of public property, including recreational facilities, could only be conveyed only after approval in a referendum. While the City made original designations to the property after adoption of the charter, the charter also allowed changes to the original designations if adopted as an ordinance. The court found the drafters of the City charter intended to provide two methods for the disposition of those classes of property; approval by referendum for controversial actions, or redesignation by ordinance in non-controversial actions. Therefore, the court concluded that the City had acted within the scope of its charter when it redesignated the recreational property prior to its conveyance.

Growth Management ballot initiative fails because the summary contains political rhetoric and does not comport with the requirements of § 101.161(1) and "state in clear and ambiguous language the chief purpose of the measure." *Volusia Citizens' Alliance v. Volusia Home Builders Assoc.,* 29 Fla. L. Weekly D2643 (Fla. 5th DCA Nov. 18,2004).

continued...

FLORIDA CASELAW UPDATE
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The Fifth DCA held that Volusia County's ballot summary regarding an Urban Growth Boundary did not comport with the requirements of §101.161(1), F.S., which requires that the summary "state in clear and unambiguous language the chief purpose of the measure." The court cited two particular problems with the ballot summary. The first sentence, which read "[t]he establishment, implementation and enforcement of a Urban Growth Boundary benefits Volusia County's natural resources, scenic beauty, orderly development and the welfare of its citizens" was "political rhetoric." And, the second defect was the fact that the ballot summary alluded to the fact that establishment of the boundary would be self-executing upon the passage of the amendment but the amendment's text indicated that adoption of the boundary would only occur after a public hearing, and that implementation of the boundary would occur through local planning agreements. Thus, establishment of the Urban Growth Boundary would be subject to the political processes of local governments, which was not clearly stated in the ballot summary.

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University of Florida Hosts Three Environmental and Land Use Conferences

Submitted by Alyson Flournoy

UF and the Environmental Law Institute (ELI) co-hosted a one-day academic symposium on November 12, 2004, intended to focus attention on the implications of the Supreme Court's 2003-2004 term, a term in which the Court decided an unprecedented six environmental cases. The purpose of the symposium, titled "Alternative Grounds: Defending the Environment in an Unwelcome Judicial Climate," was to explore these recent important environmental law decisions in light of existing case law and evaluate the viability of relevant statutory and constitutional theories, as well as litigation strategies. The symposium was organized by Professor Michael Wolf, who holds the Richard E. Nelson Chair in Local Government Law, and was supported through the Nelson Chair. The Symposium was held at the historic Belleview Biltmore in Clearwater.

Presenters at the conference included Professors Christopher Schroeder (Duke), William Buzbee (Emory), J.B. Ruhl (Florida State), Richard Lazarus (Georgetown), Robert Glicksman (Kansas), Paul Boudreaux (Stetson), and Sean Donahue (Washington & Lee), along with UF Environmental and Land Use Law Professors Mary Jane Angelo, Alyson Floumoy and Michael Allan Wolf, with Mark Fenster, Richard Hamann and Christine Klein serving as respondents. Joining these academics were Jay Austin of ELI, Doug Kendall of the Community Rights Counsel, Sambhav Nott Sankhar, a law clerk to Justice Sandra Day O'Connor during the 2003-2004 term, and Donald Stever, a partner at Kirkpatrick and Lockhart. Papers presented at the conference will be published in a volume edited by Professor Wolf and published by the ELI.

UF's Environmental and Land Use Law Program was recently ranked in the top 20 of law schools throughout the nation, in large part due to strong scholarship and research by program faculty. The program offers an unusually rich and diverse curriculum and numerous opportunities for students to gain practical experience and network with professionals as well as the opportunity to earn a certificate in the area. New offerings this spring include a course on Environmental Issues in Business and Real Estate Transactions to be co-taught by adjunct faculty members Terry Zinn and Enola Brown.

Two additional major conferences on environmental and land use law issues are scheduled for February 2005. On Feb. 11, at the Hilton UF Conference Center in Gainesville, the Richard E. Nelson Symposium will focus on "Billboards Law: Regulating the Signs of the Times." (Contact Conference Director Barbara DeVoe at *devoe@law.ufl.edu* for details.) On February 24-26, the students of UF's Environmental and Land Use Law Society host the Eleventh Annual Public Interest Environmental Conference (PIEC) at the J. Wayne Reitz Union on the UF campus. (Contact Ashley Cross-Rappaport at *cross711l@,ufl.edu* or Adam Regar at *aregar@,ufl.edu*.)

The PIEC kicks off with a reception on Thursday evening at the Florida Museum of Natural History, featuring remarks by 2004 Goldman Environmental Prize winner and grassroots environmental justice activist Margie Eugene-Richard. A Thursday afternoon pre-conference workshop, sponsored by the Florida Native Plant Society and the University of Florida Conservation Clinic, will focus on the promotion and protection of Florida's native plant species. The panels on Friday and Saturday address a broad range of topics, including climate change, the state of our seas, post-hurricane redevelopment, water quality credit trading, adaptive management, citrus canker, brownfields redevelopment, conservation of reptiles and amphibians, and many others. You can visit the conference website and register online at *www.ufpiec.org*.

For more information on UF's Environmental and Land Use Program visit us at *http://www.law.ufl.edu/elulp/*.

Water Management District Updates

SWFWMD

by Karen A. Lloyd, Senior Attorney

District's Hurricane Emergency Orders Expire

The Executive Director issued a series of four emergency orders in response to the four hurricanes this season. The orders declare an emergency within the District and set forth modified permitting and compliance procedures for Chapters *400-2,* 40D-4, 40D-40 and 40D-400 FAC to facilitate and expedite hurricane recovery activities for those affected by the hurricanes. Those orders expire December 31, 2004.

Miscellaneous Rule Amendments

A number of rule amendments will become effective in late January 2005:

1. Changes to the District's Joint Application for Environmental Resource Permit/Authorization to Use State Owned Submerged Lands/Federal Dredge and Fill Permit, Form 547.27(8/03), regarding Information for General Environmental Resource Permits for Minor Surface Water Systems and incorporation of the revision date into Rule 40D-1.659, F.A.C.
2. Rule 40D-4.331, F.A.C., is amended to direct an Environmental Resource Permit applicant to use a new form TSV-009.02 to expedite the permitting process of certain out parcels. See 3. below.
3. A new form, General Environmental Resource Permit Application for Modification Related to Outparcel Construction Within Permitted Commercial Projects, Form No. TSV-009.02 is incorporated into 40D-1.659, F.A.C. to help streamline the permitting process for out parcels as set forth in 40D-4.331 (2)(a), F.A.C.
4. A simple administrative procedure is established in 40D-2.341, and 40D-4.341 F.A.C. to allow District staff to cancel Water Use Permits and Environmental Resource Permits when the permits are no longer desired by the permittees.
5. The procedure in 40D-2.351, F.A.C. for requesting transfer of Water Use Permits is changed, including that the new owner or person obtaining legal control must request the transfer within 45 days of the transfer or the permit becomes null and void.
6. Rule 40D-3.038, F.A.C., is amended to require that water well contractors notify the District within 15 days of any change in the contractor's mailing address.
7. The District has changed the Environmental Resource Permitting Basis of Review Section 6.4.1 regarding retention/detention pond side slopes. The change describes the side slope ratios and acceptable public safety protection around retention and detention areas.
8. Rule 40D-4.351, F.A.C. is amended to provide for an expedited process for the review of Statement of Completion and certified As-Built construction drawing submittals.
9. A general Environmental Resource Permit is created within Rule 40D-40.301, F.A.C. to authorize the construction, operation and maintenance of the surface water management systems serving certain minor residential subdivisions.

Southern Water Use Caution Area

The most current version of the draft rules for the Southern Water Use Caution Area can be accessed at *www.swfwmd.state.fl.us/waterman/*

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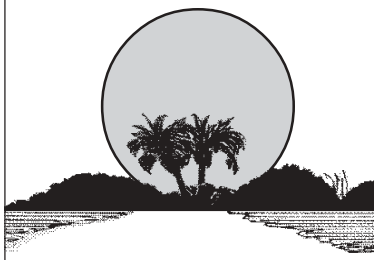

The Environmental and Land Use Law Section has an Internet Mailing List for Section Members. To join, submit your name and e-mail address.

List1@eluls.org

DEP Update

by Angela C. Dempsey

GLOBAL RISK BASED CORRECTIVE ACTION (RBCA) AND OTHER CLEAN-UP CRITERIA RULES -

On December 7, 2004, the DEP briefed the Environmental Regulation Commission (ERC), in Tallahassee, on proposed Rule 62-780, Florida Administrative Code (F.A.C.), Contaminated Site Cleanup Criteria (commonly referred to as "Global RBCA") and on revisions to the following rules:

- 62-770, Petroleum Contamination Site Cleanup Criteria
- 62-777, Contaminate Cleanup Target Levels (CTLs)
- 62-782, Drycleaning Solvent Cleanup Criteria
- 62-785, Brownfield Cleanup Criteria

One issue that was discussed was the requirement of notice to nearby property owners when contamination has migrated onto their property. Other issues presented include additivity (the summation of the toxic effect of multiple contaminants) and apportionment (adjustment of CTLS for individual contaminants to compensate for additive effects of mixtures). These rules are scheduled for adoption at a hearing before the ERC on February 24, 2005.

WETLAND RESTORATION WEBSITE - As part of an ongoing commitment to improve services the DEP launched a website, on October 26, 2004, that is intended to increase access to online environmental news, science and information. The Florida Wetland Restoration Information Center provides government, businesses and organizations with information that allows a person to research wetland restoration processes and identify funding assistance. The website includes a library, a section on wetland policy and programs, guidance on restoration, funding opportunities and the Florida Ecological Restoration Inventory, which provides a comprehensive list of current and proposed restoration projects. Visit the Site at *http://www.dep.state.fl.us/water/wetlands/fwric*

APALACHICOLA-CHATTAHOOCHEE-FLINT RIVER BASIN WATER ALLOCATION - Following the expiration of the Apalachicola-Chattahoochee-Flint (ACF) Compact on August 31, 2003, Florida, Alabama, Georgia, and the Army Corps of Engineers, among others, have engaged in litigation in three federal district courts - and now in the 11th Circuit and D.C. Circuit - over the Corps' operation of federal reservoirs in the ACF River Basin. The following is a brief summary of the status of this litigation.

In the 11th Circuit, *Georgia v. United States Army Corps of Engineers,* Case No. 2:01-CV-0026-RWS, Georgia has asked Florida and Alabama whether they will support Georgia's proposed "motion to consolidate appeals" from the Georgia court's abatement order and the Alabama court's preliminary injunction; Gwinnet County has moved to abate the Alabama litigation pending appeal. In *Alabama v. United States Army Corps of Engineers,* Case No. CV 90-BE-1331-E (N.D. Ala.), Judge Karon Bowdre entered an order lifting her stay of those aspects of the Alabama litigation still under her jurisdiction pending appeal, set a January 7 deadline for plaintiffs to file motions to amend the complaint, and set a February 21 deadline for responsive pleadings. Florida sent the Corps and other federal agencies a 60-day notice letter under the Endangered Species Act (ESA), indicating its intention to commence an action pursuant to the ESA. Finally, in the D.C. Circuit, *Southeastern Federal Power Customers. Inc. v. United States Army Corps of Engineers,* Case No. 04-5143, the Florida and Alabama join t reply brief is due December 23. Oral argument in this case is scheduled for February 8, 2005.

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