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THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

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March 2009

• Gary K. Hunter, Jr., Chair • Thomas R. Gould, Co-Editor • Jeffrey A. Collier, Co-Editor

Professional Ethics Committee Considering Opinion on Rule 4-4.2, Communication with Person Represented by Counsel

The Professional Ethics Committee (PEC) of The Florida Bar is considering publication of a formal advisory opinion to guide members in interpreting and applying Rule 4-4.2 of the Rules of Professional Conduct. The ELULS Executive Council is taking this opportunity to make its membership aware that a proposed advisory opinion to which Bar members may submit comments is anticipated to be published later this year by the PEC.

BACKGROUND

Rule 4-4.2 of the Rules Regulating The Florida Bar states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." An attorney with a law firm with extensive business related to the Office of Financial Regulation (OFR) had been told that employees of OFR were represented by counsel in all matters involving the attorney's law firm and that Rule 4-4.2, then, prohibited direct contact between attorneys of that firm and OFR employees. The attorney sought "clarification" of the rule, and on July 15, 2008, Florida Bar Staff Opinion 28193 was issued with a conclusion substantially similar to the one in the response to the Section mem-

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From the Chair

by Gary K. Hunter, Jr.

Assuming the media retains at least marginal levels of credibility, we should all now be impacted by the economic crisis which seems to be crippling our Nation and State. As I write this column, Congress is in extended debate over an economic stimulus package designed, we hope, to bring life back to the most vibrant economy in history. Unfortunately, in educating myself on how our elected officials deem this most likely to succeed and in monitoring the issues upon which the Congressional disputes appear most focused, I'm reminded of the principle that "[l]aws always lose in energy what the government gains in extent." Let's hope that patriotism prevails resulting in a product that can bring meaningful relief and opportunity to all in need. In Florida alone, our State's 2009-10 budget is anticipated to face a $4 billion deficit before formulation of the spending begins in earnest; that will necessarily equate to further budget cuts to the state and local agencies for whom many of our ELULS members work and upon whom the balance of

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INSIDE:

CHAIR'S MESSAGE
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us (and our clients) rely for the processing of permits, applications, land use requests, etc. The ability of local governments to fund necessary infrastructure improvements (primarily to roads and bridges) is on hold due to both the absence of new construction and the resulting revenue coupled with a shrinking ad valorem base, estimated by some economists to be 20% of property values on a statewide average. In the residential market, the Florida Association of Realtors and Florida Home Builders report that 1 in 22 homes in Florida are in some level of foreclosure. As we have all experienced, the foreclosures have overwhelmed an already underfunded judiciary, making it nearly impossible to secure timely motion hearings, trials or rulings.

Despite grim numbers and predictions, I retain complete faith in the world's most industrious nation to band together, illustrating good judgment on a personal and professional level as we collectively lead our economy back into full motion. As lawyers, we must remain mindful of our enhanced responsibility in counseling clients through troubled times and in guiding them to sound decisions. Further, we must protect the third branch of our government and assure that funding levels are adequate in retaining the judiciary on equal footing to the executive and legislative bodies who control the purse.

To the extent this "lull" in activity creates opportunity to rethink how the statutes, rules and policies through which ELULS members navigate function, I urge all of us as stakeholders to add thoughtful participation to the debate. Having spent the last 2 weeks with our statewide elected officials, I assure you they are anxious for new ideas and creative thinking on how to improve and streamline the method of implementing Florida's environmental and growth management laws. Done properly, there should only be winners from this process, and it is incumbent upon us as interested and impacted participants to help frame the debate and outcome—ideally in a collegial manner even where we will undoubtedly encounter disagreement.

On the ELULS front, I encourage all members to review Kelly Samek's article concerning Rule 4-4.2, Rules Regulating The Florida Bar, providing an excellent summary of the current debate on applicability of this rule to communications by lawyers with non-lawyer government employs. The debate centers on whether those communications must be routed through a general counsel's office of an agency when the topic of conversation is not currently the subject of litigation. At some point all ELULS practitioners will encounter this situation; thus, familiarity with the issue and awareness of the Professional Ethics Committee guidance on this topic is critical. Because of the diverse interests of the ELULS membership, the Section is not advocating a position; however, we will continue to inform members on the issue and ultimate resolution, assuming one is reached.

Although the deadlines for summer 2009 applications have passed, I remind the Section membership of the various summer law clerk opportunities which we sponsor. The ABA Fellowship in Environmental Law (co-sponsored with our Section) provides the opportunity for 2 law students to spend the summer with the legal department of a government agency in Florida, focusing on environmental and land use law issues. In addition, the ELULS sponsors a single position referred to as the Florida Environmental Public Interest fellowship, providing a law student a summer clerkship with a public interest organization in Florida, again focusing on environmental and land use law advocacy. Forms and information concerning each of these programs are fully described on the Section's website.

Thank you again to all who contributed tirelessly to a seamless rescheduling of our Annual Update to a few cold November days at Amelia Island. Congratulations to our award winners, recognized at the Section Annual meeting in Amelia: Tara Duhy--Judy Florence Memorial Award; Jim Porter--Stephens/Register Memorial Award; Richard Grosso--Bill Sadowski Outstanding Service Memorial Award; and R.S. Murali (posthumously)--R.S. Murali Affiliate Member Outstanding Service Award. Finally, recall that our Affiliate members regularly schedule mixers (yes, free drinks and food) at locations around the State (as announced on the Section website and Listserve)--I hope to catch up with many of you at the next event where we can commiserate on the state of the economy or, better yet, the poor recruiting effort of the 2009 UF football team (GO DAWGS!) Until then…

This newsletter is prepared and published by the Environmental and Land Use Law Section of The Florida Bar.

DCA Update

by Kelly Martinson, Assistant General Counsel

Final Orders:

Sarasota Shoppingtown, LLC v. Sarasota County, et al., DOAH Case No. 07-4598GM

As summarized in the December 2008 Reporter, an ALJ found a comprehensive plan amendment in Sarasota County related to Phase II of the Sarasota Interstate Park of Commerce, a 275-acre development of regional impact (DRI), "in compliance." On November 3, 2008, the Department issued a Final Order also finding the amendment "in compliance." The Department determined it was proper for the supporting transportation study to address only the next three years (through the December 31, 2009 build-out date for the associated DRI) rather than five. The developer-funded improvements reflected in the capital improvements schedule fully mitigate the amendment's impact, ensuring that the level-of-service standards for the impacted roadways will be achieved and maintained. As part of this amendment, the local government did not need to analyze the entire capital improvement element through five years to determine whether additional publicly-funded improvements are needed due to background traffic growth. Such an analysis is required when the local government annually updates its capital improvement element in conjunction with adoption of the local budget.

Recommended Orders:

DCA, et al. v. City of Jacksonville, et al., DOAH Case Nos. 07-3539GM & 08-4193GM

DCA found a Future Land Use Map (FLUM) amendment for a 77.22-acre parcel located entirely within the coastal high-hazard area (CHHA), as depicted in the Northeast Florida Regional Planning Council's Storm Surge Atlas (Atlas), "not in compliance." The amendment increases the number of allowed residential units by 1,146. Subsequently the City adopted a text amendment modifying the definition of the CHHA to allow site-specific data to further refine the location of the category 1 storm surge line. DCA also found this amendment "not in compliance" and the cases were consolidated. As for the FLUM amendment, DCA alleged that the City failed to direct population concentrations away from the CHHA or appropriately mitigate the impacts under Section 163.3178(9), Florida Statutes. The Atlas depicts 10-foot contours. Therefore, although the Atlas places the entire site within the CHHA, a professional survey showed approximately 23.88 acres above 5 feet in elevation and thus outside the CHHA. The ALJ found a professionally prepared survey constitutes the best available evidence of elevations and the location of the category 1 storm surge line. Consequently, the ALJ found the CHHA definition "in compliance" and determined that if development of the site is confined to the 23.88 acres outside of the CHHA, no mitigation is needed. Furthermore, the ALJ found the revised CHHA definition did not create an internal inconsistency with the plan's CHHA map as the map is used for illustrative purposes only. Based on unrelated issues, the ALJ did ultimately find the FLUM amendment "not in compliance." During the hearing the City and applicant stipulated that the FLUM amendment was "not in compliance." The City and applicant proposed remedial measures, but the ALJ declined to make findings on them.

1000 Friends of Florida, Inc., et al. v. Palm Beach County, et al., DOAH Case No. 06-4544GM

This case involves two Future Land Use Map (FLUM) amendments going from Rural Residential (1 unit/10 acres) to Low Residential (1 unit/acre) found "in compliance" by DCA after the County submitted additional data and analysis to address the compliance issues originally raised. The County's Tier Map was also amended to include the properties in the Urban/Suburban Tier rather than the Rural Tier. Low Residential is not allowed in the Rural Tier. All land in the County, including within the municipalities, is in one of five tiers. The ALJ found the amendments are inconsistent with the tier re-designation factors contained in the County's Comprehensive Plan and are therefore "not in compliance." Although the amendments exhibit some indicators of urban sprawl, those indicators as a whole do not reflect the County's failure to discourage urban sprawl.

Small-Scale Amendment Orders:

Burson v. City of Titusville, DOAH Case No. 08-0208GM

As summarized in the December 2008 Reporter, an ALJ found a 9.78 acre small-scale amendment in the City of Titusville "in compliance." On January 30, 2009, the Department issued a Final Order also finding the amendment "in compliance." The Final Order found that Petitioner did not waive her right to file exceptions to the Recommended Order Following Remand (ROFR) by not filing exceptions to the Recommended Order. Even though Petitioner's exceptions were directed to findings of fact not modified by the ROFR, the ROFR contained a "Notice of Right to Submit Exceptions." It was also noted that the amendment does not appear to meet the criteria for a small-scale amendment because the overall parcel exceeds the 10-acre threshold at 18.17 acres. Because that issue was not raised by the Petitioner, it was not considered in the Final Order.

Rulemaking:

The Department continues to be involved in rulemaking related to the rural land stewardship area program and the implementation of House Bill 697 adopted during the 2008 legislative session. More information about these rules can be found on the Department's website: www.dca.state.fl.us.

DEP Update

by Amanda G. Bush, Senior Assistant General Counsel

Everglades Settlement Agreement

In July, the Miccosukee Tribe filed a motion asking the court to require the State to reinitiate construction of the EAA Reservoir and to require the State to provide "assurances" that the expansion of Compartments B and C will be constructed. The State parties filed their response on July 31. The Sierra Club, NWF, FWF, Defenders of Wildlife, NRCA and Audubon Society filed a response in opposition to the Tribe's motion. On August 13th, Judge Moreno issued an order denying the motion with leave for the Tribe to refile pending the outcome of the NRDC litigation over the 404 permit, "and the actual resolution of the deal struck between the State of Florida and United States Sugar Corporation, whereby the State would acquire approximately 187,000 acres of farm land from U.S. Sugar for $1.75 billion." On August 26, Judge Moreno denied a motion to intervene that was filed prior to the hearing by New Hope Sugar Company and Okeelanta Corporation.

On December 16, 2008, the South Florida Water Management District's Governing Board voted to accept the negotiated proposal with U.S. Sugar Corporation to acquire at least 180,000 acres of U.S. Sugar's land in the Everglades Agricultural Area for $1.34 billion, contingent upon financing. Final contract documents were executed on December 23, 2008. The proposed transaction will be the largest land acquisition in Florida's history and the single most important action to protect the Everglades since the designation of Everglades National Park sixty years ago.

Benefits from the land acquisition would include:

- Increases in water storage to reduce harmful freshwater discharges from Lake Okeechobee to Florida's coastal rivers and estuaries.
- Improvements in the delivery of cleaner water to the Everglades, including preventing tons of phosphorus from entering the Everglades.
- Eliminating the need for "back-pumping" water into Lake Okeechobee.
- Sustainability of agriculture and green energy production.

Triennial Review Rulemaking (Chapters 62-302 and 62-303, F.A.C.)

The Federal Clean Water Act requires states to conduct a comprehensive review of their surface water quality standards every three years ("triennial review"). The Department has initiated rulemaking to discuss the following proposed amendments, among others: Revisions to human health-based criteria to reflect a new fish consumption rate; adoption of bioassessment methods as new biological health criteria; revisions to criteria for specific conductance; new criteria for saltwater un-ionized ammonia; listing of all site-specific alternative criteria (SSACs); revisions to transparency criteria; addition of a fish and shellfish tissue methylmercury impairment threshold; and establishment of a numeric nitrate criterion in springs.

***City of Bartow et al. v. Republic Services and DEP*, DOAH Case No. 08-0727**

Republic applied for a permit to construct and operate a Class I landfill adjacent to its existing and operating Class III landfill. The Department issued an intent to issue, which was challenged by the City of Bartow et al. The Legislature included a provision in SB1294—the Department's reauthorization bill—that prohibits the Department from issuing the permit. The ALJ therefore relinquished jurisdiction back to the Department to deny the permit. Republic had already filed an action in federal court asking the court to declare that it had a right under a previous settlement agreement with Bartow to accept Class I waste, except household garbage, at the landfill, and that Bartow's actions in challenging the permit violated that settlement agreement. Republic moved to amend its complaint to join Secretary Sole, as head of the agency, and to obtain declaratory and injunctive relief. Republic challenged the constitutionality of the new statute on federal constitutional grounds. It also challenged the constitutionality of the provision under the Florida Constitution (Art. III, Sec. 11(b)), alleging that it is an illegal special law, or, alternatively, that it is a general law that has illegally classified a political subdivision of the state in a manner not reasonably related to the subject of the law. The federal court has dismissed the pending action without prejudice to Republic seeking relief in the original action between Republic's predecessor in interest and the city.

***DEP v. John Jozsa*, DOAH Case No. 08-002081EF**

On September 22, 2008, DOAH issued a final order sustaining the charges in the Department's notice of violation. The notice of violation was issued after respondent created a pond within wetlands on his property without authorization (specifically, respondent dredged approximately 0.91 acres of wetlands and filled approximately 0.52 acres of wetlands surrounding the dredged area). The final order requires the respondent to re-grade the impacted area to the previous un-impacted configuration and replant and monitor the area for five years. The notice of violation assessed a $6,000 penalty. While the respondent presented no evidence of mitigation, the ALJ reduced the penalty by 50% because the ALJ stated respondent arguably acted in good faith when he hired consultants – after the notice of violation had been issued – to delineate wetlands on the property and propose corrective actions prior to the hearing. Respondent has appealed the case to the Fifth District Court of Appeal (Case No. 5D08-3656).

DEP and Board of Trustees v. JG Key West, LLC and JG Pier House, LLC D/B/A Pier House Joint Venture

In December, the Department executed a consent order which resolves violations stemming from the unau-

thorized placement of 15 cubic yards of rip rap, and the unauthorized excavation of a 24' x 24' wide and 6' – 8' deep area of submerged lands. The activities occurred below the mean high water line in Key West Harbor Channel, a Class III Outstanding Florida Water. The excavated material caused impacts to corals that were recently transplanted by Respondent as a mitigation measure to satisfy the Florida Keys National Marine Sanctuary. In addition to the corrective actions, the consent order requires Respondent to pay $14,000 in settlement of the regulatory and proprietary matters addressed in the consent order including $500 for costs and expenses. Respondent is also required to mitigate for the coral impacts by donating $25,000 to the Florida Keys National Marine Sanctuary within 30 days of the consent order.

***California v. EPA*, Case No. 08-70030 (9th Circuit Court of Appeal, San Francisco)**

Florida DEP moved to intervene in this case to support California's request for a waiver of federal automobile emissions standards in order to be able to enforce more strict state standards including restrictions on the emission of greenhouse gases, a request that was denied by EPA. The 9th Circuit granted EPA's Motion for Reconsideration of its earlier order denying EPA's Motion to Dismiss and then dismissed the appeal on the basis that the agency's December letter denying the waiver was not "final action" and that the Court therefore has no jurisdiction. The appeal of the decision published in the March Federal Register is now proceeding in the DC Circuit, where Florida DEP has joined other states and state agencies in appealing the denial of the waiver. In the D.C. Circuit case, EPA has indicated that it will seek a stay of appellate proceedings while the new Administrator reviews its previous denial of the waiver, at the request of President Obama.

***North Carolina v. EPA*, Case No. 05-1244 (D.C. Circuit)**

North Carolina successfully challenged EPA's Clean Air Interstate Rule (CAIR) rule in federal circuit court. The Court vacated the CAIR rule, leaving the states that are part of the CAIR region, including Florida, in limbo. *See* 531 F.3d 896 (D.C. Cir. 2008). The State of Florida, through the Attorney General's office, joined with the State of New York and other states in support of a motion for reconsideration to the extent of requesting the court leave the current CAIR rule in place until EPA adopts a new rule complying with the Court's opinion. On December 23, 2008, the Court on petitions for rehearing, remanded to EPA without vacatur of CAIR so that EPA might remedy CAIR's flaws in accordance with the Court's earlier opinion.

Fees rulemaking

The Department is initiating rule development to amend the fee schedule in Rule 62-4.050, F.A.C., with two primary objectives. First, it will conform the rule with Senate Bill 1294 (2008), Chapter 2008-150, Laws of Florida, which established new fees and minimum fee requirements for environmental resource permit (ERP) program activities under Part IV of Chapter 373, F.S., and drinking water fees under Section 403.087, F.S. For activities under Part IV of Chapter 373, F.S., the legislation established a $250 minimum fee for noticed general permits and individual permits; a new $100 minimum fee (not to exceed $500) to verify qualification for an exemption; and a new $100 minimum fee, not to exceed $500, to conduct an informal wetland boundary determination. The legislation also established a new annual operation license fee of $50 for each public water system, automatically increases the minimum fees for drinking water construction or operation permits to $500 (not to exceed $15,000) and established the permit fee for a drinking water distribution system permit, including a general permit, at $500 (not to exceed $1,000). The new fees and the minimum fees described above automatically go into effect on July 1, 2008, and remain in effect until the Department adopts new fees by rule.

Secondly, the legislation requires the Department to review all fees authorized under Part IV of Chapter 373, F.S., and Chapter 403, F.S., at least once every five years and adjust the fees to reflect changes in the rate of inflation since the time each fee was established or most recently revised. This includes a requirement to adopt by rule the inflation index or indices to be used for making all fee adjustments. After evaluating appropriate inflation indicators, the Department has determined that the U.S. City Average CPI will be used as the inflation indicator. The Department's adoption of the CPI will also be binding on the Water Management Districts.

In addition, the Department is initiating rulemaking to delegate authority to the St. Johns River, Suwannee River, Southwest Florida, and South Florida Water Management Districts to conform their rules establishing fees for ERP program activities under Part IV of Chapter 373, F.S., with the legislation described above. This authority is not being delegated to the Northwest Florida Water Management District because, in accordance with Section 373.4145, F.S., the District uses the Department's rules to implement their responsibilities in the ERP program. The Department is currently in rulemaking to adopt ERP rules for the Northwest Florida Water Management District, and the fee schedule will be amended to reflect the new statutory requirements as a part of that ongoing effort.

Notices of Proposed Rule Development related to this effort to amend Rules 62-113.200, 62-4.050, and 62-346.071, F.A.C., were published in the Florida Administrative Weekly on June 27. The Notice of Proposed Rulemaking for 62-113.200 (the rule delegating authority to the WMD's) was published in the September 19, 2008, issue of the Florida Administrative Weekly, and the Department is publishing a Notice of Change for this rule in February to address concerns raised by the Joint Administrative Procedures Committee. The Department held a workshop in Tallahassee regarding the proposed amendments to Chapteres 62-4 and 62-346, F.A.C., in December, and published the Notices of Proposed Rule on January 16, 2009. All three rule amendments should take effect by May 2009.

Quality Assurance Rule (Chapter 62-160)

The amendments to the chapter update the Department's Standard Operating Procedures for field activities and laboratory activities (DEP-SOP-001/01 and DEP-SOP-002/01,

continued...

DEP UPDATE
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respectively). There are a limited number of new SOPs for conducting and interpreting biological assessments, which represent recent advances in environmental science. In addition, the Department has clarified the process by which data usability is assessed by incorporating by reference the "Department of Environmental Protection Process for Assessing Data Usability" (DEP-EA-001/07). The Department submitted the rule for certification with the Department of State on November 13th and the rule became effective on December 3rd.

Updates to previously reported power siting cases

• **In Re: Seminole Electric Cooperative Seminole Generating Station Unit 3 Power Plant Siting Application No. PA 78-10A2**, DOAH Case No. 06-0929EPP: Subsequent to the Fifth DCA ruling remanding the matter to the Secretary with directions to issue a final order granting certification, the Secretary entered the final order approving certification on August 18.

• **In Re: Tampa Electric Company Willow Oak-Wheeler-Davis Transmission Line Siting Application No. TA07-15**, DOAH Case No. 07-4745TL: The Siting Board considered the DOAH Recommended Order that the transmission line application be approved subject to the conditions of certification agreed upon by the parties (including DCA, DOT, SFWMD, Hillsborough County, and intervening adjacent property owners) at a meeting of the Governor and Cabinet on July 29. The final order approving certification of the transmission line was subsequently distributed on August 7th.

• **Florida Power & Light Company, Bobwhite-Manatee 230 KV Transmission Line**, DOAH Case No. 07-000105TL: The recommended order was issued on August 11th. This transmission line siting case was presented to the Siting Board on October 28th. The final order was approved, as drafted, by the Siting Board on October 28th. The signed final order was provided to the parties on November 6th. A timely appeal has been filed.

Of Note

The Environmental Regulation Commission approved adoption of the California motor vehicle standards on December 2nd.

Finally, DEP proudly congratulates its newly board-certified specialists in State and Federal Government and Administrative Practice: Betsy Hewitt, Nona Schaffner, Francine Ffolkes and Doug Beason.

The Florida Bar Continuing Legal Education Committee and the Environmental & Land Use Law Section present

2009 Hot Topics in Environmental and Land Use Law

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

One Location: April 24, 2009
Hyatt Regency Pier Sixty-Six • 2301 S.E. 17th Street
Ft. Lauderdale • (954)525-6666

Course No. 0749R

8:00 a.m. – 8:25 a.m. **Late Registration**

8:25 a.m. – 8:30 a.m.
Opening Remarks
Erin L. Deady, Lewis, Longman & Walker, P.A.

8:30 a.m. – 9:15 a.m.
Turning Up the Heat! Federal and State Regulation of Greenhouse Gas Emissions
James M. Porter, James M. Porter P.A.

9:15 a.m. – 9:45 a.m.
Cleaning Up New Development: New Directions in Water Quality and Environmental Permitting
Luna E. Phillips, Gunster Yoakley & Stewart, P.A.

9:45 a.m. – 10:00 a.m. **Break**

10:00 a.m. – 11:00 a.m.
New Mandates in Water Conservation and Alternative Water Supply
Bruce Adams, EMC Engineers, Inc.
Fred Bloetscher, Florida Atlantic University & Public Utility Management and Planning Services, Inc.
John J. Fumero, Lewis, Longman & Walker, P.A.

11:00 a.m. – 12:00 noon
Ethics for Lawyers, Planners & Environmental Professionals: What do we have in Common?
Frank Schnidman, Center for Urban and Environmental Solutions, Florida Atlantic University

12:00 noon – 1:30 p.m. **Lunch (included in registration)**

1:30 p.m. – 2:15 p.m.
The New Twist on Everglades Restoration: Restoring the "River of Grass"
Kenneth G. Ammon, South Florida Water Management District
Barbara Miedema, U.S. Sugar Cane Growers Cooperative

2:15 p.m. – 3:00 p.m.
The Economic Stimulus Package and What it Means to Florida
Debbie Wasserman Schultz, Congresswoman, United States House of Representatives (Invited)

3:00 p.m. – 3:15 p.m. **Break**

3:15 p.m. – 4:00 p.m.
Going Green and Why Everyone's Doing It!
Susan R. Martin, South Florida Water Management District
Richard Abedon, Navarro Lowrey Properties, Inc.

4:00 p.m. – 5:00 p.m.
What's Hot and What's Not with the Big Land Use and Environmental Cases
Robert N. Hartsell, Everglades Law Center
Susan L. Trevarthen, Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.

5:30 p.m. – 7:00 p.m.
Affiliate/Attorney Mixer (seminar attendees welcome)
Bimini Boatyard, Ft. Lauderdale

WEBCAST

Registrants will receive webcast connection instructions 2 days prior to the scheduled course date via e-mail. If you do not have an e-mail address, contact Order Entry Department at 850-561-5831, 2 days prior to the event for the instructions.

ENVIRONMENTAL & LAND USE LAW SECTION

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Ethics: 1.0 hour

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Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

American Planning Association

Planning Certification Maintenance credits are pending.

HOW TO REGISTER	ON-LINE: www.floridabar.org/CLE	MAIL: Completed form w/check	FAX: 850/561-5816 Form w/credit card info.

REFUND POLICY: Requests for refund or credit toward the purchase of the audio CD or course books for this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $25 service fee applies to refund requests. Registrants who do not notify The Florida Bar by 5:00 p.m., April 17, 2009 that they will be unable to attend the seminar, will have an additional $35 retained. Persons attending under the policy of fee waivers will be required to pay $35.

Register me for the "2009 Hot Topics in Environmental and Land Use Law" Seminar

ONE LOCATION: (084) HYATT REGENCY PIER SIXTY SIX, FT. LAUDERDALE (APRIL 24, 2009)

TO REGISTER OR ORDER AUDIO CD OR COURSE BOOKS BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD $25.00. **On-site registration is by check only.**

Name _____ Florida Bar # _____

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JMW: Course No. 0749R

LOCATION (CHECK ONE):

- ❑ **Ft. Lauderdale** - April 24, 2009**
  (084) Hyatt Regency Pier Sixty Six
- ❑ **Live Webcast / Virtual Seminar* April 24, 2009**
  (317) Online

***Registrants who participate in the live webcast will receive an e-mail with a web-link and log-in credentials 2 days prior to the seminar to include access to the course materials.**

** Videotaping

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Environmental & Land Use Law Section: $220
- ❑ Non-section member: $245
- ❑ Full-time law college faculty or full-time law student: $140
- ❑ Persons attending under the policy of fee waivers: $35
  Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.) Fee Waivers are only applicable for in-person attendees.

Live Webcast:

- ❑ Section member: $285
- ❑ Nonsection member: $310

❑ Check here if you require special attention or services. Please attach a general description of your needs. We will contact you for further coordination.

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-5816.)
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Signature: _____

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To aid in the prevention of fraudulent credit card use, we now require the 3 - 4 digit CVV (Credit Validation Verification) Code from the back of your Master Card, Discover or Visa credit card, or from the front of your American Express card.

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Private taping of this program is not permitted. **Delivery time is 4 to 6 weeks after 4/24/09. TO ORDER AUDIO CD OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax to the price of tapes or books. Tax exempt entities must pay the non-section member price.**

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course book/tapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

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Related Florida Bar Publications can be found at http://www.lexisnexis.com/flabar/

Florida Caselaw Update

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

County's rediversion of water across landowner's property is a taking, even though the property had previously been subjected to flooding but was then protected from flooding by a County drainage project. *Drake v. Walton County*, 33 Fla. L. Weekly D2710 (Fla. 1st DCA Dec. 19th, 2008).

Oyster Lake occasionally overflowed onto the upper portion of the subject property, until 1988, when the state and County eliminated this water flow. Consequently, no water overflowed onto the property between 1988 and 1995. During this period, the landowners purchased the property. Following a hurricane in 1995, culverts became blocked, and the County diverted water over the upper portion of the property in order to alleviate flooding in Oyster Lake. From 1996 until 1999, the County unsuccessfully worked with the landowners to redirect the water flow off of the property to pre-hurricane routes. In 2004, the County successfully redirected the flow, but at least once thereafter, in 2005, the County rediverted the water flow back across the property to protect a neighbor's home and property, and this rediversion remained in place at the time of the trial. The landowners filed suit against the County, making several claims, including an inverse condemnation claim.

The trial court accepted the County's argument that the final rediversion simply restored the natural processes in existence before the landowners purchased the property, and therefore the County had not taken the property. The trial court found that the landowners had not engaged in due diligence because they could not rely on the drainage patterns established in 1988. Further, the trial court found that the County enjoyed statutory immunity from an inverse condemnation claim based on § 252.43(6), F.S., which concerns actions undertaken in an emergency.

On appeal, the 1st DCA reversed the trial court's judgment on the landowners' inverse condemnation claim. The court determined that "the critical undisputed fact in this case" was that the water flow was stabilized so that it did not flow across the property before the landowners purchased it. The landowners could reasonably rely on the County's act of redirecting the water flow, since although the property did flood in the past, that flooding was eliminated by the County in 1988. Because the County's rediversion conferred a public benefit on other property owners rather than prevented a public harm, the County's actions constituted a taking.

Finally, the court ruled that, even assuming *arguendo* that the County's actions were proper under § 252.43(6), "the fact remains that the County acted in a manner that caused flooding" on the landowners' property. Any statutory authority granted by § 252.43(6) must yield to Article 10, § 6 of the Florida Constitution, which requires compensation for takings. Thus, the County did not enjoy statutory immunity from the landowners' inverse condemnation claim.

Constitutional takings claims cannot be barred by a legislative grant of immunity. Plaintiff's requested injunctive remedy was proper, since it gave the administrative agency flexibility in complying, and because the complaint alleged the agency violated substantive rights without giving an equal benefit in return. *Crowley Museum & Nature Ctr., Inc. v. Southwest Fla. Water Management Dist.*, 993 So. 2d 605 (Fla. 2d DCA 2008).

The Nature Center's land was flooded, and trees were killed as a result of overflow from irrigation tailwater, which flowed from nearby farm operations through an adjacent swamp. Southwest Florida Water Management District permitted the flood irrigation and undertook projects to reduce water flow. When the District could not provide a timeline for correcting the problem, the Nature Center filed numerous claims. The trial court dismissed the claims with prejudice, on grounds that the District enjoys sovereign immunity from all damages claims, and the complaint failed to state a cause of action for an injunction.

On appeal, the 2d DCA reversed and remanded the Nature Center's inverse condemnation claim, accepting the Nature Center's argument "because such a constitutional claim cannot be barred by a legislative grant of immunity." The District conceded this point, but argued that the Nature Center had not set forth a facially sufficient claim; the court declined to reach this point, since the trial court had not ruled on that basis.

The 2d DCA also ruled that the trial court had erred, and that a proper cause of action for an injunction had been stated. First, the court noted the rule that it normally "will not use its equity powers to interfere with an administrative agency's exercise of legislative power absent 'fraud or gross abuse of discretion.'" The trial court, however, neglected the exception to this rule that equity is available when an "administrative agency commits a public wrong or violates substantive rights without giving an equal benefit in return." Second, the trial court correctly found "the separation of powers doctrine preclude[ed] it from entering an injunction that require[ed] an administrative agency to perform its duties in a particular way." Nevertheless, the trial court incorrectly ruled that the complaint gave the district no flexibility. On its face, the complaint gave the district the choice of means by which to manage its lands. The 2d DCA remanded for a determination of whether these methods were feasible and gave an actual choice.

Finally, the 2d DCA declined to reach the question of whether an injunction was inappropriate because a claim for inverse condemnation constituted an adequate remedy at law. It also did not reach the issue of whether a statute of limitation barred the inverse condemnation claim.

When an inverse condemnation claim cannot be evaluated as a

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facial taking, it should be evaluated as an as-applied taking. Ripeness for an as-applied taking claim requires a property owner to follow all reasonable and necessary steps to permit the land use authority to exercise its discretion in considering development plans. *Collins v. Monroe County*, 34 Fla. L. Weekly D64 (3d DCA Dec. 31, 2008).

Landowners holding diverse real properties in Monroe County filed a Beneficial Use Determination (BUD) application with the County in 1997, a process intended to determine whether any beneficial use of the property remained. The applications were filed pursuant to the Monroe County Year 2010 Comprehensive plan, which was adopted by the Board of County Commissioners (BCC) in 1996, amended in 1996, and adopted by FAC rule in 1996 and 1997. The Special Master, following the County planning director's advice, determined that the landowners' properties had been deprived of all use and value and recommended that the County purchase the properties. Between 2002 and 2004, the BCC approved the Special Master's recommendations and rendered final BUD resolutions. In 2004, the landowners filed suit against the County for inverse condemnation. The trial court eventually found that a facial taking was presented, but was barred by the four-year statute of limitations. It also "found that the BUD resolutions were not final determinations of whether or how the properties would be developed."

The 3d DCA first determined that the landowners' claim was not one of a facial taking but rather an as-applied taking, reversing the trial court. It explained that a facial taking, "also known as a per se or categorical taking, occurs when the mere enactment of a regulation precludes all development of the property, and deprives the property owner of all reasonable economic use of the property," whereas "in an as-applied claim, the landowner challenges the regulation in the context of a concrete controversy specifically regarding the impact of the regulation on a particular parcel of property." Because land sales and development permits showed that the regulation's enactment with the comprehensive plan in 1997 did not deprive all reasonable economic use of the landowners' property, any facial challenges failed as a matter of law. Thus, the claims were properly brought as as-applied challenges.

Second, the 3d DCA reversed the circuit court's determination that the as-applied claim was not ripe for review. Ripeness for an as-applied claim requires a property owner to follow all reasonable and necessary steps to permit the land use authority to exercise its discretion in considering development plans, and the County's BUD process "provided a mechanism whereby both Landowners and Monroe County could assess all possible uses and viable remedies, as well as seek additional uses of the properties through variances or TDRs…. Resolutions to the BUD applications were final decisions by the government entity charged with implementing the regulations regarding the application of the regulations to the property at issue." Thus, the landowners had obtained a "final determination" of the application of the regulations to the property when the County passed the landowners' BUD resolutions.

When a permit is denied and it is futile to seek further permits to develop a property, there has been a final determination for a federal takings claim. *Shands v. City of Marathon*, 34 Fla. L. Weekly D68 (Fla. 3d DCA Dec. 31, 2008).

Landowners appealed a circuit court's dismissal of their inverse condemnation suit against the City of Marathon. The parcel, a 7.9 acre island, had been owned by family members since 1956 and was zoned General Use under Monroe County jurisdiction. In 1986, the County changed the parcel's zoning and future land use status to Conservation Offshore Island. The parcel was incorporated into the City of Marathon in 1999, which left the zoning and land use designations unchanged. In 2004, the City denied landowners' application for a dock permit due to the City's prohibition on development in areas with high quality hammock or with threatened or endangered species.

Landowners then filed a Beneficial Use Determination application, a process intended to determine whether any beneficial use of the property remained. The Special Master found that the landowners had reasonable economic investment-backed expectations of building a family residence on the key and the City should grant a permit or buy the property. The City disagreed and denied the landowner's application. The landowners brought suit against the City, claiming its acts resulted in an as-applied regulatory taking of their property without just compensation, in violation of state and federal law. The circuit court dismissed the suit, characterizing the suit as a facial taking, which was barred by the four-year statute of limitation for inverse condemnation claims. The circuit court also found the federal claim was not ripe because the landowners had not obtained a "final determination" under state law.

The 3d DCA noted some confusion between the parties, since the landowners asserted an as-applied taking but used language indicating a facial taking standard, while the City argued a facial taking. The court held, first, that the landowners' claim was not for a categorical, facial takings claim. Applying the analysis of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the court reasoned that all economically beneficial use of the property was not eliminated, and the landowners had no distinct, investment-backed expectations. Thus, the court reversed the circuit court's dismissal, since the suit was actually an as-applied taking cause of action.

Second, the 3d DCA reversed the circuit court's determination that the federal claim was not ripe for review. The landowners had obtained a "final determination" of the application of the regulations to the property when the City denied their Beneficial Use Determination application because it would have been futile to seek further permits to develop the property.

Standing for those who suffer an adverse effect to an interest protected by a comprehensive plan require an interest different in degree from that of other citizens, not a greater harm from that of other citizens. *Save the Homasassa River Alliance v. Citrus*

***County*, 33 Fla. L. Weekly D2490 (Fla. 5th DCA Oct. 24, 2008).**

Citrus County approved a property owner's application to develop and redevelop residential buildings on property adjacent to the Homosassa River, an essential manatee habitat, and amended its land development code atlas to reflect the approval. An environmental group and area landowners filed suit against the County and the property owner pursuant to § 163.3215, F.S., claiming the County's approval was inconsistent with the County's comprehensive land use plan. The circuit court dismissed plaintiff's second amended complaint with prejudice due to lack of standing. It found that "plaintiffs failed to allege their interest were adversely affected by the project in a way not experienced by the general population and because of insufficient 'nexus' allegations."

On appeal, the 5th DCA reversed and remanded, explaining that § 163.3215 was intended to amend the common law by ensuring standing for any person who suffers an adverse effect of an interest protected by the comprehensive plan: "[a]s a remedial statute, [it] is to 'be liberally construed to advance the intended remedy.'" Standing under the statute depends on an interest that exceeds in degree the general interest in community good shared by all—in other words, an interest that is something more than a general interest in community well being. The court also disagreed strongly with any interpretation of the statute requiring a harm different in degree from other citizens, since it would "eviscerate the statute and ignore its remedial purpose, [dragging] the statute back to the common law test."

The court held that this standard of a greater interest was met, noting that the complaint "contains lengthy allegations in support of their standing to bring this suit." These interests included the environmental group's formation for the purpose of protecting, studying, and enjoying the river and the individuals' interests in demands on public services, demands on the local transportation system, and volunteer efforts to protect the river. In their pleadings, plaintiffs properly linked these interests to those that the comprehensive plan is intended to protect and the harms that defendants might cause.

The 5th DCA distinguished this case from *Fla. Rock Props. v. Keyser*, 709 So. 2d 175 (Fla. 5th DCA 1998). Unlike in the instant case, the plaintiff in *Keyser* "never demonstrated any specific injury, only that the county would not be as bucolic as it once was. Keyser is a citizen with an interest in the environment and nothing more." The degree of Keyser's interest was no different than the public's. On the contrary, the plaintiff environmental organization in *Putnam County Envtl. Council, Inc. v. Bd. of County Comm'rs*, 757 So.2d 590, 592-93 (Fla. 5th DCA 2000), had as its primary organizational purpose the study and protection of the type of lands in question. Similarly, the environmental group in this case had primary purposes intimately related to the type of land in question.

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On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of February 4, 2009. Readers are encouraged to advise the authors of pending appeals that should be included.

FLORIDA SUPREME COURT

Advisory Opinion to the Attorney General re: Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans, Case No. SC06-521. The Attorney General has asked the Court for an advisory opinion as to whether the financial impact statement prepared by the Financial Impact Estimating Conference (FIEC) on the constitutional amendment, proposed by initiative petition and entitled "Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans," is in accordance with s. 100.371, F.S. Status: On September 25, 2008 the Court concluded that the revised statement prepared by the FIEC is misleading and therefore does not comply with s. 100.371(5), F.S.; accordingly the Court remanded the statement to the FIEC to be redrafted. 33 Fla. L. Weekly S692a.

Phantom of Brevard, Inc. v. Brevard County, Florida, Case No. SC07-2200. Petition for review of Fifth DCA decision affirming in part, reversing in part and remanding a summary judgment upholding a county ordinance relating to fireworks. *Phantom of Brevard, Inc v Brevard County*, 32 Fla. L. Weekly D2084b (Fla. 5th DCA Aug. 31, 2007). Status: Quashed on December 23, 2008. 33 Fla. L. Weekly S1002c.

Fla. Assn of Professional Lobbyists v Division of Legislative Information Services, Case No. SC08-791. Certified questions from the Eleventh Circuit: Whether the Act establishing executive and legislative lobbyist compensation reporting requirements violates Florida's separation of powers doctrine, was properly enacted under Florida law, or infringes upon the Florida Supreme Court's jurisdiction. Status: Oral argument held January 6, 2009.

Advisory Opinion to the Attorney General re Florida Growth Management Initiative Giving Citizens the Right to Decide Local Growth Management Plan Changes, Case No. SC08-

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ON APPEAL
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318. The Attorney General has asked the Court for an advisory opinion as to whether the so-called "Smarter Growth" amendment encompasses a single subject, and whether the ballot title and summary comply with the pertinent legal requirements. Status: On December 18, the court issued an opinion concluding that the proposed amendment complies with the single-subject requirement of Article XI, Section 3 of the Florida Constitution, that the ballot title and summary comply with Section 101.161(1), Florida Statutes (2008), and that the Financial Impact Statement complies with Section 100.371, Florida Statutes (2008). 33 Fla. L. Weekly S966a.

Kurt S. Browning v. Florida Hometown Democracy, Case No. SC08-884. Petition for review of DCA opinion finding that a 2007 state law that allows voters to revoke their signatures on petitions collected in the citizens initiative process violates the Florida Constitution by imposing an unnecessary regulation on citizen initiative process. 33 Fla. L. Weekly D1099b. Status: Oral argument held January 8, 2009.

FIRST DCA

Florida Homebuilders Association, Inc., et al v. City of Tallahassee, Case No. 1D07-6413. Appeal from summary judgment for the City in connection with challenge to City's Inclusionary Housing Ordinance. Among other things, the plaintiffs allege that the ordinance constitutes a taking and an illegal tax. Status: All briefs have been filed.

International Paper Company v. Florida Department of Environmental Protection etc., et al. Case No. 1D07-4198. Appeal from a DEP final order denying International Paper's application for a wastewater discharge permit at its Pensacola Mill. Status: Motion for stay granted and oral argument set for September 17, 2008 was cancelled.

Brenda D. Dickinson and Vicki A. Woolridge v. Division of Legislative Information of the Offices of Legislative Services, et al, Case No. 1D07-3827. Appeal from final judgment rejecting a constitutional challenge to executive and legislative lobbyist compensation reporting requirements. Status: Oral argument held June 24, 2008; appeal stayed pending final disposition of *Fla. Assn of Professional Lobbyists v Division of Legislative Information Services,* Case No. SC08-791 (above), where some of the same questions were certified from the Eleventh Circuit to the Florida Supreme Court.

SECOND DCA

Peace River/Manasota Regional Water Supply v. State, Department of Environmental Protection, Case No. 2D06-3891 and 2D07-3116 (consolidated cases). Appeals from final order granting environmental resource permit to Mosaic for Ona Mine. Status: Oral argument held October 8, 2008.

Marine Industries Association of Collier County v. Florida Fish & Wildlife Conservation Commission, Case No. 2D07-1777. Appeal from a final order approving the Fish and Wildlife Commission's permit granted to the City for the placement of waterway markers. The final order rejected much of the Administrative Law Judge's recommended order finding that 1) the parties had standing to challenge the permit and the necessity of the ordinance underlying the waterway marker permit application and 2) the Fish and Wildlife Commission was obligated to independently determine whether the local ordinance was needed. Status: Reversed and remanded September 12, 2008, 33 Fla. L. Weekly D2181b; motions for rehearing filed; motion for rehearing denied October 30, 2008.

THIRD DCA

Collins v. Monroe County, Case No. 3D07-1603. Appeal from an amended order granting state's motion for summary judgment on ripeness grounds. Status: Remanded December 31, 2008. 34 Fla. L. Weekly D64a.

Luis Stabinski and Bell Stabinski, et al v. Miami-Dade Co., Department of Planning and Zoning, et al, Case No. 3D08-1226. Appeal from order dismissing complaint because Plaintiffs' taking claims are not ripe. Status: Affirmed November 12, 2008.

Shands, et al, v. City of Marathon, Case No. 3D07-3288. Appeal from order to dismiss property owners' complaint because the property owners' claims were time barred and unripe. Status: Reversed December 31, 2008. 34 Fla. L. Weekly D68a.

Thomas F. Collins, et al., v. Monroe County and the State of Florida, Case No. 3D07-1603. Appeal from Final Order granting summary judgment for defendant's in an inverse condemnation case. Status: Reversed and remanded December 31, 2008. 34 Fla. L. Weekly D64a.

FIFTH DCA

A. Duda and Sons v. SJRWMD, Case No. 5D08-1700. Appeal from final order denying Duda's petition to determine invalidity of agency rule and statement generally relating to the so-called agricultural exemption. DOAH Case No. 07-3545 (final order entered April 24, 2008). Status: All briefs filed December 29, 2008. Oral argument date set for March 19, 2009.

St. Johns River Water Management District v. Coy A. Koontz, Jr., etc., Case No. 5D06-1116. Appeal from trial court order determining that the trial court had effected a taking of Koontz's property and awarding damages. Among other things, the trial court determined that the off-site mitigation imposed by the District had no essential nexus to the development restrictions already in place on the property and was not roughly portional to the relieve requested by Mr. Koontz. Status: Affirmed January 9, 2009, 34 Fla. L. Weekly D123a (Fla. 5th DCA 2009); motion for rehearing en banc filed January 26, 2009.

Law School Liaisons

Activities on Tap for the Spring '09 Semester at Florida State College of Law

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

The Florida State College of Law is very excited to be strengthening its nationally-ranked environmental program by adding a Visiting Scholar to work on future energy and land use policy, through the Law School's participation in The Institute for Energy Systems, Economics and Sustainability (IESES). The Scholar will prepare a series of reports on the interface between land use law and the siting of new energy production and distribution infrastructure in Florida suitable for use in policy-making bodies such as the legislature and local governments, teach a seminar to law and other graduate students, organize academic symposia, and participate in educational conferences.

Florida State Law has a full schedule of activities and initiatives on tap for the spring '09 semester, including the following:

1) Professor Hope Babcock of Georgetown University Law School is this spring's *Distinguished Lecturer*. Professor Babcock will be giving her public lecture, entitled "The Problem with Particularized Injury: the Disjuncture Between Broad-Based Environmental Harm and Standing Jurisprudence," on February 25, 2009. Members of the public are welcome to attend this public lecture; please contact Jeremy Lightner at *jlightne@law.fsu.edu* if you are interested.

2) The Law School Spring '09 *Environmental Forum* is scheduled for April 1, at 3:00 p.m., in Room 102 at the Law School. Many Section members have participated in our *Forum* Series in the past. The purpose of the Series is to provide a neutral forum for discussion of timely environmental topics. We will provide further information via the ELULS list serve within the next few weeks.

3) The Environmental Law Program is bringing in a series of speakers through its Environmental Certificate Seminar. On January 26, Associate Professor Hari Osofsky of Washington and Lee School of Law presented her paper *Is Climate Change "International"* to the FSU College of Law faculty and spoke on *Climate Change – the Obama Administration & Diagonal Regulation* to the Certificate Program students. Professor Shi-Ling Hsu, University of British Columbia Law School, will present his new work on *Carbon Taxes* to both the faculty and the students on February 9, while on February 16 Professor Felicia Coleman of the FSU Marine Lab will guest lecture to the Certificate Seminar on *The Role of Science in Setting Marine Policy*.

4) On January 28, 2009, the College of Law's Externship Program and Environmental Law Program co-hosted an Environmental Externship Luncheon for externship providers, students, and faculty. Our students have the opportunity to earn academic credit while completing an externship with a government agency or public interest group. The College of Law has expanded its environmental externship opportunities substantially in recent years. Participants in the recent luncheon included: the Florida Fish and Wildlife Conservation Commission, the Division of Administrative Hearings, the Department of Environmental Protection, the Department of Community Affairs, 1000 Friends of Florida, The Nature Conservancy, the Leon County Attorney's Office, and Apalachicola Riverkeepers.

Our students have been busy and productive on a number of fronts. Jacob Cremer, FSU Law '10, has had his article, *Tractors Competing with Bulldozers: Integrating Growth Management and Ecosystem Services to Conserve Agriculture*, accepted for publication in the ENVIRONMENTAL LAW REPORTER. Katherine Weber, FSU Law '10, will be publishing her article, *Increasing Hope for Florida Keys Coral Reefs in the Face of Climate Change*, in the February 2009 issue of the ABA Section on Environment, Energy, and Resources' *Marine Resources Newsletter*.

Our Environmental Moot Court Team, consisting of Ryan Cooper, Andrew Greenlee, and Preston McLane and coached by Tony Cleveland and Segundo Fernandez is busy preparing for the National Competition at Pace, while our International Environmental Moot Court Team, consisting of Jennifer Kilinski, DeWitt Revels, and Yusser Shebib and coached by Visiting Professor Randy Abate, will compete in the North American Atlantic Regional at the University of Maryland School of Law on February 6-7. Our Environmental Law Society has several events planned, including a career panel on March 18, 2009.

We hope you'll join us for one or more of our programs. For more information about our programs, please consult our web site at: www.law.fsu.edu, or please feel free to contact Professor David Markell, at *dmarkell@law.fsu.edu*. Our environmental brochure, available online at *http://law.fsu.edu/academic_programs/environmental/documents/environmental_brochure_08.pdf*, also contains considerable information about the environmental law program at FSU.

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Stetson University College of Law to Host 11th International Wildlife Law Conference and 13th Annual International Environmental Moot Court Competition

For the first time, Stetson will hold the International Wildlife Law Conference in conjunction with the Stetson International Environmental Moot Court Competition. Both events will take place on Stetson's Gulfport campus (in the Tampa/St. Petersburg area). Section members are invited to serve as oral round judges and/or attend the conference. We also encourage law students to consider attending the conference, which provides an excellent opportunity to meet and network with people working on wildlife and environmental issues throughout the world.

11th International Wildlife Law Conference (March 26-27)

The Conference's four sessions focus on biofuel production and biodiversity impacts, sustainable ecotourism, regional fisheries management organizations, and the Antarctic ecosystem. Speakers from six countries include:

- **Johannes Huber**, Executive Secretary, Antarctic Treaty Secretariat
- **Julia Jabour**, Institute of Antarctic & Southern Ocean Studies, University of Tasmania
- **Gunther Handl**, Tulane University
- **Andi Pearl**, Antarctic Krill Conservation Project, The Pew Charitable Trusts
- **Patricia Farnese**, University of Saskatchewan
- **Clay Henderson**, Holland & Knight LLP
- **Laurie MacDonald**, Defenders of Wildlife
- **Brett Paben**, WildLaw
- **Richard Caddell**, Swansea University
- **Annecoos Wiersema**, The Ohio State University
- **Irini Papanicolopulu**, University of Milan-Bicocca

The complete agenda and registration information is available at *http://www.law.stetson.edu/tmpl/news/events/conf/internal-1-sub.aspx?id=4716*.

13th Annual Stetson International Environmental Moot Court Competition (March 25-28)

This competition, established by Stetson in 1996, is the world's largest moot court competition that focuses exclusively on global environmental issues. This year, in honor of the 50th anniversary of the Antarctic Treaty, the competition involves alleged excessive krill harvesting in the Antarctic region and a related enforcement action on the high seas. Regionals have been held in north and south India, Ireland, Latin America, and Southeast Asia. In addition, the University of Maryland School of Law hosted the North American (Atlantic) Rounds, and Santa Clara University School of Law hosted the North American (Pacific) Rounds. The top teams from these regionals, along with teams from China, Nepal, Nigeria, and Ukraine, have been invited to participate in the International Finals at Stetson. The final round judges will be Dr. Wil Burns, editor-in-chief of the Journal of International Wildlife Law and Policy, Johannes Huber, executive secretary of the Antarctic Secretariat, and Andi Pearl, manager of the Pew's Antarctic Krill Conservation Project.

Oral round arguments are scheduled before and after the conference sessions to provide the opportunity for conference attendees to judge the competition and to allow moot court students to attend the conference. If you would like to judge one of the oral rounds, please contact Peggy Gordon at *mcgordon@law.stetson.edu*.

Thanks for your consideration, and we hope to see you in March!

Center for Earth Jurisprudence Update

Conference and Workshop: In early February, the Center for Earth Jurisprudence (CEJ) partnered with Science and Environmental Health Network (SEHN); with the support of an ELULS special projects grant, they conducted a conference and workshop at both CEJ branches in Miami and Orlando that explored the Precautionary Principle and expanding its incorporation into law and policy, from federal legislation to local ordinances.

SEHN executive director Carolyn Raffensperger made a case for a precautionary approach that would heed early warnings (for example, higher-than-average rates of autism), examine alternatives to damaging practices and shift existing burdens of proof in legal texts. Since uncertainty is intrinsic to a complex world and prevention is safer and less costly than cure, she argued for authorities to be bound by an obligation to prevent harm. Dr. Ted Schettler, SEHN's science director, discussed types and degrees of scientific uncertainty, what can and cannot be proven and the types of error – and resulting harm to health and environment – that are sealed into legislation as a consequence. Given the complex web of interactions that add up to causation,

the current approach is inadequate to ensure safety and we owe it to future generations of all species to ask the right questions and to exhibit greater scientific rigor in dealing legislatively with the potential for harm. Next, SEHN legal director, Joseph Guth, took a trenchant approach to complex legislation, stripping it of confusion and isolating tests that elucidate underlying assumptions. Under the Toxic Substances Control Act of 1976, the EPA must demonstrate that a chemical presents an unreasonable risk before it can ban the substance. In case of doubt surrounding the level of risk, the chemical remains on the market – providing an incentive to chemical producers to ensure that doubt persists. The European Union's REACH legislation (EC Regulation 1907/2006) and the recently proposed Kid-Safe Chemicals Act 2008 provide a more considered foundation for chemical regulation and show growing impatience with assumptions that benefit enterprise while putting health and environment at risk.

At a lunch session, Sister Pat Siemen, executive director of the CEJ, discussed how precaution dovetails with the broader Earth jurisprudence framework. This was followed by a panel that projected a precautionary approach against local initiatives. In Miami, Richard Grosso, executive director of the Everglades Law Center, law professor and environmental litigator, guided the discussion, which featured presentations by Kelly Brooks, of Lehtinen Riedi Brooks Moncarz; Carlos Espinosa, director of the Department of Environmental Resources Management; and Katy Sorenson, Miami-Dade County commissioner. In Orlando, Robert D. Guthrie, senior assistant county attorney of the Orange County Attorney's Office, led the discussion, which featured Linda W. Chapin, director of the Metropolitan Center for Regional Studies, University of Central Florida; Anthony J. Cotter of GrayRobinson, P.A.; and Lori Cunniff, CEP, CHMM, manager of the Orange County Environmental Protection Division.

Speaking engagements: CEJ legal director Mary Munson presented "Fast Forward Florida 2060: Planning Now for a Changed World" at the Public Interest Environmental Conference in late February. U.S. laws tend to protect the environment by imposing restrictions and controls to address discrete threats; global warming and catastrophic species loss demonstrate the failings of this approach. She discussed the need for laws to recognize the interdependent, interrelated nature of Earth systems. To be effective, environmental policy must be crosscutting in nature, affecting all aspects of humans' relationships with ecosystems. By positing that all laws be viewed through the lens of encouraging a mutually sustaining relationship between humans and our planet, Earth jurisprudence may offer a solution and an analytical framework for the large-scale reforms that are needed.

The CEJ is interested in reaching out to law schools to engage students and faculty in discussions advancing Earth jurisprudence concepts. The CEJ can provide guest lecturers, workshop panelists and ideas for including Earth jurisprudence content in course curriculum. We are also available to speak with law school environmental law organizations. To discuss possibilities, please contact CEJ legal director Mary Munson at *mammunson@stu.edu*.

The CEJ (*www.earthjuris.org*) seeks to establish new approaches to law and governance that acknowledge the rights and interdependence of nature and the inhabitants of Earth.

UF Law Update: Environmental and Land Use Law Program Emphasizes Cross-Disciplinary Education

by Alyson C. Flournoy, ELULP Program Director

The Environmental and Land Use Law Program at UF Law has continued to build on its strength by offering students an educational experience that crosses disciplinary boundaries. Through new offerings in the J.D. curriculum, in the design of the LLM program, and in extra-curricular opportunities, students in the UF program have the opportunity to learn from experts in a wide array of disciplines closely related to environmental and land use law.

The LL.M. in Environmental and Land Use Law

UF's newest program, the LL.M. in Environmental and Land Use Law, received final ABA acquiescence last spring and our first class of two students began in fall 2008. Kalanit Oded (J.D. Tulane Law School) and Andrew Hand (J.D. and M.S. in Real Estate, University of Florida) are completing courses of study that combine land use planning and environmental law. Kalanit is also completing her Masters in Urban and Regional Planning at UF concurrent with her LL.M. Prior to commencing her studies at UF, Kalanit was a mediation attorney with the U.S. Court of Appeals for the Fifth Circuit and before that was in private practice. Andrew has practiced with, Shepard, Smith & Cassady, P.A. in Maitland, since earning his degrees.

UF is currently recruiting students for the fall 2009 entering class. The LL.M. program is designed to be a small and selective full-time program, geared towards students with an interest in studying both law and closely related fields such as land use planning, wildlife ecology, and environmental engineering. LL.M. students complete 26 hours of coursework during their one-year program, 6 credits of which are in courses with substantial non-law content. Students develop a course of study that includes courses offered through the J.D. curriculum and other UF departments, an LL.M. Research Methods course, and the Environmental Capstone Colloquium, and can include the Conservation Clinic. LL.M. students can also

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apply to participate in the Costa Rica Summer Study Abroad Program. For more information visit our website at: www.law.ufl.edu/elulp/llm or contact Lena Hinson at elulp@law.ufl.edu. The deadline for applications for fall 2009 is May 31, 2009.

Course Offerings Emphasize Cross-Disciplinary Learning

Both J.D. and LL.M. students benefit from a growing suite of courses that expose students to the science, law, and policy of environmental issues. Longtime Professor and CGR Research Associate Richard Hamann has developed several offerings in recent years that provide students this opportunity. Each spring, Richard offers his course on Wetlands and Watersheds, which provides students who have studied natural resources law with a chance to study the law and policy related to wetlands in a context that exposes them to some relevant scientific information and issues. Students learn through guest lectures from professors and professionals in a variety of fields, four day-long field trips that take them out to see wetlands and engage on the ground the issues they've studied. They work in teams on written projects, developing a strong understanding of practical and legal issues related to topics like wetlands delineation, mitigation, and ordinary high water line determinations.

In addition, Richard has worked with a cross-disciplinary team of UF faculty to develop an interdisciplinary Ph.D. program that has received funding from the National Science Foundation IGERT program. The program focuses on Adaptive Management of Water, Wetlands, and Watersheds. Law students have benefited from the opportunity to enroll in two courses offered as part of the program.

The first is a course Professor Hamann co-teaches with professors from the UF Environmental Engineering Sciences department, the School of Forest Resources and Conservation, and the School of Natural Resources and the Environment on Adaptive Management of Water and Watershed Systems. The second is a field course on Ecosystems of South Florida. Students in this two-week intensive summer course travel with a team of faculty across South Florida. With a focus on adaptive management, the course includes an introduction to ecological, hydrological, chemical, social, legal, and political issues surrounding the Everglades and its restoration. The field course approach is designed to maximize direct experience with habitats, geography, local experts and user groups, and permits students to gain a firsthand view of management actions and ecological outcomes. The students and faculty meet with and learn from a wide range of agency officials, private stakeholders and representatives of NGOs throughout the course. In addition to experiential and interdisciplinary learning, the course helps students develop skills related to working in teams and cross-disciplinary communication, as well as critical thinking and synthesis. Regrettably, due to funding cutbacks, this unique and valuable course may not be offered in May 2009 unless adequate private funding is identified.

In addition to these course offerings, a team of faculty has begun to explore development of a new cross-disciplinary course on the law, science, and policy of climate change to add to the UFLaw curriculum.

Environmental Speaker Series

Through its Environmental Speaker Series, the ELULP is able to bring a selection of five outstanding legal academics, practicioners, and experts in related fields to present papers to students and faculty in the UF Program and interested members of the Bar. This year's series focused on climate change. To open the series, Michelle Mack, a biologist at UF whose work focuses on climate change provided an overview of some of the recent developments and the uncertainties in the scientific understanding of climate change. Additional speakers in the series focused on avenues to address climate change through international law, the climate change/energy law connection, climate change and disaster law, and the evolving legal practice related to climate change. The 2009 Environmental Speaker Series was made possible by generous support from Hopping Green & Sams, P.A. and Lewis Longman & Walker P.A.

The Public Interest Environmental Conference and Richard E. Nelson Symposium

This year marked the 15th Annual PIEC, organized by a team of students in collaboration with the Public Interest Committee of the ELUL Section of the Florida Bar. The experience of planning and attending this event provides students exposure to the rich mix of technical and legal information and questions that characterizes most environmental and land use law issues. Panels and plenary sessions that feature scientists, planners, journalists, and elected and appointed officials, as well as lawyers, help students to enrich their education. UF Law students also have the chance both to attend and participate in the annual Nelson Symposium, which often features speakers with a mix of professional backgrounds. This year's program focused on "The Squeeze on Local Governments" and two UF Law students, Tara Nelson and Andrea Becker, presented updates on relevant recent legal developments.

PROFESSIONAL ETHICS
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ber a month later. Dissatisfied with the response, a second request for "clarification" was sent to Bar ethics counsel. This is now being handled as an appeal to the Professional Ethics Committee (PEC), which appointed a subcommittee to examine the issue and present a recommendation for consideration by the PEC at its January 2009 meeting.

Coincidentally, during approximately the same time frame, a matter was referred to the ELULS Executive Council for consideration involving a Section member in private practice who had sought assistance from Florida Bar ethics counsel in interpreting the same rule.

The Section member asked if this rule prohibited her from meeting with Governing Board members of a Water Management District (WMD) to discuss and advocate for a Petition to Initiate Rulemaking filed on behalf of her clients absent the WMD counsel's consent. Bar ethics counsel declined to issue an advisory ethics opinion because the matter involved past conduct and questions of fact; however, counsel did provide extensive information from past Bar opinions indicating that Rule 4-4.2 has been construed to prohibit communications—absent consent of the governmental entity's counsel—about the subject matter of a representation with governmental employees in managerial capacities or whose acts or omissions in connection with the matter may otherwise be imputed to the agency.

The Section member had the opportunity to appeal the Bar counsel's denial of the request for an advisory ethics opinion, but ultimately chose not to do so. Still, she was concerned with the response and forwarded the matter to other attorneys in environmental and administrative law for consideration. Thus, the matter was brought before the Executive Council of the Administrative Law Section and eventually came to the attention of the ELULS Executive Council as well.

The issue was discussed at the Executive Council meeting in November 2008 and at that time, a small group of Council members and others representing a cross-section of practitioners in the Section was constituted to investigate whether the Section should weigh-in on the discussion in some manner or otherwise involve its membership. Ultimately, it was recommended by the small group and confirmed by the Executive Council that the issue was of great importance such that members should be made aware of the PEC action, but that the Section itself would not take a position due to the diversity of opinion on the issue and the Bar Staff Opinion being appealed and the potential divisive effect a single stated position might have within the Section.

Concerns raised by the group that reflect the complexity of this issue and the values at stake that may be at odds with each other are further detailed below.

DISCUSSION

The group raised by the Executive Council to address the rule controversy represented lawyers in private practice (from both the traditional, for-profit and public interest models) and government service (both the state and local level) with considerable experience in environmental and land use law in its many forms, including administrative practice.

It became evident that the issues are complicated by the perspective of the particular type of practice involved, and the difference in the prioritization of competing values between those types of practice. For instance, traditional private practitioners may advocate most strongly for the right of private entities to dialogue with

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public officials and to engage the assistance of attorneys in advancing their position in that dialogue, but governmental practitioners may feel that the greater weight of justice falls on the side of affording their clients protection equal to that afforded private parties. Additionally, addressing the rule from a unified front is difficult because of the sheer range of issues it touches, which, yet again, are difficult to capture on behalf of a wide spectrum of Section members. These problems are illustrated in some of the questions and observations raised in the group's discussion, such as:

- *How should the application of the rule recognize the client's (and the lawyer's, where she/he is the client) right to petition government and to retain the services of representatives (including lawyers) who are skilled in such matters?*
- *In situations where a client may be commenting on, questioning, or challenging government decisions regarding 3rd party applicants, it is unclear whether those 3rd parties are subject to the same rule enforcement.*
- *What happens if an agency's counsel (or management) has a problem with another agency or law firm and refuses consent?*
- *Are public records requests under Fla. Stat. §119 "independent justifications for communicating with the other party" described in the comments that allow for contact with the public records custodian without going through the attorney first?*

Historically, it is notable that, approximately eight years ago, a special committee was convened on the issue of communications with government under Rule 4-4.2. A subcommittee drafted a fairly extensive proposed rule change that would have incorporated two exceptions to the rule: one to allow a lawyer representing a client or who is personally a party to a controversy with the government to communicate directly with a represented government entity at a public meeting held by the government entity to provide citizens with a public forum; and another to allow a lawyer who is personally a party to a controversy with the government to communicate directly with the government as a party as permitted by the first amendment right to petition the government for redress of grievances.

These exceptions were not adopted because—as experienced in the discussion of the ELULS group—the comments from Florida Bar members came from across the spectrum. Ultimately, the only change recommended by the committee was to the rule's comment, which replaced the phrase "Communications authorized by law" with "Permitted communications" in the sentence. "Permitted communications include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter." (The change was approved by the Supreme Court of Florida in Case No. SC03-705, 875 So.2d 448 (Fla. 5/20/2004).) It is perhaps heartening to realize that the special committee felt no pressing need to recommend further changes in part because, as it wrote to the Board of Governors, it "was persuaded by the comments made on the draft that lawyers in Florida are aware of their responsibilities under the rule and that few complaints have been made on the issue of attorneys contacting represented government entities without the consent of government counsel."

STATUS

The PEC subcommittee's draft proposed advisory opinion considered by the PEC in January clarified that "[s]everal issues must be considered in responding to the requested advisory opinion," and set forth those issues as:

> whether all persons within an organization are deemed to be represented by the organization's counsel for the purposes of this rule;
>
> what matters trigger the rule's prohibition on communications with represented parties;
>
> whether, because a governmental agency has a general counsel, the general counsel is effectively representing the agency on all matters, merely by virtue of being in the continuous employ of the agency, thus preventing all communications with the agency's officials and managers on all subjects.

As to the first issue, the subcommittee answered "no," noting that attorneys are "ethically precluded from communicating with" two groups of individuals: "employees or officers of the agency with decisionmaking authority" *and* those "whose acts or omissions in connection with the controversy could be ascribed to the agency." However, the prohibition is not determined to extend to communications with "nonmanagerial employees whose acts or omissions cannot be imputed" to the agency.

As to the second issue, the subcommittee proposal states that application of the rule is "not limited to matters in litigation and may extend to matters on which litigation has not yet commenced" and that application of the rule extends to "specific transactional or non-litigation matters on which the agency's attorney is providing representation." The subcommittee acknowledged, though, that the reach of the rule falls short of preventing "direct communications with represented persons, including agency officials and others within an agency who are in managerial positions, on matters other than specific matters for which the agency attorney is providing representation are permissible" and that the scope of the rule is also limited in that "there must be actual knowledge by the non-agency attorney of representation by the agency attorney on the matter being discussed in order for Rule 4-4.2 to apply."

As to the third and final issue, the subcommittee answered in the negative, finding that the relevant Comment indicates that it is not the intent of the rule to consider an agency represented in all matters just because it has general counsel so that all communications with managerial staff are prohibited. The subcommittee is compelled by the commentary's recognition of the constitutional (First Amendment) right to petition one's government and interprets that this right remains intact in the ability to communicate with agency officials and employees "on general

matters that do not relate to those for which the State Agency's general counsel is known to be providing direct representation."

In sum, it states that:

> . . . Rule 4-4.2, as clarified by its Comments, prohibits communications with agency officials and managers who are in a decision making position about the subject matter of a specific controversy or matter on which an attorney knows or has reason to know that a governmental attorney is providing representation unless the agency's attorney consents to the communication. The rule does not prohibit an attorney from communicating with other agency employees who have no authority to bind the agency and whose actions or statements cannot be legally imputed to the agency, nor does it prohibit an attorney from communicating with agency decision makers on subjects unrelated to those controversies on which the agency attorney is providing representation.

The PEC met on January 16 in conjunction with the Bar's midyear meeting and considered its subcommittee's proposed advisory opinion at that time. The PEC voted to defer publication and referred the issue back to the subcommittee for consideration of an amendment to further address relevant constitutional concerns. The PEC is expected to take the resulting draft under consideration on June 26 in conjunction with The Florida Bar Annual Meeting. The opportunity for Bar members to comment upon any resulting proposed advisory opinion should be noticed in The Florida Bar News thereafter. The ELULS Executive Council aims to keep its membership informed in a timely manner through updates on the Section website; see http://www.eluls.org/.

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