



# THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

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• Robert A. Manning, Chair • Enola T. Brown, Co-Editor • Janet E. Bowman, Co-Editor •

## Conservation Banking in Florida

by Sheri Ford Lewin

Florida's first two conservation banks are expected to receive final approval from the U.S. Fish and Wildlife Service (USFWS) in spring 2007, opening our state to an entire new industry of environmental trading. The 2003 Guidance for the Establishment, Use and Operation of Conservation Banks,<sup>1</sup> issued by the USFWS outlines the parameters for this type of ecological banking system by public or private entities. This program has been developed as a tool to offset adverse impacts to species listed as threatened or endangered under the Endangered Species Act of 1973, as amended, and its guidelines are based on the established wetland mitigation banking program.

Conservation banks are permanently protected public or private lands that are managed for endangered, threatened, and other at-risk species. Through the approval process of a conservation bank, a management plan is developed, the elements of the conservation easement are defined, and long term funding mechanisms are established to manage the land in perpetuity. Like a biological bank account, once approved and established, the conservation bank owner/operator receives habitat or species credits to use or sell.

Who benefits from Conservation Banking?

**1. Landowners** – A conservation

bank is a market enterprise that offers incentives to protect habitats of endangered, threatened, or other at-risk species. Large tracts of land can generate income without dividing parcels or developing property in the traditional sense, but rather by managing the land in a fashion beneficial to the appropriately identified species.

**2. Public and Private Developers** – Commercial developers, homeowners and transportation agencies are required to compensate for unavoidable adverse species impacts. Offsite is often the best solution. Conservation Banks offer a predictable solution with regulatory certainty.

**3. Listed Species and other**

See "Conservation," page 15

## Message from the Chair

by Robert Manning

It is that time of year again – the Legislature is in session, Spring (i.e., pollen) is in the air, and your Executive Council is very active. Stay tuned for legislative updates by Eric Olsen. The Treatise is undergoing its semi-annual update. The CLE committee is finalizing the agenda for the Annual Update, which should include information to prepare you for the State and Federal Government and Administrative Practice certification. The Florida Bar *Journal* will be publishing Section-sponsored articles

on pollutant trading. The Public Interest Committee just held another successful conference in Gainesville. Michelle Diffenderfer (your Chair-elect) is actively looking for recipients and placement opportunities for the Section-sponsored ABA Minority Fellowship. And as always, there are numerous publishing opportunities for the writers among us. Please let me know if there are other activities or opportunities the Section should pursue, and especially, how you would like to participate.

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# Florida Caselaw Update

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

**En banc Second DCA reverses course; Easement providing access to navigable waters conveys riparian rights necessary for the “purpose” of the easement. *Branon v. Boldt*, 31 Fla. L. Weekly D1260 (2d DCA, May 5, 2006).**

Subdivision landowners sought to enforce a 22 foot wide by 347 foot long easement running over a neighboring landowner’s property to Boca Ciega Bay. The scope of the easement was only defined by a plat which noted the easement was reserved for “ingress, egress, and utilities.” The landowner of the servient estate sought to extinguish the easement. While the language of the easement was unambiguous, the question presented was whether the easement holders enjoyed the full easement rights including the appurtenant riparian rights such as rights to fish and view while located in the easement. The original panel decision (32 Fla. L. Weekly D289) concluded that by providing ingress and egress over land reaching navigable waters the easement necessarily conveys all riparian rights associated with those lands absent any express language limiting such riparian rights.

The en banc court disagreed, holding instead that the “purpose” of the easement in this case was simply to provide access to and from the navigable water and not to convey all other riparian rights. Accordingly, the subdivision lot owners could not use the easement for traditional riparian purposes, such as fishing or viewing from the bank. Recognizing that there are numerous neighborhoods with similar plat maps and easements throughout Florida, the en banc court certified the issues as a question of great public importance.

**Conducting business activities in a jurisdiction does not result in standing to challenge consistency of that**

**jurisdiction’s comprehensive plan. *Potiris v. Department of Community Affairs*, 32 Fla. L. Weekly D172 (Fla. 4<sup>th</sup> DCA Jan. 3, 2007).**

Potiris, a land use planner, claiming §163.3184(1)(a), F.S., affected person’s status as a person who owned or operated a business within the boundaries of the Village of Wellington, challenged certain amendments to the Village of Wellington’s Comprehensive Plan. The court rejected Potiris’s argument – that by simply providing land planning services to properties in the Village, he was “operating a business” for purposes of §163.3184, F.S., standing. Conducting business in the Village is different than “owning or operating a business.” Accordingly, the DCA affirmed the dismissal for lack of standing.

**DCA policy of reviewing “aspirational” comprehensive plan amendments upheld. *Indian Trail Improvement Dist. v. Department of Community Affairs*, 946 So.2d 640 (Fla. 4<sup>th</sup> DCA 2007)**

In 2004, Palm Beach County amended its Comprehensive Plan to designate itself as the provider of freshwater and wastewater services in the unincorporated rural areas. The Indian Trail Improvement District (District), a special taxing district, challenged this amendment because the District provided water and wastewater services to properties within the areas addressed by the plan amendments. The County challenged the District’s standing. The Court concluded that the District was adversely affected since it was providing the water services prior to the plan amendments.

The Court also found no error with DCA’s “policy of review that does not always require ‘the same amount or type of data for all [CLUP] amendments.’” For policy amendments or “aspirational amendments” that do

not have an immediate impact on the provision of services or require capital improvement expenditures, it is DCA’s policy to require “less data and analysis than might otherwise be required.” The Court approved of DCA’s review process noting that “some matters of policy are obviously not susceptible to numerical interpretation.”

**DEP’s water reservation rule upheld by First DCA. *Association of Florida Community Developers v. Department of Env’tl Protection*, 31 Fla. L. Weekly D3099 (Fla. 1<sup>st</sup> DCA Dec. 12, 2006).**

The Association of Florida Community Developers and Florida Home Builders Association challenged proposed rule 62-40.474, F.A.C., relating to water reservations. The challenges alleged that proposed rule 62-40.474, F.A.C., enlarged, modified or contravened section 373.223(4), Fla. Stat., which provides that DEP or the water management districts may reserve water from permit applicants for the “protection of fish and wildlife or the public health and safety.” While portions of the rule could be interpreted to allow water reservations generally, the District Court recognized that each provision of the proposed rule was limited to reservations for the “protection of fish and wildlife or the public health and safety.” Accordingly, it affirmed the ALJ’s Final Order upholding the proposed rule.

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# **CLE Audiotapes & CDs Available**

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## **Environmental and Land Use Hot Topics Projects & Cases (0462A/C)**

Current issues with environmental and land use law including, water quality; wetlands; water supply and comprehensive planning; Everglades restoration; and conservation and sustainable development.

## **Environmental and Land Use Law Annual Update 2006 - Earth Wind and Fire: The Challenges of Development in Florida (0388A/C)**

Agency updates and recent changes in environmental and land use law.

## **Environmental Law Experts and Ethics (0315A)**

Expert testimony, regulatory takings, soil and groundwater contamination, Clean Water Act, civil and criminal enforcement in environmental cases, disclosure requirements for off site contamination, and related ethical issues.

## **Environmental & Land Use Considerations for Real Estate Transactions (0403A/C)**

Present the Contract; Comprehensive Plan; Zoning and Development Permits; Concurrency: Roads, Schools and Water; Coastal Issues: Coastal Construction Control Line and Coastal Permits; Wetlands: ERP and USACOE Permitting; Cute and Costly Animals: ESA and Your Permits; Contamination of the Site; and Docks: DEP Permitting and Trustees Leases.

## **Ethical Challenges for the Environmental Lawyer and Consultant (0472A/C)**

Overview of ethical issues for environmental lawyers, professional engineers and other environmental consultants.

**To place an audiotape/CD order, visit *www.floridabar.org* and click on “CLE,” “Search Calendar,” then login to the “Storefront.”**

# On Appeal

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

*Note: Status of cases is as of March 8, 2007. Readers are encouraged to advise the authors of pending appeals that should be included.*

## FLORIDA SUPREME COURT

*Best Diversified, Inc., and Peter L. Huff, et al. v. Osceola County, et al.*, Case Nos. SC06-1823. Petition to review decision of Fifth DCA's reversal of an award of damages for inverse condemnation under the Bert J. Harris, Jr., Private Property Rights Protection Act to owner and operator of a construction and demolition debris landfill that was denied permits to continue operating the landfill due to residents' complaints and DEP's finding that the operation constituted a public nuisance. 31 Fla. L. Weekly D2143. Status: Petition denied on December 4, 2006.

*Brevard County v. Stack*, Case No. SC06-1616. Petition to review decision of the Fifth DCA rejecting County's argument that the Bert J. Harris, Jr., Private Property Rights Protection Act is unconstitutional. 932 So.2d 1258. Status: Petition denied and motion for attorneys' fees granted on January 24.

*Florida Department of Environmental Protection, et al. v. Save Our Beaches, Inc, et al.*, Case No. SC06-1447 and 1449. Petition to review decision of First DCA regarding DEP's final order allowing the renourishment of 6.9 miles of beaches and dunes within the City of Destin and Walton County. 31 Fla. L. Weekly D1173. The First DCA certified, as a question of great public importance, the issue of whether the Beach and Shore Preservation Act (Part I of Chapter 161) had been unconstitutionally applied so as to deprive the members of Stop the Beach Renourishment, Inc. of their riparian rights without just compensation for the property taken, so that the exception provided in Rule 18-21.004(3), F.A.C. – exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights – did not apply. Status: Petition granted; all briefs have

been filed; oral argument set for April 19.

## FIRST DCA

*Florida Hometown Democracy, Inc., et al. v. Sue M. Cobb, in her official capacity as Florida Secretary of State*, Case No. 1D06-5059. Appeal of summary judgment entered in favor of the defendant. Plaintiff challenged the constitutionality of a then proposed constitutional revision that changed the deadline for filing a constitutional amendment (SJR 2394 (2004)), and a state statute limiting ballot summaries for certain constitutional amendments to 75 words (s. 101.161(1), F.S.). Status: All briefs have been filed.

*Association of Florida Community Developers, et al. v. DEP*, Case No. 1D06-1425. Appeal of final order rejecting challenge to DEP's so-called Water Reservation Rule. Status: Affirmed on December 12, 2006, 943 So.2d 989.

*DEP v. Florida Petroleum Marketers and Convenience Store Association*, Case No. 1D06-0817. Appeal of final order granting attorneys fees to the Association on the basis that DEP was not "substantially justified" in promulgating the contamination notification requirements of Rules 62-770(3)(b) and (4), F.A.C. Status: Affirmed, per curiam, on October 30, 2006, 940 So.2d 1130.

*Mid-Chattahoochee River Users v. DEP*, Case No. 1D06-0371. Appeal of final order dismissing petition for administrative hearing on the basis of lack of standing. Status: Affirmed on November 22, 2006, 943 So.2d 989; motion for rehearing *en banc* denied on February 16.

## SECOND DCA

*Peninsular Properties Braden River, et al. v. City of Bradenton, Florida*, Case No. 2D06-5302. An appeal of the lower court's dismissal of a petition as untimely. The petition, which sought review of the City of Bradenton's denial of petitioners' Mira Isles project, was filed fifty-one days later, rather than the jurisdictional thirty-day

timeframe for seeking judicial review of local government action. The trial court determined it was without jurisdiction to rule on the merits of the petition. Status: Notice of appeal filed November 20, 2006; oral argument requested.

## 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 Administrative 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: Affirmed per opinion on November 15, 2006; motion for clarification, rehearing, rehearing *en banc* denied February 13.

## 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 which would accommodate the proposed Scripps biomedical campus were in compliance. Status: Response to Court's Order requesting status of Ordinances 2004-34 to 2004-39 and 2004-63 to 2004-64 and whether appeal is moot, filed June 5, 2006; jurisdiction relinquished to the Department of Community Affairs on July 12, 2006 (for 120 days); joint status report filed November 27, 2006; order granting extension of time for relinquishment of jurisdiction rendered December 7, 2006, and recommending case remain with the DCA through October 15, 2007.

## FIFTH DCA

*Alfred J. Trepanier, Successor Trustee, et al. v. County of Volusia, Florida*, Case No. 5D05-3892. Appeal by owners of oceanfront property from a summary judgment in favor of the County. Owners sued the County for allowing (and directing) the public

to park on property they claimed they owned. Status: Oral argument held November 7, 2006.

*Volusia County School Board v. Volusia Home Builders Association, Inc.*, Case No. 5D05-3535. Appeal of an administrative ruling that the School Board's recommendation of increasing the school impact fee to the Volusia County Council constituted the enactment of a rule or the amendment of a pre-existing rule. Status: Held that the recommendation was neither a rule nor an amendment and that the Volusia Home Builders Association lacked standing to challenge the recommendation; motion for rehearing or clarification/motion for rehearing en banc denied January 25, 946 So.2d 1084.

## U.S. SUPREME COURT

*Teck Cominco Metals Ltd. v. Pakootas*, Case No. 06-1188. Petition for review of a Ninth Circuit decision holding the Canadian firm Teck Cominco liable under CERCLA for contamination in the Upper Columbia River in Washington caused by discharges from its lead and zinc smelter in British Columbia. 452 F.3d 1066 (9<sup>th</sup> Cir. 2006) Status: Petition filed February 27.

*Chemtura Canada Co/CIE and Hercules, Inc. v. EPA*, Case No. 06-1014. Petition to review an Eighth Circuit case upholding the award of costs incurred by EPA for cleanup at an Arkansas Superfund site. The issue under review is whether retroactive imposition of \$110 million in liability under CERCLA violates the due process provisions of the Fifth Amendment of the U.S. Constitution. 453 F.3d 1031 (8<sup>th</sup> Cir. 2006) Status: Petition filed January 22.

*Cinergy Corp. v. EPA*, Case No. 06-850. Petition to review a Seventh Circuit decision holding that EPA can reinterpret its NSR rules to declare existing coal-fired electric generating plants "new sources" even though the plants had not undergone "modifications" as that term is defined under EPA's NSR rules. The Seventh Circuit upheld EPA's interpretation of the rules which required NSR permits for any physical change or change in operating methods that increased annual emissions and stated that EPA had the discretion to interpret the term "modification" differently under the New Source Performance Standards (NSPS) rules and the NSR

program. Cinergy argues that the proper interpretation of "modification" is in conflict with the Fourth Circuit's *Duke Energy* case. 458 F.3d 705 (2006). [Editor's note: the *Duke Energy* case is currently before the Supreme Court, the status of which is noted above] Status: Petition filed December 15, 2006.

*U.S. Forest Service v. Earth Island Institute*, Case No. 06-797. Petition for review of a preliminary injunction entered by the Ninth Circuit barring the Forest Service from proceeding with two projects to restore portions of the Eldorado National Forest that were severely damaged by fire. The Ninth Circuit held that the projects likely violated the National Environmental Policy Act (NEPA) and National Forestry Management Act (NFMA). The question presented is whether the Ninth Circuit erred in ordering the preliminary injunction by: (a) relying on declarations filed by the respondents in the district court, rather than confining its review to the administrative record, when it determined that respondents had shown a likelihood of success on the merits; (b) holding that respondents could satisfy the "irreparable injury" prong of the test for obtaining a preliminary injunction by showing only a "possibility" of such injury; and (c) discounting competing interests in the use of forest lands under multiple use principles, and the Forest Service's balance of those competing uses, when it weighed the balance of harm and the public interest. Status: Petition filed December 8, 2006.

*Morrison v. U.S.*, Case No. 06-749. Petition for review of a Sixth Circuit decision to determine whether the appellate court applied the appropriate test to assess Clean Water Act (CWA) jurisdiction over petitioners' wetlands. The Morrisons attempted to repair a malfunctioning water supply valve on property in the vicinity of a canal that empties into the St. Clair River in Michigan. The U.S. sued them for violating section 404 of the CWA, arguing that the repair involved unpermitted discharge of dredged or fill materials into wetlands. Two weeks before the *Rapanos* case was decided, the Sixth Circuit upheld the \$25,000 fine and denied petitioners' motion for rehearing. 178 Fed. Appx. 481 (2006). [Author's Note: The *Rapanos* case (126 S. Ct. 2208) was decided on June 19, 2006, and

is summarized in this column in the October 2006 issue of the *Reporter*.] Status: Petition denied March 5.

*EPA v. New York*, Case No. 06-736. Petition to review a decision by the D.C. Circuit Court invalidating an EPA New Source Review (NSR) rule that limits the circumstances in which NSR permitting requirements apply to maintenance projects at industrial plants, on the ground that the phrase "any physical change" in the definition of "modification" in Section 111(a)(4) of the Clean Air Act (CAA) unambiguously requires EPA to adopt the broadest meaning of the phrase. 443 F.3d 880 (D.C. Cir. 2006) Status: Petition filed November 27, 2006.

*City of New York v. Catskill Mountains Chapter of Trout Unlimited*, Case No. 06-729. Petition to review a Second Circuit decision holding that water transfers through tunnels, channels, or natural streams for public water supply purposes require NPDES permits under Section 402 of the CWA. 451 F.3d 77 (2006). Status: Petition denied February 26.

*DuPont v. U.S.*, Case No. 06-726. Petition to review a Third Circuit decision holding that potentially responsible parties (PRPs) could not use Section 107 of CERCLA as a means to recover response costs from other PRPs because no implied right of contribution exists. 460 F.3d 515 (3<sup>rd</sup> Cir. 2006). Status: Petition filed November 21, 2006. Joint amicus briefs filed December 27.

*The Coy/Superior Team v. BNFL, Inc.*, Case No. 06-656. Petition to review a Sixth Circuit decision allowing the owner of hazardous waste at a Superfund site to transfer title and liability for the waste to a demolition/salvage company under CERCLA. The U.S. Department of Energy contracted with BNFL to decommission and decontaminate buildings at a uranium enrichment site, and BNFL subcontracted the demolition work to Coy/Superior. 174 Fed. Appx. 901 (2006). Status: Petition denied January 8.

*Baccarat Fremont Developers LLC v. U.S. Army Corps of Engineers*, Case No. 06-619. Petition for review of a Ninth Circuit ruling, relying on Justice Kennedy's concurring opinion in the *Rapanos* case, which also addressed the issue of wetlands jurisdiction, that the Corps does not need "significant hydrological and ecologi-

*continued...*

**ON APPEAL**

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cal connection” between wetlands and adjoining streams to exert authority. 425 F. 3d 1150 (2006). [Author’s Note: The *Rapanos* case (126 S. Ct. 2208) was decided on June 19, 2006, and is summarized in this column in the October 2006 issue of the *Reporter*.] Status: Petition denied February 20.

*Rodriguez-Perez v. Esso Standard Oil Co.*, Case No. 06-579. Petition to review a First Circuit decision dismissing Puerto Rico state law counterclaims for lost income, attorneys’ fees, slander, and injunctive relief brought in a RCRA suit seeking contribution of response costs incurring in the cleanup of hazardous waste at a gas station in Barranquitas, Puerto Rico. 455 F. 3d 1 (2006). Status: Petition denied January 8.

*United States v. Atlantic Research Corp.*, Case No. 06-562. Petition to review an Eighth Circuit decision finding an implied right to contribution under Section 107(a) of CERCLA and holding that a PRP who cleaned up a contaminated site voluntarily could seek contribution from remaining PRPs. 459 F. 3d 827 (8<sup>th</sup> Cir. 2006). Status: Petition granted January 19.

*EPA v. Defenders of Wildlife*, Case No. 06-549. Request for review of a Ninth Circuit case finding that EPA violated the Endangered Species Act (ESA) by not consulting with the U.S. Fish and Wildlife Service (FWS) when granting NPDES permitting authority to Arizona under Section 402(b) of the Clean Water Act. 420 F. 3d 946 (9<sup>th</sup> Cir. 2005). Status: Petition

granted January 5. [Author’s Note: This case has been consolidated with *National Home Builders Association v. Defenders of Wildlife*, Case No. 06-340.]

*Pacific Gas & Electric Co. v. San Luis Obispo Mothers for Peace*, Case No. 06-466. Petition for review of Ninth Circuit holding that NEPA requires the Nuclear Regulatory Commission (NRC), as part of its review of a proposed federal action, to consider the environmental impact of a potential terrorist attack even if the risk is not sufficiently quantifiable to be meaningful or to assist agency decision making under NEPA. The federal respondents did not file their own petition and recommended denying review at this time, recognizing that the issue may warrant the Supreme Court’s review in the future if a circuit split develops or the Ninth Circuit imposes burdensome requirements in other cases. 449 F. 3d 1016 (9<sup>th</sup> Cir. 2006) Status: Petition denied January 16.

*Mineral County, Montana v. Ecology Center, Inc.*, Case No. 06-344. The question presented is whether the Ninth Circuit failed to apply the proper standard of review under the Administrative Procedure Act (APA) in its evaluation of whether the Forest Service had complied with NEPA, 42 U.S.C. 4321 *et seq.*, and the National Forest Management Act of 1976, 16 U.S.C. 1600, *et seq.* 430 F. 3d 1057 (9<sup>th</sup> Cir. 2005) Status: Petition denied January 8.

*D. C. Water and Sewer Authority v. Friends of the Earth, Inc.*, Case No. 06-119. Petition to review a D.C. Circuit ruling that the word “daily” in the phrase “total maximum daily

load” (TMDL) in the CWA means “every day” under the plain language of the statute and holding that EPA erred when it approved TMDLs based on annual limits for oxygen-depleting substances. Status: In response, EPA argued that review was not warranted because its recently issued nationwide guidance (December 1, 2006) provided sufficient flexibility to state permitting agencies and permit holders to apply a daily limit for TMDLs for all parameters. 446 F. 3d 140 (D.C. Cir. 2006). Status: Petition denied January 16.

*United Haulers Association, Inc., et al. v. Oneida-Herkimer Solid Waste Management Authority, et al.*, Case No. 05-1345. Petition to review a Second Circuit decision which held that a local flow-control ordinance that required that wastes be sent to any publicly owned landfill (as opposed to a specific landfill) did not violate the Commerce Clause and that any burden on commerce imposed by the ordinance is “insubstantial” and not excessive. 438 F. 3d 150 (2<sup>nd</sup> Cir. 2006). Status: Oral argument held January 8.

*Watters v. Wachovia Bank*, Case No. 05-1342. Petition by the State of Michigan challenging the scope of the federal government’s ability to preempt Michigan banking laws that would allow the state to prevent a subsidiary of Wachovia from operating in the state. Wachovia argued that because it is a national bank, its subsidiary is regulated by the Federal Office of the Comptroller of the Currency, which preempts state law. Sources believe that a ruling in favor of the state could hinder EPA’s claim in subsequent cases that it can preempt state law in situations where Congress has not explicitly granted preemption. 431 F. 3d 556 (6<sup>th</sup> Cir. 2006) Status: Oral argument heard November 29, 2006.

*UGI Utilities, Inc. v. Consolidated Edison of New York*, Case No. 05-1323. Petition to review a Second Circuit decision allowing a private party to bring a cost recovery action under Section 107 of CERCLA against other PRPs after it voluntarily cleaned up a contaminated site. 423 F. 3d 90 (2<sup>nd</sup> Cir. 2005) Status: Petition filed April 14, 2006; jurisdictional briefs have been filed.

*Rockwell International Corp. v. U.S.*, Case No. 05-1272. Petition to review a Tenth Circuit decision holding that

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

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the relater of information had satisfied the False Claims Act's disclosure requirements and was thus eligible to be an "original source" of information for the government under the Act and assist the federal government in recovering money for fraudulent contracting and other claims, including those brought by contractors for environmental cleanup. 92 Fed. Appx. 708 (2004) Status: Petition granted September 26, 2006.

*Massachusetts v. EPA*, Case No. 05-1120. Review of a D.C. Circuit decision that EPA did not violate the CAA when it declined to regulate carbon dioxide emissions (*i.e.*, "greenhouse gases") from automobiles. 415 F.3d 50, 60 (D.C. Cir. 2005). Status: Oral argument held November 29, 2006. A key issue raised at oral argument was whether the coalition of states that brought suit had standing to do so under the "injury in fact" test.

*Environmental Defense v. Duke Energy Corp.*, Case No. 05-848. Review of Fourth Circuit decision narrowing the scope of the NSR air pollution construction permitting program under the CAA by requiring EPA to interpret the emissions increase that triggers NSR requirements as an increase in the maximum hourly emissions rate of a plant rather than an increase in actual annual emissions. This effectively ended the enforcement action brought against Duke Energy. 411 F.3d 539, 60 ERC 1577 (4<sup>th</sup> Cir. 2005). Status: Oral argument held November 1, 2006.

## SECOND CIRCUIT

*Riverkeeper, et al. v. EPA*, Case No. 04-6692. Challenge to EPA's controversial phase II cooling water intake rule, which set standards under which existing power plants could draw in water used to create steam for electric power generation. Status: On January 25, the court rejected EPA's use of a cost-benefit analysis to determine the "best technology available" (BTA), EPA's performance range for selecting intake technologies, provisions allowing the plants to undertake restoration measures in lieu of preventing ecological harm, and a controversial new definition that determined when plant expan-

sions are subject to strict technology standards as "new" facilities. 475 F.3d 83 (2007). EPA has indicated that it may seek rehearing.

## ELEVENTH CIRCUIT

*United States v. Alabama Power Co.*, Case No. 06-15456. Appeal of a decision that the federal government applied the wrong interpretation of what constituted an emissions increase when it charged that Alabama Power violated NSR when it modified power plants and increased emissions without installing the required modern pollution controls. EPA interprets "emissions increase" as an increase in actual emissions measured on an annual basis. The company argued that "emissions increase" should be interpreted as an increase in the maximum potential hourly emissions rate. 37 ER 2118 (10/20/06). *See also, Duke Energy, supra*. Status: The court issued a memorandum on October 24 questioning its own jurisdiction. On November 14, the court granted a motion to stay the case until the U.S. Supreme Court reaches a decision in *Duke Energy, supra*.

## D.C. CIRCUIT

*Utility Air Regulatory Group v. EPA*, Case No. 05-1353. Challenge to EPA's Clean Air Visibility Rule, which sets guidelines for states to determine best available retrofit technology (BART) for reducing haze-forming emissions from existing power plants and other sources of air pollution. The rule also sets forth procedures for states to use when determining which sources must install BART. Industry petitioners generally challenged the rule as inappropriately requiring states to require the application of pollution controls to too many sources, while the National Parks Conservation Association argued that the rule improperly allows states to exempt too many facilities from those requirements. 37 ER 1388, 6/30/06. Status: On December 12, 2006, the court upheld the rule as a reasonable interpretation of the CAA. 471 F. 3d 1333 (2006).

*Minnesota Power v. EPA*, Case No. 05-1246, and *North Carolina v. EPA*, Case No. 05-1244. Various petitions challenging EPA's Clean Air Interstate

Rule (CAIR), which was issued March 10, 2005. The CAIR implements an emissions trading system designed to reduce emissions of sulfur dioxide and nitrogen oxides from power plants. Status: Petition filed July 11; proposed briefing format and schedule filed by EPA on September 11.

*Environmental Defense v. EPA*, Case No. 05-1159, and *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: Petition filed May 18, proposed briefing format and schedule was filed by EPA on August 29.

*South Coast Air Quality Management District v. EPA*, Case No. 04-1200. Challenge by states and environmentalists to EPA's rules implementing the e-hour ozone national ambient air quality standard finalized in 2001. The rule detailed how states that have not attained the standard must revise their attainment plans. Status: On December 22, 2006, the court vacated the rule, stating that it violates the CAA by giving certain areas a less stringent classification known as "subpart 1," providing more flexibility and staggered deadlines for compliance. Subpart 1 classifications were previously used only in maintenance areas, not in nonattainment areas. 472 F. 3d 882 (2006). EPA has indicated that it may seek rehearing *en banc*.

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# **Environmental and Land Use Law Section's Long Range Planning Retreat**

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Are you interested in becoming involved in the Section? Looking for a place to devote time, energy and have some fun? We are in search of great ideas and positive attitudes as we get together to plan the next couple of years for our Section. We will also be featuring CLE credits, a site visit of the Disney Wilderness Preserve and a number of social activities for our Council and Section members to get to know each other better. Please plan to join us for the 2007 ELULS Long Range Planning Retreat from June 28 through July 1, 2007 as a part of the 2007 Annual Florida Bar Convention at the Orlando World Center Marriott.

## **Thursday June 28, 2007**

6:30 p.m. – 7:30 p.m.      Joint Reception with Administrative Law Section  
7:30 p.m. – 9:30 p.m.      Dinner with the Executive Council (Dutch)

## **Friday June 29, 2007**

9:30 a.m. – 10:30 a.m.      CLE Committee Meeting  
10:30 a.m. – 12:30 p.m.      Executive Council Meeting  
12:00 p.m. – 3:30 p.m.      Brown Bag Lunch and Disney Wilderness Preserve Tour (CLE Credit Pending)  
5:00 p.m. – 7:00 p.m.      Reception  
7:00 p.m. – 9:00 p.m.      Dinner with the Executive Council (Dutch)

## **Saturday June 30, 2007**

9:30 a.m. – 10:00 a.m.      Continental Breakfast  
10:00 a.m. – 12:00 p.m.      Long Range Planning Retreat Discussion (Closed session)  
12:00 p.m. – 1:00 p.m.      Lunch  
1:00 p.m. – 3:00 p.m.      Long Range Planning Retreat Discussion  
3:10 p.m. – 4:00 p.m.      CLE Presentation (CLE Credit Pending)  
5:00 p.m. – 8:00 p.m.      Happy Hour and Light Dinner with the Executive Council (Dutch)  
8:00 p.m. – whenever      Outing to Pleasure Island

## **Sunday July 1, 2007**

9:30 a.m. – 10:00 a.m.      Continental Breakfast  
10:00 a.m. – 11:30 a.m.      Long Range Planning Retreat Wrap Up

To register, mail this form to: The Florida Bar, Jackie Werndli, 651 E. Jefferson Street, Tallahassee, FL 32399-2300. If you have questions, call 850.561.5623.

Name \_\_\_\_\_ Florida Bar # \_\_\_\_\_

Address \_\_\_\_\_

City/State/Zip \_\_\_\_\_ Phone # \_\_\_\_\_

**Hotel Reservations:** A block of rooms has been reserved at the Orlando World Center Marriott at the rate of \$171 single/double occupancy. To make reservations, call 800.228.9290 and reference the group code FLOFLOA. Reservations must be made by 6/6/07 to assure the group rate and availability.

*Space is limited – register early!*



# DEP Update

by Kelly Samek, Senior Assistant General Counsel and Amanda G. Bush, Assistant General Counsel

## ACF Update

**State of Alabama v. U.S. Army Corps of Engineers, et al.**, 90-CV-1331-Bowdre (N.D. Ala.)

Court-ordered mediation was held on December 12 and January 18 in Atlanta. The court has extended the stay for mediation through March 30, 2007.

**Southeastern Federal Power Customers, Inc. v. Luis Caldera, et al.**, 1:00-CV-02975-Jackson (D.C. Cir.)

Florida and Alabama filed Appellants' Opening Brief on February 1. Oral argument on the motion to transfer all pending federal litigation (the two aforementioned cases in addition to **State of Florida v. U.S. Fish and Wildlife Service, et al.**, pending in the Northern District of Florida, and **State of Georgia v. U.S. Army Corps of Engineers, et al.**, pending in the Northern District of Georgia) to the Multi-District Panel occurred on January 25 in Miami.

**Struhs v. Wyner**, Case No. 06-531 (United States Supreme Court)

Respondents T.A. Wyner and George Simon filed a civil action against the manager of a Florida State Park and the head of the Florida Department of Environmental Protection challenging a regulation imposing minimum clothing requirements in Florida's State Parks, which prevented Respondents from performing annual plays and political performances in the nude at the park. On February 13, 2003, less than twenty-four hours later, the district court held an emergency hearing, at which the district court entered a preliminary injunction prohibiting Petitioners from arresting or interfering with Respondent's performance. After a hearing on the merits, Respondents lost their claim for a permanent injunction and other relief. The district court determined that Respondents were prevailing parties because of the preliminary injunction and awarded Respondents' attorney's fees and costs. Petitioners appealed the finding of prevailing party status and the award of attorney's fees. The Eleventh Circuit Court of Appeal affirmed.

The petition for United States Su-

preme Court review was granted. The questions presented are (1) Whether the 11<sup>th</sup> Circuit decision is correct in holding that a preliminary injunction is relief on the merits, or whether the Fourth Circuit decision in *Smyth v. Rivero*, 282 F.2d 268 (4<sup>th</sup> Cir. 2002), certiorari denied by 537 U.S. 825 (2002), is correct in holding that a preliminary injunction is not a ruling on the merits and thus cannot be the basis for prevailing party status and (2) Whether the Eleventh Circuit was correct in affirming the district court's order finding that Respondents are prevailing parties when their request for permanent injunctive relief was denied, although at an abbreviated hearing where Respondents were awarded interim relief. Oral argument is set for April 2007.

**Best Diversified, Inc., et al. v. Osceola County, Florida, et al.**, 945 So.2d 1289 (Fla. 2006)

The Florida Supreme Court declined to accept jurisdiction of the case, letting the Fifth DCA's opinion at 936 So.2d 55 (5<sup>th</sup> DCA 2006), stand. The Fifth DCA determined that neither the Department's actions, nor the County's, resulted in an unconstitutional "taking" of plaintiff's property, nor an "inordinate burden" under the Bert Harris Act. The Department had denied plaintiff's application to renew a general permit authorizing the operation of his facility due to the facility's numerous violations and failure to provide reasonable assurances that the facility would be operated consistent with Department rules.

**Walton County et al. v. Save Our Beaches, Inc., et al.**, Case No. SC06-1447 and 1449

Petition to review decision of First DCA relating to DEP's final order allowing the renourishment of 6.9 miles of beaches and dunes within the City of Destin and Walton County. The First DCA certified, as a question of great public importance, the question of whether the Beach and Shore Preservation Act (Part I of Chapter 161) had been applied unconstitutionally so as to deprive members of Stop the Beach Renourishment,

Inc. of their riparian rights without just compensation for the property taken, so that the exception provided in Rule 18-21.004(3), F.A.C. – exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights – does not apply. The case is fully briefed at the Florida Supreme Court, and oral argument is set for April 19, 2007.

**Association of Florida Community Developers and Florida Home Builders Association v. DEP**, 943 So.2d 989 (1st DCA 2006)

This case involved a challenge to a proposed amendment to Rule Chapter 62-40, F.A.C., the Water Resources Implementation Rule, which establishes guidance that is to be used by the Department and Water Management Districts in the establishment of reservations of water, in accordance with s. 373.223(4), F.S. Petitioners argued that the rule enlarged, modified and expanded the statute and, therefore, was invalid. The ALJ ruled in favor of the Department. Petitioners appealed to the First DCA. On December 12, the First DCA affirmed the ALJ's order with an opinion holding the rule valid.

**St. Johns Riverkeeper, et al v. U.S. EPA**, 3:04-CV-699-J-32MCR (M.D. Fla)

St. Johns Riverkeeper filed suit against EPA alleging that it should have disapproved, as a change to water quality standards, the Department's recently adopted Type II Site Specific Alternative Criteria (SSAC) which sets forth the criteria that are to be used to assure that any adopted SSAC will protect the aquatic life designated use of the particular waterbody. Plaintiffs did not challenge the rule at the state level. The Type II SSAC provisions were subsequently used to establish a Dissolved Oxygen SSAC for the Lower St. Johns River. Plaintiff's lawsuit also requested that the court enjoin EPA from approving any SSAC based on the Type II criteria or approving any TMDL for the Lower St. Johns River based on a Type II SSAC.

*continued...*



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- Or visit [www.flabarfndn.org/KidsDeserveJustice](http://www.flabarfndn.org/KidsDeserveJustice)

The Kids Deserve Justice specialty license plate funds free legal services to low-income children in Florida, helping them reach their full potential. Examples include legal representation for abused and neglected children, legal help for children transitioning out of foster care or legal assistance for children needing special education testing or access to health care.

The legal services are provided by not-for-profit organizations, including local legal aid societies and volunteer attorneys. The funds can also be used to work with the courts and other groups to improve how the broader justice system serves the needs of Florida's most vulnerable residents.

Every dollar of the Kids Deserve Justice specialty license plate fee of \$25.00 will fund children's legal services. No administrative costs will be deducted by The Florida Bar Foundation.

## DEP UPDATE

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**United States of America, et al. v. South Florida Water Management District and Florida Department of Environmental Protection, et al.**, Case No. 88-1866-CIV-Moreno (S.D. Fla. 1988)

On October 16, the court heard oral argument on the parties' responses to the Special Master's report, with the primary issues being whether the court should enter a remedial order directing the State to implement the remedies it has already begun to implement and whether the court should remand certain statistical evidence to the Special Master for consideration that the Special Master had excluded. There is no specific time for entry of a written order by the Judge.

**Florida Public Interest Research Group, et al. v. EPA, et al.**, Case No. 4:02cv408-WS (N.D. Fla.)

Plaintiffs allege that EPA failed to fulfill its mandatory duty to review the Impaired Waters Rule (IWR) as a change to water quality standards. On February 15, 2006, the Federal court in Tallahassee entered an order granting EPA's motion for summary judgment and denying plaintiff's request for relief in all respects. The court determined that EPA conducted a "meticulous" review of the IWR and that the court would defer to that review.

**Sierra Club v. EPA, et. al.** Case No. 1:05cv00209 (EGS)

The Sierra Club alleged that EPA has regulatory jurisdiction over the issuance of the NPDES permit for Buckeye's pulp and paper mill in Taylor County. There is ongoing litigation concerning the Department's

proposed NPDES permit, administrative order and alternative dissolved oxygen criteria currently pending before the Division of Administrative Hearings. The federal district court recently granted EPA's motion for summary judgment and dismissed the Sierra Club complaint for lack of jurisdiction, the effect of which is that the Department's intended decision to issue the permit and associated authorizations continue to remain in the Department's jurisdiction.

**In Re: Florida Power & Light Co. West County Energy Center, Power Plant Siting Application No. PA 05-47**, DOAH Case No. 05-1493EPP

Florida Power and Light (FP&L) applied for certification to construct and operate a new 2500 megawatt natural gas-fired power plant in Palm Beach County. FP&L's application also sought approval of 3300 megawatts as the site's ultimate capacity, with the applicant required to apply for the additional capacity in a new certification proceeding. A certification hearing was held on September 6 and 7, 2006. Four members of the public filed a motion to intervene at the hearing, which was denied. Twenty-eight members of the public testified in public testimony against the project. On October 24, 2006, the ALJ issued a Recommended Order recommending approval of the projects. The Siting Board approved the certification on December 16, 2006.

**Chapter 62-302, F.A.C. - Triennial Review of Water Quality Changes**

On December 7, 2006, amendments to Chapter 62-302, F.A.C., concerning the state's surface water quality standards became effective. The amendments were submitted to EPA for review on December 15, but have not yet been approved.

## *Ethics Questions?*

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**ETHICS HOTLINE**

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# Water Management District Update

## Revised Division of Responsibility Between the Water Management Districts and the Department of Environmental Protection

by Susan Roeder Martin, Senior Specialist Attorney, South Florida Water Management District

The Florida Department of Environmental Protection (DEP), the South Florida Water Management District, St. Johns Water Management District, Southwest Florida Water Management District and Suwannee River Water Management District (WMDs) have initiated rulemaking to revise the operating agreements concerning regulation under Part IV of Chapter 373, Florida Statutes. Since the agreements are incorporated by reference into DEP's and each of the WMDs' rules,

These agreements divide the responsibility between the WMDs and DEP for the exercise of authority for permitting, compliance, enforcement, and formal wetland delineations under Part IV of Chapter 373, F.S. The purpose of the agreements is to "further streamline environmental permitting, while protecting the environment." Draft Operating Agreement Concerning Regulation Under Part IV, Chapter 373, F.S., Between Individual Water Management Districts and the Department of Environmental Protection at 1 (Draft Agreement). Each WMD will amend its separate agreement with DEP.

These agreements will amend the Operating Agreement Concerning Regulation under Part IV, F.S. Stat. Ch. 373 and Aquaculture General Permits under §403.814, Fla. Stat., effective December 1998, which superseded several previous agreements. With certain exceptions, some of the major activities that the previous agreement allocated responsibility to DEP were: solid, hazardous, and domestic waste facilities; potable water facilities; certain mines; power plants, electrical distribution and transmission lines; communication cables and lines; natural gas or petroleum exploration, production and distribution facilities; docking facilities, boardwalks, shore protection

structures and piers; projects constructed operated or maintained by a WMD; navigational dredging by governmental entities; port authority seaports and related development. A more detailed list of DEP's responsibilities can be reviewed in the operating agreement itself.

The WMDs have responsibility for all activities not specifically assigned to DEP. Additionally, with respect to the activities assigned to DEP, if the activities are an incidental component of a project DEP would not otherwise review, fully contained within a system that DEP would not otherwise review, part of a larger plan of development or project for which the Department does not review and take final action on permit applications, then the activity will be reviewed by the WMD. Agreement at 4.

The primary changes to the operating agreement: clarify which mining projects are retained by DEP; provide

that the WMD will review boat docks associated with residential developments also reviewed by the WMD, even if the upland development qualified for a no-notice general permit; provide that the WMD can review utility lines that are contained in projects under the WMD's review; eliminate aquaculture from the agreement (which is now reviewed by the Florida Department of Agriculture and Consumer Services), and provide a process for the review or transfer of incorrectly submitted applications.

The WMDs and DEP are well into the rule adoption process and the agreements are scheduled to all become effective in July, 2007.

### Endnotes:

<sup>1</sup> Rules are incorporated by reference at Fla. Admin. Code R. 62-113; 40B-4.1090; 40C-4.091; 40D-4.091; and 40E-4.091 rulemaking is necessary to amend the agreements.

<sup>2</sup> Rulemaking notices may be found at <http://www.flrules.org>.

## 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 news and legislative updates as well as Section news and events. Additionally, the listserv is the first and best source of information (including access info) on the new online Environmental and Land Use Law Treatise. 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](http://www.eluls.org).

# Law School Liaisons

## University of Florida Levin College of Law Update

by Alyson Flournoy

### **Spring Events at the Levin College of Law**

#### Thirteenth Annual Public Interest Environmental Conference

The annual Public Interest Environmental Conference, co-sponsored by the Section, brought over 200 people to the Levin College of Law campus for two days of panels and plenary sessions, on March 1-3. Among the highlights, Jill Zilligen, Vice President, Sustainable Business Practices at Nau, Inc., gave a fascinating view into a start-up outdoor apparel company with a central focus on sustainability at the opening reception on Thursday, which was also a Section affiliate mixer. Among other insights, she described challenges the organization faced in incorporating a commitment to sustainability in the company's charter.

At the Friday evening banquet, Ray Anderson, Founder and Chairman of Interface, provided a detailed picture of how a focus on sustainability enables a company to reap significant financial benefits while minimizing the costs it externalizes on the rest of society. The facts and figures Anderson cited made abundantly clear that a large part of sustainability is simply good business practices that should interest every business leader interested in the bottom line. The final plenary session featuring Phyllis Harris, Vice President for Environmental Compliance at Wal-Mart and John Henry Hankinson concluded with a rousing song "Testify" written specially for the conference and performed (with harmonica) by Hankinson (with audience assistance on the refrain).

Plenary presentations included Professor David Driesen from Syracuse University College of Law discussing the concept of an Environmental Competition Statute, Professor J.B. Ruhl of Florida State University College of Law on ecosystem service payments, Professor Charles Kibert of UF College of Design Construction and Planning talking about green building trends, Professor Joseph

Tomain from University of Cincinnati College of Law on the intersection of energy and environmental law and policy, and Professor Pat Parenteau of Vermont Law School on the role of litigation in advancing sustainability. The UF Leadership Development Institute organized a very popular interactive Saturday morning workshop on communicating about sustainability with corporate leaders. Special thanks to all the ELULS Public Interest Committee members who helped in organizing and moderating the twelve very successful panels that spanned Friday and Saturday.

#### Next Generation Environmental Law Roundtable

The Levin College of Law was host to a roundtable meeting on Thursday, March 1, that brought together a group that included environmental and land use law professors and experts in economics, political science, environmental and chemical engineering, ecology, urban planning, and sociology to discuss collaborative projects to inform the development of the next generation of environmental laws. Representatives of a wide array of disciplines from the University of Florida joined with legal scholars from around the country for a day of discussions to identify future needed research and ideas that warrant further development. The roundtable was funded by a seed money grant from the UF School of Natural Resources and the Environment.

#### UF Environmental Speaker Series and Capstone Colloquium

One more speaker will be visiting UF as part of this spring's Environmental Speakers Series: Marc Mihaly, Acting Associate Dean for the Environmental Program and Acting Director of the Environmental Law Center at Vermont Law School, will speak on *Kelo and Public-Private Redevelopment* on Thursday March 29 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](mailto:elulp@law.ufl.edu) to reserve a seat if you plan to attend a presentation.

### **New Programs at UF**

#### IFAS Conservation Clinic collaboration on Smart Growth and Sustainability

The IFAS Cooperative Extension Service and the UF Law Conservation Clinic have developed an initiative to provide legal services to the Florida extension community on issues relating to land use and sustainability. The collaboration has allowed the Conservation Clinic to retain an Assistant In Environmental Law (Thomas Ruppert) who assists Clinic Director Tom Ankersen in the supervision of students providing policy products to statewide and local extension personnel.

#### Sustainability at UF

The Office of the Provost retained Legal Skills Professor Tom Ankersen and Conservation Clinic Student Brenda Appledorn to prepare a review of UF's campuswide sustainability curriculum, including centers, institutes and programs and sustainability programs at peer or other institutions, with conclusions and recommendations. The Provost accepted the report and directed the UF Sustainability Committee to pursue implementation, including development of a minigrants program, an interdisciplinary graduate certificate and a legislative budget request.

*Law School Liaisons, continued...*

# A Spring '07 Update on the FSU College of Law's Environmental Program

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

We're in the midst of another busy semester at FSU College of Law. This article is a brief summary of some of the major environmental and land use events and initiatives we'll be hosting or participating in during the next few months.

We're delighted to welcome one of the nation's leading environmental law scholars to the law school on March 28. Professor Daniel Farber, Sho Sato Professor of Law and Director of the Environmental Law Program at UC Berkeley, will give our spring *Distinguished Environmental Lecture*. The College of Law hosts a Distinguished Environmental Scholar each semester. These lectures are open to the public and we would be delighted to have ELULS members join us for this program. Professor Farber will be the 24<sup>th</sup> lecturer in this series, which has brought many of the nation's leading scholars to the College of Law.

On April 4, our spring *Environmental Forum*, which we are co-sponsoring with ELULS, will focus on "Affordable Housing in Florida: Is Regulation the Cause or the Cure?" The *Environmental Forum* series was launched in 2003; and this spring's *Forum* will be the seventh in the series. Several experts on the timely issue of affordable housing and trends in the Florida housing market will participate in the program, including Wellington H. Meffert II, Florida Housing Finance Corporation; Jaimie Ross, 1000 Friends of Florida; Shaw P. Stiller, Florida Department of Community Affairs; Henry H. Fishkind, Fishkind & Associates, Inc.; and David Powell, Hopping Green & Sams. The program will begin at 3 p.m. and will be followed by a reception.

The College of Law's *Journal of Land Use and Environmental Law*'s spring 2007 issue will feature articles from last year's ground-breaking **Symposium on Ecosystem Services**. Authors include Professors Debra Donahue, University of Wyoming; A. Dan Tarlock, Chicago-Kent College of Law; Dale Goble, University of Idaho; Tony Arnold, University of Louisville School

of Law; Dennis Hirsch, Capital University; David Hodas, Widener University; Robert Abrams, Florida A&M University; James Salzman, Duke University; and Florida State University College of Law Professors Robin Craig, David Markell and J.B. Ruhl.

In February, our Environmental Moot Court team (FSU students Mike Makdisi, Spencer Bishins, and Erika Siu) made it to the quarterfinals of the 2007 Environmental Moot Court Competition at Pace Law School. One team member, Ms. Erika Siu, was named best oral advocate for one of the rounds in the competition.

The College of Law's Environmental Law Society has an active spring planned. Students are exploring a variety of strategies to make the FSU College of Law campus "more green" (energy conservation measures, etc.).

The ELS is also taking a lead role in bringing together the significant number of students now engaged in environmental and land use law activities through the Certificate Program, the *Journal of Land Use & Environmental Law*, and the ELS itself. Students will participate in the Public Interest Law Conference at the University of Florida at the beginning of March, and in Florida Ocean Day at the Capitol in mid-April.

We hope you'll join us for our spring activities. For more information about our programs, please consult our web site at: [www.law.fsu.edu](http://www.law.fsu.edu), or please feel free to contact Professor David Markell, at [dmarkell@law.fsu.edu](mailto:dmarkell@law.fsu.edu). Please also review our environmental brochure, *available online*, which provides an in-depth overview of the environmental law program at FSU.

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# An Active Start for Affiliate Membership in 2006/2007

by J. Chris Herin, ELULS Affiliate Membership Chair

Our first social mixer of 2007 took place in Tampa at the Rusty Pelican on January 25, 2007 and was a good compliment to The Florida Bar's course entitled "Environmental & Land Use Considerations for Real Estate Transactions". We had about 50 in attendance with plenty of networking between lawyers and affiliates. If you have a chance, please let our event sponsors know you appreciate their financial and time contributions to make this happen – the sponsors were Carlton Fields, Environmental Engineering Consultants,

and HSW.

As I write this, it is Thursday evening, 1 March 2007 and I've just returned from attending our reception/mixer in Gainesville which was associated with the 13th Annual Public Interest Environmental Conference (PIEC) put on by the University of Florida's Levin College of Law. This mixer was a nice event and I am left deep in thought on the subject of sustainability (which was the theme) – as were others who I spoke with at the reception. This was well worth attending! Thanks are in order to our

sponsors for this reception: Hopping Green & Sams, Water & Air Research, and Golder Associates.

Our next mixer took place the evening of The Florida Bar course entitled "Environmental and Land Use Hot Topics, Projects & Cases" held in Ft. Lauderdale on March 30, 2007. One other mixer is being scheduled for April in the Orlando area. Please plan to attend! These mixers offer excellent networking opportunities; take advantage of it!

So far in 2006/2007, we have had three Affiliate articles published in the ELULS Section Reporter:

- Bad News for TCE Fans – by Keith Tolson of Geosyntec (October 2006);
- Application of Institutional Controls for Contaminated Site Redevelopment – by Andrew Lawn of HSW (January 2007); and
- Conservation Banking in Florida – by Sheri Ford Lewin of Mitigation Marketing (April 2007).

These articles are very relevant to current environmental issues in Florida. The technical content is excellent and we appreciate the efforts by these authors.

And, the Affiliates are deep into planning for their portion of ELULS's August 2007 Annual Update in Amelia Island. There will be several very good Affiliate speakers at this event.

**LAWYERS** – in deference to the above, please be aware that our Affiliate members have expressed a willingness to be a resource for you (as evidenced by the above active involvement). When you want to team with a technical consultant – consider teaming with an Affiliate member's company. When you have the need for a technical presentation think about giving an Affiliate member a shot at it. And, when you'd like to co-publish a technical article, please consider involving an Affiliate. We love working with ELULS membership!

See you at the next mixer!

**Chris Herin** can be reached via email at [CHerin@GeoSyntec.com](mailto:CHerin@GeoSyntec.com) and telephone at 561-922-1041.

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## CONSERVATION

from page 1

**wildlife and plants** – The establishment of large areas for conservation to compensate for multiple projects is more likely to ensure ecosystem success, foster biodiversity and provide opportunity for linking existing protected habitat as opposed to smaller, project-specific mitigation.

**4. The public and community** – The protection of large areas of open space contributes to a healthy environment especially when conservation banking works in concert with regional conservation planning.

However, in order for conservation banking in Florida to evolve into a viable option for landowners and end users, several essential elements must be in place.

1. Clear and predictable enforcement of laws regulating impacts. Enforcement provides the demand for conservation action on a larger scale, without which there will be no supply.

2. Level playing field for all forms of mitigation. This includes equivalent success criteria and full cost accounting for all forms of mitigation whether provided by a public entity, NGO, or private provider.

3. Flexibility while maintaining Sound Science. Success criteria should incorporate flexibility through the intelligent use of credit ratios, currency types and service territory variations as long as ecological func-

tionality is truly replaced.

These essential elements can create a market based solution for Florida that is responsive, efficient and provides incentives to landowners interested in conservation practices.

One of the first Conservation Banks expecting final approval this spring is located in Hendry County. The Florida Panther Conservation Bank is 1,930 acres in size and its primary goal is to provide habitat for Florida Panther. In addition, the Bank provides habitat for a multitude of species including the Florida Black Bear, several species of Raptors and the Red Cockaded Woodpecker. This Conservation Bank has been in the approval process since 2004 through the South Florida Ecological Services office of the USFWS located in Vero Beach, Florida.

Also expecting final approval this year from the USFWS is the HD Ryals Conservation Bank. Located in Charlotte County, this bank site is approximately 1,650 acres in size and will be managed for Florida Scrub Jay habitat. The bank has been in the approval process for just under one year. Both bank sponsors are private landowners.

Initiating the Conservation Banking program in Florida has not been without challenges. Both groups associated with the above-noted banks and the USFWS admit that the process has been difficult and slow due to several factors; 1) lack of precedent in Florida or detailed guidelines in the guidance, and 2) the desire by the

USFWS to get the program started on the “right-track”. However, with an additional four conservation bank applications in for review at the USFWS’ Vero Beach office, the program should be fairly well established by the end of 2007.

According to the USFWS staff in South Florida, there is a great and immediate need for conservation banks in Florida to offset impacts to habitat for the Florida Panther, Florida Scrub Jay and Sand Skink. The USFWS is doing their part to promote conservation banking in Florida through outreach to landowners and consultants at appropriate conferences, along with enforcement education at county environmental meetings and USFWS field offices.

With all the essential elements in place, conservation banking, by providing a market incentive to private landowners, can play a key role in solving Florida’s conservation challenges.

### Endnote:

<sup>1</sup>A copy of the Guidance is available at: <http://www.fws.gov/endangered/policies/conservation-banking.pdf>

*Sheri Ford Lewin is Vice President of Mitigation Marketing LLC. Mitigation Marketing provides Management and Marketing Services to Wetland Mitigation Banks and Conservation Banks throughout Florida from their offices in Orlando. Sheri can be reached at [sheri@mitigationmarketing.com](mailto:sheri@mitigationmarketing.com) or 407-481-0677.*

**Mark your calendar for upcoming  
CLE events...**



**August 23-25**  
ELULS Annual Update  
Amelia Island Plantation

Registration information, when available, will be posted at [www.eluls.org](http://www.eluls.org).

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