

# THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

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• Joseph D. Richards, Chair • Jeffrey A. Collier, Co-Editor • Anthony J. Cotter, Co-Editor

## EPA and ACOE Release Draft Guidance Relating to Federal Wetland Regulations

by Anthony J. Cotter, GrayRobinson, P.A.

In late April of this year the Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“ACOE”) published proposed guidance to federal agency field staff in making determinations concerning whether waters are protected under the Clean Water Act (“CWA”).<sup>1,2</sup> EPA and ACOE claim that the proposed guidance clarifies how the EPA and ACOE interpret existing requirements of the CWA and the federal regulations implementing the CWA

following the Supreme Court decisions concerning the extent of waters covered by the CWA in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*<sup>3</sup> (“SWANCC”) and *Rapanos v. United States*<sup>4</sup> (“Rapanos”). EPA and ACOE also claim that the proposed guidance will provide clearer, more predictable guidelines for determining which waters are protected under the CWA.

For the ease of reference this proposed guidance document will be

referred to as the 2011 Guidance. The draft 2011 Guidance may be obtained from the EPA at <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>. The EPA and ACOE have opened the draft 2011 Guidance to public comment for a 60-day period.<sup>5</sup> Upon conclusion of the 60-day period, the agencies anticipate finalizing the 2011 Guidance and then undertake rulemaking consistent with the federal Administrative Procedures Act. The draft explains

See “EPA and ACOE,” page 26

## From the Chair

by Joe Richards, Pasco County Attorney’s Office

I am excited about a new initiative just now getting underway, the formation of an Energy Committee. This new substantive committee will provide a forum for interested practitioners across the full spectrum of energy law—from utilities regulation and facility siting to the intersection with climate change and greenhouse gas regulation—to network and generate opportunities of common interest. With this initiative, ELULS is hoping to create a niche for energy law attorneys who may have, up to this point, felt “homeless” within The Bar.

If this committee appeals to you, we encourage you to get involved.

The committee’s inaugural gathering will take place at the upcoming Annual Update during the substantive committee luncheon scheduled for Thursday, August 11. Information on the Energy Committee will be posted to the Section website and a committee-specific email list will be opened shortly after the Annual Update. Instructions for joining will be provided in the future via the Section email list. (If you are not currently subscribed to the Section email list, you can do so at <http://www.eluls.org/list.html>.) Until then, any questions regarding the Energy Committee can be fielded by committee co-chair Kelly Samek ([kelly.samek@myfwc.com](mailto:kelly.samek@myfwc.com)).

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## CHAIR'S MESSAGE

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We continue to have a need for Bar Journal articles. If you have a recent brief you've worked on that could be turned into a Journal column, please let us know. Or if you know of a topic that you think should be covered let us know. We will find someone to write it up.

For anyone interested in joining the Executive Council, I encourage you to become involved with one of our many committees. Please check the website for more details. There are many ways to become involved and I encourage you to do so. You can contact us through the website or Facebook or call me anytime. Thanks.



*Editors Note: The article "The Governor's South Atlantic Alliance: Regional Ocean & Coastal Governance" published in the last issue of the Reporter was authored by Veronica Saavedra and Sidney F. Ansbacher, shareholder with GrayRobinson, P.A., and past chair of the ELULS. We apologize to Sidney for the omission.*

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# We Could Play This Game Much Better If We Knew The Rules – One Reason Why Land Use Quasi-Judicial Hearings Do Not Currently Work

by Laura Belflower, Laura B. Belflower, P.A.

Remember when you and your friends used to make up games on the playground? You could get this great idea and just start playing. It was lots of fun for about five minutes. Then the arguments would start – you can't do that, that's not the way you play, that's not fair. Games really don't work very well when they don't have rules. In many ways, it is the same for local government quasi-judicial land use hearings. We declare that we are holding a quasi-judicial hearing, swear in witnesses, and talk about the need for competent substantial evidence, but, in most cases, the hearings do not work very effectively for anyone. It is the intent of this article to suggest this is because it is unclear by what rules we are to be "playing."

Since *Board of County Commissioners of Brevard County v. Snyder*<sup>1</sup> declared that, in Florida, small scale rezoning actions join conditional use permits,<sup>2</sup> variances,<sup>3</sup> and other development orders<sup>4</sup> as quasi-judicial reviews, there have been issues about how to conduct quasi-judicial hear-

ings (due process rights, cross-examining witnesses, findings of fact, etc.). But, as important as those issues are, it is suggested that the fundamental reason why quasi-judicial hearings are not much better than legislative type reviews in producing objective, fact supported decisions that implement the adopted regulations is because there are almost never sufficient rules (standards, requirements, criteria) against which the "evidence" that is presented can be weighed.

As laid out in *Irvine v. Duval County Planning Commission*,<sup>5</sup> in a quasi-judicial hearing, the applicant has the burden of demonstrating that the applicable standards have been met. Then the responsibility shifts to those seeking to deny the application to prove that the standards have not been met and that the request is adverse to the public interest.<sup>6</sup> Further, there must be competent substantial evidence in the record in front of the decision-maker to support the decision made.<sup>7</sup> Putting these together, there must be com-

petent substantial evidence put in the record by the applicant that the applicable standards have been met and competent substantial evidence put in the record by those seeking the denial of the application that the applicable standards have not been met. The decision on the application must be made based on this evidence<sup>8</sup> and only this evidence.<sup>9</sup> But, in this dance of burden-shifting, objective, evidence-based decisions will consistently be produced only if the participants understand the applicable standards that have to be met.

When was the last time you saw all the standards that must be demonstrated clearly listed in a land development code? At most, it is usually a statement that the request has to be consistent with the Comprehensive Plan, be compatible, advance public purposes, or some similar, usually undefined phrases, which are often so vague as to not appear to be standards or criteria at all. The Florida courts have long held that, not only must there be specific criteria against which

an application is to be reviewed,<sup>10</sup> the criteria must also be clear enough to be consistently applied.<sup>11</sup>

There are, however, also several cases that have upheld what most would consider to be very general, if not vague, standards. There are good—if not legally sound, certainly politically sound—reasons why many jurisdictions might want the standards in their land development regulations kept vague. It does provide maximum flexibility in the decision-making, and certainly helps the local government attorneys defending their clients' decisions in court. But is that the correct goal for a quasi-judicial review? It may be politically expedient and easier to have greater flexibility and may seem advantageous to create an environment with an increased likelihood of winning in court, but would it not be a more appropriate goal to have decisions that fully and consistently implement the local government's adopted Comprehensive Plan and land development regulations?

Operating under the assumption that the goal is to have decisions that implement the adopted regulations, there should be clear standards that govern each application. These are the rules of the game; they are what must be followed. The creation of these standards must be done in the actual drafting and adoption process of the land development regulations, rather than during the review of individual applications on an ad-hoc, case-by-case basis. This is because not only do case-by-case decisions on the applicable rules make for arbitrary decisions,<sup>12</sup> but also because such decisions are policy decisions—a legislative function, which cannot legally be made in a quasi-judicial review, where the role is to implement the already established requirements.<sup>13</sup>

Having clear standards is, however, only the first part of the equation. They must also be applied; the rules have to be followed. It is very rare to see an application or an applicant's presentation at the hearing in which the applicant specifically addresses the criteria that do exist in the land development code. This is likely true at the hearings because experienced applicants' representatives have learned that the decision-makers do not necessarily want to hear an analysis of whether the application meets all of the criteria or not; many boards feel that is the planning staff's

job and the application would not be before them with a recommendation of approval from staff if it did not meet the criteria.<sup>14</sup> But that is the problem; for most applications, whether the application meets the criteria is the *only* issue for consideration in the review.<sup>15</sup> If the application does not meet the standards, it must be denied.<sup>16</sup> Except rezonings, if the application does meet the standards, it must be approved.<sup>17</sup> It is only if this standards-proving threshold has been passed, and only for rezonings, that there is any additional consideration.<sup>18</sup> So, to get beyond that critical threshold, the standards are the only rules of the game; everything else is irrelevant.<sup>19</sup>

Because this threshold of standards compliance proof is so critical, an applicant must be required to specifically address them and to demonstrate by competent substantial evidence that the application meets them. Staff should not find an application complete for processing unless there is a specific statement of how the applicable standards are met by the application. This statement of compliance should be the applicant's major statement of the application; this is what is to be considered. At the hearing, this statement and the analysis of compliance with the standards should be the entire focus of the hearing.

Having standards, which are actually applied, also helps any opponents of an application to have a legitimate role in "playing the game." Having clear standards that have to be achieved and a specific statement from the applicant on how they are met not only answers many questions and may satisfy many neighbors' concerns, but it also clearly defines the universe of questions and issues that are relevant at the hearing. Without any standards, or any confidence that the discussion will be limited to the standards, opponents have no choice but to shotgun their approach; they must object to everything that may be a concern. This leads to hearings with busloads of opponents, wearing same color shirts, waving signs and handfuls of materials they downloaded from the internet, but it usually does not produce much relevant competent substantial evidence that the decision-makers can use. If the neighbors are told in their notices what the applicable requirements are and that their discussion must be limited to those issues, they know what they

need to do—what their rules are—as well. Whether they want to support or oppose the application, they have what they need to contribute to the process in a meaningful way.

Perhaps most importantly, having clear standards that are required to be addressed, and are the only things that are addressed, makes a tremendous difference for the decision-maker(s). The final decision-makers are often elected officials. All decision-makers, but especially elected officials, should appreciate being able to fall back on clear standards as the justification for their decision; it is much easier to say "I'm sorry, I wanted to vote your way, but we are bound by the adopted standards in our decision." Without clear applied standards, the decision-makers are back to deciding based on whether they personally like the proposal or whether it is politically expedient for them to make a certain decision.

Having clear standards that are followed also makes for more consistent court decisions. Having clear applied standards allows the courts to reasonably assess the local government's decision, without improperly re-weighing the evidence, to determine whether there was sufficient competent substantial evidence in the record to support the decision made.<sup>20</sup> If there are clear standards and the "evidence" in the record does not relate to those clear standards, it is not competent substantial evidence because it is not relevant.<sup>21</sup>

Having clear rules for everyone also helps keep the hearings more manageable. If anyone starts to go too far afield in their comments, they can easily be brought back on track by limiting the discussion to the standards. If they want to object to the standards, they can be directed to a separate process to seek the amendment of the standards.

Having clear applied standards may also help resolve or, at least lessen, many of the other issues of quasi-judicial hearings. Presentations of evidence would be more focused and shorter when they do not have to address everything in the universe, which protects due process rights by freeing time to allow everyone to have a meaningful say. Whether or not the decision-maker provides written findings of fact, if the standards are properly presented and considered, the record should contain the appli-

*continued...*

cable standards and the competent substantial evidence to support both sides' arguments, as needed to support the decision. The issue of cross-examination would be unresolved, but at least the topics of examination and cross-examination would be more focused.

For almost twenty years, Florida cities and counties have been holding quasi-judicial hearings and trying to make them work. Most have tried to play a quasi-judicial game using rules suited to legislative procedures and expectations and, like the games we made up on the playground, it just does not work. It is suggested that before quasi-judicial hearings can work properly and our comprehensive plans and land development regulations can be properly implemented, we must reset the rules—adopt clear standards to guide the reviews and use them.

*Laura B. Belflower is a land planner and attorney practicing primarily in the area of land use law. She is the author of a new blog (Floridaldrs.com) focusing on Florida land development regulations.*

**Endnotes:**

<sup>1</sup> 627 So. 2d 469, 474 (Fla. 1993).

<sup>2</sup> *City of Melbourne v. Hess Realty Corp.*, 575 So.2d 774, 775 (Fla. 5th DCA 1991)(confirming that a conditional use permit is a quasi-judicial function).

<sup>3</sup> *Walgreen Co. v. Polk County*, 524 So.2d 1119, 1120 (Fla. 2d DCA 1988)(confirming that reviews of variances, even variances for alcoholic beverage sales, are quasi-judicial).

<sup>4</sup> *Park of Commerce Assoc. v. City of Delray Beach*, 636 So.2d 12, 15 (Fla. 1994) (holding “decisions of local governments on building permits, site plans, and other development orders ... are quasi-judicial in nature”).

<sup>5</sup> 495 So. 2d 167 (Fla. 1986).

<sup>6</sup> For rezonings, the shifted burden on the denying body is to demonstrate that maintaining the existing zoning classification accomplishes a legitimate public purpose and that the refusal to rezone the property is not arbitrary, discriminatory, or unreasonable. *Snyder*, 627 So. 2d at 476 (Fla. 1993).

<sup>7</sup> *Irvine*, 495 So. 2d at 167 and *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001).

<sup>8</sup> *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

<sup>9</sup> See *City of Naples v. Central Plaza of Naples, Inc.*, 303 So. 2d 423, 425 (Fla. 2d DCA 1974) (stating “as pertinent as [concerns presented at the hearing] may seem to be, the City Council did not have a right to consider them in making its determination. [citation omitted] The only criteria upon which the Council could legally base its decision were those set forth in the ordinance”).

<sup>10</sup> *N. Bay Village v. Blackwell*, 88 So. 2d 524, 526 (Fla. 1956); *Drexel v. City of Miami Beach*, 64 So. 2d 317, 319 (Fla. 1953); and *Phillips Petroleum Co. v. Anderson*, 74 So.2d 544, 547 (Fla. 1954).

<sup>11</sup> *Drexel*, 64 So. 2d at 319; *Phillips Petroleum*, 74 So.2d at 547.

<sup>12</sup> *Drexel*, 64 So. 2d at 319; *City of Homestead v. Schild*, 227 So. 2d 540, 543 (Fla. 3d DCA 1969).

<sup>13</sup> *Snyder*, 627 So. 2d at 474 (finding that “[g]enerally speaking, legislative action results in the formulation of a general rule of policy,

whereas [quasi-]judicial action results in the application of a general rule of policy”).

<sup>14</sup> Whether an application that can be definitively shown to meet all of the applicable criteria should even have to go through a quasi-judicial hearing, rather than just an administrative staff review, is a whole different issue that should also be explored.

<sup>15</sup> *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 375, 377 (Fla. 3d DCA 2003) (finding that “quasi-judicial boards cannot make decisions based on anything but the local criteria enacted to govern their actions”).

<sup>16</sup> *G.B.V.*, 787 So. 2d at 842.

<sup>17</sup> *Alachua County v. Eagle's Nest Farms, Inc.*, 473 So.2d 257, 259 (Fla. 1st DCA 1985); *Effie, Inc. v. City of Ocala*, 438 So.2d 506, 509 (Fla. 5th DCA 1983); *ABC Liquors, Inc. v. City of Ocala*, 366 So.2d 146, 149 (Fla. 1st DCA 1979).

<sup>18</sup> Before a rezoning application can be denied, there must also be evidence in the record that keeping the existing zoning category accomplishes a legitimate public purpose and is also consistent with the comprehensive plan. *Snyder*, 627 So. 2d at 476.

<sup>19</sup> See *Windward Marina, L.L.C. v. City of Destin*, 743 So. 2d 635, 638 (Fla. 1st DCA 1999) (finding that “a local government may not deny a development order based on criteria which are not specifically enumerated in its land use regulations”).

<sup>20</sup> This is the relevant role of the court in a certiorari review. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 627 (Fla.1982); *G.B.V.*, 787 So.2d at 843.

<sup>21</sup> *De Groot*, 95 So. 2d at 916 (finding that “[s]ubstantial evidence [is] such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. [citations omitted] In employing the adjective ‘competent’ to modify the word ‘substantial,’ we are ... of the view ... that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the ‘substantial’ evidence should also be ‘competent’”).

# A Legal Analysis of DEP’s New ERP Exemption for Small Scale Living Shorelines

by R. Benjamin Lingle, Student Associate, University of Florida Conservation Clinic and Thomas T. Ankersen, Director  
January, 2011

Florida’s Department of Environmental Protection and the Northwest Florida Water Management District recently enacted a new rule exempting small-scale “Living Shoreline” projects from the need for an Environmental Resource Permit. This geographically limited exemption is intended to incentivize riparian and littoral property-owners to pursue ecologi-

cally sound shoreline restoration rather than hardened armoring as a means to prevent property loss due to erosion. However, the exemption removes only one of three regulatory requirements; those engaging in ERP exempted shoreline restoration will likely still need state authorization to use state-owned submerged lands and federal authorization to dredge and fill in

navigable waters. These continuing requirements could mute the intent of the rule’s drafters to expand the use of Living Shorelines in Northwest Florida through streamlined permitting. At the same time, the new ERP exemption, by itself, lacks safeguards – notice and monitoring - to ensure the efficacy and accountability of privately constructed shorelines on state lands.

On November 1, 2010, the Florida Department of Environmental Protection (DEP) and the Northwest Florida Water Management District (NWF-WMD) implemented Phase II of the Environmental Resource Permitting Program for Northwest Florida.<sup>1</sup> A new rule, codified by DEP in Florida Administrative Code Chapter 62-346, brings Northwest Florida into full reliance on the Environmental Resource Permits (ERPs) used in the state's four other water management districts.<sup>2</sup> Notably, the new rule makes Northwest Florida the state's first region to exempt so-called "Living Shorelines" from the permitting process.<sup>3</sup> So long as a Living Shoreline meets the specifications articulated in the new rule, the project will be exempted from the regulatory and financial requirements of an ERP.<sup>4</sup>

This is good news for advocates of ecologically sound alternatives to shoreline hardening, as well as for the state's riparian and littoral property-owners, who otherwise face great difficulty in controlling both natural and anthropogenic causes of erosion. However, those interested in pursuing a Living Shoreline alternative should be aware that the new exemption removes only one of the three regulatory requirements that must be met before a Living Shoreline project can go forward; property-owners must still obtain the state's authorization to use sovereign submerged lands and the Army Corps of Engineers' (Corps) permission to dredge and fill on waters of the United States.<sup>5</sup> The Board of Trustees of the Internal Improvement Trust Fund (Trustees) holds title to the state's sovereign submerged lands in trust for the people.<sup>6</sup> DEP's Division of State Lands (DSL) serves as staff for the Trustees and is typically the agency charged with reviewing applications for consent to use sovereign lands.<sup>7</sup>

Despite the regulatory and proprietary hurdles still remaining, the new Living Shoreline permitting exemption does provide substantial relief to property-owners wishing to construct projects with minimal impact on the state's waters. The rule exempts, "The restoration of an eroding shoreline of 150 feet or less by planting with native wetland vegetation no more than 10 feet waterward of the approximate mean high water line."<sup>8</sup> The rule further dictates that: [1] "Plantings shall consist of native veg-

etative species;"<sup>9</sup> [2] "Any invasive/exotic vegetative species . . . shall be removed;"<sup>10</sup> [3] "If wave attenuation is needed to protect and ensure survivability of the plantings, turbidity curtains shall be installed . . . , but must be removed within three months;"<sup>11</sup> and [4] "No filling by anything other than vegetative planting is authorized, except that if permanent wave attenuation is required . . . an oyster reef 'breakwater' is authorized."<sup>12</sup> The provisions on oyster reef breakwaters further provide that such breakwaters can be no more than ten feet waterward of the Mean High Water Line (MHWL),<sup>13</sup> must be primarily oyster shell,<sup>14</sup> must not be on or within three feet of submerged vegetation,<sup>15</sup> and must be constructed so that at least three feet of unobstructed waterway separates each twenty foot section of breakwater.<sup>16</sup> Though these limitations preclude large-scale projects from utilizing the exemption, many owners of single-family residential parcels will now have one less regulatory hurdle to navigate.

The opening provision of the permitting exemption states that exempted activities "may be conducted without notice to [DEP];" however, performing exempted activities "does not relieve the person or persons who are using the exemption . . . from meeting the permitting, authorization, or performance requirements of other rules of [DEP], the Board of Trustees, the water management districts, or other federal, state, or local governmental agencies."<sup>17</sup> This specific reference to "authorization" and "the Board of Trustees" conveys the drafter's intent that consent of the Trustees would still be a prerequisite to use of sovereign submerged lands.

Other provisions incorporated by the new rule further substantiate that exemption from permitting does not exempt a property-owner from the need for consent to use sovereign submerged lands. The new rule's section on Policy and Purposes provides that, "The requirements of this chapter are in addition to . . . the requirements specified in the 'Department of Environmental Protection and Northwest Florida Water Management District Environmental Resource Permit Applicant's [Handbook] Volume 1.'"<sup>18</sup> This handbook states that authorization to use sov-

ereign submerged lands is distinct from and survives permitting exemptions: "[E]ven though an activity may be authorized by the noticed general permit or an exemption, construction, alteration, modification, maintenance, operation, abandonment, or removal of an activity should not commence until the required state-owned submerged lands authorization also has been granted."<sup>19</sup> In a later section, the handbook reemphasizes that, "[E]xemptions do not provide the authorization that may be required from other local, state, regional, or federal agencies. For example, exempt activities that occur on state-owned submerged land may require a separate letter of consent, easement, or lease . . . ." <sup>20</sup> Similar references to the need for Trustees approval are included in the Joint Application for Environmental Resource Permit/ Authorization to Use State-Owned Submerged Lands/ Federal Dredge and Fill Permit in Northwest Florida<sup>21</sup> and in the Request for Verification of an Exemption.<sup>22</sup>

Even if DEP had not explicitly emphasized the need for Trustees authorization, Florida law makes it clear that such authorization is needed. Through Florida Statutes Section 253.77, the legislature has stated that,

A person may not commence any excavation, construction, or other activity involving the use of sovereign or other lands of the state, the title to which is vested in the board of trustees of the Internal Improvement Trust Fund under this chapter, until the person has received the required lease, license, easement, or other form of consent authorizing the proposed use.<sup>23</sup>

The Trustees are authorized to delegate and have delegated to DEP the power to grant authorization to use sovereign submerged lands.<sup>24</sup> The Florida Administrative Code contains numerous provisions outlining the factors to be considered when granting such consent.<sup>25</sup> Nothing intimates that DEP, when exercising this power, could ignore these factors and exempt the need for authorization to use sovereign submerged lands.

Certain activities affecting sovereign submerged lands have been given consent by rule.<sup>26</sup> However, "[c]onstruction, or replacement,

*continued...*

## A LEGAL ANALYSIS

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bulkheads, seawalls, or other shoreline stabilization structures that extend no more than three feet waterward of the line of mean or ordinary high water” requires a letter of consent.<sup>27</sup> The same is required for “[p]lacement, replacement, or repair of riprap, groins, breakwaters, or intake and discharge structures no more than ten feet waterward of the line of mean or ordinary high water.”<sup>28</sup> These latter two definitions encompass Living Shoreline projects.

The guidelines for obtaining authorization to use sovereign submerged lands are outlined in Chapters 18-21 and 18-20 of the Florida Administrative Code.<sup>29</sup> Chapter 18-21 regulates the management of sovereign submerged lands;<sup>30</sup> Chapter 18-20 contains the special rules that apply within the state’s Aquatic Preserves.<sup>31</sup> Chapter 18-21 states that authorization to use sovereign submerged lands will be granted on a case by case basis<sup>32</sup> and that shoreline stabilization is a permissible reason to seek authorization.<sup>33</sup> Projects in Aquatic Preserves likewise will be weighed on a case by case basis; the authorizing agency will balance the benefits and harms of each project to determine whether or not authorization is appropriate.<sup>34</sup> As an example of a specific benefit, Chapter 18-20 lists: “Restoration/enhancement of altered habitat or natural functions, such as conversion of vertical bulkheads to riprap and/or vegetation for shoreline stabilization or reestablishment of shoreline or submerged vegetation.”<sup>35</sup> Considering these and similar provisions, property-owners both within and outside of Aquatic Preserves should receive favorable consideration in their efforts to construct an ERP-exempted Living Shoreline on sovereign submerged lands.

The requisite federal permit for a Living Shoreline is the Corps-issued Clean Water Act Section 404 permit.<sup>36</sup> Certain dredge and fill activities may proceed without a Section 404 individual permit pursuant to a “nationwide permit.”<sup>37</sup> Three nationwide permits could pertain to an ERP-exempted Living Shoreline project: Nationwide Permits 13, 18, and 27.<sup>38</sup> However, un-

like the ERP exemption, the permit most likely to be applicable still requires pre-construction notification. Nationwide Permit 18 authorizes “[m]inor discharges of dredged or fill material” so long as the total discharge is less than twenty-five cubic yards of material deposited below the MHWL.<sup>39</sup> Further, the discharge cannot “cause loss of more than 1/10 acre of waters of the United States.”<sup>40</sup> “Loss of waters of the United States” occurs when waters are “permanently adversely affected” by a regulated activity.<sup>41</sup> This includes activities that “increase the bottom elevation of a waterbody.”<sup>42</sup> These limitations may preclude the use of this categorical permit for ERP-exempted Living Shoreline activities, at least when a porous breakwater is contemplated.

Nationwide Permit 13 authorizes bank stabilization to counter erosion.<sup>43</sup> However, for the project to be eligible, it must meet certain criteria: (a) the material placed must be no more than necessary; (b) the length of the project must be less than 500 feet; (c) the discharge must be less than a cubic yard per linear foot; (d) the discharge must not be in special aquatic sites; (e) the discharge must not disrupt the flow of surface water; (f) the discharge must not be easily erodible; and (g) the discharge must not be “a stream channelization activity.”<sup>44</sup> The Code of Federal Regulations defines “special aquatic sites” as,

[T]hose sites identified in subpart E. They are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region.<sup>45</sup>

Subpart E identifies special aquatic areas as sanctuaries and refuges,<sup>46</sup> wetlands,<sup>47</sup> mudflats,<sup>48</sup> vegetated shallows,<sup>49</sup> coral reefs,<sup>50</sup> and riffle and pool complexes.<sup>51</sup> This list encompasses some of the areas where a Living Shoreline might be constructed, thus precluding the use of this categorical permit in many situations. When the permit is applicable, the property-owner should note that subsection (f) precludes “material [] placed in a

manner that will be eroded by normal or expected high flows.”<sup>52</sup> The notes after the permit text state, “Bank stabilization projects involving the installation of plant materials on riprap may be authorized by this NWP, but erodible materials should be properly stabilized within the riprap or stabilized by other means.”<sup>53</sup> So while breakwaters and vegetation are permissible, the addition of sediment stabilized only by plant material could be problematic. This limitation, however, is no greater than that in DEP’s new permitting exemption for Living Shorelines, which also precludes the introduction of sediment.<sup>54</sup>

The final nationwide permit that could be applicable is Nationwide Permit 27.<sup>55</sup> Permit 27 applies to,

[A]ctivities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas and the restoration and enhancement of non-tidal streams and other non-tidal open waters, provided those activities result in net increases in aquatic resource functions and services. To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: . . . the installation of current deflectors; the placement of in-stream habitat structures; . . . the construction of oyster habitat over unvegetated bottom in tidal waters; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.<sup>56</sup>

The permit further states that it does not authorize “the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., stream to wetland or vice versa) or uplands.”<sup>57</sup> Therefore, a Living Shoreline project utilizing this permit may not convert a riparian area from open water habitat to a riparian wetland, which is precisely the beneficial intent of the Living Shoreline.

Nonetheless, Permit 27 does permit many of the activities engaged in during Living Shoreline construction. Except for a few select activities that

qualify for pre-construction reporting, however, all permittees must obtain pre-construction notification.<sup>58</sup> Most Living Shoreline projects fall into the pre-construction notification category, requirements for which are included in Section 330 of the Code of Federal Regulations.<sup>59</sup>

For property-owners in need of a Section 404 permit and a letter of consent to use Florida's sovereign submerged lands, the first step is to complete the Joint Application for Environmental Resource Permit/Authorization to Use State-Owned Submerged Lands/ Federal Dredge and Fill Permit in Northwest Florida. The application should be forwarded to the Corps and to DEP's DSL. It is true that the property-owner will have to complete the same paperwork as he or she would have had to complete before the ERP exemption was enacted. However, the exemption has added a financial incentive to choosing a Living Shoreline over hardened armoring. Under the exemption, the property-owner will avoid the fee associated with an ERP.<sup>60</sup>

The exemption and streamlined authorizations described above should benefit Florida by fostering healthier ecosystems along the state's shorelines. However, absent the notification and reporting safeguards provided for by federal nationwide permitting and state sovereign submerged land authorization, the new exemption would result in the construction of Living Shorelines by private persons on public lands with no opportunity for quality assurance or ability to monitor success over time. Poorly constructed Living Shorelines could harm existing resources and adversely affect neighboring shorelines. For this reason, at least in its early stages, the Living Shoreline exemption should be treated as an experiment, and the state should, at the very least require notification of the activity and maintain a record its location for the purposes of monitoring success over time. By itself the exemption requires neither of these. As it stands, an ERP is no longer necessary for small Living Shoreline projects. However, property-owners and Living Shoreline advocates should be aware that the new exemption removes only one of the three hurdles that must be navigated before a Living Shoreline project can commence.

## Endnotes:

<sup>1</sup> ENVIRONMENTAL RESOURCE PERMITS, N.W. FLA. WATER MGMT. DIST. (2010), <http://www.nwfwmd.state.fl.us/permits/permits-ERP.html>.

<sup>2</sup> See FLA. ADMIN. CODE. r. 62-346 (2010).

<sup>3</sup> *Id.* r. 62-346.051(14)(e). Definitions vary, but according to one Florida source, "Living Shorelines use natural shoreline ecosystems to absorb wave energy without causing erosion. Living Shorelines extend from the upper bank of the property to below the water level. They typically include a variety of plants, including salt marsh grasses and/or mangroves as well as structural elements such as oyster shell, or even riprap." See [http://www.flseagrant.org/index.php?option=com\\_content&view=article&id=201:living-shorelines-an-alternate-for-preventing-coastal-erosion&catid=51:research-summary&Itemid=101](http://www.flseagrant.org/index.php?option=com_content&view=article&id=201:living-shorelines-an-alternate-for-preventing-coastal-erosion&catid=51:research-summary&Itemid=101).

<sup>4</sup> *Id.*

<sup>5</sup> See FLA. STAT. § 253.77(1) (2010). See also 33 U.S.C. § 1344 (2006); *id.* § 403 (2006).

<sup>6</sup> The Florida Constitution dictates that "title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people." FLA. CONST. art. X § 11. The Florida Statutes vest title to these lands in the Trustees. FLA. STAT. § 253.02-03 (2010).

<sup>7</sup> For information on the DSL and the lease, easement and consent of use of state-owned lands, see USE OF STATE-OWNED LANDS, FLA. DEP'T OF ENVTL. PROT. (2010), <http://www.dep.state.fl.us/lands/use.htm>.

<sup>8</sup> FLA. ADMIN. CODE. r. 62-346.051(14)(e).

<sup>9</sup> *Id.* r. 62-346.051(14)(e)(1).

<sup>10</sup> *Id.* r. 62-346.051(14)(e)(2).

<sup>11</sup> *Id.* r. 62-346.051(14)(e)(3).

<sup>12</sup> *Id.* r. 62-346.051(14)(e)(4).

<sup>13</sup> *Id.* r. 62-346.051(14)(e)(4)(a).

<sup>14</sup> *Id.* r. 62-346.051(14)(e)(4)(b) ("The 'breakwater' shall be composed predominantly of natural oyster shell cultch such as clean oyster shell and fossilized oyster shell, although unconsolidated boulders, rocks, and clean concrete rubble can be associated with the oyster material.").

<sup>15</sup> *Id.* r. 62-346.051(14)(e)(4)(c).

<sup>16</sup> *Id.* r. 62-346.051(14)(e)(4)(d).

<sup>17</sup> *Id.* r. 62-346.051(1).

<sup>18</sup> *Id.* r. 62-346.010.

<sup>19</sup> NORTHWEST FLORIDA WATER MANAGEMENT DISTRICT ENVIRONMENTAL RESOURCE PERMIT APPLICANT'S HANDBOOK VOLUME 1 at 1-7 (2010), available at [http://www.nwfwmd.state.fl.us/permits/erp/erp\\_downloads/AH\\_General.pdf](http://www.nwfwmd.state.fl.us/permits/erp/erp_downloads/AH_General.pdf).

<sup>20</sup> *Id.* at 3-6. The handbook also reiterates the point in § 4.2.3, stating, "Whether exempt from permitting or not, in accordance with Chapter 253, F.S., and Chapter 18-21, F.A.C. (April 14, 2008), activities conducted on state-owned submerged lands must be separately authorized by the Board of Trustees of the Internal Improvement Trust Fund (BOT)." *Id.* at 4-2.

<sup>21</sup> *Id.* at Appendix C, Form 1, Attachment 2 at 2.

<sup>22</sup> *Id.* at Appendix C, Form 11.

<sup>23</sup> FLA. STAT. § 253.77 (2010).

<sup>24</sup> See *id.* § 253.002(1), see *supra* note 6.

<sup>25</sup> See generally FLA. ADMIN. CODE ch. 18-21 (2010).

<sup>26</sup> *Id.* ch. 18-21.005(1)(b).

<sup>27</sup> *Id.* ch. 18-21.005(1)(c)(5). Shoreline protection structures that are ineligible for letters of consent require an easement. *Id.* ch. 18-21.005(1)(e)(3).

<sup>28</sup> *Id.* ch. 18-21.005(1)(c)(6).

<sup>29</sup> *Id.* ch. 18-21, 18-20 (2010).

<sup>30</sup> *Id.* ch. 18-21.

<sup>31</sup> *Id.* ch. 18-20.

<sup>32</sup> *Id.* ch. 18-21.004(1)(g).

<sup>33</sup> *Id.* ch. 18-21.004(2)(e).

<sup>34</sup> *Id.* ch. 18-20.004(1)(a).

<sup>35</sup> *Id.* ch. 18-20.004(2)(d)(4).

<sup>36</sup> See 33 U.S.C. § 1344 (2006). The Corps' dredge and fill permitting authority is also governed by the Rivers and Harbors Appropriation Act of 1899. See 33 U.S.C. § 403 (2006).

<sup>37</sup> Nationwide permits are permits that authorize a category of activities viewed to have minimal impact on navigable waters when conducted in accordance with the conditions set forth by rule. For more information on the Corps Nationwide Regulatory Program See <http://www.swl.usace.army.mil/regulatory/national.html>.

<sup>38</sup> See U.S. ARMY CORPS OF ENG'RS, NATIONWIDE PERMIT INFORMATION (2010), [http://www.usace.army.mil/cecw/pages/nw\\_permits.aspx](http://www.usace.army.mil/cecw/pages/nw_permits.aspx).

<sup>39</sup> U.S. ARMY CORPS OF ENG'RS, DECISION DOCUMENT NATIONWIDE PERMIT 18 at 1 (2010), available at [http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/NWP\\_18\\_2007.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/NWP_18_2007.pdf).

<sup>40</sup> *Id.* The Permit further precludes discharges that are "placed for the purpose of stream diversion." *Id.*

<sup>41</sup> U.S. ARMY CORPS OF ENG'RS, 2007 NATIONWIDE PERMITS, CONDITIONS, FURTHER INFORMATION, AND DEFINITIONS (WITH CORRECTIONS) 35, available at [http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/nwp2007\\_gen\\_conditions\\_def.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/nwp2007_gen_conditions_def.pdf).

<sup>42</sup> *Id.*

<sup>43</sup> U.S. ARMY CORPS OF ENG'RS, DECISION DOCUMENT NATIONWIDE PERMIT 13 at 1 (2010), available at [http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/NWP\\_13\\_2007.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/NWP_13_2007.pdf).

<sup>44</sup> *Id.*

<sup>45</sup> 40 C.F.R. 230.3(q-1) (2010).

<sup>46</sup> *Id.* 230.40.

<sup>47</sup> *Id.* 230.41.

<sup>48</sup> *Id.* 230.42.

<sup>49</sup> *Id.* 230.43.

<sup>50</sup> *Id.* 230.44.

<sup>51</sup> *Id.* 230.45.

<sup>52</sup> See *supra* note 41.

<sup>53</sup> *Id.* at 7.

<sup>54</sup> See FLA. ADMIN. CODE. r. 62-346.051(14)(e)(4) (2010).

<sup>55</sup> U.S. ARMY CORPS OF ENG'RS, DECISION DOCUMENT NATIONWIDE PERMIT 27 at 1 (2010), available at [http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/NWP\\_27\\_2007.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/NWP_27_2007.pdf).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2-3. The requirements for reporting are included in § 1.0 of the permit. *Id.*

<sup>59</sup> Section 1.1 of Permit 27 states that "[p]re-construction notification requirements, additional conditions, limitations, and restrictions are in 33 CFR part 330." *Id.* at 3. The requirements for notification are slightly more rigorous than the requirements for reporting, with the former stating that the district engineer "will review the notification and may add activity-specific conditions to ensure that the activity complies with the terms and conditions of the NWP and that the adverse impacts on the aquatic environment and other aspects of the public interest are individually and cumulatively minimal." 33 CFR § 330.1 (2010). The requirements for reporting do not mention the addition of activity-specific conditions. See DECISION DOCUMENT NATIONWIDE PERMIT 27 *supra* note 55.

<sup>60</sup> The fees for individual permits range from \$11,220 for activities affecting more than ten acres, FLA. ADMIN. CODE. r. 62-346.071(1)(a)(1), to \$710 for activities affecting less than one acre. *Id.* r. 62-346.071(1)(a)(5). However, subject to certain conditions, "permits solely for environmental restoration or enhancement" cost only \$250. *Id.* r. 62-346.071(1)(d).

# On Appeal

by Lawrence E. Sellers, Jr.

*Note: Status of cases is as of May 11, 2011.* Readers are encouraged to advise the author of pending appeals that should be included.

## FLORIDA SUPREME COURT

*Kuvin v. City of Coral Gables*, Case No. SC10-2352. Petition for review of 3<sup>rd</sup> DCA decision in *Kuvin v. City of Coral Gables*, affirming trial court's order upholding sections of the City's zoning code that prohibit the parking of trucks in residential areas of the City unless parked in an enclosed garage. The appellate court certified the following question: "May a City ordinance, which prohibits the parking of any truck in a private driveway or in a public parking spot at night, as applied to a personal-use of a light duty truck, be upheld as constitutional?" 45 So.3d 859 (Fla. 3d DCA August 25, 2010). Status: Notice filed December 2, 2010.

*SJRWMD v Koontz*, Case No. SC09-713. Petition for review of 5<sup>th</sup> DCA decision in *SJRWMD v Koontz*, affirming trial court order that the District had effected a taking of Koontz's property and awarding damages. 15 So.3d 581 (Fla. 5<sup>th</sup> DCA 2009). Status: Oral argument held April 5, 2010.

## FIRST DCA

*Haridopolos, President of the Senate v. Alachua County, et al*, Case No. 1D10-6433. Petition for writ of certiorari to quash a trial court's denial of a motion to dismiss in an action for declaratory relief, seeking to declare unconstitutional the 2009 impact fee legislation, s. 163.31801(5), *Florida Statutes*. Status: On May 9, 2011, the court granted the petition and quashed the order denying the motion to dismiss on legislative immunity grounds. 36 F.L.W. D978a. Note: During the 2011 Regular Session, the Legislature reenacted challenged impact fee legislation. See SB 410.

*Guidry v. DEP*, Case No. 1D10-6399. Petition for review of final order determining appellants lack of standing to challenge as unadopted rules two conditions in a beach restoration permit and a position with regard to when erosion control lines must

be established. Status: Proceedings stayed until June 1, 2011.

*Mid-Continent Casualty Co. v. First Coast Energy, L.L.P and DEP*, Case No. 1D10-5740. Appeal from final judgment determining that the term "site check" in insurance policy has the same meaning as the term in EPA's regulations in 40 CFR 280.52 and may provide a basis for a "confirmed release" for which insurance coverage is provided. Status: Notice of appeal filed October 29, 2010.

*Honorable Jeff Atwater, et al v. City of Weston, Florida, et al*. Case No. 1D10-5094. Petition for review of final summary judgment determining that one provision in SB 360 (Chapter 2009-96), the 2009 growth management legislation, constitutes an unfunded mandate, and determining that the entirety of SB 360 "is declared unconstitutional. . . and the Secretary of State is ordered to expunge said law from the official records of the state." Status: On May 2, 2011, the court determined that none of the four named defendants was a proper party, and it therefore reversed and remanded to the trial court to dismiss the complaint. 36 F.L.W. D919d

*Kurt S. Browning v. Florida Prosecuting Attorneys, et al*. Case No. 1D10-4532. Appeal from declaratory judgment declaring that a proviso in the 2010-11 General Appropriations Act providing that "no state agency may expend funds provided for Bar dues," is unconstitutional as violative of III, Section 12, of the Florida Constitution, and ordering the Secretary of State to expunge the challenged proviso from the official records of the state. Status: Reversed on March 10, 2011, 36 F.L.W. D522a. Note: The appropriations bill approved during the 2011 Regular Session again includes a provision authorizing the payment of Bar dues.

*Schweickert v. DCA and Citrus County*, Case No. 1D10-3882. Petition for review of final order determining amendment to Citrus County comprehensive plan to be in compliance. Appellant argues his constitutional right to due process of law was violated by the ALJ's granting of the request for an expedited hearing. Status: On May 4, 2011, the court

dismissed for lack of standing to appeal; the court also granted Citrus Mining's motion for attorneys fees.

*Griffis v. FFWCC*, Case No. 1D10-3492. Petition for review of final order by FFWCC permanently revoking Griffis' commercial saltwater fishing license and assessing an administrative penalty against him. Status: Affirmed on March 28, 2011. 36 F.L.W. D639b.

*Jacqueline Lane vs. International Paper, etc. et al*. Case No. 1D10-1893. Petition for review of DEP final order adopting the ALJ's ultimate conclusions that IP provided reasonable assurances that its effluent would not adversely affect the biological community; that granting the permit will be in the public interest; that the discharge would not be unreasonably destructive to the quality of the receiving waters; that the proposed project complies with the DEP's antidegradation policy; and that the consent order establishes reasonable terms and conditions to resolve the enforcement action for past violations and is the order that establishes a schedule for achieving compliance with all permit conditions. Status: Affirmed *per curiam* on March 24, 2011.

*Martin County Conservation, et al v. Martin County*, Case No. 1D09-4956. Petition for review of final order determining comprehensive plan amendments to be in compliance. Two appellees moved to dismiss the appeal for lack of standing, and requested attorneys fees. Status: Appeal dismissed *per curiam* on June 21, 2010, because "the appellants' have not demonstrated that their interest or the interest of a substantial number of members are adversely affected by the challenged order, so as to give them standing to appeal." On December 14, 2010, the court entered an order concluding that the appeal was filed in contravention of s. 57.105(1), F.S., and imposing sanctions against appellants and their counsel. 35 F.L.W. D2765a Appellants have filed a motion for rehearing and a motion for rehearing *en banc*.

*Lowe's Home Centers, Inc. v. DCA*, Case No. 1D09-4383. Petition for review of final order of Administration Commission finding that Lowe's amend-



ment to Miami-Dade Comprehensive Plan is not in compliance. Status: Affirmed February 28, 2011. Motion for rehearing and motion for rehearing *en banc* denied on April 25, 2011.

### THIRD DCA

*Flagler Retail Associates v. DCA*, Case No. 3D11-948. Petition for review

of final order of Administration Commission finding that an amendment to the Miami-Dade County Comprehensive Plan is in compliance. Status: Notice of appeal filed April 11, 2011.

### FOURTH DCA

*Rosenblum v. Zimmet*, Case No. 4D10-3049. Petition for review of

DEP final order finding that Zimmet was entitled to a single family dock exemption for his project and rejecting Rosenblum's claim that his navigation would be impeded to and from the south side of his dock. Status: Notice of appeal filed July 26, 2010; all briefs have been filed.

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# Florida Case Law Update

by Gary K. Hunter, Jr. and Jacob T. Cremer, Hopping Green & Sams, P.A.

**The judicial review powers of the Administration Commission are limited by chapter 120, Florida Statutes, as is judicial review of its final agency action. *Miami-Dade County v. DCA*, 54 So. 3d 633 (Fla. 1st DCA Feb. 28, 2011).**

Miami-Dade County amended its future land use element (FLUE), expanding its Urban Development Boundary. The county's comprehensive plan allows an expansion of the boundary through a determination of need for additional development. This review occurs through the comprehensive plan amendment process. The codified amendment was transmitted to the Department of Community Affairs, as required by section 163.3184(7), Florida Statutes. The department issued a notice to find the amendment not in compliance with the county's comprehensive plan, the South Florida Strategic Regional Plan, and chapter 9J-5, Florida Administrative Code. The matter was transferred to an administrative law judge (ALJ) for proceedings under chapter 120, Florida Statutes. After a hearing, the ALJ issued a recommended order to the Administration Commission, which considered and ruled on a number of exceptions. Ultimately, the Commission largely adopted the ALJ's recommended order and held the amendment not in compliance.

The county appealed, and the 1st DCA affirmed: "[b]ecause the appellant has failed to show grounds for remand or setting aside the agency action, the Administration Commission's final agency action is affirmed." *Id.* at 634. The 1st DCA explained the Commission must comply with Florida's Administrative Procedure Act. There was nothing in the record showing it exceeded its statutory authority. Further, section 120.68(7), Florida Statutes, limits the 1st DCA's review of the Commission's actions to whether there was competent, substantial evidence in the record for the action, whether there was a misinterpretation of law, and whether the agency abused its discretion in violation of a constitutional provision or statute.

**Notice sent to former legal counsel and to neighbor could not be imputed to property owner. *Hasselback v. DEP*, 54 So. 3d 637 (Fla. 1st DCA 2011).**

Hasselback petitioned the Department of Environmental Protection to challenge a coastal construction control line permit it issued for an adjacent property. The department provided written notice of the permit to another neighbor adjacent to Hasselback and to a law firm that had represented Hasselback. The department found that that the neighbor was acting as Hasselback's agent and the law firm was his legal counsel when the notices were received. Thus, it imputed the notice to Hasselback and dismissed his petition as untimely.

The 1st DCA reversed because the department's findings were not supported by competent, substantial evidence in the record. There was no evidence of an agency relationship between Hasselback and his neighbor. The law firm had formerly represented Hasselback, but that relationship terminated more than a year before the notice. Thus, notice could not be imputed, and the case was remanded.

**Equal protection claim for zoning code interpretation cognizable under 42 U.S.C. § 1983. Law of the case doctrine did not apply where new facts arose during litigation. *City Nat'l Bank of Fla. v. Tampa*, 2011 WL 1295874 (Fla. 2d DCA 2011).**

The parcel owners held a vacant 1.76-acre corner lot zoned to allow seventy-five condominium units per acre, but which was also located in a historic district that subjected any development to the Architectural Review Commission (ARC). The ARC's sole responsibility was to issue a certificate of appropriateness (COA) if development met aesthetic guidelines. Although the city initially approved a twenty-eight story condominium, the project was reduced four stories to accommodate a local neighborhood association. When a COA was requested, the parcel owners were required to provide certification

from the city that the project complied with the zoning code. The city's zoning administrator provided a completely new interpretation of the zoning code by imposing a double front yard setback, after more than 10,000 similar decisions to the contrary. The planning commission adopted staff's recommendation to cure the problem with an amendment to the zoning code. The city council passed a different amendment, recommended by the local neighborhood association, which remedied the situation in the future but not for the subject parcel owners.

After the project was redesigned, the zoning administrator confirmed it met zoning requirements. The parcel owners met at least nine times with the ARC and addressed all concerns. At the final COA hearing, the local neighborhood association complained, for the first time, about the project's height. An ARC board member--also a member of the neighborhood association--moved to deny the application which motion was approved. After another redesign, down to twenty stories, the ARC again called the redesign insignificant and rejected it. An appeal to the city council was denied.

The parcel owners brought suit against the city. During litigation, the parcel owners learned that the city had approved three roughly equal or taller projects within the historic district. Eventually, the circuit court dismissed with prejudice the parcel owners' third amended complaint. The 2d DCA reversed, "based on the unique facts of this case." First, the circuit court should have allowed an equal protection claim under 42 U.S.C. Section 1983, based on the interpretation of a zoning code. The 2d DCA explained that a plaintiff could be treated as a "class of one" for the purpose of an equal protection claim if it was intentionally treated differently from others similarly situated with no rational basis. This test applies to land use regulations. Because the parcel owners had alleged just that, their claim should not have been dismissed. Second, the circuit court erred in determining that the law of the case doctrine applied.

Although the circuit court on certiorari review determined that competent, substantial evidence supported the city's COA denial, the facts alleged on the issue of equal protection had not yet surfaced. Thus, when the facts surfaced and the complaint was amended, the claim was different because the issue was different than that presented and decided previously.

**In reviewing a dismissal of a complaint under Section 163.3215, Florida Statutes, the test is whether a plaintiff is entitled to a declaration of rights. Plat approval does not constitute a development order under section 163.3215, Florida Statutes. *Graves v. Pompano Beach*, 2011 WL 1376617 (Fla. 4th DCA 2011).**

A property owner requested city approval of a plan to expand and further develop an existing racetrack and casino. The city first required a plat approval before any building could occur. Graves and others lived nearby and alleged that the plat approval had to comply with the city's comprehensive plan, and filed a consistency challenge under Section 163.3215, Florida Statutes. The trial court granted the property owner's motion to dismiss, reasoning that a plat approval is not a development order for purposes of Section 163.3215 review.

The 4th DCA affirmed, explaining that the test for reviewing a dismissal of a complaint under Section 163.3215, Florida Statutes, is whether a plaintiff is entitled to a declaration of rights. Here, the 4th DCA held the plaintiffs were not. A plat is simply a map or representation that does not authorize building on the land or alteration of structures. The city required further steps for development to occur. Thus, the plat approval was not a development order and could not be challenged under Section 163.3215, Florida Statutes.

**Nonconforming use lawful where**

**previous owner relied on city interpretation of zoning code, maintained proper licenses, and current owner continued use and license. *Allen v. Key West*, 2011 WL 1485992 (Fla. 3d DCA 2011).**

Under a previous interpretation of the city's zoning code, which the city knew about and did not challenge, property owners could rent out their principle dwelling for anything less than 50% of the year without obtaining a transient housing license. In *Rollison v. Key West*, 875 So. 2d 659 (Fla. 3d DCA 2004), the 3d DCA found a nonconforming use lawful where (1) the use was ongoing before a zoning code provision was adopted that changed the transient housing policy, (2) the use complied with the previous policy because the home was rented for less than 50% of the year, and (3) she obtained the correct licenses under the previous policy.

The trial court ruled for the city, ruling that *Rollison* was not controlling because the Allens' nonconforming use was in a different part of the city and that the *Rollison* plaintiff had sought approval from the city that she could rent out her unit short term. The 3d DCA held that these differences were immaterial. It held that *Rollison* applied to the entire city, with or without city approval. It also held that the time of home purchase was not important, it was the nonconforming use that was controlling.

**Proper parties not joined in challenge to growth management bill SB 360 (2009); trial court had no jurisdiction to declare statute unconstitutional. *Atwater v. Weston*, 2011 WL 1634234 (Fla. 1st DCA 2011).**

Numerous cities and counties filed suit requesting chapter 2009-96, Laws of Florida, Senate Bill 360 (2009), be declared unconstitutional. They alleged SB 360 violated the single subject and unfunded mandate provisions of the Florida Constitu-

tion. Defendants moved to dismiss, arguing they were not proper parties to the action because they are not designated to enforce Florida's growth management law. The trial court denied the motion and ultimately declared the law unconstitutional as an unfunded mandate.

On appeal, the 1st DCA reversed. It concluded the defendants should have been dismissed from the suit. The 1st DCA reaffirmed prior holdings that the proper defendant in a suit challenging a law's constitutionality is the official designated to enforce it. In such a case, neither individual legislators nor the Governor are proper parties. Only when legislation involves a "broad constitutional duty of the State implicating specific responsibilities" would those parties be proper. In this case, the court held, because the proper parties were not defendants, there was no dispute between adverse parties that would confer jurisdiction upon the trial court.

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# Department of Community Affairs Update

by Richard E. Shine, Assistant General Counsel

*Department of Community Affairs v. Escambia County, DOAH Case No. 10-6857GM*

Escambia County adopted Ordinance No. 2010-16 amending their Comprehensive Plan to include an Optional Sector Plan. The Department found the County's 2030 Comprehensive Plan not in compliance because the Optional Sector Plan Requirements found in section 163.3245, Florida Statutes, were not met with regard to the Conceptual Long-Term Buildout Overlay. The adopted Conceptual Long-Term Overlay did not identify the maximum buildout figures and did not identify the extent of uses of land that would occur in the overlay area at buildout. With regard to facilities including water, sewer, solid waste, drainage, parks/recreation, and schools the amendment did not identify buildout figures. Additional issues included the need for a North-South Limited Access Roadway Facility, the identification and mapping of anticipated conservation land uses, and the need to identify regionally significant natural resources. The Department and Escambia County entered into a Stipulated Settlement Agreement and the Department reviewed the remedial amendment and filed a

Cumulative Notice of Intent to find the plan amendment in compliance and issued a Final Order closing the file.

*Florida Wildlife Federation and Collier County Audubon Society v. Collier County and Buckley Enterprises, Hideout Golf Club, Ltd., John L Cowan and Jane Ann Cowan, DOAH Case No. 07-2317GM*

Collier County adopted amendments to the Comprehensive Plan Future Land Use Map series relating to Section 24 - North Bell Mead and associated text amendments to the Future Land Use Element. The Department found the amendment adopted by Ordinance Number 07-07 not in compliance and internally inconsistent with the comprehensive plan due to the natural resource protection provisions related to Section 24 of the Future Land Use Map, the protection of the habitat of the Red Cockaded Woodpeckers, and the eligibility for use as Sending Lands as defined in the County's comprehensive plan. After substantial negotiations, the parties reached a settlement, balancing the interest in preserving Red-Cockaded Woodpecker habitat with the interest in property development rights. The

County thereafter adopted remedial comprehensive plan policies which were found in compliance by the Department's Cumulative Notice of Intent. On April 15, 2011, the Department issued a Final Order dismissing the proceeding and closing the file.

*Department of Community Affairs v. Brevard County et al., DOAH Case No. 10-1158GM, (Brevard - Farmton).*

In April 2011, after going to hearing and submitting proposed recommended orders, the parties settled the case. Under the remedial amendment, the developable area is reduced from 3,800 acres to 2,800 acres by eliminating the smaller of the two areas dedicated to development. Removal of the development area will enhance the functioning of the site as a corridor for bears and other wildlife. Removal of the development area, eliminating the lowest density land use category (Hamlet) and requiring a minimum density of 4 dwelling units per acre addresses concerns about urban sprawl. Approximately 9,200 acres, equivalent to 80% of the site, will be subject to a conservation easement and conservation management plan. The conservation policies for the site were made clearer and more specific. The remedial amendment states the maximum intensity and density of development allowed (1.25 million square feet and 2,306 dwelling units) as opposed to the initially adopted matrix which converted vehicle trips to density or intensity. No certificate of occupancy can be issued until 2016, unless a financially feasible capital improvements schedule is adopted to support the development. The Department has issued a Cumulative Notice of Intent finding the amendment in compliance and the ALJ issued an Order Relinquishing Jurisdiction and Closing File.

*Miami-Dade County v. DCA, 1D09-4382, and Lowe's Home Centers, Inc. v. DCA, 1D09-4383*

The First District affirmed a Final Order of the Administration Commission which found not in

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compliance a future land use map amendment which would have expanded Miami-Dade's Urban Development Boundary. The County's Comprehensive Plan "contemplates such expansion of this boundary when, in order to maintain adequate development capacity, additional commercial land supplies are needed. As provided in the plan, the determination of 'need' is to be 'through the plan review and amendment process.'"

*Flagler Retail Associates, Ltd v. Miami-Dade County, DOAH Case No. 09-4713GM*

The Petitioners challenged a future land use map amendment which did not involve an expansion of Miami-Dade's Urban Development Boundary. The ALJ's Recommended Order found the amendment not in compliance because it was inconsistent with a plan policy that map amendments "satisfy a deficiency in the Plan map to accommodate projected population or economic growth of the County." The ALJ concluded the policy was the "primary" factor is considering map amendments. The Administration Commission rejected the ALJ's recommendation, and issued a final order which found that the plan policy relied upon by the ALJ was outweighed by other policies. The Final Order is pending appeal in Third District Court of Appeal Case No. 3D11-948.

*Adjutant General v. Clay County, DOAH 10-0912GM*

Section 163.3177(6)(a), Florida Statutes, requires local governments to "update or amend their comprehensive plan to include criteria and address compatibility of lands adjacent or closely proximate to existing military installations..." Clay County adopted a plan amendment to meet this requirement with regard to Camp Blanding, and the Adjutant General and the Florida Department of Military Affairs challenged the amendment. The ALJ's Recommended Order found that the plan amendment complied with the base compatibility requirements in the 2009 statutes, but did not rule upon compliance with the requirements adopted by the 2010 Legislature. The Recommended Order is pending at the Department.

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# The Florida Fish and Wildlife Conservation Commission Update: Threatened Species Rules

By Jeffrey Vivó

This article explains the major revisions to Florida Administrative Code chapter 68A-27, Fla. Admin. Code, (“Rules Relating to Endangered or Threatened Species”) adopted by the Florida Fish and Wildlife Conservation Commission (FWC) in November 2010 after a multi-year stakeholder-engagement process. These revisions include the addition of purpose and intent language, the addition of definitions, a dramatic change to the state’s species listing process, the consolidation of the protected species into one list with two subdivisions, and the reorganization of permitting information into a new section.

FWC added a provision (at rule 68A-27.0001) in order to clarify that the intent of the regulations is not to prohibit lawful nature-based recreational activities (such as hunting and fishing) that may result in mere annoyance or disturbance of listed species so long as the activities do not constitute take pursuant to the rules. Definitions pertaining to listed species were either moved from the FWC’s general definitions chapter or created within Chapter 68A-27 and together now comprise their own section at rule 68A-27.001. A definition of “take” has been created to track the federal definition. A definition for “management plan” has been promulgated that allows the FWC to craft plans around a single or multiple species, but requiring certain elements regardless, such as biological status and the consideration of anticipated economic, ecological, and social impacts of plan implementation.

The method for evaluating and listing species is outlined in rule 68A-27.0012 and has been revised considerably. The rule now identifies annual windows when requests will be accepted by the agency and defines two distinct parallel processes for two different categories of species discussed below.

Florida Endangered and Threatened species are now of one of two categories: Federally-designated Endangered and Threatened species or State-designated Threatened species. Both of those categories are contained

in rule 68A-27.003.

The list of Federally-designated Endangered and Threatened species is populated through the adoption of Federal action for Florida-native species, which occurs if the species: (1) is listed pursuant to the Federal Endangered Species Act; and (2) is native to Florida (as defined in rule 68A-27.001). If the two aforementioned factors are met, then the FWC will list the species through a notice of intent to adopt a Federal standard consistent with Section 120.54(6), Florida Statute.

The State-designated Threatened evaluation consists of two phases: an initial biological vulnerability screening using the Millsap process (initially described in Wildlife Monographs 111), followed by a biological status review using the IUCN Red List criteria. Under the Millsap process, species are assigned a biological score which indicates the species’ relative risk. Those given a score of 27 and above go to the listing process, below 19 are not evaluated for listing as imperiled, and biological information for those in the 19-27 range are evaluated further by FWC staff. Due to concern that the Millsap screening would exclude species that would otherwise meet the eligibility criteria for listing, regardless of biological score, a species may still proceed to biological status review if data and analysis demonstrate that species meets at least one of the listing criteria outlined in rule 68A-27.001(3). The second phase of the listing process—the biological status review—is based on the IUCN Red List guidelines, which uses five criteria designed to assess various biological characteristics that indicate a species is at risk of extinction. Further information on the IUCN guidelines can be found at [www.iucnredlist.org](http://www.iucnredlist.org). Only after the outcome of the IUCN process is known will a species be placed on the State-designated Threatened species list.

Due to concerns expressed by the Joint Administrative Procedures Committee, further refinements to chapter 68A-27 have been noticed recently in the Florida Administrative Weekly. Those proposed refinements will clarify that marine threatened and

endangered species--over which FWC exercises statutory rather than constitutional powers--are identified within chapter 68A-27 but regulated by other rules promulgated under statutory authority.

Additionally, a separate list of Species of Special Concern (SSC) remains codified at rule 68A-27.005. The rule was amended to allow those species to remain listed as SSC until a listing review is conducted to determine whether those species should be listed under the new listing criteria for State-designated Threatened species and until management plans are developed for the species regardless of whether the species is listed or not. FWC created a new rule--68A-27.007--to codify permit requirements and authorize certain activities without need for a permit. The agency has sought to eliminate confusion due to overlapping Florida and Federal permits. Now, a federally-issued permit to take a listed species eliminates the need for a state-issued permit. In some instances the federal government may delegate the permitting authority to FWC. The permitting standards have been revised to become species-specific.

Other changes to chapter 68A-27 include the repeal of the provisions allowing for impacts to protected species on airport property when the aircraft safety and human lives are in jeopardy. Instead, this is now more extensively detailed according to the provisions of rule 68A-9.012.

FWC is currently working on biological review for the 61 species that were listed prior to the November 2010 rule revisions. Requests to list species or remove species from the list will not be acted upon until the expiration of a two-year moratorium during which the management plans for the 61 species are developed. Information on imperiled species and the listing process, status of species, and what you can do to better preserve Florida’s wildlife can be found at (<http://myfwc.com/wildlifehabitats/imperiled>).

*Jeffrey Vivó is a recent graduate of the FSU College of Law. He externed with FWC in the Spring of 2011.*

# CLE News

by Kelly Samek, CLE Committee Chair

It's been a challenging but exciting year for ELULS CLE programming. I hope you will mark your calendars now to join us for the Annual Update this August 11-13 in Ponte Vedra, at the beautiful Sawgrass Marriott Golf Resort and Spa. This year's theme is "Power to the People," and in addition to our tried-and-true offerings on the latest in legislation and administrative law, the agenda features speakers on issues such as siting renewable energy facilities, climate change litigation, pollution associated with energy exploration, and ethical considerations in energy development. Also slated are panels on fisheries regulation, contamination and foreclosure, and form-based codes. The Water, Wetlands, Wildlife, and Beaches Committee along with affiliate member E Sciences are in the midst of planning the return of a popular new tradition: the Thursday evening ecowalk. Last year, attendees had the pleasure of witnessing the excavation of a sea turtle nest and the consequent liberation of several loggerhead hatchlings. And as usual, Friday will include the Section's annual lunchtime business meeting and awards presentation, so there are a lot of reasons you should prioritize this program in planning to meet your CLE requirements.

The program chairs for the Annual Update have traditionally been your Section CLE vice-chairs—this year, Tara Duhay and Adam Schwartz. Tara is an associate at Lewis, Longman & Walker's West Palm Beach office. She is a 2004 graduate of the University of Colorado School of Law. Adam, on the other hand, graduated from Florida State University's College of Law in 2006 and now practices with Akerman Senterfitt in West Palm Beach. If you haven't met them before, take a moment to introduce yourself at the Annual Update and let them know what you think of the program.

Full details on the agenda and how to register will be posted on the ELULS website in late June, along with information on a partial registration fee waiver that is available on a limited basis for government and non-profit practitioners. (I hope

we'll see you there, in no small part because of another project that's just beginning: the ELULS is forming an Energy Committee! This new substantive committee will provide a forum for interested practitioners across the full spectrum of energy law—from utilities regulation and facility siting to the intersection with climate change and greenhouse gas regulation—to network and generate opportunities of common interest. With this initiative, ELULS is hoping to create a niche for energy law attorneys who may have, up to this point, felt "homeless" within The Bar. Consider this your personal invitation to get involved. The committee's inaugural gathering will take place at the upcoming Annual Update during the substantive committee luncheon scheduled for Thursday, August 11.

If a tight budget or overwhelming schedule mean participating in a live CLE event is impossible for you, remember that there is a wealth of recorded Section programming available for purchase at The Florida Bar's website. These include the recent offering called "Greening the Law" that ELULS co-sponsored with the Real Property, Probate and Trust Law Section, which covers legal issues arising out of sustainable development, the incorporation of new energy

technologies in land use, the consequences of engaging in the new breed of false advertising and puffing known as greenwashing, and the ethical considerations of disaster preparedness. In addition, two SFGAP certification preparation courses remain available, as does the 2011 Hot Topics program and this year's audio webinar series focused on ethics and legislative matters. Please keep in mind as you make decisions concerning your CLE needs that these programs contribute to your Section's financial bottom line. Your support is appreciated!

Finally, if you have not already done so, take advantage of the free webinar sponsored last fall by the Water, Wetlands, Wildlife and Beaches Committee on changes to the state's endangered and threatened species rules that is available for playback at <http://www.eluls.org/2010/FWC/Webinar.html>. This program has been accredited for one hour of General CLER, including SFGAP certification; after watching the presentation, just enter course number 9863 0 on your online reporting form. (Materials from the Public Interest Committee's workshop on "Endangered Species in My Backyard" may also be of interest to those accessing the webinar, so look for those at [http://www.eluls.org/2011/PIC\\_PIEC2011.html](http://www.eluls.org/2011/PIC_PIEC2011.html).)

## Ethics Questions?



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# ELULS Affiliate Update

by Chad Drummond, P.E., Geosyntec Consultants

Environmental and Land Use Law Section (ELULS) affiliate members have been busy for the past several months and look forward to several exciting upcoming events. Recent ELULS Affiliate/Attorney Mixers in Tampa and Orlando have been very well attended. I would like to extend my appreciation to the following mixer sponsors: GrayRobinson, Carlton Fields, Cardno TBE, Arcadis, E Sciences, Inc., and HSW Engineering. Their sponsorship support is key to enabling these important social events to occur for members and their guests.

The ELULS Affiliate Membership sponsored a free, non-accredited webinar on June 7. This lunchtime seminar, **Changing Tides: Florida's Shifting Stormwater Regulations**, summarized existing stormwater regulations and the status of the statewide stormwater and EPA numeric nutrient criteria rulemaking efforts in Florida. This timely webinar was presented by Jamie T. Poulos, P.E. LEED® AP, of Poulos & Bennet, LLC and moderated by Chad Drummond, P.E., of Geosyntec Consultants. The PowerPoint presentation from this program is available at [www.eluls.org](http://www.eluls.org). I am particularly

excited about our lineup of speakers for the **2011 Ethical Challenges for the Environmental Lawyer and Consultant** program to be held on August 11 in Ponte Vedra, Florida ([http://www.eluls.org/2011/annualupdate\\_aug\\_2011.html](http://www.eluls.org/2011/annualupdate_aug_2011.html)). Presentation titles and speakers include:

## **Ethically Staying Within your Practice Area**

*William L. Finger, William L. Finger, Attorney at Law*  
*Robert Wojcik, Golder Associates, Inc.*

## **Lawyers and Consultants: Preparing Each Other for the Presentation of Ethical Expert Testimony**

*Robert D. Fingar, Of Counsel Guilday Tucker Schwartz & Simpson*  
*James Hirsch, F and H Consulting, LLC*

## **Duty to Preserve Evidence and Protect Environmental Reports: Ethical and Practical Challenges**

*Rory C. Ryan, Ryan Law, P. A.*  
*Joel Balmat, HSW Engineering, Inc.*

## **Situational Ethics: Can the Circumstance Affect the Ethical Responsibilities of Environmental Attorneys and Professionals?**

*Anna H. Long, Lowndes Drosdick Doster et al*  
*Peter K. Partlow, E Sciences, Inc.*

Also, for the accompanying **2011 ELULS Annual Update: Power to the People** to be held on August 11 and 12, the affiliates have put together an excellent panel covering the latest on Florida stormwater issues. Panelists for the Friday, August 12 talk include:

Mark W. Ellard, Geosyntec Consultants  
Richard J. Budell, Department of Agriculture & Consumer Services  
Robert A. Malinoski, Gunster, Attorneys at Law  
Donald D. Carpenter, HSW Engineering, Inc.

This is an exciting time to be involved in ELULS. For more information or to find out how to increase your involvement please contact Chad Drummond at [CDrummond@Geosyntec.com](mailto:CDrummond@Geosyntec.com).

## **Environmental & Land Use Law Section CLE Audio-CD Programs Available**

The first link is to the CLE by Sponsor, Environmental & Land Use Law Section of the Florida Bar website where you can purchase the programs on-line. <https://www.floridabar.org/FBWEB/CLEReg.nsf/By%20Sponsor?Openview&Start=10&Expand=10#10>

The second link is a PDF of the audio/video list and order form that you can print and return with your payment. [https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/33D29E3754E2FC1A85256B96006BFDBE/\\$FILE/AVTapesList.pdf?OpenElement](https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/33D29E3754E2FC1A85256B96006BFDBE/$FILE/AVTapesList.pdf?OpenElement)

You may also visit the LegalSpan site to purchase additional CLE courses or CLEtoGo. <http://www.legalspan.com/TFB/catalog.asp?CategoryID=20060801-441572-825390&UGUID=T2008070783521934192526>



# Law School Liaisons

## Barry University School of Law

by Jane Goddard

### Center for Earth Jurisprudence Announces First Graduates of Environmental Law, Jurisprudence and Justice Honors Program

Barry University School of Law's inaugural class of graduates receiving an Honors Certificate in Environmental Law, Jurisprudence and Justice walked in the graduation ceremony with their fellow graduates on May 14, 2011. Students Cathryn Henn, Bethany Szewczyk, and Tim Martin will receive a certificate and a notation on their transcript reflecting their concentrated study.

"By completing this program, these students will be able to play an important role in addressing our current and future environmental concerns," said Leticia M. Diaz, dean of the Barry University School of Law. "We are proud of them for completing this challenging program, and look forward to watching them put their knowledge and skills into action."

Law students in the program must complete Introduction to Environmental Law, Jurisprudence, and Justice; Environmental Law; Administrative Law or Florida Administrative Law and Environmental Regulation; an approved skills component; and an approved writing course. They must also complete two approved electives and maintain a 2.5 grade point average.

Developed with the support of the Center for Earth Jurisprudence, the Honors Certificate Program reflects Barry's unique strengths as a leader in the fields of Environmental Law, Earth Jurisprudence, and Environmental Justice. The program is designed to prepare law students for the pressing ecological demands of our time.

### **Journalist and Author Cynthia Barnett to Speak at Center for Earth Jurisprudence in October**

Award-winning environmental journalist and author Cynthia Barnett will discuss Florida's water issues and the need for a water ethic at a recep-

tion hosted by the Center for Earth Jurisprudence on October 5, 2011, at the Barry Law School in Orlando. Her latest book, *Blue Revolution: Unmaking America's Water Crisis*, is scheduled for publication in September.

*Blue Revolution* reports on the many ways one of the most water-rich nations on the planet has squandered its way to scarcity, and argues the best solution is also the simplest and least expensive: a water ethic for America. Combining investigative reporting with solutions from around the nation and the globe, Barnett shows how local communities and entire nations have come together in a shared ethic to dramatically reduce consumption and live within their water means.

"Launching Cynthia's *Blue Revolution* book in Central Florida continues the Center's commitment to sustainable access to water for future generations," stated Sister Pat Siemen, director of the Center for Earth Jurisprudence. "Cynthia has contributed to laying the foundation for a water ethic in Florida and we are pleased to help introduce her new book."

Barnett's previous book, *Mirage: Florida and the Vanishing Water of the Eastern U.S.*, won the Florida Book Award gold medal for nonfiction in 2008. Barnett is a senior writer for *Florida Trend* magazine who writes frequently about environmental and public policy issues.

### **After Cochabamba: A Case for the Rights of Nature**

Sister Patricia Siemen, Director of the Center for Earth Jurisprudence, recently joined an international group of environmental pioneers at a publication party for *The Rights of Nature: The Case for a Universal Declaration of the Rights of Mother Earth*. The book collects the work of writers, political leaders, and environmental and community activists from around the world, sharing their passion and insights about the need to recognize Earth's rights and move toward a sustainable future. Many of the authors were present at the party, which was held at the Delancy Street Foundation, San Francisco, California. *The Rights of Nature* is a publication of the Council of Canadians, Fundación Pachamama, and Global Exchange.

### **Center for Earth Jurisprudence to Relocate**

This summer the Center for Earth Jurisprudence will move to a new location at the Barry University School of Law. In addition to staff offices, the Center's new location will include space for meetings and conferences, and an exterior plot to be used as a demonstration garden.

For additional information, please contact Jane Goddard at (321)206-5788 or [jgoddard@mail.barry.edu](mailto:jgoddard@mail.barry.edu).



*Law School Liaisons continued....*

## FIU Law School Establishes Environmental Law Clinic

The FIU College of Law Environmental Law Clinic (ELC) enrolled its first class this semester. Operating as one of seven in-house clinics at the College of Law, the ELC focuses on environmental and land use matters of national, state, and regional significance. Students work with ELC clients on rulemaking, permitting, and litigation matters before state and federal courts and administrative bodies. This work includes matters relating to Everglades restoration

and litigation, issues of water quality and quantity, growth management, resource protection, endangered species and environmental justice. In addition to developing advocacy skills, students learn substantive aspects of the major federal and state environmental laws and regulations and how those laws are applied in real world settings.

In celebration of Earth Day, students at FIU organized dozens of events for FIU Earth Week, a six-

day festival dedicated to bringing awareness to environmental and sustainability initiatives. Law students participated in this university-wide effort by organizing a beach clean-up at Elliott Key in Miami. "As part of Biscayne National Park, Elliott Key is a special place and I'm proud of the hard work our students put into the effort" said Miami attorney Jim Porter, a ELULS Executive Council member, who runs the ELC.

## An Exciting and Successful Year for Florida State University College of Law's Environmental and Land Use Program (Summer 2011)

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

We are delighted to report that the most recent (2011) *U.S. News & World Report* ranks Florida State University College of Law's Environmental Law program 6th in the United States, the second consecutive year the program has been ranked in the top ten.

This column provides an update on our very active spring semester at the College of Law, and on recent accomplishments by our students and alumni.

### Spring 2011 Programs

**Symposium: "Law and Sustainability: The Energy-Land Use Nexus:"** This very well-attended major one-day symposium brought together leading legal scholars to consider the nexus between energy and land use, looking both at energy consumption based on our land use patterns, and land consumption for energy generation. Presenters included **Terrell Airline**, Bay County Attorney, **Prof. William Buzbee** of Emory University School of Law, **Prof. Steven Ferrey** of Suffolk Law School, **Prof. Robert Glicksman** of George Washington University Law School, **Mike Halpin**, Director, Power Plant Siting Office, DEP,

**Angela Morrison** of Hopping Green & Sams, **Prof. John Nolon** of Pace University Law School, **Prof. Jim Rossi** of The Florida State University College of Law, and **Prof. Patricia Salkin** of Albany Law School. The day also included a presentation by **Sharon Buccino**, Director, Land and Wildlife Program, Natural Resources Defense Council. As part of the Sustainable Energy Research Project, the event was a joint effort of the Law School's Environmental and Land Use Law Program and The Florida State University's Institute for Energy Systems, Economics, and Sustainability (IESES).

**Distinguished Environmental Lecture:** Our spring 2011 *Distinguished Lecture* featured **Prof. Jody Freeman**, the Archibald Cox Professor of Law at Harvard University School of Law and a leading scholar in the fields of administrative and environmental law. Prof. Freeman delivered her lecture on the topic "U.S. Climate Change Policy-What Next?" This lecture series was sponsored by the College of Law's *Journal of Land Use and Environmental Law*, which will publish an article by Prof. Freeman based on her lecture in a future volume.

### Spring Environmental Certificate Seminar Guest Faculty Lectures.

In addition to its spring *Symposium* and *Distinguished Environmental Lecture*, the College of Law hosted two professors this spring for faculty workshops and as guest lecturers for our Environmental Certificate Seminar: **Prof. Lesley McAllister** of the University of San Diego School of Law, and **Prof. Michael Wara** of Stanford Law School.

### College of Law Student Honors and Accomplishments

**Kevin Schneider**, FSU Law 2013, is interning this summer with the Equal Justice Alliance ([www.noaeta.org](http://www.noaeta.org)).

**Layne Zhao**, FSU Law 2012, is externing this summer with EPA Region 3 in Philadelphia.

**Melanie Leitman**, FSU Law 2011, is publishing her paper entitled "Water Supply and Management for a Growing State" in the *Journal of Land Use and Environmental Law*.

**Ann Drobot**, FSU LL.M. 2010, has had her article entitled "Transitioning to a Sustainable Energy Economy:

*The Call for National Cooperative Watershed Planning*” accepted for publication in *Environmental Law* (published by Lewis & Clark Law School).

### **Alumni Updates**

**Chris Brockman** ('85) has been appointed practice group leader of Holland & Knight's Central Florida Real Estate Practice. This practice group combines extensive private and public sector transactional expertise with a preeminent land use and local government practice. The group is an integral part of the firm's national real estate practice group, comprised of approximately 200 real

estate professionals — the largest domestic real estate department in the country.

Brockman, who joined the firm in 1985, focuses his practice in the area of real estate law, with special emphasis on commercial real estate transactions, including commercial leasing matters. In addition to his work with Holland & Knight, Brockman serves as Chairman for The Kimball Foundation; 2011 Orlando, Inc. Board of Directors. Brockman has published articles for *Florida Investor* and *RE Business Online* and he is a frequent speaker on real estate matters throughout the state of Florida. Brockman is the former editor-in-chief for the *Journal of Land Use and Environmental Law*,

The Florida State University College of Law.

**Jeffrey H. Wood** ('03) has been named Minority Staff Director for the United States Senate Subcommittee on Water & Wildlife (Committee on Environment & Public Works) and Counsel on Environment, Energy & Transportation to Senator Jeff Sessions (R-AL).

For more information about our *Distinguished Lectures* and our *Environmental Forum* series, and to keep apprised of other programs at the College of Law, please see: [http://www.law.fsu.edu/academic\\_programs/environmental\\_events.html](http://www.law.fsu.edu/academic_programs/environmental_events.html). Please also feel free to contact Steven M. Goldstein Professor David Markell, at [dmarkell@law.fsu.edu](mailto:dmarkell@law.fsu.edu).

## **St. Thomas University – LL.M. in Environmental Sustainability**

The new LL.M. in Environmental Sustainability at St. Thomas University School of Law will get underway officially in fall 2011. It departs from the conventional law school focus on legal categories such as land use law or environmental regulation, taking an interdisciplinary approach to policies and programs that promote sustainability; this approach is shaped also by the ethical consideration of nature's intrinsic value and the interdependence of species. Courses are organized in three formats. Skills-based foundational modules involve students in collaborative out-of-class projects similar to tasks frequently found in practice. Immersion modules, generally scheduled over the weekend, take students onsite to work locations where they explore such topics as Ecology & Ecosystem Management for Lawyers in the Everglades Agricultural Area of Florida, or study comparative water management in the Netherlands. Two-day “hot topic” workshops change in response to current events and disasters; the 2011-12 line-up features the Deepwater Horizon Oil Spill Compensation scheme, the EPA's abandonment of climate change initiatives in 2010 in favor of rulemaking and enforcement, and issues pertinent to our South Florida location. The complete course listing is available at [www.stu.edu/law/environmentLLM](http://www.stu.edu/law/environmentLLM), under ‘curriculum.’

The fact that the official kick-off of the graduate program in environmental sustainability is not until fall does not mean we have been idle. John C. Dernbach led a riveting short course during one intensive week in March 2011 titled, “Environmentally Sustainable Development: Law and Institutions.” “I gained invaluable knowledge from Environmentally Sustainable Development with Professor Dernbach,” said 3L student Ryan Price. “I was expecting overlap with other Environmental Law courses, but this class was unique. We studied cutting-edge areas of law and society on a global scale that was unparalleled by any other law school course. Involved class discussion explored advanced and novel views on human consumption and construction.” Professor Dernbach will return to St. Thomas Law to teach another course in fall.

In addition, St. Thomas Law's graduate program in environmental sustainability is sponsoring a new Legal Scholarship Network (LSN) Sponsored Subject Matter eJournal: Environmental Justice & Sustainability eJournal. LL.M. program director and professor of law Alfred Light and Randall S. Abate, associate professor of law at Florida A&M University's College of Law, are joint editors of the eJournal. It distributes working and accepted paper abstracts examining policies and programs that support

sustainability, reducing the risks to national security, improving economic efficiency, enhancing our health and communities, creating jobs, improving the lives of the poorest among us, and fostering greater human well-being. Environmental justice refers to those values, policies, rules and behaviors that support sustainable communities, with a frequent emphasis on distributive justice (*i.e.*, the equitable distribution of both the burdens of environmentally threatening activities and the environmental benefits of government and private programs). The principle of environmental sustainability encompasses adaptive ecosystem management; actions to correct environmental problems must simultaneously reduce uncertainty in the future, allowing correction of our uncertain course. Those interested can view papers at <http://ssrn.com/link/Environmental-Justice-Sustainability.html> or subscribe at <http://hq.ssrn.com/jourInvite.cfm?link=Environmental-Justice-Sustainability>.

To read more about the program, visit our website at [www.stu.edu/law/environmentLLM](http://www.stu.edu/law/environmentLLM) or check out the LL.M. in Environmental Sustainability brochure newsletter, “Adapt and Survive: Law for a sustainable world,” at [www.stu.edu/Portals/Law/cej/newsletspring11.pdf](http://www.stu.edu/Portals/Law/cej/newsletspring11.pdf). Questions are welcome: [environmentLLM@stu.edu](mailto:environmentLLM@stu.edu).

*Law School Liaisons continued....*

## UF Law Update: Student Accomplishments Mark the Semester's End

Submitted by Alyson Flournoy, Director, Environmental and Land Use Law Program, and Heather Judd (2L)

### Participants for Summer J.D. Fellowships Chosen

In the last issue we told you about our new program fellowships: the Conservation Law J.D. Fellowships and the Minority ELUL Fellowship. Conservation Law Fellowships are awarded to students who demonstrate exceptional commitment to and achievement in environmental and land use law and participate in the Conservation Clinic. The Minority ELUL Fellow also must demonstrate an interest in the impact of environmental and land use law issues on minorities or be a member of a minority group. This year's recipients of Conservation Law J.D. Fellowships are Jennifer Allen (2L) and Antionette Vanterpool (2L). Each will receive a \$2,500 grant and work in a summer placement focusing on environmental and land use projects of relevance to the Conservation Clinic. Ms. Allen will travel to Costa Rica this summer with the Conservation Clinic and will work with The Center for Environmental and Natural Resources (CEDARENA) on water-related issues through the Conservation Clinic. Ms. Vanterpool will have an externship with the Public Trust Environmental Law Institute in St. Augustine and then will work with the Jamaica Environmental Trust in Jamaica this summer. Danisa Gonzalez (1L) is our Summer 2011 Minority Fellowship recipient. Ms. Gonzalez's summer placement and project also involves travelling to Costa Rica, where she will extern with the Inter-American Institute for Human Rights, which provides support to the International Court for Human Rights located in Costa Rica. Ms. Gonzalez will receive a \$2,000 grant as the Minority Fellow.

### Student Accomplishments, Publications and Awards

- Byron Flagg (LL.M. student) co-authored the 3rd edition of "Anchoring Away: Government Regulation and the Rights of Navigation in

Florida," published as a Florida Sea Grant technical report and available at: [http://www.flseagrant.org/images/PDFs/anchoring%20away\\_03\\_09\\_11\\_full\\_web3.pdf](http://www.flseagrant.org/images/PDFs/anchoring%20away_03_09_11_full_web3.pdf).

- LL.M. student Andrew Hoek wrote a paper titled "Lee County Facelift: Using Transit Oriented Development To Revitalize One Of Southwest Florida's Most Historic Counties" which was relied on in a land use symposium called "Lee County in 2035: Back to the Future?" organized by Fowler White, Reconnecting Lee, City of Fort Myers, and Florida Gulf Coast University. His paper was included in one of the speakers' materials for the symposium and on Reconnecting Lee's website.

- Ben Lingle's (3L) article "A Legal Analysis of DEP's New ERP Exemption for Small Scale Living Shorelines" is to be published in this Section Reporter.

- Working with Adjunct Professor Cathy Sellers, Ryan Todd (3L) wrote a paper on legislation enacted in the 2010 Special Session of the Legislature, overriding Governor Crist's veto and requiring legislative ratification of all administrative agency rules having a cumulative impact of \$1M over five years. The paper is being submitted for publication in the Florida Bar Journal on behalf of the Administrative Law Section of The Florida Bar.

- Professor Dawn Jourdan's Spring 2011 Land Use Planning students worked on drafting disaster response ordinances for Pinellas County. The students were mentored during this project by Thomas Rupert of Florida Sea Grant.

- The UF Law Conservation Clinic won a student planning award from the Florida Chapter of the American Planning Association for the "Town of Marineland Unified Land Development Code Clinic Students over several semesters were involved with the project. Allison Fischman accepted the award on behalf of the Clinic at

the FAPA annual meeting in Tampa.

- The UF Office of Sustainability's annual Sustainable Solutions Awards honored the Public Interest Environmental Conference (PIEC) with an award in the Energy category this year. The UF Water Institute took the award in the water category, for becoming an EPA Regional Center for Watershed Excellence. The Center for Watershed Excellence was a project developed in part by Levin College of Law students Alyssa Cameron (3L) and Megan Policastro (3L) in conjunction with Ph.D. students associated with the Conservation Clinic.

### Student Summer Employment

In addition to these fellows, UF Law students will participate in a variety of opportunities this summer. Some will travel to Costa Rica for the UF ELUL Summer Study Abroad. Others will pursue externships, paid, or volunteer employment. Two students will be working with federal agencies. **Vivek Babbar (1L)** will participate in an externship with the National Oceanic and Atmospheric Administration in St. Petersburg and will work on matters related to the 2010 BP Oil Spill, and **Allison Fischman (2L)** will be a law clerk with the U.S. Environmental Protection Agency Office of Enforcement and Compliance Assurance in Washington, D.C. Additionally, several students will work with non-profits on conservation issues. **Stephen McCullers (1L)** will extern with The Nature Conservancy in its Altamonte Springs, Florida office. **Sekita Grant (LL.M. student)** will be a volunteer law clerk for The Nature Conservancy's Latin America and Caribbean Legal Group in Washington, D.C. for the early part of this summer, supported by a grant from the UF Association for Public Interest Law, before she travels to Costa Rica where she will work on an international sea turtle conservation project with colleagues from Costa Rica and Panama through the UF Conserva-

tion Clinic. **Alexis Leventhal (1L)** will draw on her background in urban and regional planning in her work with the New Orleans Redevelopment Authority. **Ariane Assadoghli (2L)** will extern with the Division of Administrative Hearings in Tallahassee. Three students will have externships with County Attorneys' offices: **Chad Bickerton (2L)** with the Seminole County Attorney's Office, **Nicholas Andrews (2L)** with the Pasco County Attorney's Office, and **Heather Judd (2L)** with the Brevard County Attorney's office, where she will work on projects involving planning, environmental, and local government issues. **And Evan Seretan (2L)** will extern with the Connecticut Department of Environmental Protection in Hartford CT.

### Updates from the Conservation Clinic

The Conservation Clinic was very busy serving clients on a wide array of environmental and land use issues this spring. The Clinic has been focusing on work with watershed-wide stakeholder organizations including the St. Marys River Water Management Committee, the Blackwater River Foundation and the Withlacoochee River Alliance. Outcomes of this work include enhanced coordination of water quality monitoring between Georgia and Florida for the St Marys River, an interstate water body, and the designation of the University of Florida as an EPA Center for Watershed Excellence. The UF Water Institute will host the Center which is designed to engage UF in work with stakeholder organizations to achieve water quality improvement in se-

lected watersheds. A key component of the Clinic's watershed work has been the continuous involvement of Ph.D. students from UF's NSF funded Adaptive Management of Water, Wetlands and Watersheds program. The Clinic has continued its work with the Waterfronts Florida Partnership and recent Clinic graduate Kevin Sharbaugh, has taken that work into his practice. Sharbaugh now works under contract to complete development of a desktop planning tool to assess the significance of maritime infrastructure to local governments. The tool will assist state and local planners, as well as maritime community stakeholders, with land use decisions that may affect public access to the water.

Every summer the Conservation Clinic goes to Costa Rica for six weeks. This year participants will work on projects addressing international sea turtle law, community based watershed management through environmental service payments, local markets for sustainable seafood, and ecotourism concession agreements within protected areas.

### Oil Spill Legal Research Underway

Six students in the Environmental and Land Use Law Program have spent the past year researching legal and policy issues related to the BP Deepwater Horizon Oil Spill in the Gulf of Mexico. Assisting the UF Law Oil Spill Working Group are law student legal research assistants, including **Alyssa Cameron (3L)**, **James Davies (2L)**, **Carli Koshal (3L)**, **Austin Moretz (3L)**, **Fay Pappas (2L)**, and **Jesse Reiblich (3L)**.

Their research is being funded by a grant from the McIntosh Foundation. The final report will be submitted to the Gulf Coast Ecosystem Restoration Task Force, headed by UF law alum John Hankinson.

### Certificates and LL.M. Degrees in Environmental and Land Use Law Awarded

Ten students are expected to receive a Certificate in Environmental and Land Use Law in addition to the J.D. degree at the May commencement exercises: **Zachary Bazara**, **Zachary Broome**, **Alyssa Cameron**, **Daniel Harris**, **Carli Koshal**, **Benjamin Lingle**, **Jesse Reiblich**, **Joanna-Reilly Brown**, and **William Sasser**; **Sean McDermott** will also receive a Masters in Interdisciplinary Ecology. To be eligible for the certificate students must have completed required core and elective courses and eight additional credit hours beyond the minimum required for graduation with a J.D.

In addition to our J.D. certificate graduates, James Choate (LL.M.) received his LL.M. degree in December and is currently in the U.S. Corps of Engineers Honors Program in Charleston, S.C. In May 2011, four additional students are scheduled to receive the LL.M. degree: **Byron Flagg**, **Karen Greene**, **Seth Hennes**, and **Andrew Hoek**. This year marks the third year of our LL.M. in Environmental and Land Use Law. The program is kept small by design to foster development of in-depth expertise in the subject matter by allowing students to work closely with faculty and in special programs such as the Conservation Clinic.



*Mark Your Calendar!*

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that the draft 2011 Guidance is not a rule; as such, it is not binding upon the agencies, and specifically lacks the force of law.

Once the draft 2011 Guidance is finalized, the agencies estimate that the number of waters protected under the CWA will increase as compared to current practices. When finalized, the 2011 Guidance will apply to all CWA programs, including section 303, water quality standards; section 311, oil spill prevention and response; section 401, water quality certification; section 402, National Pollutant Discharge Elimination System permits; and section 404 permits for discharges of dredge or fill materials. The 2011 Guidance, once finalized, will supersede the “Joint Memorandum” providing guidance on SWANCC, dated January 15, 2003,<sup>6</sup> and the guidance entitled “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabel v. United States*,” dated December 2, 2008. However, it is not the intention of either the EPA or the ACOE to reopen previously issued jurisdictional determinations.

The United States Supreme Court has addressed the scope of waters of the United States protected under the CWA in three cases. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court accorded *Chevron*<sup>7</sup> deference to the ACOE’s interpretation of term “waters of the United States” and held that wetlands adjacent to a traditional navigable waters and their tributaries were properly considered to be “waters of the United States.”<sup>8</sup> The Court in *Riverside Bayview Homes* did not address whether agency jurisdiction extended to wetlands that were not adjacent to traditional navigable waters or their tributaries.<sup>9</sup>

The Court was presented with an opportunity to address whether agency jurisdiction extended to wetlands that were not adjacent to traditional navigable waters or their tributaries in SWANCC. In SWANCC, the Court addressed the question of CWA jurisdiction over isolated, non-navigable, wholly intrastate ponds when the sole

basis for regulation was the use of the waters as habitat for migratory birds (the “migratory bird rule”). In that case, the Court’s majority determined that the statutory language was clear and therefore did not accord *Chevron* deference to the agency’s interpretation. The Court refused to recognize ACOE jurisdiction to wetlands that were not adjacent to traditional navigable waters and their tributaries, and struck down the ACOE’s migratory bird rule. The Court concluded that CWA jurisdiction could not rely solely on the presence of migratory birds.

The SWANCC decision did not address the full scope of federal wetlands jurisdiction under the CWA. SWANCC merely established a bulwark beyond which jurisdiction did not lie. The scope of federal wetlands jurisdiction inside of the line drawn by the SWANCC Court remained uncertain.

The Court had another opportunity to clarify the extent to federal wetlands jurisdiction under the CWA in *Rapanos*.<sup>10</sup> The Court in *Rapanos* addressed the extent of CWA protections for wetlands adjacent to non-navigable tributaries. However, the Supreme Court was unable to garner a majority of Justices to agree on a test or standard to answer the question of the extent of federal jurisdiction over wetlands under the CWA. Instead, the Court issued five separate opinions with no opinion commanding a majority of Justices. Two tests or standards for determining wetland jurisdiction emerged from *Rapanos*’ murky waters. Ultimately, a divided Supreme Court reaffirmed limits on federal regulatory jurisdiction under the CWA and found that the ACOE had exceeded its authority by asserting jurisdiction over wetlands adjacent to, or narrowly separated from, non-navigable tributaries of traditional navigable waters.

The plurality opinion penned by Justice Scalia, provided that “waters of the United States” extended beyond traditional navigable waters to include “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographical features’ that are described in ordinary parlance as . . . streams[,] . . . oceans, rivers, [and] lakes.”<sup>11</sup> Justice Scalia further asserted that only wetlands with a “continuous surface connection” to other jurisdictional waters are considered “adjacent” and protected by the CWA.<sup>12</sup> Jus-

tice Scalia further wrote that this interpretation is the only “plausible interpretation” of phrase “waters of the United States,” and “[t]he phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”<sup>13</sup> Justice Scalia provides a clear test or standard from which to determine federal regulatory jurisdiction under the CWA. The Scalia test would leave many wetlands formerly under the jurisdiction of the ACOE or EPA on dry land.

Justice Kennedy’s concurring opinion contemplated a much different standard for determining “waters of the United States.” Justice Kennedy concluded that “waters of the United States” included wetlands that had a “significant nexus to traditional navigable waters.”<sup>14</sup> Justice Kennedy goes on to state “wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as ‘navigable.’”<sup>15</sup> The test espoused by Justice Kennedy reflects a more expansive view of federal regulatory jurisdiction under the CWA. However, the test does not bring clarity to the uncertainty left in the wake of SWANCC.

In the dissenting opinion by Justice Stevens, the dissenting Justices opined that the lower courts should interpret *Rapanos* in a manner that would give effect to both the test adopted in the plurality’s opinion, as well as the test adopted in the concurring opinion written by Justice Kennedy, because all the dissenting Justices would uphold the ACOE’s jurisdiction under either test. It is this approach that forms the basis of the draft 2011 Guidance. EPA and ACOE assert that it is most consistent with *Rapanos* to assert jurisdiction over wetlands that meet either the Scalia test or the Kennedy test because the majority of the Justices would uphold jurisdiction under either opinion.

The 2011 Guidance provides a more thorough discussion of the agencies interpretation then was provided in earlier memoranda. The 2011 Guidance includes a discussion on how waters with a “significant nexus”

to traditional navigable waters or interstate waters are protected by the CWA. The 2011 Guidance is divided into eight sections. Section 1 addresses traditional navigable waters, and section 2 addresses interstate waters. Section 3 provides guidance relating to Justice Kennedy's "significant nexus" standard. Section 4 addresses tributaries, whilst section 5 provides guidance as to adjacent wetlands. Section 6 provides guidance as to the catchall other waters. Waters that are generally not considered "waters of the United States" are discussed in section 7. Lastly, guidance on the documentation necessary to support decisions concerning whether waters are protected under the CWA is provided in section 8. Additional scientific and legal information concerning the 2011 Guidance is provided in the appendix to the 2011 Guidance.

The 2011 Guidance provided the following summary of key points:

#### SUMMARY OF KEY POINTS

Based on the agencies' interpretations of the statutes, implementing regulations and relevant caselaw, the following waters are protected by the Clean Water Act:

- Traditional navigable waters;
- Interstate waters;
- Wetlands adjacent to either traditional navigable waters or interstate waters;
- Non-navigable tributaries to traditional navigable waters that are relatively permanent, meaning they contain water at least seasonally; and
- Wetlands that directly abut relatively permanent waters.

In addition, the following waters are protected by the Clean Water Act if a fact-specific analysis determines they have a "significant nexus" to a traditional navigable water or interstate water:

- Tributaries to traditional navigable waters or interstate waters;
- Wetlands adjacent to jurisdictional tributaries to traditional navigable waters or interstate waters; and
- Waters that fall under the "other waters" category of the regulations. The guidance divides these waters into two categories, those that are physically proximate to other jurisdictional waters and those that are not, and discusses how each category should be evaluated.

The following aquatic areas are generally not protected by the Clean Water Act:

- Wet areas that are not tributaries or open waters and do not meet the agencies' regulatory definition of "wetlands";
- Waters excluded from coverage under the CWA by existing regulations;
- Waters that lack a "significant nexus" where one is required for a water to be protected by the CWA;
- Artificially irrigated areas that would revert to upland should irrigation cease;
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

• Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

- Water-filled depressions created incidental to construction activity;
- Groundwater drained through subsurface drainage systems; and
- Erosional features (gullies and rills), and swales and ditches that are not tributaries or wetlands.

• EPA and the ACOE are requesting public comment on all aspects of the draft 2011 Guidance. Comments on the draft 2011 Guidance must be received by 1 July 2011. Until the 2011 Guidance is finalized, the 2003 and 2008 guidance memoranda remain in effect.

#### Endnotes:

<sup>1</sup> 2011 Guidance published in Federal Register, Vol. 76, No. 84, May 2, 2011, pp. 24479-24480.

<sup>2</sup> 33 U.S.C. § 1251 *et seq.*

<sup>3</sup> 531 U.S. 159 (2001).

<sup>4</sup> 547 U.S. 715 (2006).

<sup>5</sup> The public comment email address in the original Federal Register notice is incorrect. The correct email address to submit comments to the docket is ow-docket@epa.gov.

<sup>6</sup> 68 Fed. Reg. 1991, 1995.

<sup>7</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)

<sup>8</sup> *Id.* at 139.

<sup>9</sup> *Id.* at 131.

<sup>10</sup> *Rapanos* consists of two consolidated cases: (1) *United States v. Rapanos*, 376 F.3d 629 (6<sup>th</sup> Cir. 2004) involving an enforcement action for failure to obtain a § 404 permit prior to filling wetlands; and (2) *Carabell v. ACOE*, 391 F.3d 704 (6<sup>th</sup> Cir. 2004) involving the denial of a § 404 permit to place fill into a wetland.

<sup>11</sup> *Id.* at 739.

<sup>12</sup> *Id.* at 742.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 780.

<sup>15</sup> *Id.*



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