www.eluls.org

THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

Vol. XXVIII, No. 3
April 2006

• Robert J. Riggio, Chair • Enola T. Brown, Editor •

Legislature Enacts New Lobbyist Disclosure and Reporting Requirements

By Lawrence E. Sellers, Jr.

During the December 2005 Special Session, the Florida Legislature enacted new requirements for all lobbyists and lobbying firms and their principals – including some that could well affect environmental and land use lawyers. The measure became effective on January 1, 2005.[1]

The new law received considerable attention in the popular press because it generally bans gifts or other expenditures to legislators and many other government employees by any lobbyist or principal. However, the new law includes a number of disclosure and reporting requirements. Most significantly, the new law requires lobbying firms to periodically disclose the compensation paid by the principal to the lobbying firm for lobbying.

Here is a brief summary of some of the key provisions:

Registration

The new law does not make any major change in *who* must register before lobbying the legislative or executive branch.[2] Generally speaking, you must first register with the legislative branch if you receive compensation for influencing or attempting to influence legislative action or inaction through oral or written communications or for attempting to obtain the goodwill of a member or employee of the Legislature. Likewise, you must first register with the Commission on Ethics if you receive

See "Legislature Enacts," page 11

Message from the Chair

by Robert J. Riggio

Continuing Legal Education, better known as CLE, has been the most visible and respected service provided by the Section to its members. Typically, four to six high quality, topically diverse seminars and workshops, along with the Annual Update, would take place. Section members have come to expect that significant changes in the law or new developments in law or technology would oftentimes be quickly disseminated through very focused CLE programs.

Sometimes, our efforts resulted in programs with less than a full house audience. But then attendance, and the financial implications of attendance, was not the primary consideration in the planning of a program. In many ways, this distinguished Section CLE programs, from those of many of the other CLE providers.

Nevertheless, the need to make changes, even to something that has worked so well, has been thrust upon us. This year marks the beginning of a change in CLE that is the result of a change in the financial relationship between your Section, in fact all the Bar Sections, and the Bar. Without going into the obtuse mathematical calculations, let it be said that the new process of sharing the expenses and profits of CLE programs, puts a premium on the numbers of attendees and thus makes low-attendance programs extremely

See "Chair's Message," page 2

INSIDE:

CHAIR'S MESSAGE
from page 1

costly to the Section. These changes were the focus of the recent Executive Council Retreat led by Chair Elect Robert Manning.

How, you may ask, does this affect me and why should I care? Well, for one thing, the number of seminars and workshops are likely to be reduced, at least initially. Fewer programs mean less financial risk to the Section. Fewer programs would also allow for more advanced notice which makes it easier to work a program into our busy schedules. Theoretically, this should increase the likelihood of greater attendance at these programs. On the other hand, fewer programs means that many of the specialized programs of the past will go by the way side and, it goes without saying that having fewer dates available will make it more difficult for some of us to attend any Section CLE programs in a given year.

However, there is certainly an up side. For one thing, sponsorship of programs with other Sections will help reduce financial risks and, at the same time, provide a greater pool of attendees. The Section already cosponsors a program every other year with the City, County & Local Government Law Section in Tampa and the General Practice Section at the Farm Bureau in Gainesville. In the future, I would expect to see more cooperative efforts. It also appears that our highly specialized programs will simply move to the web. The affiliates in our Section are already busy working the bugs out of web seminars. Moving such programs to the web may actually increase programs of this sort and provide for even more timely dissemination of information. The end result of this is that in the next few years, expect the face of CLE to change; hopefully for the better.

Speaking of CLE programs, take a moment now to mark your calendar for the Section Annual Update at Amelia Island on August 24 - 26. The Update has always been the flagship event of the Section. This year, as in the past, the affiliate program will run during the morning of August 24th and will be followed by the Update for the remainder of the 24th and the 25th. Committee meetings and other goings on dominate the 26th.

Finally, the Treatise continues to move ever forward toward its internet release to Section members. Already a limited "beta" version containing several chapters is being tested and the "on-line" version appears to be user friendly. If all goes as planned, an entry portal displaying the contents of the Treatise will serve as the primary means of accessing the various chapters which will be in pdf format. Specific items can also be pulled up through the index. For the many of you who have not had the opportunity yet to view this magnum opus, I can assure you that you will be pleased.

The Public Interest Committee congratulates The Environmental and Land Use Law Center, Inc., staffed by attorneys Richard Grosso, Lisa Interlandi, and Robert Hartsell.

Recipient of the 2006 Public Interest Committee Award for the Center's work representing the public interest in matters involving, to name a few, the Florida Keys, the Everglades, and the Scripps Institute.

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

Internet Mailing List

by Joe Richards, Internet Committee Chair

Don't forget to update your listing on the Section's Internet mailing list. Anytime you change your e-mail address you need to let us know or you will miss out on enlightening legal discussions, case and legislative updates as well as Section news and events. All this is provided right to your desktop when you are a subscriber. To update your information or to join for the first time go to *www.eluls.org*.

Florida Caselaw Update

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

Waiver of Sovereign Immunity Cannot Be Implied. *City of Gainesville v. State Dep't of Transp.*, 30 Fla. L. Weekly D2851 (1st DCA, December 19, 2005).

The City of Gainesville sought to collect stormwater utility fees from the Department of Transportation (DOT) under Chapter 403, F.S. The City argued that since DOT is a "person" within the meaning of Chapter 180, F.S., its sovereign immunity was waived. Following a dismissal with prejudice by the trial court, the District Court affirmed, recognizing that statutes allegedly waiving sovereign immunity are strictly interpreted in favor of the state.

The Court iterated that a statutory waiver of sovereign immunity must be clear and unequivocal or, contained in a written contract. Considering that Chapter 180, F.S., did not include a waiver of stormwater utility fees within its scope, the Court refused to rewrite that chapter to include such. Additionally, because there was no written contract, the court affirmed the dismissal with prejudice.

Modification of Development Application Following Adoption Of New Review Criteria Subjects Application To The Newly Adopted Criteria. *Morningside Civic Ass'n, Inc. v. City of Miami Comm'n,* 917 So.2d 293 (3d DCA 2005)

The City approved a zoning resolution granting a developer a major use special permit. Opponents of the development, Morningside, filed a petition for writ of certiorari challenging the zoning resolution. At issue was the version of the zoning ordinance that applied to the application. The original application, filed in 2003, was recommended for denial by the Planning Advisory Board in December 2003.

Then, on February 10, 2004, the developer submitted a "substantially modified" application after the rezoning ordinance had been amended. The ordinance took effect in January, 2004. The new zoning ordinance required the City to make written findings with respect to eight criteria. Although the City did not make these findings in the zoning resolution, it determined in the resolution that the application was "complete" on February 10, 2004. On appeal from the circuit court's refusal to grant certiorari, the District Court found that the circuit court had applied the law incorrectly. The Court held that the proper version of the zoning ordinance was the amended 2004 version that required written findings rather than the pre-2004 version that was applied by the circuit court. Because the City failed to make written findings relating to the criteria, as required by the amended 2004 ordinance, the Court quashed the circuit court's order.

The Statute Of Limitations To File Suit Under The Bert J. Harris, Jr., Private Property Rights Protection Act, Section 70.001, F.S., Is Four Years. *Russo Assoc., Inc. v. City of Dania Beach Code Enforcement Bd.*, 31 Fla. L. Weekly D418 (4th DCA Feb. 8, 2006).

Following the City's enforcement of a zoning change that prohibited Plaintiff's existing use of the property, Plaintiff filed a Harris Act claim with the City on October 10, 2002 and later filed suit. The City moved to dismiss the complaint arguing that the Act's statute of limitations required a suit, rather than claim, be filed "less than one year after the subject ordinance was first applied to Plaintiff's Property." The trial court agreed, and dismissed the complaint with prejudice.

On appeal, the Court reversed. The Court noted that Section 70.001(11), F.S., only requires that a Harris Act claim be presented to the government within one year from the date the offending regulation was applied by the government. The Court rejected the City's argument that this provision was also a one year statute of limitations in light of the Act's requirement that a lawsuit cannot be filed until a government has provided a written settlement offer and ripeness decision to the claimant, which it has 180 days to do. The effect of the City's interpretation was the creation of a six-month statute of limitation.

Recognizing that the intent of the Act was to create clarity and simplicity when bringing claims and lawsuits under the Act, the Court recognized that the one year time frame was simply a pre-suit condition intended to encourage dialogue between the property owner and government as a means of effecting settlement. The Court held that the statute of limitations for filing a lawsuit (assuming the pre-suit conditions were met within the first year) was four years from the date the regulation was first applied by the governmental entity.

Court Finds Harris Act Claim And Takings Claim Frivolous And Enforces PUD Conditions To Restore And Preserve The Big Blue Reserve. *Palm Beach Polo, Inc. v. Village of Wellington,* 31 Fla. L. Weekly D202 (4th DCA, January 18, 2006)

After the Village of Wellington filed a declaratory action to force Palm Beach Polo, Inc. (Polo) to restore and enhance an area known as Big Blue Reserve (Big Blue), Polo counterclaimed alleging inverse condemnation and a violation of the Bert J. Harris, Jr., Private Property Rights Protection Act, Section 70.001, F.S. Polo's predecessors in interest had entered into a Planned Unit Development (PUD) with the County that was approved with conditions that required that Big Blue be enhanced and preserved. Development density from Big Blue (~92 acres) was transferred to other parcels within the PUD. Following additional modifications to the PUD, Polo's predecessors agreed that the County's Compre-

continued...

hensive Plan would be amended to designate Big Blue as open Space-Reserve (OS-R).

Wellington was incorporated after Polo purchased the PUD (which included Big Blue) out of bankruptcy in 1993. In 1999, Wellington adopted its own Comprehensive Plan that essentially followed the County Comprehensive Plan and included a "conservation" designation for Big Blue. Polo objected to this designation even though it imposed no additional limitations on Big Blue beyond the County's original designation of OS-R in the PUD. Polo then filed a Harris Act claim. Wellington responded that no change would be made to the Comprehensive Plan and sued Polo to enforce the conditions of the PUD requiring restoration of Big Blue. The Court rejected Polo's Harris Act claim as frivolous because the "conservation" designation in Wellington's Comprehensive Plan "changed nothing regarding the property."

The Court also rejected Polo's claim that the PUD conditions agreed to by Polo's predecessors were unconstitutionally vague and overly broad. In light of testimony from Polo's predecessor and the County, it was clear that the meaning of all terms were well understood by all parties. Therefore, they were not vague or overly broad. Finally the Court dismissed summarily the takings claim because the flooding of Big Blue is precisely what Polo's predecessor bargained for in exchange for the transfer of development rights to another portion of the PUD.

Proposed Annexation Was Not "Contiguous" Where 1.6% Of Boundary Bordered City. Pre-Annexation Agreement Was Invalid As It Was Illegal Contract Zoning. *County of Volusia v. City of Deltona*, 31 Fla. L. Weekly D233 (5th DCA, January 20, 2006)

Volusia County challenged the City of Deltona's voluntary annexation of three parcels of land. The District quashed the circuit court order upholding the annexation finding it failed to follow the essential requirements of law on two issues.

The Court found first that the circuit court applied the law incorrectly when it found that the territory to be annexed was "contiguous" to the City. The three parcels proposed for annexation included one ten acre parcel, one 339 acre parcel and one 4,626 acre parcel. Only the ten acre parcel actually bordered the City because its entire western border of 350 feet adjoined the City. The circuit court had accepted the statutory contiguity requirement based on the fact that a substantial part of "a boundary" of a parcel to be annexed adjoined the City in a substantial sense.

The District Court held that the lower court's contiguity interpretation was flawed because Section 171.031(11), F.S., requires "a substantial part of the boundary of the territory to be annexed" by the City be coterminous with the City boundary. Thus, the analysis should focus on the entire territory to be annexed rather than the parcel adjoining the City. In this case, the Court found that while the territory to be annexed had a western boundary of 22,116 feet, only 350 feet of it (that of the ten acre parcel) adjoined the City. The Court concluded that since only 1.6% of the boundary of the territory was contiguous with the City border, that was not "substantial," and thus did not meet the contiguity requirement. The District Court also concluded that the efforts of the City and owners who "attempted shoestring annexation using a narrow corridor to connect the municipality to an outlying, noncontiguous area . . . defeats the basic concept of a municipal corporation of unity and compactness."

In what could be construed as dicta, the Court also suggested that the "Pre-Annexation Agreement" with the owner of the 4,626 acre parcel was illegal contract zoning because it delegated the City's police power. The agreement placed substantial obligations on the City, including a commitment to "use its best efforts to provide agricultural and conservation zoning until ownership of the property changed and, the property was rezoned at the owner's request." The Court quashed the order of the circuit court that denied certiorari and remanded for further proceedings.

Gary K. Hunter, Jr. *is a Shareholder with Hopping Green & Sams, P.A. in Tallahassee, Florida. He received his B.B.A. and J.D. from the University of Georgia.* ***D. Kent Safriet*** *is an Associate with Hopping Green & Sams, P.A. in Tallahassee, Florida. He received his B.S. from Clemson University and his J.D. from the University of South Carolina. Mr. Hunter and Mr. Safriet practice primarily in the areas of environmental, land use and property rights litigation.*

Mark your calendar

2006
Environmental and Land Use Law Section Annual Update

August 24-26, 2006
Amelia Island Plantation

Seminar registration information will be available in June at *www.eluls.org*.

On Appeal

by Lawrence E. Sellers, Jr., Susan L. Stephens and Stacy Watson May

Note: Status of cases is as of March 17, 2006. Readers are encouraged to advise the authors of pending appeals that should be included.

FLORIDA SUPREME COURT

Advisory Opinion to the Attorney General re: Referenda Required for Adoption and Amendment of Local Government Comprehensive Plans, Case No. SC06-161. Request for advisory opinion regarding proposed constitutional amendment requiring referenda for adoption and amendment of local comprehensive plans. Status: Petition filed February 1, 2006; on March 10, the Court directed the sponsor of the amendment to advise the Court whether as of February 1, 2006 it had obtained the required signatures, to place the proposed amendment on the 2006 ballot.

FIRST DCA

Victor Lambou, et al. v. Wakulla County, et al., Case Nos. 1D05-1722 and -2990. Consolidated appeals of non-final agency action by the Department of Community Affairs partially dismissing petitions for hearing on the consistency of Wakulla County's comprehensive plan amendment. The petitions on appeal were denied because partial dismissal of a complaint is only reviewable when it is established that the dismissed claims are not legally and factually interrelated with the remaining claims. Status: Petitions denied January 31, 2006.

Jonesville Properties, Inc., et al. vs. Florida Dept. of Community Affairs and Alachua Co., Case No. 1D05-2432. Appeal of final order determining that proposed amendments to Alachua County's comprehensive plan are in compliance. Status: Notice of appeal filed May 23, 2005; motion to dismiss pending; all briefs have been filed.

Florida Petroleum Marketers and Convenience Store Association v. DEP, Case No. 1D06-817. Appeal of final order granting attorneys fees on the basis that DEP was not "substantially justified" in promulgating Rule 62-770(3)(b) and (4). Status: Notice of Appeal filed February 17, 2006.

SECOND DCA

Citizens for Responsible Growth, et al. v. City of St. Pete Beach, Case No. 2D06-550. Appeal of a state court ruling that three of four proposed revisions to the City Charter of St. Pete Beach would not appear on the March general election ballot. The proposed revisions were aimed at allowing greater voter input into the process for adopting the City's comprehensive plan and its amendments. Status: Notice of appeal filed February 8, 2006.

THIRD DCA

Florida Keys Citizens Coalition, Inc., et al., vs. Florida Administration Commission, et al., Case No. 3D05-1800. Appeal from final order of Division of Administration Hearings finding that proposed Florida Administrative Code rules regarding the Comprehensive Plans of Monroe County and the City of Marathon were not invalid exercises of delegated legislative authority. Status: Notice of appeal filed July 29, 2005; motion to dismiss pending; initial brief filed October 27, 2005.

FOURTH DCA

1000 Friends of Florida, et al. v. DCA, Case No. 4D05-2068. Appeal of final order determining that proposed amendments to Palm Beach County comprehensive plan to accommodate the proposed Scripps biomedical campus were in compliance. Status: Oral argument held October 5, 2005.

FIFTH DCA

Osceola County, et al. v. Best Diversified, Inc., and Peter L. Huff, et al., Case Nos. 5D04-216, 5D04-217. Appeal by Osceola County and DEP from a final judgment awarding damages for inverse condemnation under the Bert J. Harris Jr. Private Property Rights Protection Act. Damages were awarded to the owner and operator of a construction and demolition debris landfill that were denied permits to continue operating the landfill on the basis of residents' complaints and DEP's finding that the operation constituted a public nuisance. Status: Affirmed in part and reversed in part on July 29, 2005 [30 Fla. L. Weekly D 1831]; motion for rehearing *en banc* pending.

U.S. SUPREME COURT

Arkansas v. Oklahoma, Case No. 220133. Arkansas asked the Court to exercise its original jurisdiction to hear a dispute between Arkansas and Oklahoma under CERCLA. Oklahoma sought to hold poultry growers in Arkansas liable for contamination allegedly caused by concentrated animal feeding operation. Status: Motion for leave to file a bill of complaint on November 7, 2005, denied February 21, 2006.

S. D. Warren Co. v. Maine Board of Environmental Protection, Case No. 04-1527. A coalition of 34 states filed an amicus brief urging the Court to preserve the states' authority to block federal agencies from issuing operating permits without the state's water quality certification required by Section 401 of the Clean Water Act. Status: Oral argument held February 21, 2006.

Environmental Defense v. Duke Energy Corp., Case No. 05-848. Appeal by citizen groups of the Fourth Circuit's decision rejecting the EPA's regulatory definition of emission as an increase in actual emissions measured on an annual basis under the Clean Air Act, effectively ending enforcement actions against Duke Energy. EPA alleged that Duke Energy failed to obtain a prevention of significant deterioration permit before making modifications to its plants. Status: Petition filed December 28, 2005.

continued...

ON APPEAL
from page 5

Beazer East, Inc. v. Mead Corp., Case No. 05-524. Appeal of the Third Circuit's decision holding that magistrate judges may not make allocation distribution decisions in CERCLA contribution actions because they are beyond the "additional duties" defined by The Magistrate Act. Status: Petition denied January 9, 2006.

Seven Up Pete Venture v. Montana, Case No. 05-588. Appeal by mining company of Montana Supreme Court's determination the state's ban on open pit gold and silver mining using cyanide leaching was not a taking of the company's property rights and it did not violate the Montana or United States constitution even though it constituted a substantial impairment of a contractual agreement with the state. Status: Petition denied February 21, 2006.

Gerke Excavating, Inc. v. United States, Case No. 05-623. On appeal from the Seventh Circuit, Petitioner asked the Court to review the question of whether the Clean Water Act prohibits discharges into wetlands that do not abut a navigable river. Here, the wetlands are drained by a ditch into a non-navigable creek that runs into a non-navigable river and then into a navigable river. The Seventh Circuit held that the U.S. Army Corp of Engineers did not exceed its authority under the Clean Water Act and that this authority did not exceed the congressional interstate commerce power. The court reasoned that wetlands are "waters of the United States" within the meaning of the Clean Water regardless of distance from a navigable waterway, if water from the wetlands enters a stream that flows into the navigable waterway and, that there is no basis for interpreting the regulation to distinguish between a stream and a ditch. Status: Petition filed November 11, 2005.

Rapanos v. United States, Case No. 04-1034; *Carabell v. U.S. Army Corps of Engineers,* Case No. 04-1384. A group of property developers asked the court to review whether the Clean Water Act requires permits for discharges into wetlands not connected currently hydrologically to navigable waters. Status: Oral argument held February 21, 2006.

SEVENTH CIRCUIT

In re Cinergy Corp., Case No. 05-8025. Appeal of Southern District of Indiana decision allowing EPA to proceed against Cinergy for alleged new source review violations. Cinergy is charged with increased emissions as a result of modifying several electric generating units without upgrading pollution controls. Status: Appeal granted January 3, 2006.

NINTH CIRCUIT

Baccarat Fremont Developers v. U.S. Army Corps of Engineers, Case No. 03-16586. Developer's appeal of district court's dismissal of challenge to Corps permit requiring the developer to create freshwater wetlands and maintain wetlands on the site. The court held that the Clean Water Act does not require the Corps to show a "significant hydrological or ecological connection" between the wetlands and adjoining lakes and streams to exercise its authority. Status: Affirmed on October 14, 2005. Motion for rehearing pending.

ELEVENTH CIRCUIT

Atlantic Green Sea Turtle, et al. v. County Council of Volusia County, et al., Case No. 05-13683. Appeal of an order dismissing complaint filed under Endangered Species Act and Administrative Procedure Act. Status: Motion to dismiss appeal as moot granted; remanded to district court on January 18, 2006.

D.C. CIRCUIT

Association of Home Builders v. U.S. Army Corps of Engineers, Case No. 04-5221. Appeal of dismissal of challenge to Corps rule defining the term "discharge of dredged materials" to include all mechanized landclearing within regulated waters. Trade groups alleged that permit requirement for activities such as bulldozers clearing trees or digging of channels near lakes and rivers overstepped the agency's authority which is limited to activities that result in "additions" of pollutants. Status: Reversed and remanded February 3, 2006.

Environmental Defense v. EPA, Case No. 05-1159; *Chesapeake Bay Foundation v. EPA,* Case No. 05-1267. Various petitions challenging EPA's March 15 rule allowing coal-fired power plants to avoid maximum achievable control technology (MACT) emissions controls for mercury. Status: Petitions filed in July. The cases were consolidated and a motion by EPA to hold the cases in abeyance pending agency action, is pending. EPA status report due February 9, 2006.

Minnesota Power v. EPA, Case No. 05-1246; *North Carolina v. EPA,* Case No. 05-1244. Various petitions challenging EPA's Clean Air Interstate Rule (CAIR), which was issued March 10. The CAIR implements an emissions trading system to reduce emissions of sulfur dioxide and nitrogen oxides from power plants. Status: The cases have been consolidated. EPA's motion to hold the cases in abeyance pending agency action, is pending.

New York v. EPA, Case No. 03-1380. Challenge to EPA's New Source Review rule amendments published on October 27, 2003, which expand 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: On March 17, the court vacated the equipment replacement rule.

Lawrence E. Sellers, Jr., *(larry.sellers @hklaw.com), received his J.D. from the University of Florida College of Law in 1979. He is a partner in the Tallahassee office of Holland + Knight LLP.*

Susan L. Stephens, *(susans@hgslaw.com), received her J.D. from the Florida State University College of Law in 1993. She is of counsel at Hopping Green & Sams in Tallahassee.*

Stacy Watson May*, (stacy.watsonmay@hklaw.com), received her J.D. from The John Marshall Law School in 1997. She is a senior attorney who practices in the Jacksonville and Orlando offices of Holland + Knight LLP.*

Department of Environmental Protection Update

By Kelli M. Dowell, Senior Assistant General Counsel

***Penzell v. M&M Construction*, 915 So.2d 194 (Fla. 3d DCA 2005)**

In September 2005, the Third District Court of Appeal, in *Penzell v. M&M Construction,* affirmed the trial court's determination of the priority afforded a final judgment held by the Department of Environmental Protection (the "Department") under section 197.582(2), Florida Statutes (establishing priorities for distribution of excess tax sale proceeds). The Department's final judgment, *inter alia*, (1) mandated environmental cleanup of the subject property, (2) authorized the Department to conduct the remedial activities itself (should the owner default), with the owner held liable for the cost, and (3) retained jurisdiction to enforce these provisions. The *Penzell* Court held that the Department's final judgment constituted a valid "lien of record held by a governmental unit" entitled to priority under section 197.582(2), Florida Statutes (establishing priorities for distribution of excess tax sale proceeds). On December 21, 2005, the Third District declined to grant Appellants' (Penzell and Bank of America) motions for rehearing and clarification. Appellants sought to invoke the Florida Supreme Court's discretionary review pursuant to Article V, Section 3(b)(3), *Florida Constitution*, and Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. Appellants alleged that the *Penzell* decision conflicts with several other district court decisions. Jurisdictional briefs have been filed and are currently pending before the Florida Supreme Court (Case No. 06-56). The briefs are available at *http://www.floridasupremecourt.org/clerk/briefs/2006/1-200/index.shtml*.

EPA and Florida Sign Brownfields Agreement

On November 29, 2005, DEP and EPA executed a Memorandum of Agreement (MOA) recognizing Florida's Brownfields Redevelopment Program as a means of expediting the cleanup of polluted properties and returning them to productive use. This MOA supercedes the MOA between DEP and EPA executed in December 1999. The new MOA incorporates the requirements of the 2002 Federal Brownfields Law and recognizes that cleanups conducted under Florida's program may satisfy the requirements of the Federal Resource Conservation and Recovery Act (RCRA) by specifying the criteria under which the EPA will forego its oversight. In addition, the MOA expands the types of sites that are eligible for consideration. Now, certain sites subject to corrective action under RCRA will be eligible for State economic redevelopment incentives. Additionally, in order to be eligible to receive funding under CERCLA Section 128(a) which was authorized by the Federal Small Business Liability Relief and Brownfields Revitalization Act of 2002, a state must be a party to a voluntary response program MOA with EPA or demonstrate that its response program includes, or is taking steps to include, the elements of a response program. All states with response programs must maintain, and make available to the public, a record of sites in accordance with CERCLA Section 128(b)(1)(c). Florida is one of only 19 states with an existing MOA. As a result, Florida's response program is eligible automatically for grants from the EPA under CERCLA Section 128(a).

Underground Injection Control (UIC) Fast Track Rulemaking

On November 22, 2005, EPA published it final regulation of underground injection control, which allows vertical fluid movement from Class I municipal injection control wells into an underground source of drinking water (Class G-II groundwater as designated by the Department), as long as the domestic wastewater that is injected meets the secondary treatment standards under Rule 62-600.420, Fla. Admin. Code; the pretreatment requirements of Chapter 62-625, Fla. Admin. Code; high level disinfection, as proscribed in Rule 62-600.440, Fla. Admin. Code; and does not otherwise adversely affect the heath of persons. Without this change in the Federal regulations, fluid movement into an underground source of drinking water would be strictly prohibited from this type of UIC facility. The regulation was effective on December 22, 2005. On December 27, 2005, the Department adopted the Federal regulations by reference into Chapter 62-528, Fla. Admin. Code. Because the Department adopted the rules by reference and the rules had gone through the economic analysis and public meeting processes, rulemaking proceeded under Section 403.8055, Fla. Stat., which allows for a faster track. Under the new rule, existing UIC wells (a well that filed a complete application on or before December 22, 2005) must meet treatment requirements within 5 years from notice from the Department of possible fluid movement. The regulation covers 24 counties primarily in South Florida, which includes counties with no Class I municipal UIC wells, but which probably have the type of geology that could allow fluid movement out of the injection zone. Those counties are: Brevard, Broward, Charlotte, Collier, Flagler, Glades, Hendry, Highlands, Hillsborough, Indian River, Lee, Manatee, Martin, Miami-Dade, Monroe, Okeechobee, Orange, Osceola, Palm Beach, Pinellas, St. Johns, St. Lucie, Sarasota, and Volusia. New wells in these counties must meet the treatment requirements before waste is injected. Eight entities filed notices of intent to challenge the federal regulation. They are the Counties of Miami-Dade and Palm Beach, the Cites of Sunrise, Ft. Lauderdale, Cooper City, Margate, and Miramar, and the Sierra Club. If the Federal regulation is found invalid in whole or in part, or is modified or withdrawn, then Florida must modify or withdraw its rule accordingly.

continued...

ERC Adopts Amendments To Vegetative Index Rule

On October 27, 2005, the Environmental Regulation Commission (ERC) held an adoption hearing on the Department's proposed changes to Rule 62-340.450, Fla. Admin. Code. The proposed changes revise the status of gallberry and slash pine from positive indicators of upland areas to a neutral or "facultative" indicator of uplands and wetlands. The ERC continued the October hearing so that the Department could perform more field tests to demonstrate the effects of the rule change. Twelve sites were submitted to the Department for field testing. The proposed rule change would result in a small increase in the size of wetland at 3 of the 12 sites. On February 23, the Department presented the results of the field tests to the ERC, which unanimously adopted the amendment. Pursuant to Section 373.421, Fla. Stat., the adopted amendment can not become effective until ratified by the legislature. In addition to improving the scientific accuracy of the vegetative index, adding slash pine and gallberry to the list of facultative plants in Chapter 62-340, Fla. Admin. Code, is viewed as an essential step toward streamlining the state wetland program with the Federal wetland program.

ERC Approves Wekiva Rule

On February 23, 2006, the ERC approved proposed Rule 62-600.550, Fla. Admin. Code, for the Wekiva Basin which creates protection zones for domestic wastewater management with additional restrictions on discharges of total nitrogen. The Wekiva Basin comprises parts of Seminole, Lake, and Orange Counties. The goal of 0.2 mg/L of nitrate-nitrogen for the spring vents that lie within the Basin is set out in the legislation found at Sections 369.316 and 369.318, Fla. Stat. These new rule restrictions, which apply to new and existing discharges of domestic wastewater, is protective of that goal. The rule also provides the legislatively-mandated opportunity for an affirmative demonstration by a facility that its discharge should not have to meet the new restrictions. The groundwater standard for total nitrogen is 10 mg/L, but there is no surface water standard. The Wekiva Rule is the first rule that regulates springs and, is a culmination of the Governor's Springs Initiative.

ACF Update

On December 7th, the Eleventh Circuit denied Florida's motion for rehearing. In the DC litigation, the court granted the hydropower customers' motion to stay the litigation, stating that the stay did not impede the Corps' obligation to go forward under the settlement agreement, now that the Alabama court's injunction has been lifted. Accordingly, the DC litigation is stayed while the Corps undertakes NEPA procedures with regard to the proposed water storage contracts. Florida and Alabama have filed motions to certify the stay order and begin the appeal. In the Alabama litigation, Florida has filed a motion for preliminary injunctive relief under the Endangered Species Act seeking to compel the Corps to consult formally with the U.S. Fish and Wildlife Service regarding the needs of the threatened and endangered species in the Apalachicola River and Bay prior to the gulf sturgeon spawning season. Florida also filed a motion for an order to show cause why the Corps should not be held in contempt. A hearing on all pending motions has been set for April 14.

Southwest Florida Water Management District

by Karen A. Lloyd, Assistant General Counsel

Rare Interdistrict Transfer Approved to Supply Polk County

The Tohopekaliga Water Authority ("Toho") and Polk County entered into an Interlocal Agreement that contemplates that Toho will provide Polk County's Northeast Regional Utility Service Area ("NERUSA") with potable water supply for up to five years. Polk County is subject to a consent order with the Southwest Florida Water Management District ("Southwest") which requires it to refrain from overpumping under its permit and develop additional sources of water to meet demands in the NERUSA. Toho's withdrawal facilities are located in the South Florida Water Management District ("South Florida") and the County's NERUSA is located within the Southwest.

Toho sought to modify its permit with South Florida to allow an inter-district transfer of up to 3.75 mgd to Polk County to be used within Southwest.

Section 373.223(3), F.S., provides that an "inter-district transfer" is an application process for the withdrawal of groundwater in one water management district and use of the water in another water management district. The application is filed with the water management district in which the withdrawals are proposed to be made. Only a permit from that district, based on its permitting criteria, is required for the inter-district transfer. The comments of the district within which the water will be used must be attached to the notice of proposed action. The permitting Governing Board must consider the future water needs of the area of the withdrawal and the area of use when applying the public interest test. If both needs can be met, and all other permitting criteria are met, the permit shall be issued. An additional notice of proposed action is required. If requested, DEP reviews the intended action and issues a final order.

The South Florida Governing Board approved the transfer, subject to Toho, Polk County, Southwest and South Florida entering into an agreement containing provisions specified by the South Florida Governing Board. The parties are working on a draft agreement.

This is the first interdistrict transfer to be approved by South Florida and one of the very few approved in the state. However, it is anticipated that more of these transfers will be requested as growth moves inland toward the center of the state where the boundaries of the water management districts meet.

Law School Liaisons

UF Students Active in Environmental and Land Use Law

by Prof. Alyson Flournoy

UF Environmental Moot Court Team Success

The University of Florida's Environmental Moot Court Team reached the semi-finals of the National Environmental Moot Court Competition, held in White Plains, New York last month. Team members Nick Beninate, Valerie Brennan, and Jessica Hovanec turned in outstanding performances. In the three preliminary rounds, Valerie was selected best oralist twice and Jessica was selected best oralist once. Best oralists are not selected in the quarter-and semi-final rounds, but team coach Ryan Baya reported that Nick Beninate excelled in the quarter-finals.

Of the 75 teams competing from law schools around the country, 9 reached the semi-finals and 3 advanced to the finals. In the last 5 years, UF has advanced to the semi-finals twice and the quarter-finals once.

UF's participation in the annual national competition is made possible by the Section's $1000 grant, available to all law schools in the state to support a moot court team. This year's competition problem focused on the definition of point source under the Clean Water Act, whether the citizen suit provision of the Clean Water Act permitted enforcement against non-point sources for water quality violations, the right to contribution under CERCLA, and preemption of federal and state public nuisance common law claims.

Twelfth Annual Public Interest Environmental Conference

The annual PIEC, organized by UF law students in conjunction with the Public Interest Committee of the Section, took place March 8-11. This year's conference had the most expansive and diverse program ever, including: a special presentation by Robert F. Kennedy, Jr. on Wed. March 8, co-sponsored by UF Accent; an interdisciplinary track focused on children's literature, education, and the environment, organized by the UF Center for Children's Literature and Culture; and participation by students from the National Association of Environmental Law Societies, coming from as far as Hawaii and Vermont. Richard Louv, noted author of the book *Last Child in the Woods: Saving our Children from Nature Deficit Disorder* spoke at the conference kick-off reception on Thursday, and Philippe Cousteau, spoke at the keynote banquet on Friday.

UF Environmental Speaker Series and Capstone Colloquium

Two more speakers will be visiting UF as part of this spring's Environmental Speakers Series: Sarah Krakoff, an expert on Indian Law from the University of Colorado, will speak on March 23, and James Rasband, from Brigham Young University, whose research has challenged the premise of extensive federal land ownership, will speak on Thursday March 30. Both presentations will be from 3-5 pm in the Faculty Dining Room in Bruton-Geer Hall.

The Environmental Speaker Series is supported by the Environmental and Land Use Law Section, Hopping Green & Sams P.A., and Lewis Longman & Walker P.A. This support enables UF to bring in nationally recognized scholars to speak on current environmental and land use law topics. Students in UF's ELUL Certificate Program and UF faculty participate in the seminar with the speaker as part of their Environmental Capstone Colloquium, and section members are invited to attend. Because space is limited, please contact us at *elulp@law.ufl.edu* to reserve a seat if you plan to attend either or both presentations.

A New Faculty Member at FSU College of Law and Activities on Tap for the Spring '06 Semester

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

The big news at FSU College of Law this spring is that we've enticed a leading environmental and land use scholar, Robin Kundis Craig, to join the faculty. Professor Craig is a prolific author, including an Environmental Law casebook with West Publishing. Professor Craig is currently a professor at the Univ. of Indiana School of Law in Indianapolis. Professor Craig's addition to the faculty will bolster what already is considered to be one of the nation's leading environmental and land use law programs.

Our Environmental Moot Court team, Melinda Parks, Lee Sanderson, and Michael Makdisi, advanced to the Quarterfinals of this year's National Environmental Law Moot Court Competition. Melinda Parks received the honor of being named best oralist in the first preliminary round.

The College of Law has a full schedule of land use and environmental law activities scheduled for the spring, including the following:

1) A Distinguished Lecture by Professor Douglas Kysar of Cornell University, part of the College of Law's Distinguished Lecture Series (March 21).

2) The Law School's spring '06 *Environmental Forum,* entitled *Integration of Land Use and Water Management in Florida* (March 28).
3) The Law School's academic *Symposium* on *Ecosystem Services*, which will feature leading scholars from throughout the United States, including Deb Donahue of the University of Wyoming, Don Elliott of Yale, Jim Salzman of Duke, and Dan Tarlock of Chicago Kent (April 7 and 8).

We hope you'll join us for one or more of our programs. For more information about our programs, please consult our web site at: *www.law.fsu.edu*, or please feel free to contact Professor David Markell, at *dmarkell@law.fsu.edu*. Our environmental brochure, available online at *http://www.law.fsu.edu/academic_programs/environmental/images/environmental_brochure04.pdf* , also contains considerable information about the environmental law program at FSU.

LEGISLATURE ENACTS
from page 1

compensation for seeking – on behalf of another person – to influence an agency decision in the area of policy or procurement or for attempting to obtain the goodwill of an agency official.[3]

The new law adds two provisions that affect registration. First, each principal must now identify its "main business." This is to be done by use of the North American Industry Classification System (NAICS), a six-digit numerical code. Second, the new law prohibits the registration of a person convicted of a felony after January 1, 2006.

Compensation Reporting

For the first time, lobbying firms are required to report compensation received for lobbying. This applies to those lobbying the executive branch, as well as to those who lobby the Legislature. Each firm is required to file a compensation report for each quarter. The reports must disclose the amount of compensation provided or to be provided by each principal and the total by all principals. The reports are due 45 days after the end of each quarter. The first reports are due May 15, 2006.

Recordkeeping/Audits

The new law also requires lobbying firms to maintain all records, papers and other documents to substantiate the compensation paid for lobbying. These documents may be subpoenaed for audit by either house of the Legislature or the Commission on Ethics, and the subpoena may be enforced in circuit court. In addition, the new law provides for audits of three percent (3%) of lobbying firms by independent auditors to determine compliance with the new compensation disclosure requirement.

Ethical Implications of Disclosure Requirements

The new reporting provisions require those lobbyists who are lawyers to disclose confidential information about the client which implicates the Rules of Professional Conduct. The Florida Bar has provided guidance on these matters.[4] Among other things, the Bar notes that lawyers who are lobbyists must obtain the consent of each client for whom the lawyer provides lobbying services in order to comply with the statute's disclosure requirements. The Bar also recommends that lawyers consider segregating the information that relates to lobbying activities from all other representation of the client. In addition, the Bar suggests that the lawyer disclose information to an auditor only in response to a subpoena and that the lawyer seek a judicial determination before disclosing any information the lawyer believes is privileged.

Ban on Expenditures

The new law prohibits any expenditure by a lobbyist or principal to any employee or member of the Legislature (except floral arrangements displayed in the chamber on opening day of the regular session). It also prohibits any expenditure by a lobbyist to agency officials, members and employees of certain executive branch agencies.[5] The term "expenditure" is defined broadly to include a payment, distribution, loan, reimbursement, deposit or anything of value made by a lobbyist or principal for the purpose of "lobbying."

Unanswered Questions

The new law was adopted somewhat hastily during a special legislative session that was called to deal with other issues. As such, it is no surprise that there appear to be a number of as yet unanswered questions.

One of the principal questions concerns whether the lobbying firm is required to report only that compensation received for those activities that fall within the definition of "lobbying" or, whether the firm also must report all compensation paid by the principal to the firm that is in any way related to or supportive of the firm's lobbying on behalf of the principal. For example, consider a lawyer who represents a principal for compensation seeking to influence a pending DEP rulemaking. The lawyer is not required to register to appear at a public workshop or public hearing.[6] However, the effective lawyer often submits written comments or meets with key agency officials outside of these public proceedings, and registration is required for these latter activities. When the lawyer's firm files its quarterly compensation report, does the firm disclose only the compensation paid by the principal for those activities that constitute "lobbying" (i.e., those activities out-

side of the public workshop or public hearing) or, must the firm disclose all compensation received for all of activities in any way related to or supporting the efforts to influence the rulemaking (including appearances at a public workshop or hearing)?

Guidance

As of this writing, the only guidance that the Legislature has provided for those who lobby the Legislative branch, are interim guidelines that deal primarily with the ban on expenditures.[7] The Florida Commission on Ethics has published emergency rules to implement the provisions that concern lobbyists who lobby executive branch agencies.[8] The Commission also has announced that it will be amending its current rules, Chapters 34-7 and 34-12, Florida Administrative Code, to conform to the new law.[9]

Legal Challenge

The new law is the subject of a legal challenge filed on February 16, 2006. The plaintiffs allege that the new law is invalid and should be stricken because it: (1) was not validly enacted; (2) invades the exclusive jurisdiction of the Florida Supreme Court to regulate lawyers, violates the right to freedom of speech and association, to petition government and to equal protection by prohibiting expenditures for lobbying, and by prohibiting contributions to candidates and committees; (3) violates the right to freedom of speech and association, to petition government and to equal protection by imposing vague or standardless regulations, and by imposing special burdens on lobbyists; (4) violates the right of privacy by compelling disclosure of private information; (5) violates the right to due process and jury trial; and (6) violates the separation of powers doctrine. *Florida Association of Professional Lobbyists, Inc., et al. v. Division of Legislative Information Services of the Florida Office of Legislative Services, et al.,* Case No. 2006 CA 488 (2d Cir.).

Stay tuned.

Lawrence E. Sellers, Jr., larry.sellers@hklaw.com, *received his J.D. from the University of Florida College of Law in 1979. He is a partner in the Tallahassee office of Holland + Knight LLP.*

Endnotes:

[1] See Chapter 2005-359, Laws of Florida.
[2] See s. 11.045, F.S. (Lobbying before the Legislature); s. 112.3215, F.S. (Lobbying before the executive branch).
[3] The Commission on Ethics has adopted implementing rules in Chapter 34-12, Fla. Admin. Code.
[4] See *Questions and Answers on Ethical Implications of the New Lobbyist Disclosure Statute,* available online at *http://www.floridabar.org/tfb/TFBETOpin.nsf/b2b76d49e9fd64a5852570050067a7af/6c7f30327c264287852570f4006e651c?OpenDocument*
[5] An agency official or employee is an individual who is required to file full or limited disclosure of his or her financial interests.
[6] See Rule 34-12.170(7).
[7] See Interim Guidelines on Lobbyists Expenditure (Jan. 20, 2006.)
[8] See Chapter 34ER06.
[9] The Commission was expected to publish proposed rule amendments on March 24 and to adopt them at its meeting on April 21.

The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399-2300

PRSRT-STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43