

# THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

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

## Florida's Waters: Significant Cases In the Works

by Susan L. Stephens, Tallahassee Office, Holland & Knight LLP

Environmental advocacy groups and citizens have been in a litigation frenzy of late over the Florida Department of Environmental Protection's (FDEP) alleged violations of the federal Clean Water Act (CWA) and related state law and, the Environmental Protection Agency's (EPA) failure to call FDEP on the carpet about the alleged violations. One suit challenges the wastewater permitting program for animal feeding operations (AFOs) in state court (the CAFO case). Another has challenged the state's Identification of

Impaired Waters Rule (IWR) in federal court as a change to Florida's water quality standards (WQS) (the IWR case). The third, using the prior two cases for support, has challenged Florida's National Pollutant Discharge Elimination System (NPDES) program delegation as a whole, seeking to force EPA to revoke delegation (the NPDES case). These plaintiffs groups have had at least initial success in the CAFO and IWR cases; the NPDES case has only recently been filed. All three of these cases are significant and bear watching to see

what happens next.

*The CAFO Case: Save our Suwannee, Inc., et al. v. Florida Dep't of Env't'l Protection*, ER FALR '04:181, Case No. 2001-CA-001266 (Fla. 2d Cir. Ct. Mar. 5, 2004). In the CAFO case, the plaintiffs filed suit in the circuit court for the second judicial circuit in and for Leon County, Florida, pursuant to §403.412(2), Florida Statutes (F.S.), seeking injunctive relief. They alleged that FDEP violated state law and the CWA by failing to require concentrated animal feeding opera-

See "Florida's Waters," page 18

## From the Chair

by Robert D. Fingar

I would like to take this column to update everyone on three things. Truth be told, I would like to start with a story that a friend of mine likes to tell that commands: "There are three things you need to know, and only three things...." Unfortunately, propriety prevents me from doing so; which should also make for a shorter column. I'll just chuckle to myself.

First, there is the issue of legal certification in governmental and administrative law, a proposal generated by the Government Lawyer Section. Of particular note is the definition of "administrative and

governmental practice:"the practice of law on behalf of public or private clients on matters involving administration of government, including, but not limited to, rulemaking or adjudication associated with state or federal governmental agency actions such as contracts, licenses, orders, permits, policies, or rules." The minimum standards for certification require that the applicant have been engaged in an administrative or governmental practice before, against, or on behalf of Florida or federal governmental agencies for at least five years and that a minimum of 40 percent of the applicant's practice in

*continued, page 2*

### INSIDE:

|  |    |
|--|----|
| The Environmental Regulation Commission Adopts Global RBCA .....                   | 3  |
| On Appeal .....  | 4  |
| Florida Caselaw Update .....   | 8  |
| FSU's Law Students Make Their Mark ..  | 10 |
| Department of Community Affairs' Update .....                                      | 11 |
| DEP Update .....   | 12 |
| Water Management District Updates .....  | 13 |
| UF Student Writing Recognized Nationally; Successful Spring Conferences Held ..... | 14 |
| Treatise on Florida Environmental & Land Use Law .....                             | 15 |
| Waterways and Waterfronts Seminar .....  | 16 |

**FROM THE CHAIR**

*from page 1*

this time period is dedicated to administrative and governmental practice. The applicant must also provide 20 examples of service as a "lead advocate" within the past ten years of participation in governmental actions, including proceedings under Chapter 120, the Federal Administrative Procedure Act, the US Court of Claims, the Court of International Trade, tort claims proceedings in US District Courts, personnel proceedings such as those before the EEOC or Merit Systems Protection Board, and other fully-adjudicated state or federal administrative or civil proceedings involving governmental entities, including any appellate proceedings.

The Government Lawyers Section introduced this proposal to the Bar's Board of Legal Specialization and Education in January and further meetings may be scheduled later this year. In the interim, the Administrative Law Section has established a committee to review and revise the initial proposal. It is likely that the

new proposal will have some sort of a-points-qualifying-procedure which will seek to balance certain mandatory APA experience with what is described as "other traditional APA and governmental experience" and "non-traditional experience."

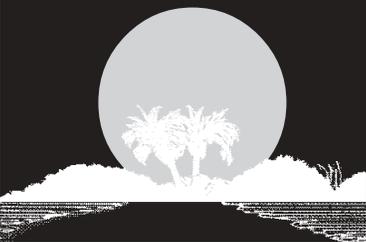
The concept of a certification program for Environmental and/or Land Use Law has been oft debated and oft killed for lack of interest. That is not to say, however, that we should not carefully follow developments of a possible new certification by the Government Lawyers, and possibly Administrative Law Section. Towards that end, the Executive Council has appointed a committee of Robert Riggio, Kirk Burns, Paul Chipok, and me to monitor the issue. Any thoughts you have would be greatly appreciated.

Item two. The National Conference of Commissioners on Uniform State Laws has drafted the Uniform Environmental Covenants Act (UECA), and has asked for our comments as this item moves toward possible legislation in Florida. Given that the three Chapter 376 programs (petroleum, dry cleaning and Brownfields) have had some experience for a number of years with re-

strictive covenants and DEP has policy guidelines on the issue, some have expressed concerns that we do not adversely impact progress already achieved. Of course, if the UECA would result in a better understanding of risk-based cleanups, so much the better. Towards that end, the Executive Council has requested that a committee comprised of George Gramling, Lisa Duchene, Roger Schwenke, and Bob Wells evaluate the potential impact of UECA. I will have more to report on this in the next Chair's Column.

Finally, the Treatise. It has been the long-standing goal of the Executive Council to make the Treatise widely (and affordably) available. The best way, it seems, to accomplish this, is to put the Treatise on our web site in some password-protected fashion. We have made significant progress towards this goal, although the details are not fully resolved. However, we are close enough that our plans for the Treatise and some other budget issues have caused us to propose a \$10 per year increase in Section dues. We ask that you bear with us. We expect that you will see the fruits sooner, rather than later.

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# The Environmental Regulation Commission Adopts Global RBCA

Chris Saranko Ph.D., DABT, Senior Toxicologist, GeoSyntec Consultants, Tampa, FL

Barring the possibility of a rule challenge, the final act of the long-running Global RBCA rulemaking saga played out in Tallahassee on February 3<sup>rd</sup> when Florida's Environmental Regulation Commission (ERC) held an adoption hearing for Chapters 62 780 (Global RBCA), 62 770 (Petroleum), 62 777 (Cleanup Criteria), 62 782 (Dry Cleaning), and 62 785 (Brownfields), F.A.C. All the rules were adopted.

During the period between the December ERC Briefing and the February ERC Adoption hearing the FDEP modified the "Notice" provisions of each of the rules to avert a potential rule challenge. The new notice provisions require responsible parties to provide actual notice only to FDEP and the local County Health Department within ten days of the discovery of off-site contamination. The revisions also raised the burden of proof from a reasonable inference of off-site migration to the detection (by analytical data meeting appropriate quality assurance protocols) of site-related contamination beyond the boundary of the source property. This represents a significant change from earlier rule drafts, which many warned would result in more 3<sup>rd</sup> party litigation.

The ERC considered more than fifty proposed amendments to one or more of the rules. Most of these were housekeeping amendments that corrected grammatical errors and other minor issues. However, a few more substantive amendments were considered. Several of these are discussed briefly below.

At the adoption hearing, the Legal Environmental Assistance Foundation (LEAF) offered an amendment to each of the rules that would have prohibited site management strategies that include indefinite use of off-site institutional controls when a contaminant plume leaves the source property boundaries, if the neighboring property owner agreed to place engineering and/or institutional controls on his/her property. LEAF argued that FDEP did not have statutory authority to approve such

measures. FDEP's attorneys successfully argued otherwise and the amendment failed for the lack of a motion to approve it by the ERC.

LEAF offered a second amendment to Chapter 62-777 that would have eliminated FDEP's use of a 33% bioavailability adjustment factor in the calculation of the Soil Cleanup Target Levels (SCTLs) for arsenic. This bioavailability adjustment factor is the outcome of an FDEP-funded study at the University of Florida the results of which have been discussed extensively and debated over the past several of years by Florida's Contaminated Soils Forum. The use of the bioavailability adjustment factor raises the default SCTLs for arsenic from 0.8 mg/kg to 2.1 mg/kg (residential) and from 3.7 mg/kg to 12.0 mg/kg (commercial/industrial). LEAF argued that these adjustments were not sufficiently supported by the current research. This amendment also failed.

The Florida Petroleum Marketers and Convenience Store Association (FPMA) offered an amendment to Chapter 62-770 that would have modified the Petroleum Rule so that it was consistent with Chapter 62-780 with regard to "de minimis discharges." Chapter 62-780 allows a responsible party to remediate contaminant releases without requiring the submittal of a formal report to the Department. FPMA argued that a similar option should be available under the Chapter 62-770. FDEP argued that the Petroleum rule already specified a minimal discharge volume below which no reporting is required and that it needed to maintain tighter controls on the cleanup process because the State is funding many of the petroleum cleanups. This amendment failed.

FPMA offered two additional amendments to Chapter 62-770 that would have changed when and to whom notification of a temporary point of compliance beyond the source property boundary must be provided. FPMA argued that the rule language was an invalid exercise of delegated legislative authority be-

cause FDEP had gone beyond the specific provisions of the referenced statutes. Both of these amendments failed.

Following the ERC adoption hearing, FPMA filed a formal challenge to Chapter 62-770 claiming an invalid exercise of delegated legislative authority with regard to the notice requirements associated with establishing a temporary point of compliance beyond the source property boundary. As a result of this challenge, the Petroleum rule will follow a different timeline for adoption than the other rules.

FDEP plans to publish the amended rules to the Bureau of Waste Cleanup's website (<http://www.dep.state.fl.us/waste/categories/wc/default.htm>). The Notice of Change was published on March 4<sup>th</sup>. A 21-day period follows the publication during which legal challenges to the proposed rules may be filed. If there are no challenges, FDEP has indicated that the rules should become effective in mid-April.

After that, things will get interesting. It is my personal opinion that the complexity and highly prescriptive nature of the RBCA process detailed in Global RBCA and other "program" rules will prove challenging to implement at many sites. If strictly enforced, several of the more technical rule elements such as cleanup target level apportionment, the 3X "not to exceed" criterion, and highly prescriptive sampling requirements will create technical and financial obstacles to appropriate risk-based evaluations.

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# On Appeal

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

*Note: Status of cases is as of March 7, 2005. Readers are encouraged to advise the authors of pending appeals that should be included.*

## FLORIDA SUPREME COURT

*Quietwater Entertainment, Inc. et al. v. Escambia County*, Case No. SC05-215. Petition to review a First DCA decision affirming a circuit court order granting summary judgment in favor of Escambia County. The County created the Municipal Services Benefit Unit, which includes all real property on Santa Rosa Island that is owned by the County, and then levied special assessments for law enforcement and mosquito control on properties within that MSBU, including property leased by the Petitioners. The Petitioners sought a declaratory judgment that the MSBU (and the accompanying assessments) was invalid because it did not confer any direct, special benefit to the real property it burdens. The Petitioners assert conflict jurisdiction, claiming the First DCA's affirmance conflicts with three decisions of the Florida Supreme Court and one by the Fifth DCA on the same question of law. 890 So. 2d 525 (Fla. 1<sup>st</sup> DCA 2005). Status: The Petitioners filed their jurisdictional brief on February 11; the County's amended brief is due March 24.

*Bay Point Club, Inc. v. Bay County, et al.*, Case No. SC05-260. Petition to review a First DCA opinion affirming 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 with the Bay County Comprehensive Plan. 890 So. 2d 256 (Fla. 1<sup>st</sup> DCA 2004). Status: Petition filed February 10; jurisdictional briefs have been filed.

*Daniels v. Department of Health*, Case No. SC04-230. Petition to review a *per curiam* affirmance of the Third DCA 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, 2004.

*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: Review denied February 8.

*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 First DCA 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. 1<sup>st</sup> 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, 2004.

*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. 1<sup>st</sup> DCA 2002), *reh'g denied* (2002). Status: The Court affirmed on October 7, 2004. 29 Fla. Law Weekly S551, *reh'g denied* (Feb. 5, 2005).

## FIRST DCA

*Asher G. Sullivan Jr. St. Augustine Trust dated May 16, 1996 v. DEP*, Case No. 1D04-0475. Appeal of a final order of the DEP denying the Trust eligibility to participate in the Florida Petroleum Liability and Restoration Insurance Program (FPLRIP) on the ground that the Trust was not properly enrolled in FPLRIP because although coverage was in effect when the discharge took place, the insurance policy had expired by the time the discharge was reported, and the Trust did not renew its policy. Status: The court reversed and remanded on December 29, 2004. 890 So. 2d 417.

*Mosley v. DEP*, Case No. 1D04-1614. Appeal of a DEP final order dismissing Mosley's petition for administrative hearing as being untimely filed when it was 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: The court affirmed *per curiam* December 28, 2004. 889 So. 2d 76.

*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 adoption, review, and approval of

manatee protection plans; the criteria that FWCC will use to designate “substantial risk counties for manatee mortality”; 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, 2004; 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: Oral argument has been scheduled for May 24.

*Butler Chain Concerned Citizens, Inc. v. DEP*, Case No. 1D04-3941. Appeal of a DEP final order holding that the 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: DEP’s motion to dismiss was denied January 7; fully briefed; oral argument has been requested.

*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: The court affirmed *per curiam* on December 27, 2004. 889 So. 2d 75.

*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 non-compliance 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: The court affirmed *per curiam* on February 22, 2005 WL 405485.

*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. 2<sup>nd</sup> Cir. Mar. 5, 2004). Status: The court affirmed *per curiam* on March 2.

## 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: The court affirmed *per curiam* on February 18.

*Behrens v. Southwest Florida Water Management District*, Case No. 2D04-1250. Appeal of a DOAH final

order assessing attorney’s fees against Behrens pursuant to section 120.569(2)(3), F.S., for his petition challenging issuance of a water use general permit to Has-Ben Groves in Hardee County, where Behrens had not inquired of the water management district prior to filing his petition nor reviewed the file concerning the permit, and there was no reasonable factual basis to believe that withdrawals of 31,100 gallons per day at groves would adversely affect Behrens own well, located approximately 16 miles away. DOAH found that Behrens did not make a reasonable inquiry regarding the facts and applicable law before filing his petition and therefore did not have a “reasonably clear legal justification” to proceed. Status: Oral argument was held February 22.

*River Place Condominium Association at Ellenton, Inc. v. Benzings*, Case No. 2D04-1489. Appeal of an order from circuit court granting final summary judgment in a quiet title action in favor of the Benzings, holding that they are the proper owners of lands formerly submerged beneath the Manatee River and subsequently exposed by dredge and fill activities. River Place argued that it was the proper owner pursuant to section 253.12(9) because it is the record owner of the immediately adjacent upland property, while the Benzings argued they are the proper owners because they are the record owners of the filled lands. Status: The court affirmed on December 22, 2004. 890 So. 2d 386.

## 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’

*continued...*

## ON APPEAL

from page 5

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 contested the denial of attorney’s fees. Status: On January 14, the court reversed the finding of liability and remanded for the imposition of attorney’s fees and costs against DEP. DEP’s motion for rehearing was denied on March 2. 30 Fla. L. Weekly D215.

*Cole v. City of Deltona*, Case No. 5D03-3289. Appeal of a non-final circuit court order denying Cole’s motion for an emergency temporary injunction in a suit Cole filed challenging the procedural due process the City used in approving the site plan of a Dollar General Store proposed to be constructed near the entrance of Cole’s residential neighborhood. Cole argues on appeal that the trial court erred in applying a “special damages” standard in determining whether Cole adequately alleged and demonstrated the “likelihood of irreparable harm” required for a party to be entitled to a preliminary injunction. Status: The court reversed and remanded on December 30, 2004. 890 So. 2d 480.

*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: Fully briefed; oral argument has been requested.

## U.S. SUPREME COURT

*DLX, Inc. v. Commonwealth of Kentucky*, Case No. 04-1018. Petition to review a 6<sup>th</sup> Circuit decision affirming a district court decision, based on the principle of sovereign immunity, barring DLX from bringing suit alleging a regulatory taking against Kentucky in federal court. 381 F.3d 1511 (6<sup>th</sup> Cir. 2004). Status: Petition filed January 25.

*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: Oral argument was held February 22.

*Appollo Fuels v. U.S.*, Case No. 04-907. 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) *reh’g and reh’g en banc denied*, (Fed. Cir. Oct. 7, 2004). Status: Petition denied February 28.

*Alabama v. North Carolina*, Case No. 132, 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.

## SECOND 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: On February 28, the court upheld portions of the rule and vacated and remanded others to EPA for reconsideration, holding that certain aspects of the rule violate the CWA or are otherwise arbitrary and capricious under the federal Administrative Procedures Act. 35 ER 20049.

## 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, 2004 WL 1576726 (S.D.W.Va. July 8, 2004), *modified in part*, 2004 WL 2384841 (Aug. 13, 2004), *reconsideration denied* (Aug. 31, 2004). Status: Notice of appeal filed September 13, 2004.

## SIXTH CIRCUIT

*Ellis et al. v. Gallatin Steel Company et al.*, Case No. 02-6421. Appeal of a district court decision dismissing a citizen’s suit brought under the Clean Air Act against Gallatin Steel based on the fact that the company had entered into a consent decree with EPA to resolve the alleged air violations that was lodged with the

court on the eve of an injunction hearing on the matter. The decision appears to conflict with appellate decisions in the 2<sup>nd</sup>, 8<sup>th</sup>, and 7<sup>th</sup> Circuits. Status: The court affirmed on October 26, 2004. 390 F.3d 461.

*American Canoe Association, et al. v. City of Louisa Water & Sewer Commission, et al.*, Case No. 02-6018. Appeal of a district court dismissal of a citizen's suit brought under the Clean Water Act alleging the water commission and its wastewater treatment plant failed to file monitoring reports required under the plant's NPDES permit. The lower court dismissed the suit on the grounds that the American Canoe Association and Sierra Club lacked standing. Status: In a precedential decision, the court held on November 1 that the environmental groups had standing to sue under the Clean Water Act, both on their own behalf and on behalf of their members, because the failure to file the reports amounted to an "informational injury" to the plaintiffs. 389 F.3d 536.

#### TENTH CIRCUIT

*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: The court dismissed the appeal on February 8, holding that the agreement between Utah and the Department was not a final appealable judgment. 396 F.3d 1281.

#### ELEVENTH CIRCUIT

*Legal Env'tl Assistance Founda-*

*tion, Inc. v. EPA*, Case No. 03-16439. Petitions seeking review of EPA's decisions not to take any enforcement action against Florida's Title V Clean Air Act permit program and Alabama's Title V Clean Air Act permit program (consolidating two separate petitions) for alleged program deficiencies or to otherwise declare the Title V programs to be inconsistent with the Clean Air Act. Status: On February 23, the court denied the petitions, holding that the environmental groups lack standing to challenge EPA's determinations because they have failed to demonstrate an injury in fact; judicial review of any particular Title V permit decision remains available. 2005 WL 419086.

#### 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, 2004, the Court vacated the rule. 374 F.3d 1363, *opinion modified on denial of reh'g*, 393 F.3d 1315 (D.C.Cir. Jan. 7, 2005).

*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, 2004.

*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 has convened proceedings to reconsider the rule and is required to file status reports. The latest status report was filed February 22.

*New York v. EPA*, Case No. 02-1387. Challenge to EPA rule amendments granting additional exemptions from NSR/PSD requirements. Status: Oral argument was held 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: The matter has been held in abeyance pending EPA proceedings; EPA is required to file status reports. EPA's latest state report was filed January 6; the next report is due March 7.

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# Florida Caselaw Update

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

**A party is eligible for participation in the Florida Petroleum Liability and Restoration Insurance Program (FPLRIP) where the party demonstrated financial responsibility on the date of the discharge and received a notice of eligibility to participate in FPLRIP. *Sullivan v. Florida Dep't of Env'tl Protection*, 890 So. 2d 417 (Fla. 1st DCA 2004).**

Property owners purchased petroleum liability insurance from a private insurer for the period of September 3, 1997 to September 3, 1998. The insurance policy demonstrated financial responsibility in accordance with Section 376.3072(2)(b)(2), F.S., and thus established eligibility for the FPLRIP. A petroleum discharge was discovered on September 17, 1998 – two weeks after expiration of the insurance policy – and promptly reported to DEP.

DEP, in its Final Order, held that the property owners had not demonstrated “financial responsibility,” because the property was not insured on the date the discharge was discovered. It was undisputed that the discharge occurred while the policy was in effect. The First DCA reversed DEP’s Final Order, because DEP effectively ignored the language of the insurance policy which included the language required by 40 C.F.R. § 280.97(b)(2)(2)(e) which stated “[t]he insurance covers claims otherwise covered by the policy that are reported to the ‘Insurer’ within six months of the effective date of cancellation or non-renewal of the policy.”

Thus, the Court found the petroleum discharge discovered two weeks after the non-renewal of the policy was covered by the private insurance policy, and the property owner was “financially responsible” on the date of discharge such that it was eligible for participation in the FPLRIP.

**Under Section 253.12(9), F.S., title holders, not the upland property owners, are the proper owners of**

**lands filled before July 1, 1975. *River Place Condominium Assoc. at Ellenton, Inc. v. Benzings*, 890 So. 2d 386 (Fla. 2d DCA 2004).**

Section 253.12(9), F.S., adopted on July 1, 1993, divested the state of sovereign submerged lands that were filled before July 1, 1975, to which the State previously held title. Ownership was divested to “the landowner having record or other title to all or a portion thereof or to the lands immediately upland thereof.”

River Place, owners of a parcel of upland property, asserted ownership to adjacent filled lands under Section 253.12(9), F.S. However, prior to the enactment of Section 253.12(9), F.S., on July 1, 1993, a developer had recorded a quit claim deed to the filled lands, which was subsequently transferred to the Benzings. The Second DCA found that title to the filled lands vested in the developer upon the enactment of section 253.12(9), F.S., on July 1, 1993 and thus the Benzings were the record title holders of the filled lands. Because Section 253.12(9), F.S., was enacted to remove clouds on the title to lands filled before July 1, 1975, deedholders asserting ownership of filled lands under Section 253.12(9) have a superior claim over adjacent upland property owners’ claims.

River Place argued, alternatively, that Section 253.12(9), F.S., is unconstitutional because the sale of sovereign lands is only authorized by the Florida Constitution (Article X, Section 11) when the sale is “in the public interest.” River Place claimed that since the State did not receive compensation, the sale was not “in the public interest.” The court found the lands were of “marginal value” and would be more valuable if included on the tax roll. Thus, the court construed the statute to allow the sale without immediate compensation and thus declared Section 253.12(9), F.S., valid and constitutional.

**The City’s denial of a petition to redesignate a parcel from pres-**

**ervation to residential was not “fairly debatable.” *Island, Inc. v. City of Bradenton Beach*, 884 So. 2d 107 (Fla. 2d DCA 2004).**

Property owners appealed a decision by the City Commission denying their petition to change the Future Land Use Map designation of their property from preservation to medium/high residential in order to permit construction of a duplex. The Second DCA found that the City Commission’s denial of the property owners’ petition was not fairly debatable because the City failed to properly rebut the expert testimony that the subject property did not meet the definition of preservation.

Property owners presented expert testimony, including the City’s land planner, that the subject property did not meet the definition of preservation, the county taxed the property as R-3 residential property, and the mayor’s son had a license to operate a sailboat rental business on the property, which is not allowed on parcels designated preservation. The only evidence offered by the City to support denial of the petition was that of neighboring property owners and former members of the City Commission or advisory council that the City intended for the property to be designated preservation and maintained as open space. Thus, based on the City’s failure to rebut this expert testimony, the City’s denial of the petition was not fairly debatable.

**Standing requirements to appeal under Section 120.68(1), F.S., are narrower than the standing requirements for an administrative hearing under Chapter 163, F.S. *Melzer v. Florida Dep’t of Community Affairs*, 881 So. 2d 623 (Fla. 4<sup>th</sup> DCA 2004).**

Appellants attempted to challenge amendments to Martin County’s comprehensive plan allowing the County to have more flexibility in locating schools and other public facilities near wetlands and other natural

resources. The Appellants, who were residents of Martin County, qualified for standing under Chapter 163, F.S., because the definition of affected person includes “persons owning property, residing, or owning or operating a business within the boundaries of the local government whose plan is the subject of the review.” However, standing to appeal the administrative order is governed by Section 120.68, F.S., which requires a party to be “adversely affected by the final agency action.” Because Appellants failed to establish they were “adversely affected by the final agency action,” they lacked standing to appeal.

**A City may not lease excess capacity in fiber optic cables used in operation and maintenance of electric transmissions lines because that use exceeded the scope of the easement. *City of Orlando v. MSD-Mattie, L.L.C.*, 30 Fla. L. Weekly 341 (Fla. 5th DCA 2005).**

The City, owner of easements for electric transmission lines, replaced old copper cored “shield” wires with fiber optic wires. While the City used a small portion of the fiber optic wires for communications related to the electric transmission lines, the City wanted to lease the additional capacity of the fiber optic wires to telecommunication companies. The property owners objected arguing that such a use would exceed the scope of the easement.

The Court found the terms of the easement were unambiguous and specified that the wires could be used for internal communication for the “establishment, use, operation, and maintenance of one or more overhead electric transmission lines.” While the parties agreed that the fiber optic cable installation was within the scope of the easement to the extent it was used solely by the City for the electric transmission line operation, the Court found the lease of the additional capacity would exceed the scope of the easement.

The City argued unsuccessfully that because the leasing of the fiber optic cable’s additional capacity would not further burden the servient estate, such use was not prevented by the easement. The Court rejected this argument finding “the

scope of an easement is defined by what is granted, not by what is excluded, and all rights not granted are retained . . . .” Therefore, the right to convey the use of the easement for telecommunications purposes was retained by the grantor of the easement.

**DEP failed to prove by competent and substantial evidence that Appellant was responsible for the discharge of oil on the subject property. *Kerper v. Dep’t of Environmental Protection*, 30 Fla. L. Weekly 215 (Fla. 5th DCA 2005).**

Kerper was leasing a parcel of property which he used to sell salvaged auto parts. Kerper intended on purchasing the property until he discovered environmental problems on the property. After filing a complaint against the property owner with the County for the environmental problems, Kerper vacated the property upon the filing of an eviction proceeding.

Shortly thereafter, DEP investigators visited the site, wherein the property owner stated that Kerper was responsible for a 55 gallon drum that was tipped over and leaking a substance which “appeared” to be oil. The hearsay testimony of the now deceased property owner was the only evidence DEP presented to prove Kerper was responsible for the discharges. The Fifth DCA reversed the DEP’s Final Order finding that this hearsay testimony was not competent, substantial evidence. In addition, DEP failed to prove the substance was oil. The court found that “DEP’s current policy of requiring a person cited to conduct [analytical] testing to prove his innocence improperly shifts the burden of proof required by law.” Thus, the DEP failed to prove by competent and substantial evidence that Kerper was responsible for the discharge of oil on the property.

The court also found DEP’s document entitled “Corrective Actions for Contaminated Site Cases” (CACSC) was an unpromulgated rule. Section 376.30701, F.S., required DEP to establish rules for contaminated site rehabilitation by July 1, 2004. The DEP failed to promulgate rules for this purpose, but instead published the CACSC. The CACSC “requires

compliance,” uses mandatory terms such as “shall,” and is a “statement of general applicability” which therefore requires promulgation as a rule. Thus, the CACSC, which sets procedures for a violator to initiate site sampling, propose remedial actions, and file plans and reports cannot be enforced because it was an unpromulgated rule.

**An easement for ingress and egress is implied by a grant of oil and mineral rights. *Noblin v. Harbor Hills Development*, 30 Fla. L. Weekly 237 (Fla. 5th DCA 2005).**

Noblin was successor to a party who was granted “one-half of the mineral and oil rights, including the right to exploit the same.” The court found the “right to exploit” conveyed an easement for ingress and egress, allowing Noblin to enter the property “to search for and extract one-half of the oil and minerals.” The general rule is that for a grant of oil and mineral rights, the parties intend to create two estates, the mineral estate and the surface estate. “[T]he owner of the mineral estate has the right of ingress and egress to explore for, locate and remove the minerals, but he cannot so abuse the surface estate so as unreasonably to injure or destroy its value.” Therefore, generally the grant of oil and mineral rights implies the right of ingress and egress to explore for and remove the oil and minerals.

However, the Court found that material issues of law and fact existed as to whether this easement of ingress and egress is extinguished by the Marketable Record Title Act (MRTA). The deed creating the easement for ingress and egress predates the root of title. However, Noblin claims that Section 712.03(5), F.S., the “use” exception to the MRTA, prevents this easement from being extinguished, because minerals had been previously extracted. Although the easement of ingress and egress had probably been used, the materials that had been extracted were clay, sand, topsoil and limestone and did not constitute minerals. Since there are remaining issues of law and fact on the issue of the application of the MRTA, the Court remanded for further proceedings.

**Property owner’s complaint**

*continued...*

**bringing challenging the constitutionality of code enforcement statutes and alleging a claim under 42 U.S.C. Section 1983 stated a cause of action. *Wilson v. County of Orange*, 881 So.2d 625 (Fla. 5<sup>th</sup> DCA 2004).**

County code inspectors filed code enforcement violations against the Wilsons after several warrantless searches of the Wilson's trailer park. After a hearing, the Code Enforcement Board (CEB) found violations of the Code. The Wilsons were given 30 days to correct the violations. Despite the Wilsons' claim that the violations were timely corrected, a code inspector filed an affidavit of non-compliance. Without any further hearings the CEB entered three orders imposing a \$300/day fine until the properties were brought into compliance. The CEB order was recorded as a lien against the Wilsons' real and personal property.

Approximately 19 months later, an

inspector filed an affidavit of compliance for the properties. As a result, the County imposed fines totaling \$117,100. Another 16 months later, the CEB entered an order reducing the fine amount by 80 percent to \$23,420, which the Wilsons paid.

The Wilsons brought an action under 42 U.S.C. section 1983 alleging that the County, under color of state law, violated their Fifth Amendment rights to procedural due process by imposing fines on the property with notice and a hearing. The Wilsons also alleged that their substantive due process rights were violated because the County imposed liens on their property based solely on a one-sided affidavit of non-compliance. In addition, the Wilsons alleged – in the section 1983 count – that the excessive fines imposed by the County violated their Eight Amendment rights.

The Wilsons also challenged the constitutionality of sections 162.09(1) and 162.07, F.S. (along with parallel provisions of the County Code) alleging that the sections were facially unconstitutional for authorizing the imposition of: 1) fines and liens

against property without providing for notice and an opportunity to be heard; 2) fines and liens based solely upon the affidavit of a code inspector; and 3) excessive fines. In addition, the complaint challenged the facial constitutionality of County Code Section 28-41 that authorized warrantless searches of property. After reviewing the allegations in the complaint, the Fifth DCA held the complaint stated a cause of action with respect to each count.

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## FSU's Law Students Make Their Mark

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

The contributions and achievements of FSU's law students have played an integral role in the College of Law's expanded, nationally recognized environmental and land use program.

The law school's environmental and land use journal, the *Journal of Land Use and Environmental Law*, staffed entirely by students, is rated in the top 15 nationally among journals in environmental law, based on both citation by courts and "impact factor," according to Washington & Lee University's 2004 law journal ranking web site.

The Environmental Moot Court has made it to the finals and semi-finals in its last two trips to the national Environmental Moot Court competition, held at Pace Law School in New York.

The student-run Environmental Law Society has become an active

force on campus and beyond. It holds regular brown-bag lunches that bring leading practitioners to the law school to meet with students over lunch; hosted a Green Tailgate event in November during FSU's homecoming game, collecting pledges from citizens to commit to recycling over the next year; participated in the American Water Resources Association national meeting in Orlando; and will host a dinner this semester allowing local attorneys to meet with students interested in practicing environmental and land use law.

We also place a premium on helping our students gain practical experience in the practice of law during their time at the law school. Through the College of Law's innovative externship program, students work with the states major environmental agencies, such as the DEP and DCA.

In addition, students serve as externs with environmental groups, such as Earthjustice and Wildlaw, as a way to help meet the legal needs of Florida residents who otherwise might not be able to obtain legal assistance. Many of our students also, of course, work with private firms.

In short, our students, through their activities and accomplishments, have earned a stellar reputation among their peers and in the larger legal community. We have created a Mentoring Directory to facilitate our students' talking with practitioners about the practice of environmental and land use law. As part of our effort to strengthen ties with the Section, we would be delighted to include additional volunteers in this important program. Please contact David Markell at [dmarkell@law.fsu.edu](mailto:dmarkell@law.fsu.edu) if you're interested in serving as a Mentor.

# Department of Community Affairs' Update

by Shaw Stiller, Assistant General Counsel

*Collier County v. City of Naples & Department of Community Affairs*, Final Order No. DCA04-GM-240 (DOAH Case No. 04-1048GM)

For over a decade, Collier County has been studying and planning transportation improvements to address traffic demands at the intersection of Golden Gate Parkway and Airport-Pulling Road. Three of the quadrants of this intersection lie within the unincorporated County; the fourth is within the City of Naples. The County ultimately accepted a recommendation that the construction of a vehicle overpass at the intersection would be the most effective method of addressing the transportation demands, and began to move forward with planning and construction of the overpass.

In 2003, the City of Naples adopted an amendment to its comprehensive plan that would restrict, but not prohibit, the construction of flyovers or overpasses in the City in favor of other planning solutions that address transportation demands. The Department published a notice of intent to find the amendment "in compliance." Collier County filed a petition challenging the Department's notice, and alleging that the amendment was not in compliance because it was not supported by data and analysis, was internally inconsistent with the City's plan, and was not coordinated with the County's plan. The basis for all of the County's contentions was the allegation that the amendment was passed to serve the sole purpose of preventing construction of the overpass at Golden Gate Parkway and Airport-Pulling Road.

Administrative Law Judge Donald Alexander conducted a two-day hearing and entered a recommended order in favor of the Department and City. Judge Alexander rejected the County's bedrock contention regarding the amendment, and found that the amendment did not prohibit the construction of any particular overpass but applied generally and only restricted such construction to in-

stances where alternative planning approaches, such as at-grade improvements, were not sufficient. Based upon this finding, the Judge concluded that the County had failed to prove that the amendment "will produce substantial impacts on the increased need for publicly funded infrastructure" and, therefore, lacked standing. *See*, § 163.3184(1)(a), Fla. Stat. The Judge continued on the merits and rejected the County's compliance arguments.

The Department adopted the Recommended Order *en toto* as the agency's Final Order. The County timely appealed to the Second District Court of Appeal. The underlying administrative case remains pending, yet in abeyance, as the Administrative Law Judge retained jurisdiction to consider the City's request for attorneys' fees.

*Alachua Leadership Alliance – Citizens Helping Us All, Inc. et al. v. Department of Community Affairs*, DOAH Final Order No. 04-2872RU

Every seven years, local governments are required to prepare an "Evaluation and Appraisal Report" (EAR) assessing the progress of their planning efforts and changes in state law. The governments are then required to update their comprehensive plans in accordance with the EAR. If a local government fails to adopt these update amendments within the prescribed time, the Department may petition the Administration Commission to impose sanctions on the local government for this failure. *See*, § 163.3191(11), Fla. Stat.

In a Petition filed August 16, 2004, three individuals and one organization contended that the Department had an unadopted rule that it would never file for sanctions against a local government under this provision. Petitioners' specific contention was that the agency had failed to seek sanctions against the City of Alachua on the basis of this alleged unadopted rule.

Administrative Law Judge William Quattlebaum conducted a one-day hearing on October 21, 2004, and thereafter entered a Final Order rejecting Petitioners' claims. Judge Quattlebaum first concluded that none of the Petitioners had demonstrated standing to challenge the alleged non-rule policy. The Judge continued that there were no Department statements of "general applicability" that constituted an unadopted rule. The Judge finally concluded that even if Petitioners had demonstrated that the agency had some unadopted rule, there was no violation of Chapter 120 since rulemaking by the Department was not feasible and practicable.

Appeal of the Final Order was not taken, and the time for doing so has expired.

*Alachua Leadership Alliance – Citizens Helping Us All, Inc. et al. v. City of Alachua and Department of Community Affairs*, Final Order No. DCA04-GM-022

The Department reviewed the City of Alachua's adopted amendments that implemented its Evaluation and Appraisal Report, found them consistent with state law, and published a Notice of Intent to find them "in compliance." A Petition contending that the Department's determination that the Department's determination was in error was faxed to the agency on December 1, 2004. The facsimile transmission was not complete until after 5:00 p.m. and thus, the Petition was not deemed filed with the Department until the next day, December 2, 2005. *See* Rule 28-106.104(9), FAC. As December 2<sup>nd</sup> was twenty-two days after publication of the agency's Notice, and any petitions must be filed within twenty-one days of publication, the Department dismissed the Petition with prejudice as untimely. *See*, §§ 120.569(2)(c) & 163.3184(9), Fla. Stat. The Department denied a subsequent motion for reconsideration. Appeal was not taken, and the time for doing so has expired.

# DEP Update

by Angela C. Dempsey

**Everglades Phosphorus Rule** - On January 13, 2005, DEP submitted the Everglades Phosphorus Criterion rule, 62-302.540, F.A.C. to EPA for review under the Clean Water Act. On January 24, EPA issued its formal determination on the rule, approving the rule in all respects except for the compliance/achievement methodology for the Loxahatchee Refuge. EPA did not approve this part of the rule, which adopts the 14-station methodology set forth in Appendix B of the Federal Settlement Agreement, because EPA did not consider this monitoring network to be sufficiently representative of the entire water body. EPA did approve the four-part test for use throughout the Everglades Protection Area, and also approved the Federal Settlement Agreement methodology from Appendix A for use in Everglades National Park. On February 11 and 18, DEP posted a notice of rule development and public workshop for Rule 62-302.540, F.A.C., on DEP's official notices website. The rule amendments are limited to extending use of the 4-part test to the Refuge in re-

sponse to EPA's comments. The original rule became effective on July 15, 2004, after the Department successfully defended an administrative rule challenge. The petitioners have appealed the ALJ's final order approving the rule as a valid exercise of the Department's delegated legislative authority. Appellants' brief was received by the 1st DCA on January 12, 2005 and Appellees' answer briefs are due March 7, 2005. Oral argument has not yet been set.

**Global RBCA** - On February 2, 2005, the Environmental Regulation Commission approved the proposed rules to implement "Global" Risk-Based Corrective Action legislation, Rule 62-780, F.A.C., along with related clean-up rules, 62-770, 62-777, 62-782, and 62-785, F.A.C. On February 14, the Florida Petroleum Marketers and Convenience Store Association (FPMA) filed a petition with DOAH (Case No. 05-0529RP) challenging two subsections of proposed Rule 62-770, F.A.C. FPMA challenges the proposed requirement that a person seeking a temporary point of compliance beyond the property's boundary provide notice to any residents or business tenants of the property into which the temporary point of compliance is extended. It argues that the statutory language limits the notice requirement to local governments and the property owner of any such property. FPMA also challenges the requirement that notice be given every 5 years if the cleanup has not been completed, arguing that the statute limits notice to the time at which the temporary point of compliance is established.

**Dillard & Associates Consulting v. DEP** - On February 22, 2005, the First DCA affirmed DEP's final order dismissing Dillard's petition for formal administrative hearing for lack of standing to challenge a consent order between DEP and the Florida Department of Transportation (DOT). In 2001, Dillard entered into a contract with DOT to operate and manage five wastewater treatment

facilities, including all permitting, reporting and site inspections with DEP. The agreement also requires Dillard to pay regulatory penalties and sanctions incurred as a result of Dillard's operations at the facilities. However, in this case DOT paid the amount owed to DEP pursuant to the consent order. Dillard argued that it had standing because its agreement with DOT exposes Dillard to possible claims for reimbursement, without an opportunity to dispute their propriety and amount. The First DCA found that Dillard was not a party whose substantial interests were being determined, pursuant to Section 120.569, F.S., citing *Sickon v. Sch. Bd. of Alachua County, Fla.*, 719 So.2d 360, 363 n.3 (Fla. 1<sup>st</sup> DCA 1998) and *Agrico Chem. Co. v. Department of Env'tl Reg.*, 406 So.2d 478 (Fla. 2d DCA 1981). Instead, Dillard is affected by the terms of its contract with DOT and should challenge that contract in circuit court.

**Coronet Industries** - DEP and EPA conducted a joint investigation of the Coronet facility that revealed alleged violations in various program areas, including industrial wastewater, drinking water and hazardous waste. Subsequent sampling confirmed contamination in the soil and groundwater at this phosphate processing plant in Plant City. On May 11, 2004, DEP issued an Emergency Order, under which Coronet has been stabilizing and assessing the wastewater contamination at the Facility. That Order was amended in October 2004, to take into account the very active 2004 hurricane season. EPA and DEP are continuing to negotiate a compliance schedule with Coronet to address federal and state compliance and remedial actions at the Facility. In a related private lawsuit, lawyers for residents suing Coronet obtained an injunction on January 27, 2005 halting all work at the Coronet site. However, this injunction was dissolved on February 16, 2005, so Coronet may now continue its assessment and remedial work.

## Ethics Questions?



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# Water Management District Update



**SWFWMD**

by **Karen A. Lloyd**  
Senior Attorney

## **Water Shortage Rules, 40D-21, F.A.C., to be Revised**

The District is developing a substantial revision to its Water Shortage Plan contained in Rule 40D-21, F.A.C. The District is required by Chapter 373, Florida Statutes, to have a Water Shortage Plan. In 1984 the District adopted Chapter 40D-21, Water Shortage Plan, F.A.C., in accordance with this requirement. Since that time, the District has extensively used this Plan. The District is now updating the Plan and variances to the Plan to reflect the experience and knowledge gained through the droughts and other water shortage events that have occurred since 1984.

The draft plan provides for hydrologic water shortage indicators for surface and ground water; four water shortage phases consistent with the proposed amendments to section 62-40.411, F.A.C., of the Water Resources Implementation Rule; re-

sponse mechanisms – which are not in all cases use restrictions – for each phase for each type of water use; and provides flexibility to declare shortages based on a particular water body or water supply source or geographic area.

Rule development workshops were held in February and March 2005 on the current draft. Additional workshops are anticipated to be held after discussions with the Governing Board at its April 2005 meeting.

A copy of the draft of proposed amendments and supplemental material are available from the District's website [www.watermatters.org](http://www.watermatters.org).

## **Southern Water Use Caution Area Draft Rules for Minimum Flows and Levels and Recovery Strategy**

A central provision of the current draft rules is a cumulative impact analysis which will be applied to applications for the withdrawal of new quantities of water within the Southern Water Use Caution Area ("SWUCA") that are projected to impact the salt water intrusion aquifer level. A model is under development

that will simulate the change in the potentiometric surface of the upper Floridan aquifer within the Most Impacted Area resulting from each permit action since 2000 where there are reductions in ground water withdrawn and projects add quantities to the upper Floridan aquifer as well as permitted new quantities of water and growth into existing permits. To determine the potential impact of a withdrawal of new quantities on the salt water intrusion minimum aquifer level, the evaluation will also include the annual upper Floridan aquifer recovery required to achieve the salt water intrusion minimum aquifer level. The amount of annual upper Floridan aquifer improvement needed to achieve the proposed salt water intrusion minimum aquifer level is also under development.

Staff will present preliminary modeling results to the Governing Board in April. Once those results are reviewed, any changes necessary to the draft rules will be made and rule workshops will be scheduled. The current draft rules are on the District's website at [www.swfwmd.state.fl.us/waterman/swuca/SWUCA.htm](http://www.swfwmd.state.fl.us/waterman/swuca/SWUCA.htm).



***Mark your calendar!***

**2005**

## **Environmental and Land Use Law Section Annual Update**

August 25-27, 2005  
Amelia Island Plantation

Seminar registration information will be available  
in June at [www.eluls.org](http://www.eluls.org).

# UF Student Writing Recognized Nationally; Successful Spring Conferences Held

by Alyson Flournoy  
UF Student Writing in Spotlight

One University of Florida student's writing has attracted national and international attention recently, and a UF seminar has been selected as one of three in the nation to compete in the ABA Environment, Energy, & Resources Section's first-ever Law Student Writing Competition.

Third year student Erika Zimmerman's paper, which she wrote in Professor Joan Flocks' Environmental Justice Seminar, recently won the NYU Environmental Law Journal's Environmental Essay Contest. In addition to a \$1000 prize, her essay will be published in an upcoming issue of the Journal.

Earlier this year, Ms. Zimmerman participated in the Conservation Clinic, directed by Professor Tom Ankersen. As part of her clinic assignment, she drafted a petition to UNESCO to designate the Belize Barrier Reef – already a World Heritage Site – as a threatened World Heritage Site under the World Heritage Convention, based on impacts from climate change. Professor Ankersen reports that there is no set format for a petition to designate a World Heritage Site as threatened, so Ms. Zimmerman

developed a template. Two other groups submitting petitions at the same time, based in part on the impacts of climate change to Mt. Everest and a World Heritage site in Peru, adopted her template in drafting their petitions. The petitions were submitted to UNESCO in Paris and are currently pending. The filings were noted by The New York Times and the BBC.

This semester's seminar on Animal Rights and the Law, taught by Adjunct Professor David Hoch, received recognition recently and a unique opportunity from the ABA Section on Environment, Energy & Resources. The ABA Section selected the seminar, along with seminars at the University of Virginia and the University of Memphis, as one of three in the country to participate in the Section's first ever Law School Writing Competition. The ABA Section's Law School Programs Committee will consider the top five papers from each of the three seminars. The papers selected by the Committee will be published on the ABA Section's website. The announcement of UF's selection and the details of the competition are available at: <http://www.abanet.org/environ/committees/lawstudents/home.html>.

## Successful Spring Conferences, Speaker Series

Over 250 people took part in the 11<sup>th</sup> Annual Public Interest Environmental Conference Feb. 24-26. The participants included more than 175 attendees, 80 panelists and speakers, and some 30 law students who organized the conference. This successful collaboration between the UF Environmental and Land Use Law Society and the Florida Bar ELULS, provided continuing legal education in a unique format – offering attendees four separate concurrent education tracks that build on kick-off plenaries. The panels were developed by the students, who worked closely with members of the Section's Public Interest Committee to identify timely topics of broad appeal and knowl-

edgeable panelists.

This year's program included extremely popular panels on mercury in fish, a legislative session preview featuring Past ELULS Section Chair Larry Sellers and Rep. Thad Altman (R-Melbourne), conversion of rural agricultural land, inter-agency conflicts in permitting, springs protection, citrus canker, water quality trading, and post-hurricane redevelopment, among others. The grand finale plenary panel focused on the state of our seas, highlighting the ecological and economic consequences of over-fishing.

Keynote speaker Margie Eugene Richard, a former teacher from Norco, La. and winner of the 2003 Goldman Environmental Prize, was a highlight of the conference, with her inspiring tale and dedication to the hard work of getting the facts necessary to protect her community's health.

A second UF Conference this spring, the Richard E. Nelson Symposium entitled "The Signs of Our Times" – focused on billboards and the laws regulating their use. The day-long symposium featured an array of national experts who explored a wide range of topics that covered federal constitutional law, state and local land use law, and federal anti-trust issues. About 75 people heard from billboard industry advocates, scholars and lawyers with expertise, and advocates for better enforcement of laws regulating billboard use. This event, organized by Nelson Chair holder Professor Michael Wolf, was made possible through the generous gift of the late Richard E. Nelson and his widow Jane Nelson.

Meanwhile, this spring's Environmental Speaker Series continues to bring top national scholars to UF's campus to speak to students, faculty and interested members of the bar. The Speaker Series is supported by gifts from Hopping Green & Sams, Lewis Longman & Walker, LLC and the Section. For more information or to receive information about future programs at UF, contact Marla Wolfe at [elulp@law.ufl.edu](mailto:elulp@law.ufl.edu).

## Internet Mailing List

by Joe Richards, Internet Committee Chair

As many of you know, one of the services the section provides is an internet mailing list. The list is used to remind members of upcoming seminars, announce updates to the section's website as well as a forum to discuss recent legal developments. If you are not on the list you can sign up at [www.eluls.org](http://www.eluls.org) or send an e-mail to me at [jrichards@pascocountyfl.net](mailto:jrichards@pascocountyfl.net). Also, if you were on the list and recently changed your e-mail address, please update it through the same process noted above. Hope to see you on the list.

# Treatise on Florida Environmental & Land Use Law

by Ellen B. Prest, President, REGfiles, Inc.

This is the first in a series of articles that will highlight the ELUL Section's *Treatise on Florida Environmental & Land Use Law*. Future articles will spotlight authors; discuss the authoring process; explore how the *Treatise* is being used; and initiate conversations about innovations for continuing development. Whatever the subject, our overall goal is to promote use of the *Treatise* and to make the *Treatise* an even more valuable tool!

During the past 5 years, as REGfiles has worked with ELUL Section members and affiliates in the creation and updating of articles, we continue to be surprised by the number of members and affiliates who don't realize that the "old green books" have been replaced by an entirely new *Treatise* with fresh content, new character and digital capabilities.

**Fresh content.** The new *Treatise* consists of 32 topical chapters containing 133 articles and over 1,900 pages. Chapter topics range from Administrative Proceedings to Wetlands and Surface Waters – with

many topics of interest in between.

Twice a year, authors are polled to update their articles to assure the articles are current with the latest underlying laws, rules, science and engineering and to create new articles. Updates are published each February and August. In February 2005, 15 articles were updated.

**New character.** In the past, updates for the "old green books" were distributed as separate, colored supplements. Users had to read the original article then read the colored supplement. In the new *Treatise*, each article is updated and replaced in full. Not only does this make it easy and quick to read and reference, but it creates a full-text archive for future use.

Access to article content is facilitated by a variety of navigational aids. An alphabetical Treatise Contents lists articles by chapter; each chapter has a table of contents; and Authors, Cases, Citations and Subject indexes help users quickly find information of interest.

**Digital capabilities.** Currently the *Treatise* is distributed on compact

disk. A home page provides a central location to move into and around articles. Bookmarks and hypertext links are provided for quick navigation. And, a full-text word search feature, based on words, word roots or phrases, makes finding and retrieving particular articles of interest a breeze.

The compact disk can be used to view articles on your computer screen or printed in an 8.5" x 11" page format. A completely revised version of the *Treatise* is distributed with each bi-annual update. No color-paged supplements here!

In sum, if you're still envisioning the *Treatise* as the "old green books," take another look. We now see and do the *Treatise* differently!

The *Treatise* is produced through an Alliance of the ELUL Section and REGfiles. As we continue our work together to make this reference tool even more meaningful and useful for members and affiliates alike, we want to hear from you. Send us your ideas and suggestions. You can reach us at REGfiles—850.878.1285 or [regfiles@aol.com](mailto:regfiles@aol.com).

## Disaster Recovery Seminar Set



The Environmental and Land Use Law Section has scheduled an all-day seminar covering the law of disaster recovery for June 10, 2005, at the Hyatt Regency Orlando International Airport Hyatt.

Called "I've Seen Fire and I've Seen Rain," the seminar features speakers from throughout Florida who are thoroughly experienced in the problems of delivering and coordinating disaster aid. The roles of the Federal Emergency Management Administration and the Florida Department of Community Affairs Emergency Operations Division will be explained. Local government and private aid agencies will also present at the seminar.

Although the seminar is geared to lawyers, governmental officials and business interests will also gain valuable knowledge. The seminar is designed to feature practical ways to gain aid quickly for public and private clients, and to protect the public health and safety during clean-up.

The ethics session will explore how lawyers can provide service to the community when there's no power.

Registration information will be available mid-April on the Section's webpage at [www.eluls.org](http://www.eluls.org).

The Environmental & Land Use Law Section, Florida Sea Grant, The Florida Department of Community Affairs, and The Center for Governmental Responsibility, at the University of Florida Levin College of Law present the

# Waterways and Waterfronts: Issues of Law, Policy and Planning



THE FLORIDA BAR

COURSE CLASSIFICATION: INTERMEDIATE LEVEL



May 20, 2005

Marriott Hotel & Marina • 1881 S.E. 17th Street • Ft. Lauderdale, FL • (954) 463-4000

Course No. 0160R

## Schedule of Events

8:15 a.m. – 8:30 a.m.

### **Welcome**

*Richard Hamann & Thomas T. Ankersen, University of Florida Center for Governmental Responsibility (UF CGR)*  
*Michael Spranger, Assistant Director, Florida Sea Grant*  
*Maria Abadal-Cahill, Florida Department of Community Affairs*

8:30 a.m. – 8:50 a.m.

### **The State of our Waterfronts: Where Land, Water and People Meet**

*The Honorable Thaddeus L. Cohen, AIA, Secretary, Florida Department of Community Affairs*

8:50 a.m. – 9:10 a.m.

### **The State of our Waterways: Realizing an Inland Waterway System**

*Bob Swett, Florida Sea Grant*

9:10 a.m. – 10:10 a.m.

### **Manatees: Protection Plans, Legislation, Listing & Litigation**

*Moderator: Richard Hamann, UF CGR*  
*James V. Antista, Florida Wildlife Conservation Commission*  
*Wade L. Hopping, Hopping, Green and Sams*  
*Steve Boutelle, Marine Engineering, Lee County*  
*Pat Rose, Save the Manatee Club*

10:00 a.m. – 10:30 a.m.

### **Break**

10:30 a.m. – 11:00 a.m.

### **Stormwater: A Regulatory and Design Dilemma on the Waterfront**

*Eric H. Livingston, Florida Department of Environmental Protection*

11:00 a.m. – 12:00 noon

### **Surface Water Zoning, Nearshore Marine Protection Areas & Marine Signage**

*Moderator: Donna R. Christie, FSU College of Law*  
*Walter Clark, North Carolina Sea Grant*  
*Captain Alan S. Richard, Florida Wildlife Conservation Commission*  
*David J. White, The Ocean Conservancy*

12:00 noon – 1:15 p.m.

### **Lunch (included in registration fee)**

**Cleveland: A Great Lakes Case Study in Waterfront Revival**  
*David Beach, EcoCity Cleveland*

1:30 p.m. – 2:10 p.m.

### **Waterfront and Waterway Access Issues**

*Moderator: Thomas T. Ankersen, UF CGR*

**Controversial Conversions: Marinas, Boatyards & Boat Ramps**  
*Frank Herhold, Marine Industries Association of South Florida*

### **Strategies for Preserving Public Access Facilities**

*James F. Murley, Center for Urban and Environmental Solutions, Florida Atlantic University*

2:10 p.m. – 2:30 p.m.

### **Break**

2:30 p.m. – 3:30 p.m.

### **Making Waterfronts Work: Case Studies in Planning Law and Policy**

*Moderator: Jennifer Carver, Florida Department of Community Affairs*  
*Justin Bloom, Urban Green, NYC*  
*Brett Bibeau, Miami River Commission*  
*Georgia Katz, St. Johns County*

3:30 p.m. – 4:30 p.m.

### **Reconciling Conflicting Policies: Waterfront Revitalization, Historic Preservation & Hazard Mitigation**

*Moderator: Timothy E. McLendon, UF CGR*  
*Nancy Freeman, Nassau County Emergency Management*  
*Julia "Alex" Magee, 1000 Friends of Florida*  
*Jim L. Richmond, Florida Building Commission*  
*William Straw, Federal Emergency Management Agency*

4:30 p.m. – 5:00 p.m.

### **Liability for Vessels in the Post-Storm Environment**

*Andrew W. Anderson, Houck, Hamilton, & Anderson*

5:30 p.m. – 7:00 p.m.

### **Urban Baywater Issue Cruise\***

*Sponsored by The Marine Industries Association of South Florida*

\*Additional registration fee required. Space is limited so sign up early.

How to register:

ON-LINE: www.ELULS.org

MAIL the completed form w/payment

FAX: Completed form to 850/561-5825

# Registration

## Register me for "Waterways and Waterfronts: Issues of Law Policy and Planning" Seminar

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## FLORIDA'S WATERS

from page 1

tions (CAFOs) to apply for NPDES permits, failing to require dairy farms that could be CAFOs to even notify FDEP of their existence, and putting the burden of proving that an NPDES permit is required on FDEP, rather than requiring the operation to prove entitlement to an exemption from permitting.

Rule 62-670, Florida Administrative Code (FAC), governs wastewater discharges from AFOs; CAFOs are feeding operations with larger numbers of animals, in the case of dairy farms, more than 700 mature cattle. CAFOs are required by Rule 62-670 to apply for a NPDES permit from the FDEP. However, a permit application is not required under the rule until there has been an onsite inspection of the operation by FDEP and a FDEP determination that the operation should and can be regulated under the permit program. Rule 62-670.400(3) also allows a case-by-case determination by FDEP as to whether a permit is required for a particular AFO, even if it doesn't meet the definition of a CAFO.

According to FDEP's website, the FDEP has ordered large dairies (meeting the CAFO definition) to obtain permits for their operations. Of Florida's 53 large dairies, four are closing because of enforceable orders and 44 are operating under permits or administrative agreements with the agency. Again, according to FDEP, all operating large dairies were required to submit NPDES permit applications by the end of 2004, and 26 applications are already under review.

According to the evidence before the court in the CAFO case, FDEP has entered into voluntary partnerships with certain existing AFOs in the Suwannee River Basin Partnership (SRBP) in an effort to reduce pollution from their operations. While in the partnership, the AFOs are not required to obtain any groundwater or surface water permits. The voluntary program uses Best Management Practices (BMP) to achieve reductions in water pollution. At trial, FDEP apparently justified its AFO permitting and partnership program under §403.0611,

F.S., which allows the FDEP to "explore alternatives to traditional methods of regulatory permitting, provided that such alternative methods will not allow a material increase in pollution emissions or discharges."<sup>1</sup>

The trial was held in November 2003, and on March 5, 2004, Judge Smith ruled that FDEP had failed to perform a nondiscretionary duty to abate pollution from CAFOs under Article 11, §7(a) of the Florida Constitution, which requires the state to make adequate provisions to abate pollution, and Chapter 403, F.S. The judge found that FDEP's CAFO program does not require an AFO to notify FDEP of its operation or affirmatively seek any authorization or approval to operate or exemption from permitting. Rather, the rules put the onus on FDEP to discover an animal feeding or dairy operation on its own initiative and independently inspect it to determine if a permit is required. According to the evidence before the judge, no dairy in Florida has ever been required to obtain a NPDES permit.

Judge Smith found fault with FDEP's reporting requirements under the CAFO program. A dairy is required to file a report only if it operates pursuant to a permit. Dairies are not required to file a report that might enable FDEP to determine whether a permit is required; FDEP must figure this out on its own. Judge Smith held that "by failing to require the filing of such reports, DEP is not properly protecting the waters of the state from pollution, impairment or destruction," in violation of state law. Judge Smith held that, pursuant to §403.061(13), F.S.,<sup>2</sup> operations that do not yet have a permit should be required to submit reports to FDEP to allow FDEP to determine whether a permit is required. This requirement presumably applies regardless of the size of the facility in question.

Judge Smith ordered FDEP to require all dairies in the state with more than 700 mature cattle to apply immediately for NPDES permits (without an inspection first) or demonstrate the applicability of an exemption. He also ordered FDEP to require *all* dairy operations, regardless of size, to file reports that contain information relative to their operations and to develop an

enforcement program for unpermitted CAFOs. Judge Smith specifically enjoined FDEP from relying on either the SRBP or §403.0611, F.S., as an alternative to requiring NPDES permits for dairies. In fact, Judge Smith enjoined FDEP from using §403.0611, F.S., as authority for alternatives to permitting for *any other* industrial operations needing NPDES permits. The judge ordered FDEP to submit a full report to the Legislature outlining "any future projects undertaken pursuant to §403.0611," before initiating them and mandated that the report "must demonstrate" that the proposed project will not result in an increase in pollution. In a final blow, Judge Smith awarded the plaintiffs attorneys fees and costs pursuant to §403.412(2)(f), F.S., even though an award of fees in an action involving an NPDES permit is discretionary under that section.

As might be expected, FDEP has appealed Judge Smith's ruling, filing a notice of appeal in the First District Court of Appeal. However, on March 2, the court affirmed the lower court ruling *per curiam*.

*The IWR Case: Florida Public Interest Research Group Citizen Lobby, Inc., et al., v. Environmental Protection Agency et al.*, 59 ERC 1166 (11<sup>th</sup> Cir. Oct. 4, 2004). FDEP promulgated Rule 62-303, FAC, the IWR, as mandated by the Florida Legislature, to establish a methodology for identifying those surface waters that are to be included on the state's list of water segments not meeting state WQS. As required by the CWA, FDEP will develop Total Maximum Discharge Limits (TMDL) for waters on those lists. The final IWR became effective on June 10, 2002. Following an unsuccessful challenge to the IWR in state proceedings, environmental groups and citizens filed suit against EPA in the federal district court for the Northern District of Florida seeking declaratory and injunctive relief. The plaintiffs charged that EPA had failed in its mandatory duty under the CWA to review the IWR as a change to Florida's WQS.

The CWA requires the EPA to review changes to state WQS to determine whether the state has followed its own statutory procedures for revising standards and whether the new standards, if they do not include

the water's designated uses, are based upon appropriate technical and scientific data and analysis. Under the CWA, a state's WQS can be revised only if consistent with the state's anti-degradation policy. 33 U.S.C. §1313(c), (d); 40 CFR §§131.5, 131.12. The plaintiffs contended that the IWR changed the water quality provisions that "unless otherwise stated, all criteria express the maximum not to be exceeded at any time" in Florida waters and that "in no case" shall nutrient concentrations cause an imbalance in natural populations of flora and fauna, because the IWR requires more than one sampling event to confirm impairment. See Rule 62-302.530, FAC. The Plaintiffs also contended that the current narrative nutrient standard in the WQS was changed by the IWR's method for calculating numeric concentrations of nutrients to establish impairment.

After the complaint was filed, FDEP was granted leave to intervene.<sup>3</sup> The judge granted FDEP and EPA's motions for summary judgment on May 29, 2003, holding that the IWR did not revise state WQS because FDEP did not expressly initiate rulemaking to amend its WQS and because the IWR on its face expressly states that it is not intended to change the standards. In addition, the district court noted that the IWR merely establishes a methodology for identifying waters not achieving WQS and that EPA is required to review – and did review – lists of waters identified pursuant to the IWR. When conducting such a review, EPA is required to consider a state's WQS. If Florida's IWR resulted in an impaired waters list inconsistent with Florida's WQS, then EPA would be required to disapprove the list in whole or in part and make its own listing decisions. The judge held that, as a result, the IWR could not possibly have the effect of revising Florida's WQS.

The Plaintiffs appealed the judge's order to the Eleventh Circuit Court of Appeals, and on October 4, 2004, the appellate court reversed and remanded, concluding that the lower court erred in determining as a matter of law that the IWR did not establish new or revised WQS. The Court held that the judge should not have relied on FDEP's failure to fol-

low its own procedures (i.e., to initiate rulemaking to revise its standards), nor on the statement contained in the IWR that it does not change WQS, as such reliance would allow a state to circumvent EPA review of changes to its standards merely by saying that the standards were not being changed. Further, the district court should not have relied on EPA's subsequent review of the lists as a "cure," because this eliminates a layer of protection envisioned by the CWA; any changes to WQS must be reviewed by EPA *before* they are made effective. EPA's actual review of the IWR and determination that the IWR is a "reasonable" method is not the level of review required under the CWA for WQS revisions.

Rather, the Court found that EPA should have reviewed the IWR to determine whether it had the practical effect of loosening Florida's WQS and, if so, should conduct the review required by the CWA: whether the state has followed its own statutory procedures for changing its standards and whether the revised standards, if they do not include the water's designated uses, are based upon appropriate technical and scientific data and analysis.

Importantly, the Court held that it appeared that the IWR could indeed have the effect of changing Florida's WQS, noting that "if waterbodies that under pre-existing testing methodologies would have been included on the list were left off the list because of the [IWR], then *in effect* the Rule would have created new or revised water quality standards, even if the language of the regulation said otherwise." Thus, the Court remanded the case back to the district court to determine the practical effect of the IWR on state WQS. The Court ordered the judge below to "examine whether there were waterbodies that were equally polluted both before and after the [IWR] took effect, but that were classified differently depending on whether or not the Rule was used." If in fact waterbodies were delisted simply based on application of the IWR, as opposed to a reduction in pollution in the interim, the effect of the IWR "may indeed" have been to loosen WQS. The implication in the opinion is clear: the methodologies in the IWR cannot be used to *remove* a

water from the list of impaired waters without first adopting the IWR as a WQS.

The case is currently on remand to the U.S. District Court for the Northern District of Florida. The United States has filed a Motion for Stay and Referral to the Agency, seeking an order that would place the case on hold for four months while EPA independently determines whether the IWR has effectively revised Florida's water quality standards. The Plaintiffs filed a Response in Opposition to the stay and referral, and the matter is set for a telephonic conference before Judge Stafford on March 8.

NPDES Case: Sierra Club et al. v. EPA, Case No. 04-CV401-RH/WCS (N.D. Fla.). As a condition precedent under the CWA, the Plaintiffs, on March 19, 2004, filed a petition asking EPA to withdraw Florida's NPDES permitting authority. The NPDES program governs permits for stormwater and wastewater discharges to surface waters, and similar petitions have been filed in 13 other states. FDEP submitted a response to the petition to EPA on April 26, 2004, but EPA did not act on the petition within 60 days, and the present complaint was filed in federal district court for the Northern District of Florida on October 4, 2004.<sup>4</sup>

The plaintiffs alleged that EPA had a mandatory duty to withdraw delegation of the NPDES program from Florida because Florida has failed to administer the program in accordance with the CWA. The plaintiffs alleged several bases for the suit, including FDEP's failure to require NPDES permits for CAFOs and its use of the IWR to change Florida's WQS (see above). The plaintiffs also allege that FDEP has not yet adopted a WQS for dioxin and has taken the position in administrative proceedings that the federally-adopted dioxin standard is not applicable to the state's NPDES program. The plaintiffs also allege that the FDEP has failed to promulgate a phosphorus standard for the Everglades by the deadline set forth in the Everglades Consent Decree between FDEP and EPA. The plaintiffs further allege that FDEP in several instances has failed to require permits for different types of industrial discharges and

*continued...*

has improperly authorized permits, compliance schedules, and permit continuances longer than 5 years in duration. The plaintiffs next allege that FDEP has limited administrative and judicial review and public participation of NPDES permitting decisions in various ways. Finally, the Plaintiffs assert generally that FDEP routinely fails to take enforcement action against NPDES permit violators.

The plaintiffs have requested the court to declare that Florida's NPDES program does not comply with the CWA and require EPA to withdraw Florida's authority to administer the program. This would mean that EPA would once again review and issue all NPDES permits within the state of Florida.

The United States has filed a Motion to Dismiss and Memorandum in Support, arguing that EPA has no non-discretionary duty to hold a public hearing on Florida's NPDES program and no subsequent non-discretionary duty to withdraw delegation. The U.S. also argued that Count II (that EPA has "unreasonably delayed" action on the plaintiff's initial petition) of the complaint lies within the jurisdiction of the Eleventh Circuit Court of Appeals, not the federal district court. The Plaintiffs filed a Response in Opposition on January 21, but voluntarily dismissed Count II, which will likely be re-filed in the

Eleventh Circuit. DEP has not yet sought to intervene in this case, but can be expected to do so.

**Summary**

These three pending cases could alter the landscape of wastewater regulation in Florida significantly. With the affirmance of the CAFO case, all operations with any potential to pollute may find themselves in the position of having to prepare and submit detailed reports analyzing their operations to the FDEP, even if exempt from permitting, and to prepare lengthy justifications of any exemptions. FDEP's attempts to develop alternatives to traditional permitting schemes under §403.0611, F.S., could likewise be hampered by this decision. If the judge in the IWR case finds that the IWR has the effect of changing Florida's water quality standards, all listing activities – both to delete and add waterbodies to the verified lists – may well be suspended until the IWR can be adopted as a "water quality standard" and reviewed as such by EPA. TMDL development for truly impaired waters could likewise be delayed. Adoption of the IWR as a WQS would create yet another opportunity to challenge the rule, and this too would cause more delay. Perhaps most significantly, if Florida's NPDES program authority is withdrawn, wastewater and stormwater permitting in Florida will become more complex, duplicative, and time-consuming, not to mention expensive. Regulated entities would be required to follow a

dual permitting track with EPA and the FDEP, with opportunities for administrative challenges at the state and federal levels.

These cases bear close watching. Stay tuned.

Author's Note: The author also notes that the Sierra Club filed suit on February 17 in the North District federal court against DEP under the federal Safe Drinking Water Act, alleging that DEP has filed to comply with the Act by allowing Miami-Dade County to inject 112.5 million gallons daily of treated sewage into underground injection wells, alleging that the sewage is migrating into drinking water aquifers.

**Footnotes:**

<sup>1</sup> This section directs FDEP to consider "specific limited pilot projects to test new compliance measures" and to report to the Legislature prior to implementing such projects.

<sup>2</sup> §403.061(13), F.S. gives FDEP the power and duty to adopt rules to "[r]equire persons engaged in operations which may result in pollution to file reports which may contain information relating to" that pollution. However, FDEP typically requires reports only from permitted facilities.

<sup>3</sup> Petitions to intervene filed by industry groups in support of the IWR were not ruled on by the district judge.

<sup>4</sup> EPA has stated that it is in the process of collecting NPDES permitting program profiles from states in order to conduct a comprehensive review of the NPDES program and is not in a position to respond to any of the petitions until this effort was completed.

*Susan Stephens is a partner at Holland & Knight LLP where she practices Environmental Law. For more information, email her at susan.stephens@hkllaw.com or call (850) 224-7000.*

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