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THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

Vol. XXXIV, No. 1
October 2012

• Martha M. Collins, Chair • Jeffrey A. Collier, Co-Editor • Anthony J. Cotter, Co-Editor

Will Section 12 of Ch. 2012-205 Impact Groundwater Regulation?

by Daniel H. Thompson, Berger Singerman LLC

On May 4, 2012, Governor Scott signed into law HB 503, which became effective as Chapter 2012-205, Laws of Florida, on July 1, 2012. The general purpose of the new law is to simplify and streamline various state, regional and local agency permit and other approval practices, including those relating to the regulation of groundwater discharges and cleanup by the Florida Department of Environmental Protection ("Department"). When Representative Jimmy Patronis originally introduced a similar bill in 2011, it was very controversial, particularly because of concerns that it might result in a weakening of existing environmental and land use standards. The bill's supporters subsequently worked to address those concerns, and the bill passed both chambers unanimously.

This article will focus on one specific provision of the new law, Section 12, which amends Section 403.061(11), Fla. Stat. As explained below, this section addresses groundwater regulation as it applies to "zones of discharge" at "existing installations." The regulated interests involved in advocating Section 12 have indicated to this author that they were concerned that some Department staff were not properly interpreting existing groundwater law on this subject, and that they were simply trying to make sure that the Department interpreted the term in the manner originally intended. Department staff whom this author has contacted also take the position that Section 12 does not alter existing law, and an unpublished Department

See "Groundwater Regulation," page 21

From the Chair

by Erin Deady

In my eleventh year serving on the Executive Council for the Section, I am honored to take over this year as your Section Chair. I wanted to take this opportunity to thank current members and welcome new ones! I would like to thank Martha Collins for her twelve years as member of the Executive Council and call attention to her strong record in supporting, and working on behalf of, the Section. We all appreciate Marti's hard work. The Section leadership held their annual retreat in April this year with a very specific goal: work towards developing and rolling out a Strategic Plan at the Annual Update. I am happy to report we met that goal. The retreat provided a very structured approach to identifying issues, creating an outline, developing a survey and gathering information to draft a strong measurable 5-Year Strategic Plan. I am very proud of the Council's efforts in meeting this goal because it is the first such Strategic Plan drafted for the Section in a number of years. This Plan is based on a survey provided initially to Executive Council members and then expanded and provided to the entire Section membership. We had a 15% response rate and this survey helped provide good data for use to base the Strategic Plan upon.

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CHAIR'S MESSAGE
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The Executive Council and Committees have been very busy over the last year enhancing Section services. We have a new look to our website with new tools for your use. Please visit us at www.eluls.org where you can access publications, like the reporter, the Section's Treatise, information about our CLE programs and our Committees. Consider joining a Committee, either a substantive practice area or a Committee to serve the Section overall. The Section services we provide are only as good as the efforts we collectively put into delivering them. The Section works very hard to provide the member's quality affordable services and we continue to look for ways to enhance those services so your ideas are needed and welcome!

We will continue to communicate our new events, activities and issues with you through the Section Reporter and our new monthly e-newsletter. We want to publish the accomplishments of our members through Bar Journal and Reporter articles so submissions are always needed. We would value and appreciate your service as well as your comments, suggestions and new ideas.

I hope that we can accomplish great things this year as a strong Section of the Bar. I am very excited about the direction we have and the goals we have set for this year. I also look forward to the continued support of all of you, the dedicated Section members that have helped create such a collegial and professional body like this. Thank you for the opportunity to serve you as Chair this year and we all look forward to another excellent year.

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

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Florida's Electrical Power Plant Siting Act: Helping To Keep the Lights On For 30 Years

by Douglas S. Roberts, Hopping Green & Sams, P.A.

Background

Since the Florida Legislature adopted it in 1973,[1] Florida's Electrical Power Plant Siting Act (PPSA)[2] has provided an effective mechanism to ensure that Florida has had a reliable, cost-effective supply of electricity from new and modified electrical power plants. While the electrical generating sources and fuels that Florida's electric utilities are utilizing to fulfill their statutory obligation to serve are and have been evolving over the past 30 years, the licensing of new electrical generating units depends more upon the generating capacity of the facility and the physical attributes of the proposed site for the facility than the fuel type. At the state level, any steam or solar electrical generating facility of 75 MW or greater must be certified under the PPSA before construction and operation of that facility may begin. Ultimately, certification is granted (or denied) by the Governor and Cabinet sitting as the "Siting Board" following a year-long application review and hearing process.[3]

Over the past three decades, over 43 separate power plant sites have been approved or "certified" under the PPSA. Several power plant sites now contain multiple separate electrical generating units that have been certified under that act. The total electrical generating capacity that has been certified under the PPSA is almost 37,000 megawatts (MW). This represents approximately 64 percent of the 57,605 MW of total installed electrical generating capacity in Florida in 2011. While many of the electrical power plants certified under the PPSA were new units added to meet the state's continuing growth in the demand for electricity, several existing plants have also been certified under the PPSA as they sought to increase their electrical output and thereby were subject to the PPSA.

These PPSA certified facilities use a wide variety of fuels to generate electricity, including natural gas, coal, nuclear fuel, biomass, solid waste, and solar energy. The decisions on which fuels to use in these plants were made by the state's public and investor-owned electric utilities in response to federal and state energy policies that preferred one electrical generating fuel over another or as market prices of fuels dictated their use. For example, in the mid-1970s, the Arab oil embargoes dramatically disrupted the flow of oil to the United States including Florida. Those electrical power plants that utilized oil to generate electricity saw their costs of production escalate rapidly. As a result, the federal and state governments encouraged a "back out" of the use of oil and encouraged new electrical power plants that used coal. As a result, several coal–fired electrical power plants were constructed in the early to mid-1980s. As domestic natural gas supplies became more abundant in the early to late 1990s, and new efficient generating technologies became available, new electrical power plants were constructed to efficiently use natural gas. But as the tropical storms and hurricanes of 2004 to 2005 exposed Florida's over-reliance and growing dependence on vulnerable sources of natural gas in the western Gulf of Mexico, the state again encouraged greater diversity in the mix of fuels used in the electric power industry. Florida's electric utilities proposed several coal-fired power plants as the means to meet the state's increasing demand for electricity. However, in 2007, with Governor Crist's executive orders establishing targets for dramatically reducing the state's greenhouse gas emissions, the state discouraged and disapproved several of those coal-fired projects. As a result in that shift in the state's energy policy, electric utilities responded by proposing additional natural gas-fired electrical generating units to meet the near term demand for electricity and new nuclear-fueled electrical generating units to meet projected demand for electricity beginning in the year 2020 and later. Several PPSA-certified electrical power plants involve municipal solid waste facilities in which solid wastes are burned to generate electricity, avoiding the need to land fill those wastes.[4] In addition, the PPSA has been used in the past several years to certify several renewable fuel electrical generating units in Florida. These have included the addition of a 75 MW solar thermal facility in Martin County to provide steam to an existing PPSA-certified electrical power plant and a new 100 MW biomass-fueled power plant under construction near Gainesville. Other solar and renewable energy projects have been identified and proposed for certification under the PPSA, but are unlikely to move forward unless additional goals and policies are adopted to encourage additional use of renewable energy sources to generate electricity in Florida.[5]

These certified plants have been constructed and been placed into operation across Florida - near Panama City and Tallahassee in the Panhandle, in Jacksonville, in Orlando, in the southeast counties of Palm Beach, Broward and Miami-Dade, and in several other locations in between. The certified power plant sites are of a wide range of sizes. Some sites are less than 250 acres in size[6] while other certified plant sites are upwards of thousand acres in size.[7] Certified plant sites have included "greenfield" sites where no existing generating facilities were present to existing sites where electrical plants have existed before the new units were built.[8] Several technologies have been employed in these generating units, including traditional steam boilers in which fuel is burned to produce steam in a series of boiler tube and advanced combined cycle units which burn natural gas in a combustion turbine (which is like a jet engine) and the hot exhaust is used to produce steam that is used

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to generate additional electricity. In addition to the approval to construct and operate new electrical generating units, certifications issued under the PPSA have also contained approvals to construct new associated facilities that are necessary for the operation of the electrical power plants, including fuel handling and delivery systems, electrical transmission lines and water supply and disposal pipelines.[9]

By state law, all electric utilities in Florida with existing generating capacity of 250 MW or more must submit a Ten-Year Site Plan to the Florida Public Service Commission (PSC) for review annually.[10] The Ten-Year Site Plans, submitted by April 1st annually, and the PSC's report detailing its review of those Plans previews the future growth in electric demand in Florida over the next ten years, and the means by which Florida electric utilities plan to meet that demand, by either additional energy conservation or by planned additional electrical power plants.[11] The PSC is currently undertaking its review of the 2012 Ten Year Site Plans and should issue its annual report by the end of 2012.

However, a review of the individual plans for Florida's electric utilities submitted in April 2012 provides a look at the future for new electrical power plants over the next decade, including those that will be subject to the PPSA.[12] The Florida Reliability Coordinating Council (FRCC) is comprised of the electric utilities that serve the state east and south from the Apalachicola River.[13] The FRCC prepares a summary report of the separate Ten Year Site Plans that were submitted earlier in the year. Entitled the Florida Reliability Coordinating Council's 2012 Load & Resource Plan,[14] the FRCC is forecasting that over the next decade, through 2021, that Florida will require approximately 9900 MW of additional generating capacity, which will increase the state's generating capacity from approximately 57,000 MW in 2011 to 67,000 MW in 2021. This remaining need will be met, in large part, through modernization of existing facilities and construction of additional generating units, which almost all will be fueled by use of natural gas.

According to the Florida PSC's 2011 report on the electric utilities 2011 Ten Year Site Plans, natural gas generation capacity grew in Florida from 18% of the state's electricity requirements in 2000 to 50% in 2010. Under current projections, natural gas will supply 55.5% of Florida's energy generation by 2020. The percentage of electricity generated by coal in 2020 is predicted to fall to 25% compared to 36% in 2000. By 2020, nuclear generation is projected to supply 13% of the state's electricity, decreasing from 15.6% in 2000. Renewable generation facilities in Florida are projected to increase by 900 MW between 2010 and 2020, from the current 1300 MW of existing renewable energy generating capacity. The majority of this additional generation will come from biomass (300 MW) and solar (500 MW).[15]

The recent discovery of new natural gas supplies in shale regions of the US has led to dramatic reductions in the price of natural gas. Those low prices may result in greater utilization of natural gas for new electrical power plants in the coming years. Recent federal regulatory actions that seek to reduce air emissions from electrical power plants such as limitations on emission rates of greenhouse gases will also heavily influence the choice of fuels that will be proposed in new electrical power plants. Those new federal environmental regulations may also affect the continued operation of existing Florida electrical power plants, which may necessitate their replacement with new generating units to ensure continued supplies of electricity in the future.

Against this back drop and based upon this look into the future, the PPSA has provided a means to implement many of these energy policies, these fuel choices and the various past and future environmental initiatives such as reducing air emissions and reducing the use of solid waste landfills. The PPSA has been effective in ensuring that those new electrical power plants and their associated facilities have been permitted in a timely and orderly fashion, while providing public participation throughout the site certification proceeding. In creating the PPSA, the Legislature has sought to insure that new, needed electrical power plants are built in time to serve the public's need for the power those plants will supply, while protecting the health and welfare of the state's residents and the state's natural environment.

Florida's Electrical Power Plant Siting Act

Overview

The PPSA is Florida's centralized "one-stop" process for licensing new or expanded electrical power plants of 75 MW or more of gross generating capacity.[16] One license ("certification") replaces all state, regional, and local permits and approvals regarding the location, construction, and operation of the power plant and any "associated facility," [17] including, among other things, pipelines, roads, railway lines, and electrical transmission lines. § 403.511(1), Fla. Stat.[18] In expressing its intent in adopting the PPSA, the Florida Legislature found "that the present and predicted growth in electric power demands in this state requires the development of a procedure for the selection and utilization of sites for electrical generating facilities and the identification of a state position with respect to each proposed site and its associated facilities. . . . [Further], the efficiency of the permit application and review process at both the state and local level would be improved with the implementation of a process whereby a permit application would be centrally coordinated and all permit decisions could be reviewed on the basis of standards and recommendations of the deciding agencies." § 403.502, Fla. Stat.

In achieving this legislative intent to establish a centralized permitting process, the PPSA expressly preempts all other local, regional and state permits that might otherwise be required for the construction and operation of an electrical power plant. In adopting the PPSA, the legislature provided that "[t]he state hereby preempts the regulation and certification of electrical power plant sites and electrical power plants as defined in this act." § 403.510(2), Fla. Stat. A certification issued under the PPSA is therefore the "sole license of the state and any agency as to the approval of the location of the site and any associated facility and the

construction and operation of the proposed electrical power plant, except for the issuance of department licenses required under any federally delegated or approved permit program . . ." § 403.511(1), Fla. Stat.[19] The PPSA recites a non-exclusive litany of state permitting and regulatory statutes that are displaced by a certification issued under the PPSA including, among others, Chapters 125, 163, 166, 373 and 403, Florida Statutes. § 403.511(3), Fla. Stat.[20] The only exclusions from the PPSA's preemption are "the ratemaking powers of the Public Service Commission under chapter 366 . . . [and] the right of any local government to charge appropriate fees or require that construction be in compliance with applicable building construction codes." § 403.511(4), Fla. Stat.

Application Preparation and Submittal; Agency Review and Reporting

The Siting Coordination Office of the Florida Department of Environmental Protection (DEP) receives and administers the processing of an application for site certification submitted by an electric utility.[21] DEP has prepared an Application Guide that applicants use, often with the assistance of an environmental consultant and other experts, in assembling the information required to apply for and obtain certification under the PPSA.[22] An applicant may also include in its application for certification one or more associated electrical transmission line corridors.[23] If there is an electrical transmission line corridor proposed, the applicant may expressly allow other parties to formally propose "alternate corridors" for a portion of or for the entire proposed electrical transmission line corridor during the certification proceeding and before any certification hearing. § 403.5064(4), Fla. Stat. Applicants may also propose in their applications corridors for other linear facilities such as pipelines and access roads; however, other parties may not propose alternate corridors for those linear facilities. An application for site certification will also contain, as appendices, copies of the separate, completed application forms for various federal environmental permits that may be required for the facility.

The applicant provides copies of the application to each affected agency, including local governments in whose jurisdiction the proposed power plant or an associated facility is to be located.[24] These reviewing agencies include DEP, the Florida Department of Economic Opportunity (DEO), the jurisdictional water management district(s), jurisdictional local governments (both counties and/or municipalities), the Florida Fish and Wildlife Conservation Commission (FWC), jurisdictional regional planning council(s), and the Florida Department of Transportation (DOT). § 403.507, Fla. Stat. DEP may also request that other agencies review the application and submit reports on matters within that agency's jurisdiction. § 403.507(2)(b), Fla. Stat. These additional agencies typically include the Florida Department of State's Division of Historical Resources as to potential impacts to historical and cultural resources, the Florida Department of Agriculture and Consumer Services' Florida Forest Service as to potential impacts on state-owned forests, and the Florida Department of Health as to matters related to sanitary sewer disposal and if needed, radiological issues. Upon receipt of the application, the various reviewing agencies may request that DEP ask the applicant to submit additional or clarifying information on the application, so that the application may be made "complete."[25] Once the application is deemed complete by DEP, each agency then prepares an "Agency Report" for submittal to DEP on the consistency of the facility proposed within its jurisdiction with all applicable local ordinances or regulations. § 403.507(2)(a)(3), Fla. Stat.[26] Agencies may also propose conditions of certification in their Agency Reports. Proposed conditions are to be supported by a regulatory citation under that agency's adopted laws, ordinances or regulations that support the proposed condition. This requirement for a regulatory basis for proposed conditions of certification reflects the PPSA's procedural preemption of otherwise applicable regulations, but does not support the expansion of such conditions beyond the scope of the agency's preexisting regulatory requirements.

Land Use and Zoning Consistency

While the application review is ongoing, affected local government(s) prepare and issue their determinations on the "consistency of the site, and any associated facilities that are not exempt from the requirements of land use plans and zoning ordinances under chapter 163 and section 380.04(3), with existing land use plans and zoning ordinances that were in effect on the date the application was filed . . ." § 403.50665(2)(a), Fla. Stat.[27] The "land use consistency determination" issued by a local government pursuant to section 403.50665, Florida Statutes, is limited to consistency of the site for the electrical power plant with local land use plans and zoning ordinances.[28] If the local government finds that the site or nonexempt associated facility is not consistent, the local government's Land Use Consistency Determination must address the reasons for the inconsistency and identify any needed land use or zoning approvals that are required to make the site consistent. Fla. Admin. Code R. 62-17.121(2).

Following a newspaper notice of the local government's Land Use Consistency Determination, the utility or a substantially affected person may dispute a local government's Determination by filing a petition with the ALJ within 21 days of that public notice. The ALJ will then schedule a land use hearing and subsequently issue a Recommended Order on land use and zoning issues for review by the Siting Board. §§ 403.50665(4) and 403.508(1), Fla. Stat. If no petition is filed challenging this Determination, the issue is resolved for purposes of the certification proceeding. If the Siting Board determines, following the hearing on any challenge to the local government's Land Use Consistency Determination, that the proposed power plant site or nonexempt associated facility is consistent with the existing land use plans and zoning ordinances, the local government may not change the land use plans or zoning ordinances to foreclose construction of the plant or associated facilities unless certification is subsequently denied or withdrawn. § 403.508(1)(f), Fla. Stat. If the Siting Board determines that the proposed site or nonexempt associated facility is not consistent with existing land use plans and zoning ordinances, the Siting Board may nonetheless determine that it is in the public interest to authorize the use of the site for the proposed power plant or associated

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facility and authorize a variance from or other necessary approval under the adopted land use plans and zoning ordinances that cures the inconsistency. Alternatively, the Siting Board may require the applicant to apply to the appropriate local government for any approvals deemed necessary to make the proposed site or associated facility consistent and in compliance with local land use plans and zoning ordinances. § 403.508(1)(f), Fla. Stat.

Parties to the Site Certification Proceeding; Public Participation

The PPSA provides several opportunities for public agencies, third parties and public interest organizations to become a party to a particular site certification proceeding. Many of these opportunities allow for interested persons to easily become parties, without having to show standing that might be required for entry into proceedings solely under Chapter 120, Florida Statutes. First, DEP and the applicant are automatic parties to the site certification proceeding. § 403.508(3) (a), (b), Fla. Stat. Seven listed public agencies can become parties by filing a simple notice of intent to be a party no later than 90 days before the start of the site certification proceeding, but lose their right to be a party if they fail to timely file the notice of intent, § 403.508(3)(a), (b), (d), Fla. Stat. Other public agencies and domestic, non-profit corporations and organizations involved in protecting environmental resources or public health, in promoting consumer, labor, commercial or industrial interests, in protecting historical sites, in promoting comprehensive planning, orderly development or other listed interests may become parties by filing a simple notice of intent to become a party within 75 days after the application for site certification is filed. § 403.508(3)(c), Fla. Stat. Persons whose substantial interests may be affected, including most of the previously identified organizations, can petition to become parties by alleging and ultimately showing that they have a substantial interest that is affected and being determined in the site certification proceeding. § 403.508(3)(e), Fla. Stat. Lastly, the applicant or DEP may request that the ALJ make a public agency a party including those agencies whose properties or works may be affected by the project. § 403.508(3) (f), Fla. Stat.[29]

As with any official public meeting or hearing in Florida, any land use hearing, any site certification hearing, and the Siting Board's meeting on the issue or final certification are open to the public. One-half page newspaper notices are published of the filing of the application for site certification, of the Local Government Land Use Consistency Determination, of any land use hearing and of any final certification hearing, providing ample public notice of the PPSA proceeding. § 403.5115(1), (2), Fla. Stat. FDEP also publishes notices of many of these events in the Florida Administrative Weekly. § 403.5115(4), Fla. Stat. Members of the pubic who are not already parties to the site certification proceeding may testify at the land use hearing and at the certification hearing and may participate in the Siting Board's meeting on final certification. *See* § 403.508(4)(b), Fla. Stat.

Certification Hearing and Siting Board Decision

After the statutory prerequisites discussed above occur, and if certification of the proposed project is disputed by one or more parties to the site certification proceeding, a certification hearing is held by the ALJ, typically within 265 days after the filing of the application. § 403.508(2)(a), Fla. Stat. The certification hearing is held at a location in proximity to the proposed site of the power plant. § 403.508(2)(a), Fla. Stat. Similar to many administrative hearings, parties to the certification hearing present evidence on issues raised in the agency reports or by the parties to the proceeding. The range of issues to be considered are set out in the Siting Board's final decisional criteria found in section 403.509(3), Florida Statues, as outlined below.

At the conclusion of the certification hearing, the ALJ issues a Recommended Order that contains findings of fact and conclusions of law about the matters raised at the hearing or in the application, along with proposed conditions of certification if certification is recommended. The ALJ submits the Recommended Order to the Siting Board. § 403.509(1)(b), Fla. Stat. In determining whether an application should be approved or denied, the Siting Board evaluates whether the power plant and associated facilities and their construction and operation will meet the criteria for certification established in the PPSA. The Siting Board may decide that it is in the overall public interest to certify the project, regardless of a negative recommendation from the ALJ or from the reviewing agencies. In determining whether an application should be approved, the Siting Board considers whether, and the extent to which, the location, construction, and operation of the power plant and associated facilities will:

(a) Provide reasonable assurance that operational safeguards are technically sufficient for the public welfare and protection.

(b) Comply with applicable nonprocedural requirements of agencies.

(c) Be consistent with applicable local government comprehensive plans and land development regulations.

(d) Meet the electrical energy needs of the state in an orderly, reliable, and timely fashion.

(e) Effect a reasonable balance between the need for the facility as established pursuant to [the PSC's need determination] and the impacts upon air and water quality, fish and wildlife, water resources, and other natural resources of the state resulting from the construction and operation of the facility.

(f) Minimize through the use of reasonable and available methods, the adverse effects on human health, the environment, and the ecology of the land and its wildlife and the ecology of state waters and their aquatic life.

(g) Serve and protect the broad interests of the public. § 403.509(3), Fla. Stat. In its final order, the Siting Board also may adopt "conditions which constitute variances, exemptions, or exceptions from nonprocedural requirements of the department or any agency which were expressly considered during the proceeding. . . ." § 403.511(2)(b), Fla. Stat.

The Final Order of the Siting Board is subject to judicial review as provided in Chapter 120, Florida Statutes. § 403.513, Fla. Stat.

Post Certification Matters

Once a final and affirmative

certification is issued, a number of additional steps must typically be taken before the certified electrical power plant can proceed to construction and, ultimately, begin operation. Before construction may begin, various other federally-required permits must be issued either by DEP acting on behalf of the U.S. Environmental Protection Agency or by other federal agencies such as the U.S. Army Corps of Engineers or the U.S. Nuclear Regulatory Commission for nuclear-fueled power plants.

The final conditions of certification may require the now-licensee to submit certain plans and programs to DEP and other agencies to ensure compliance with the various conditions of certification. For linear facilities for which the Siting Board certified a corridor, such as an electrical transmission line, the licensee will select a narrower final right-of-way within which the transmission line or other linear facility will be constructed and operated. Prior to commencing construction within the selected right of way, the licensee will submit additional information to DEP and designated agencies demonstrating that the linear feature will comply with applicable conditions of certification. Conditions of certification may also require a licensee to undertake previously-specified mitigation for unavoidable impacts to natural resources such as wetlands. Final details of the mitigation plans will typically be submitted to DEP and any designated agency to demonstrate compliance with the conditions.

In coming years, the PPSA will continue to play a central role in the development and licensing of the new electrical power plants that Florida will require; in the same manner it has played that role for the past 30 years.

Endnotes:

[1] Chapter 73-33, Laws of Florida.

[2] Section 403.501 to 403.518, Fla. Stat.

[3] The Secretary of the Florida Department of Environmental Protection may grant final certification in non-contested cases where no disputed issues among the parties warrant the conduct of an uncontested site certification hearing. § 403.509(1)(a), Fla. Stat.

[4] See In re: South Broward County Resource Recovery Project Power Plant Siting Certification Application PA-85-21 (DOAH Case No.85-001166EPP) (Fla. Div. Admin. Hrgs.), (April 8, 1986); See In re: Hillsborough County Resource Recovery Facility Expansions Power Plant Siting Application No. PA 83-19A(DOAH Case No.05-004347EPP) (Fla. Div. Admin. Hrgs.), (August 02, 2006).

[5] See Cavros, George, "Florida's 35 Year-Old Renewable Energy Policy: Moving Beyond 'Avoided Cost'", The Environmental and Land Use Law Section Reporter, Vol. XXXIII, No. 3, p. 1 (Florida Bar, Section on Environmental and Land Use Law, 2012) for a discussion of recent efforts to expand renewable energy resources in Florida.

[6] See In re: JEA Brandy Branch Combined Cycle Conversion, Power Plant Siting Application No. PA 00-43, DOAH Case No. 00-5120EPP (Fla. Div. Admin. Hrgs.), (Jan. 15, 2002) (certified plant site of approximately 153 acres); see In re: Florida Power & Light Co. West County Energy Center Power, Power Plant Siting Application No. PA05-47, DOAH Case No.05-1493 (Fla. Div. Admin. Hrgs.), (Sept. 2, 2005) (certified plant site of approximately 200 acres)

[7] See In re: Progress Energy Florida Hines Energy Center Power Block 3, Power Plant Siting Application No. PA92-33SA2, DOAH Case No. 02-3529EPP (Fla. Div. Admin. Hrgs.), (June 10, 2003) (certified plant site of approximately 8200 acres); see In re: Florida Power & Light Company Martin Unit 8, Power Plant Siting Application No. PA89-27A, DOAH Case No. 02-573EPP (Fla. Div. Admin. Hrgs.), (March 5, 2003) (certified plant site of approximately 2200 acres)

[8] In re: Florida Power Corp., Polk County Project, PA-92-33, DOAH Case No. 92-5308EPP (Fla. Div. Admin. Hrgs.), (December 3, 1993) (new units located on lands that had been previously mined for phosphate and been reclaimed.); In re: Lauderdale Repowering Project, Power Plant Site Certification Application, Florida Power & Light Company, PA89-26, DOAH Case No. 89-6636EPP (Fla. Div. Admin. Hrgs.), (April 4, 1990) (certified project replaced existing plant that had been in operation since the 1920s).

[9] See In re: Progress Energy Florida Levy Nuclear Project Units 1 and 2, DOAH Case No. 08-2727EPP (Fla. Div. Admin. Hrgs.), (May 15, 2009) (approving up to 185 miles of electrical transmission lines and 13 miles of wastewater disposal pipelines); see In re: Jacksonville Electric Authority, St. Johns River Power Park, Site Certification Application, No. 81-13, DOAH Case No. 81-357 (Fla. Div. Admin. Hrgs.), (May 26, 1982) (approving construction and operation of coal unloading facility to supply certified electrical power plant).

[10] Section 186.801, Fla. Stat. ; Fla. Admin. Code R. 25-22.071.

[11] See Florida Public Service Commission, Review of the 2011 Ten-Year Site Plans for Florida's Electric Utilities (Nov. 2011), available at: http://www.psc.state.fl.us/publications/pdf/electricgas/tysp2011.pdf.

[12] Electrical power plants under 75 MW in generating capacity or plants of any size that do not use steam or solar to generate electricity are not subject to the PPSA. While not the subject of this article, such power plants still must obtain all applicable local, regional, and state approvals on an individual basis. In other words, exemption from the PPSA does not exempt a facility from obtaining necessary approvals for construction and operation.

[13] The portion of Florida west of the Apalachicola River is within the Southern Electric Reliability Council.

[14] This FRCC report is available through the Florida Public Service Commission's online docket at http://www.psc.state.fl.us/library/FILINGS/12/05588-12/05588-12.pdf.

[15] See PSC Report cited at note 11 above, at pages 28-29 and 35.

[16] See Seminole Elec. Co-op v. Dep't Envtl. Prot., 985 So. 2d 615, 616-17 (Fla. 5th DCA 2008); Fla. Ch. of the Sierra Club v. Orlando Utils. Comm'n, 436 So. 2d 383 (Fla. 5th DCA 1983).

[17] Associated facilities are "those onsite and offsite facilities which directly support the construction and operation of the electrical power plant such as electrical transmission lines, substations, and fuel unloading facilities; pipelines necessary for transporting fuel for the operation of the facility or other fuel transportation facilities; water or wastewater transport pipelines; construction, maintenance, and access roads; and railway lines necessary for transport of construction equipment or fuel for the operation of the facility." § 403.503(10), Fla. Stat.

[18] Baseload generating facilities also require electrical transmission lines to convey electric power away from the electrical power plant and to the customers. Generally, transmission lines of 230 kilovolts (kV) or more, located in more than one county, and 15 miles or more in length, must be certified under the Florida Transmission Line Siting Act (TLSA), sections 403.52-403.5365, Florida Statutes. Alternatively, a utility seeking certification of an electrical power plant under the PPSA may also include in its application for certification one or more associated electrical transmission lines, without a limitation on the voltage of the transmission lines that may be certified. Generally, natural gas pipelines located solely within Florida and that cross a county line and are more than 15 miles in length must be certified under Florida's Natural Gas Transmission Pipeline Siting Act (NGPSA), sections 403.9401-403.9425, Florida Statutes. Alternatively, a utility seeking certification of an electrical power plant under the PPSA may also include in its application for certification an associated natural gas pipeline. The permitting of electrical transmission lines under the TLSA and the permitting of new intrastate natural gas pipelines under the NGPSA are beyond the scope of this article. However, those separate siting acts are similar in form and function to the PPSA and were in fact modeled after the PPSA.

[19] At the federal level, a variety of individual permits may also be required for a new electrical power plant including, for example, a Prevention of Significant Deterioration (PSD) air permit under the federal Clean Air Act, National Pollutant Discharge Elimination System (NPDES) wastewater discharge permit under the federal Clean Water Act, and/or a federal dredge and fill permit from the U.S Army Corps of Engineers, also under the federal Clean Water Act or the federal Rivers and Harbors Act. In addition, the U.S. Nuclear Regulatory Commission plays a predominant role in the federal licensing of new and expanded nuclear plants, under the federal Atomic Energy Act. Several of these federal permits are also issued by DEP and the review of those separate permit applications is coordinated with the PPSA site certification process. See, Section 403.5055, Fla. Stat., related to review of DEP-issued NPDES permits, and section 403.508(8), Fla. Stat., related to consolidated hearings on PPSA site certification and on any challenge to an DEP-proposed PSD permit.

[20] "The certification and any order on land use and zoning issued under this act shall be in

continued...

lieu of any license, permit, certificate, or similar document required by any state, regional, or local agency pursuant to, but not limited to, chapter 125, chapter 161, chapter 163, chapter 166, chapter 186, chapter 253, chapter 298, chapter 373, chapter 376, chapter 379, chapter 380, chapter 381, chapter 387, chapter 403, except for permits issued pursuant to any federally delegated or approved permit program and except as provided in chapter 404 or the Florida Transportation Code, or 33 U.S.C. s. 1341." § 403.511(4), Fla. Stat.

[21] For purposes of the PPSA, electric utility is defined as "cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy." § 403.502(15), Fla. Stat. This term has also been held to include those operators of electrical generating facilities who will sell all of their electrical output to an electric utility for use by electricity customers in Florida. Tampa Electric Co v. Garcia, 767 So.2d 428 (Fla. 2000).

[22] Application Instruction Guide Electrical Power Plant Sites and Associated Facilities, Electrical Transmission Lines (Fla. Dept of Environmental Protection, Office of Siting Coordination, undated) available at http://www.dep.state.fl.us/siting/files/rules_statutes/ppsa_draft_app_guide.pdf. In lieu of the Application Guide, an applicant for certification of a nuclear-fueled electrical power plant may elect to submit its application to the U.S. Nuclear Regulatory Commission as the application for site certification. Fla. Admin Code R. 62-17.051(1)(b).

[23] The PPSA provides that "[c]orridor" means the proposed area within which an associated linear facility right-of-way is to be located. The width of the corridor proposed for certification as an associated facility, at the option of the applicant, may be the width of the right-of-way or a wider boundary, not to exceed a width of 1 mile. The area within the corridor in which a right-of-way may be located may be further restricted by a condition of certification. After all property interests required for the right-of-way have been acquired by the licensee, the boundaries of the area certified shall narrow to only that land within the boundaries of the right-of-way. The corridors proper for certification shall be those addressed in the application, in amendments to the application filed under s. 403.5064, and in notices of acceptance of proposed alternate corridors filed by an applicant and the department pursuant to s. 403.5271 as incorporated by reference in s. 403.5064(1)(b) for which the required information for the preparation of agency supplemental reports was filed." § 403.502(11), Fla. Stat. Once a corridor has been certified, the licensee, as the holder of the certification is called, will select a final right-of-way within the corridor, based upon factors such as any limiting conditions of certification, landownership and final environmental and other resource investigations. The use of corridors for licensing linear facilities under the state's siting acts has been approved by Florida courts. Florida Sugar Cane League v. State of Florida Siting Board, 580 So.2d 846 (Fla. 1st DCA, 1991).

[24] Within seven days after receipt of an application for site certification, the DEP requests that the State's Division of Administrative Hearings (DOAH) assign an Administrative Law Judge (ALJ) to conduct any hearings required by the PPSA and to generally supervise the site certification proceeding. § 403.5065(1), Fla. Stat.

[25] "'Completeness' means that the application has addressed all applicable sections of the prescribed application format, and that those sections are sufficient in comprehensiveness of data or in quality of information provided to allow the department to determine whether the application provides the reviewing agencies adequate information to prepare the reports required by section 403.507, Florida Statutes." § 403.503(10), Fla. Stat.

[26] In a separate proceeding held under section 403.519,. Florida Statutes, the Florida Public Service Commission (PSC) determines whether there is a need for the electrical power plant and associated facilities. This "need determination" is a prerequisite to certification and is conducted in a separate, formal process pursuant to section 403.519, Florida Statutes. § 403.507(4)(a), Fla. Stat. The PSC is the sole forum for a determination of need and the issues addressed and determined by the PSC cannot be raised in any other forum. § 403.519(3), Fla. Stat.; see also Fla. Ch. of the Sierra Club, 436 So. 2d at 388 ("The determination of need is solely within the jurisdiction of the PSC, and any reevaluation of need at the certification hearing would be wasteful and improper.") For a new electrical power plant, the PSC is to conduct its hearing on a utilities' petition for need and issue its decision within 5 months of the filing of the petition for a determination of need. The PSC's decision on the petition for need determination is that agency's report under section 403.507(4)(a), Florida Statutes. The PSC's need determination is also a "condition precedent to issuance of [DEP's] project analysis and conduct of the certification hearing." § 403.507(4(b), Fla. Stat. The matter of the PSC's need determination proceeding under section 403.519, Florida Statutes, will be explored in a separate article to be published at a later date.

[27] Typically, certain associated (usually linear) facilities of an electrical power plant are exempt from the land use and zoning consistency review since they will be constructed within established rights-of-way and therefore do not fall within the statutory definition of "development." §§ 380.04, 403.50665(1), Fla. Stat.; see In re Petition for Declaratory Statement filed by George M. Hughes and Barbara Knowles, Case No. DCA-03-DEC-295, Florida Department of Community Affairs, Final Order DCA-03-DEC-295 (Apr. 9, 2004) (finding a proposed electrical transmission line outside the definition of "development" in section 380.04, Florida Statutes).

[28] The term "land use plans and zoning ordinances" is not defined in the PPSA. It has been construed in recent Siting Board orders to mean the future land use map of the comprehensive plan and the zoning designations for the site. See Land Use Order, In re: Florida Power & Light Co. Turkey Point Unit 5, Power Plant Siting Application No. PA03-45, DOAH Case No. 03-4391EPP (Siting Board) (August 10, 2004) adopting in toto the Recommender Order on Land Use, dated May 7, 2004. Consistency of the proposed electrical power plant and other associated facilities with the other provisions of the adopted local government comprehensive plan are addressed in the local government's agency reports, under section 403.507(2)(a)3., the agency report of the now-Department of Economic Opportunity, under section 403.507(2)(a)1, and at the final site certification hearing, where the issue of consistency with local government comprehensive plans and land development regulations is to be considered under section 403.509(3)(c). By this two-step consideration during the certification proceeding, the entire local comprehensive plan is considered before a proposed electrical power plant is certified under the PPSA.

[29] "For certifications issued by the board in regard to the properties and works of any agency which is a party to the certification hearing, the board shall have the authority to decide issues relating to the use, the connection thereto, or the crossing thereof, for the electrical power plant and to direct any such agency to execute, within 30 days after the entry of certification, the necessary license or easement for such use, connection, or crossing, subject only to the conditions set forth in such certification." § 403.509(6), Fla. Stat.

Section Budget/Financial Operations

	2011-2012 Budget	2011-2012 Actual	2012-2013 Budget
REVENUE			
Section Dues	70,800	61,640	66,400
Affiliate Dues	3,000	2,960	3,000
Admin Fee to TFB	(32,175)	(28,392)	(30,250)
CLE Courses	8,000	(7,433)	2,000
Section Differential	5,000	6,795	5,000
Sponsorships	12,000	17,500	15,000
Investment Allocation	10,502	(2,237)	4,826
TOTAL REVENUE	**77,127**	**50,833**	**65,976**
EXPENSE			
Credit Card Fees	125	22	120
Staff Travel	4,312	2,264	4,045
Internet Charges	420	440	420
Postage	1,000	1,117	800
Printing	150	132	150
Membership	1,000	0	1,000
Supplies	50	0	50
Photocopying	200	98	150
Officer Travel	2,500	2,144	2,500
Meeting Travel	6,500	591	6,500
CLE Speaker Expense	1,000	0	1,000
Sponsorship Expense	250	425	440
Committees	500	175	500
Council Meetings	2,000	1,247	2,000
Bar Annual Meeting	2,700	1,740	2,700
Section Annual Meeting	20,000	18,710	20,000
Section Service Programs	4,500	4,220	4,500
Retreat	2,000	1,584	2,000
Land Use Law Manual	13,000	12,600	13,000
Pubic Interest Committee	500	500	500
Awards	1,700	1,170	1,700
Scholarships	4,000	0	4,000
Law School Liaison	28,500	23,405	33,500
Dean Maloney Contest	1,000	500	1,000
Website	5,200	12,221	5,200
Council of Sections	300	0	300
Operating Reserve	10,815	0	10,878
Miscellaneous	500	0	500
TFB Support Services	4,238	6,210	5,204
TOTAL EXPENSE	**118,960**	**91,515**	**124,657**
BEGINNING FUND BALANCE	**210,033**	**217,471**	**165,880**
PLUS REVENUE	**77,127**	**50,833**	**65,976**
LESS EXPENSE	**(118,960)**	**(91,515)**	**(124,657)**
ENDING FUND BALANCE	**168,200**	**176,789**	**107,199**

SECTION REIMBURSEMENT POLICIES:
General: All travel and office expense payments are in accordance with Standing Board Policy 5.61. Travel expenses for other than members of Bar staff may be made if in accordance with SBP 5.61(e)(5)(a)-(i) or 5.61(e)(6) which is available from Bar headquarters upon request.

On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of August 13, 2012. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Miami-Dade County v. Brodeur, Case No. SC12-822. Petition review of 3rd DCA decision in *Brodeur v. Miami-Dade County,* Case No. 3D11-503, reversing the trial court's order dismissing a complaint filed by an elected member of the Miami-Dade County Community Zoning and Appeals Board for Area 12, Ms. Brodeur, for lack of subject matter jurisdiction, apparently based on the general rule that a public official lacks standing to challenge the rules and procedures applicable to his or her official acts. Status: Petition for review filed April 20, 2012.

Martin County Conservation Alliance, et al v. Martin County, et al, Case No. SC11-2455. Petition for review of 1st DCA decision in *Martin County Conservation Alliance, et al v. Martin County*, Case No. 1D09-4956, imposing a sanction of an award to appellees of all appellate fees and costs following an earlier decision of the district court that "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." Status: The Court accepted jurisdiction on May 11, 2012.

Board of Trustees of the Internal Improvement Trust Fund v. American Educational Enterprises, LLC., Case No. SC10-2251. Petition for review of 3rd DCA decision quashing the trial court's order compelling production of certain corporate financial documents. Status: Oral argument held on May 9, 2012.

FIRST DCA

FINR, II, Inc. v. CF Industries, Inc. and DEP, Case No. 1D12-3309. Petition for review of final DEP order granting CF's applications for various approvals, including Environmental Resource Permit, conceptual reclamation plan, wetland resource permit modification and conceptual reclamation plan modification. Status: Notice of appeal filed July 9, 2012.

FINR, II, Inc. v. CF Industries, Inc. and DEP, Case No. 1D12-1308. Petition for review of non-final agency order dismissing counts III and IV of FINR's petition. Status: Petition filed March 12, 2012.

Sexton v Board of Trustees of the Internal Improvement Trust Fund, Case No. 1D11-5988. Appeal from final order denying as untimely an amended petition for administrative hearing seeking to challenge the issuance of a 50-year sovereign submerged lands easement to FDOT for the reconstruction of the Little Lake Worth Bridge in Palm Beach County. Status: Notice of appeal filed November 4, 2011; all briefs have been filed.

MACLA Ltd II v Okaloosa County, et al, Case No. 1D11-4975. Petition to review DEP final order granting joint coastal permit and authorization to use sovereign submerged lands for the restoration of 1.7 miles of shoreline just east of East Pass, a project known as the West Destin Beach Restoration Beach Project. Status: Order granting motion to abate pending resolution entered on May 9, 2012.

Hasselback v. DEP, Case No. 1D11-3717. Appeal from a DOAH final order denying a request for attorneys fees relating to Hasselback's ultimately successful challenge to a neighbor's application for a coastal control line permit. DEP initially dismissed Hasselback's petition for hearing as untimely, but that final order was reversed on appeal in *Hasselback v. DEP*, 54 So. 3d 637 (Fla. 1st DCA 2011). On remand, the challenged permit was denied because all parties already had agreed the application did not comply with applicable criteria. Status: Affirmed *per curiam* on June 19, 2012

FT Investments v DEP, Case No. 1D11-3052. Petition for review of DEP final order determining that FTI is not eligible for a third party defense to liability for cleanup and cleanup costs pursuant to s. 376.208(2)(d), F.S. Status: Affirmed June 14, 2012.

U.S. SUPREME COURT

Koontz v. SJRWMD, Case No. 11-1447. Petition for writ of certiorari to review the decision by the Florida Supreme Court in *SJRWMD v. Koontz,* 36 Fla. L. Weekly S623a, in which the Court quashed the decision of the 5th DCA affirming the trial court order that SJRWMD had effected a taking of Koontz's property and awarding damages. Status: Petition filed May 30, 2012.

Caselaw Update

by Gary K. Hunter, Jr.

The Sixth Amendment requirement that juries determine any fact, other than a prior conviction, that increases a criminal defendant's maximum potential sentence applies to the sentencing of criminal fines. *Southern Union Co. v. United States*, - S. Ct. -, 2012 WL 2344465 (2012).

In 2007, Southern Union Company was indicted for violations of multiple federal environmental statutes, including the Resource Conservation and Recovery Act (RCRA), for knowingly storing liquid mercury without a permit from September 19, 2002, to October 19, 2004. A jury in the District Court for the District of Rhode Island later convicted Southern Union Company of violating RCRA. Since violations of RCRA are punishable by up to $50,000 for each day of violation, the probation officer set the maximum fine at $38.1 million at sentencing on the basis that Southern Union Company violated RCRA for 762 days. *Id.* at *3. Southern Union Company argued that since the jury was not asked to determine the precise duration of the violation, the calculation of maximum fine violated the rule from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), stating that juries are to determine any fact, other than prior conviction, that increases a criminal defendant's maximum potential sentence. The government argued that *Apprendi* does not apply to criminal fines. *Id.* at *3-4. While the District Court found that *Apprendi* does apply to criminal fines, it held that the maximum potential sentence was proper because the jury had found a 762-day violation. *Id.* at *4.

On appeal, the United States Court of Appeals for the First Circuit rejected the conclusion that the jury had found a 762-day violation, but affirmed the maximum potential sentence on the grounds that *Apprendi* does not apply to criminal fines. *Id.* Certiorari was granted.

The Supreme Court of the United States found no reason to distinguish between criminal fines and other forms of criminal sentencing when applying the rule from *Apprendi*. Reasoning that the purpose of the holding from *Apprendi* is to prohibit judicial fact finding and preserve the role of juries "as a bulwark between the State and the accused at trial for an alleged offense," the Court held that *Apprendi* does apply to criminal fines, and remanded the case to the District Court. *Id.* at *4, *11.

A third party defense to strict liability for petroleum contamination can only be asserted if the purchaser of the contaminated property had no knowledge of the contamination after reasonably inquiry. *FT Investments, Inc. v. State of Florida Department of Environmental Protection*, - So.3d -, 2012 WL 2138110 (Fla. 1st DCA 2012).

FT Investments seeks review of an order of the Department of Environmental Protection finding it strictly liable for petroleum contamination on its property, which it knew existed at the time it purchased the property in 1999. FT Investments argued that it should not be liable because the contamination was caused solely by the acts or omissions of a third party, but the order concluded that even if the third party defense was valid, FT Investments could not assert it because it had not exercised due care with respect to the contamination. *Id.* at *1.

The First District Court of Appeal affirmed, holding that in order to assert a third party defense, a purchaser of property must be able to establish that he or she had no knowledge of the contamination after conducting the appropriate inquiry. The Court did not reach the issue of whether FT Investments exercised due care with respect to the contamination, since it found that FT Investments did indeed have knowledge of the contamination at the time of purchase, rendering the third party defense unavailable. Id. at *2.

The First District Court of Appeal upholds DOT's contractual obligation to reimburse FGT for relocation costs associated with gas pipelines for which FGT has an easement located within a turnpike right-of-way, but declines to determine a permanent width and workspace for the easement. Department of Transportation v. Florida Gas Transmission Co., - So.3d -, 2012 WL 2014755 (Fla. 1st DCA 2012).

In 1992, Florida Gas Transmission and the Department of Transportation entered into two agreements regarding FGT's easements for transmission facilities located within DOT's turnpike right-of-way. The agreement at issue here is the "Reimbursable Agreement" by which DOT agreed to reimburse FGT for all costs of relocation if DOT required FGT to relocate facilities from property in which FGT holds a compensable interest. This agreement incorporated by reference the Utility Accommodation Guide and any revisions thereof. Id. at *2.

In 2000, the Florida Turnpike Authority began a widening project that required FGT to relocate a gas pipeline for which it held an easement located within the turnpike right-of-way. The Turnpike Authority sent "Final Agreement Packages" to FGT that included paperwork for submitting relocation costs to the Department of Transportation (DOT). FGT sought reimbursement for its relocation costs, which DOT refused to pay. FGT then filed suit seeking reimbursement of relocation costs, as well as a determination of a permanent easement width and a temporary easement workspace. *Id.* at *3.

DOT appeals from a declaratory judgment setting a uniform permanent and temporary space easement width, as well as from a damages judgment finding DOT responsible for reimbursement of the cost of relocating gas pipelines as a result of a Turnpike expansion project, on the grounds that the trial court erred in allowing the submission of unambiguous contract language, namely "compensable interest," to the jury for interpretation. FGT cross-appeals arguing that the trial court erred in requiring it to pay the cost of relocating the pipeline when it does not consent to DOT paving over the

pipeline in the future, and also arguing that the trial court erred in failing to find that mechanically-stabilized earth walls will always interfere with FGT's easements. *Id.* at *1.

Reviewing de novo, the First District Court of Appeal held that the term "compensable interest" as defined in the Utility Accommodation Guide incorporated by reference into the "Reimbursement Agreement" included the easement held by FGT, thereby entitling FGT to reimbursement for relocation of its transmission facilities. *Id.* at *5. The Court also held that a permanent easement width and temporary workspace were not contemplated by the parties when the easement was created, as evidenced by the lack of specificity in the easements themselves, and that width and workspace should be dependent on the needs of the particular relocation. *Id.* at *6-7.

As to FGT's cross-appeal, the First District Court of Appeal held that the trial court did not err in concluding that FGT must pay for relocation when DOT intends to pave over the pipeline at "toll plazas, ramps, and crossings," as stated in the easement. However, the First District added that, per the easement, DOT is required to implement alternative measures wherever possible to prevent FGT from having to relocate, and directed the trial court to revise its final judgment to reflect this obligation. *Id.* at *7. The First District also agreed with the trial court's conclusion that mechanically-stabilized earth walls do not always constitute a material interference with the easement. *Id.* at *8.

An appraisal that does not provide information as to the value of the individual subject property is not a "valid, bona fide appraisal" for purposes of the Bert Harris Private Property Protection Act. Turkali v. City of Safety Harbor, Case No. 2D11-3649 (Fla. 2d DCA 2012).

Turkali owned waterfront property in Safety Harbor, which he agreed to have included in the Safety Harbor Community Development District. In return, the City agreed to designate the property for retail/office/service (ROS). In 2006, the City proposed to amend the Community Development Plan, including changing the designation of Turkali's property from ROS to single-family detached dwellings. The County approved the amendments in March 2009, and Turkali filed notice of intent to file an action against the City and County under the Bert Harris Private Property Protection Act, attaching an appraisal of his property. Turkali eventually filed suit under the Act, seeking damages for lost property value. *Id.* at *2-3.

Turkali's complaint was dismissed twice without prejudice by the trial court, but when he filed a third amended complaint, the trial court dismissed his cause of action with prejudice, finding that his appraisal was not a "valid, bona fide appraisal" for purposes of the Act. Turkali challenges the judgment dismissing his claim under the Act with prejudice. *Id.* at *3.

The City and County argue that the appraisal is deficient because it conditions the loss in fair market value to the subject property on bundling the property with several other adjoining properties for joint ROS use. The Second District Court of Appeal agreed, holding that because the appraisal provided no information as to the value of Turkali's property alone, Turkali's presuit notice was invalid and he could not state a claim under the Act. Thus, dismissal with prejudice was proper. *Id.* at *4-5.

Though Delisted as a Threatened Species, Florida Black Bear Conservation Efforts Continue

by Kristen Franke

Whenever a species is removed from the Endangered or Threatened Species list, the public seems to take notice. Recently, when the Florida Fish and Wildlife Conservation Commission (FWC) promulgated a new rule proposing the delisting of the Florida black bear as a State-designated Threatened species, the wildlife agency received over 500 written and oral comments, along with nearly 5,000 form letters on the issue. Though some groups and members of the public have expressed the belief that delisting the black bear will hamper efforts in conservation of the species, the black bear population in Florida has grown significantly over the last 20 years. Today, the black bear occupies 31% of its historic range, a significant improvement from the 17% it occupied two decades ago. After FWC's implementation of new status review criteria, the black bear no longer falls under the definition of "threatened."

Still, the black bear has long played an important role in the conservation of natural habitats for other species across the state. Decreased protection of the bear could have consequences for Florida wildlife in general. However, FWC has recently promulgated another new rule to accompany the delisting, one that focuses on black bear conservation and complements the newly issued Florida Black Bear Management Plan (Plan).

Status Review and Delisting

Although bear hunting began to be closed on some wildlife management areas in the late 1950s and early 1960s, with a more sweeping closure including much of the state in the early 1970s, the Florida Game and Fresh Water Fish Commission (GFC; one of FWC's predecessor agencies)

would not classify the Florida black bear as a threatened species until 1974.[1] GFC continued its efforts to decrease bear harvests across the state, eventually closing bear hunting seasons entirely statewide in 1994.[2]

In September of 2010, FWC passed amendments to Chapter 68A-27, Florida Administrative Code (F.A.C.), a/k/a Rules Relating to Endangered or Threatened Species. Under the new rules, a biological status review (BSR) is to be conducted for 61 of the state's species that have been classified as threatened or "of special concern."[3] The rules create a significant paradigm shift, changing the FWC's approach to threatened species designation. In conducting the BSR, FWC examines population trends, the geographic range and abundance of the species, and the probability of extinction.[4] Recently, after review of the available data and the new listing criteria, FWC determined that the Florida black bear did not meet any of the criteria for designation as a threatened species and should therefore be removed from the threatened species list.[5] The black bear BSR was conducted by FWC staff and independent experts, with another five independent scientists peer reviewing the findings. All agreed with the decision to delist the bear.[6]

FWC Commissioners approved the staff's final recommendation for removal from the threatened species list in June of 2011, and the bear is officially delisted by an amendment to rule 68A-27.003, F.A.C., effective August 23, 2012.[7] Following the delisting, however, in addition to the new rule discussed below, many existing conservation measures will remain in place to preserve the species. For instance, rule 68A-4.001(3), F.A.C., makes it illegal to feed bears if doing so may cause conflicts with humans.[8] Rule 68A-12.004(12), F.A.C., restricts the sale or possession of bear parts.[9] Under rule 68A-9.010(1), F.A.C., black bears are specifically excluded from the list of "nuisance wildlife" (i.e., wildlife causing property damage, posing a threat to safety, or causing an annoyance in a building) and therefore cannot be "taken" as other species that fall into that category might.[10]

The most significant change effected by the delisting is the penalty imposed for injuring or killing a bear. Generally speaking, violations of FWC rules (and orders not otherwise categorized) count as "Level Two" violations, which are punishable as first or second degree misdemeanors, depending on other circumstances.[11] Intentionally killing or wounding a species designated as threatened, endangered, or of special concern, however, constitutes a felony, punishable by a significant fine and/or up to five years in prison.[12] Therefore, under the new rule, since the black bear is no longer listed as a State-designated Threatened species, the penalty for such activity is reduced to that of a misdemeanor.[13]

FWC does not anticipate that the delisting's effect on the penalty will have a significant impact on the illegal taking of bears. In fact, the Plan itself points out that state attorneys may be more successful in prosecuting a misdemeanor than they would be in securing a felony conviction.[14] Nonetheless, if evidence arises to suggest that the change in penalty is affecting the stability of bear populations in any part of the state, FWC remains open to working with stakeholders on solutions.[15]

Florida Black Bear Management Plan

Chapter 68A-27, F.A.C., now requires the development of management plans for any species removed from the Florida Endangered and Threatened Species list. As that rule states, in the case of delisted species, the intent of management planning is to provide a guidance document for conservation of the species so that it will not again need to be listed. An early draft of the Plan for the Florida black bear was made available for public comment from November 10, 2011, to January 10, 2012.[16] On February 9, 2012, FWC Commissioners indicated support for the rule changes and the draft Plan.[17] After revising the Plan to accommodate many suggestions received via public comments, the document was again made available for public review from April 13 to June 1, 2012.[18] The resulting final draft was then published on the Commission's website on June 11, 2012.[19] On June 27, 2012, Commissioners approved the final Plan.[20]

The primary goal of the Plan is to "maintain sustainable black bear populations in suitable habitats throughout Florida for the benefit of the species and people."[21] The main objectives of the Plan focus on bear habitat, population, human-bear conflict management, and outreach programs designed to educate the public about the black bear and its interactions with humans.[22] In order to approach these issues more efficiently, the Plan supports the creation of seven Bear Management Units (BMUs) across the state.[23] By subdividing the bear populations based on location, FWC hopes to better manage the unique characteristics of the subpopulations of bears found in those areas.

Hunting of black bears, a source of concern for many of those opposed to the bear's delisting, is specifically addressed as "outside of the Plan's scope."[24] However, when discussing habitat loss--described as the greatest threat to the long-term survival of the species--the Plan does mention the use of hunting as a means to stabilize subpopulations in areas where the habitat cannot support them.[25] Still, FWC emphasizes that increased stakeholder involvement is required in order to properly address such a complex issue in more detail.[26] Before allowing a hunt to go forward, FWC would have to examine population trends in each BMU, all the while considering the bear population objectives in place for that particular BMU.[27] FWC would also consider public input before making any final decisions on hunting in a particular area, approaching each situation from a statewide public policy perspective.[28]

Other human/bear conflicts beyond hunting are discussed in great detail in the Plan. For example, currently, more bear mortalities occur due to collisions with vehicles than due to poaching, and vehicle-related mortality rates are now quite high (collisions with vehicles accounted for approximately 81 percent (2,057 of 2,544) of known bear mortalities from 1990 to 2010[29]). Further, FWC receives countless bear-related complaints from citizens living near black bear habitats, ranging from those who fear for their small livestock to those who are concerned with bears rooting through their trash. FWC suggests widespread public education, improved waste management, trapping/relocation as well as euthanasia to effectively minimize complaints from humans.[30] In regards to habitat conservation, FWC seeks to encourage private landowners to allow bears to traverse their

continued...

lands safely by providing information on habitat management that will best serve the landowner's interests as well as Florida's bears.[31] In accomplishing all of these things, FWC hopes to bolster public opinion of and concern for the conservation of the species.

Comment on Rules and Plan

FWC received approximately 580 comments, both written and received at public hearing, concerning the new rule and the Plan, as well as nearly 5,000 form letters. A Commission meeting held on June 27, 2012 in Palm Beach Gardens was the final hearing for rule actions and consideration of the draft Plan. At the meeting, most of the public comments were directed at the delisting of the bear. Of the 14 people who spoke at the meeting, ten opposed delisting.[32] Of those opposed, eight were critical of the criteria FWC used in making its decision.[33] The proposed new rule on bear conservation, which includes the implementation of the Plan, received no direct comments.[34]

Many attendees at the Commission meeting who opposed delisting the bear were concerned that poaching might result once different penalties went into effect. Some also stated that habitat problems will only get worse as development increases and that such development is not properly addressed in the plan. Others were concerned with enforcement and the lack of funding to support effective enforcement programs.

Kipp Frohlich, Section Leader of FWC's Imperiled Species Management Section, addressed several of the concerns expressed by the attendees. In regards to the funding issue, Mr. Frohlich emphasized the aspirational nature of the Plan and the FWC's intention to seek more funding to reach their goals. In confronting the change in penalty issue, Mr. Frohlich suggested that citizens express their concerns to Florida's legislature, as FWC is not empowered to set penalties.[35] Upon consideration of the public and staff comments, the FWC Commissioners ultimately voted to approve the Plan and new rule 68A-4.009, F.A.C., as well as the amendments to rule 68A-27.003, F.A.C.

New Rule for Continued Protection

As mentioned above, a new rule has been promulgated to promote Florida black bear conservation in the wake of delisting. This rule, rule 68A-4.009, F.A.C., prohibits unauthorized "take" of bears and recognizes the Plan as the guidance document for managing bear habitat and conservation.[36] Under the new rule, FWC has the discretion to issue permits for intentional take of bears as long as those permits are issued for scientific or conservation purposes; such purposes are defined as activities furthering the conservation or survival of the species, including collection of data needed for management or removing bears from situations posing a risk to human or bear safety. Additionally, the rule reaffirms FWC's commitment to providing technical assistance to landowners in order to minimize human/bear conflict, an issue that is also addressed in the Plan.

Following the June 2012 meeting, FWC issued a Notice of Change to 68A-4.009. FWC allayed concerns expressed by staff of the Joint Administrative Procedures Committee with slight tweaks to the language of the rule as originally proposed, with the overall effect of the rule remaining the same.[37] The delisting and new bear conservation rule became effective August 23rd. The Plan and more information regarding the delisting and the new rule can be obtained at http://myfwc.com/bear/.

Endnotes:

[1] Excepting those found in Baker and Columbia Counties or in the Apalachicola National Forest. Bear Management Plan Frequently Asked Questions. MyFWC.com, http://www.myfwc.com/wildlifehabitats/managed/bear/plan-faqs/ (last visited on August 8, 2012).
[2] *Id.*
[3] *Id.* at iii.
[4] *Id.* at 26.
[5] *Id.*
[6] *Id.* at 26, 27.
[7] *Id.*
[8] *Id.* at 126.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 128,
[12] Florida Fish and Wildlife Conservation Commission. 2012. *Florida black bear status and management before and after approval of the Bear Management Plan*. MyFWC.com, http://www.myfwc.com/media/1590451/bear-status-management-before-after-plan.pdf (last visited on August 8, 2012).
[13] *Id.*
[14] *Supra* note 2, at 128.
[15] *Id.*
[16] *Supra* note 1.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Supra* note 2, Introduction, at v.
[22] *Id.* at v, vi.
[23] *Id.* at 36.
[24] *Id.* at 27.
[25] *Id.* at 40.
[26] *Supra* note 1.
[27] *Id.*
[28] *Id.*
[29] *Supra* note 2, at 30.
[30] *Supra* note 2, at 65.
[31] *Supra* note 2, at 49.
[32] Telesco, David. Summary of Public Hearing. Florida Fish and Wildlife Conservation Commission. Palm Beach Gardens, Florida. June 27, 2012.
[33] *Id.*
[34] *Id.*
[35] Art. IV, §9, Fla. Const. ("[P]enalties for violating regulations of the commission shall be prescribed by general law.")
[36] *Supra* note 2, at 126.
[37] Notice of Change. 38 Fla. Admin. W. 28 (July 13, 2012).

Kristen Franke *is a third-year J.D. Candidate at the Florida State College of Law. Ms. Franke spent her summer conducting pro bono service for the FWC and hopes to pursue a career in environmental law following her graduation next spring.*

Advocates for Jacksonville

by Wendi Whipkey, ABA-SEER Diversity Fellow, Summer 2012
City of Jacksonville, Environmental Quality Division

At forty-two stories, it is impossible to find a better view in this city. The Chief chose a table toward the back of the café where the conversations were lower. The glint of the St. John's River through the glass panels was spectacular on a clear day like this. In honor of my last week as a summer fellow in the Environmental Quality Division (EQD), the Chief suggested we have lunch. With the city sweeping out in front of us, we could only talk about Jacksonville. During my summer with the EQD, I gained a wealth of knowledge about environmental regulation, city code enforcement, and practical professionalism, but what I value most of all is the affection for Jacksonville the staff impressed upon me. The people I met here care about the health of the river, the state of the environment, and the future of Jacksonville.

My duties with the EQD this summer were quite diverse, and I was able to form relationships with staff members from all ranks and titles within the division. In the early summer, I worked closely with my supervisor to research how environmental ordinances, specifically those concerning reclaimed water, septic tank connections, and stormwater, operate in other Florida municipalities. I prepared cross-comparisons of similar and ideal ordinances so my supervisor, the Chief, and the Director of Neighborhoods may assess which methods are available and could be practical for later changes to the Jacksonville ordinances.

I also observed meetings of the city's Environmental Protection Board as well as its two committees, the Water Quality Committee and the Air and Odor Committee. Individual citizens, regulated entities, and EQD staff make up the Board and committees, and their decisions concern a broad range of impacts on the environment in Jacksonville. It was a pleasure to observe the genuine interest the board members expressed for the matters before them. Knowing that they are responsible for crucial environmental decisions, it was comforting to learn that the majority of the members had called Jacksonville home for many years. It was clear that they based their concerns for Jacksonville on the city's closeness to their hearts. Later in the summer, I joined an environmental scientist on staff with the EQD to sample the St. John's River for water quality testing. She had been with the EQD for over eighteen years and knew the St. John's like the back of her own hand.

My supervisor gave me my favorite and final assignment. I drafted a "white paper" discussing the need for modification of Jacksonville's septic tank connection ordinance. The memorandum may assist the EQD to present proposed changes to the ordinance to the City Council for consideration. Though my fellowship has ended, I plan to continue working with my supervisor to complete the memorandum.

Overall, my assignments and privileges at the EQD exposed me to a wide range of functions that the EQD performs, and at each level, I encountered individuals who enjoyed what they did for the right reasons. All of the EQD staff whom I met were very passionate about environmental enforcement as the essential means to protect our city's aesthetic quality and our citizens' health. Many of the staff have worked in the EQD for over fifteen years; through their stories and conversations, I learned that the City of Jacksonville has come a long way to achieve the health and quality of life found here today. That information gives me hope that Jacksonville will only continue to improve, as long as the EQD is acting in full force.

This summer I learned that Jacksonville has its own team of environmental advocates, each member with his or her own role in maintaining and improving the ambient quality of the city. For ten weeks in 2012, I joined their ranks. I am truly grateful for my experience with the EQD as an ABA-SEER Fellow, and I look forward to my next opportunity to explore environmental regulation.

Summer Fellowship

by Andrew Popp, ABA-SEER Diversity Fellow, Summer
Center for Biological Diversity

My experience as a fellow with the Florida ELULS and ABA:SEER was fantastic. Getting real world experience in the legal field is so valuable and I can't express my gratitude enough for the opportunity which was extended to me.

This past summer I was fortunate enough to work with Jaclyn Lopez with the Center for Biological Diversity. She was, and continues to be a great mentor and has helped me fine tune my skills in legal research and writing. Additionally, I learned more about some of the administrative procedures that are required when executive agencies make decisions. I also was able to attend a summer speaker series highlighting various non-profit and government organization in the area of environmental law. Not only did I learn a great deal about how each organizations works, I also met many great professionals in the field. Their advice continues to be invaluable as I navigate my way through my law school education and prepare to enter the workforce.

Overall, the experience broadened my knowledge base within the legal field, facilitated communication with other professionals in the field of environmental law, and helped me to further improve my legal research and writing skills. I would highly recommend this program to any and all who are considering applying.

Law School Liaisons

Center for Earth Jurisprudence Speaks Out for Springs

by Jane Goddard, Center for Earth Jurisprudence

Director Patricia Siemen and staff attorney Rob Williams of the Center for Earth Jurisprudence have submitted comments to Richard Hicks, P.G. of the Florida Department of Environmental Protection, on the Draft TMDL for Silver Springs.

In the comments, they call for an immediate moratorium on consumptive water use permitting until a plan is in place to restore the historic springsheds and until there are minimum flow levels for Silver Springs and Rainbow Springs that fully protect and restore the springs' healthy aquatic ecosystems.

They also asked the department to take specific actions to reduce the nitrogen load immediately, rather than relying on the historically slow and ineffective management planning process.

Siemen and Williams have also written to Hans G. Tanzler, III, executive director of the St. Johns River Water Management District, requesting that the district immediately implement a recovery strategy for the springs in the Wekiva River Basin to restore the established minimum flows as soon as practicable and to place a moratorium on the issuance of further consumptive use permits within the Wekiva River Basin until a recovery plan and timetable are in place.

Their positions are based on scientific evidence that Florida's springs can't wait for another round of studies, reports, and "stakeholder" meetings. "We know enough now to take action to prevent the situation from becoming worse," said Patricia Siemen. "All parts of the ecosystem, including humans, depend on clean and abundant water to survive and thrive. We need to take action to preserve and restore the springs now, before it's too late."

Center for Earth Jurisprudence Focuses Fall Events on Springs, History, and the Arts

The work of award-winning photographer John Moran and well-known painter Jim Draper will be featured by the Center for Earth Jurisprudence in two fall events intended to increase awareness and build consensus around the priceless treasures of Florida springs and Florida ecosystems. In light of the 500th anniversary of the arrival of Ponce de Leon, these presentations will highlight the integrated, interdependent reality of our relationship with nature, and that laws and policy determinations should reflect the realization that human health and well-being depends upon the health and well-being of natural systems.

Rock Springs, a second-magnitude spring, flows into the Wekiva River.

Florida nature photographer John Moran will present "Picturing Healthy Springs" at the Barry University School of Law in Orlando on September 27, 2012. The presentation will feature photographs from his 30-year career, historical photos from other sources, and contemporary views of the same locations to demonstrate the changes visited upon Florida's water-dependent landscape by growth, development, and preservation policies. A panel discussion on water policy will follow his presentation.

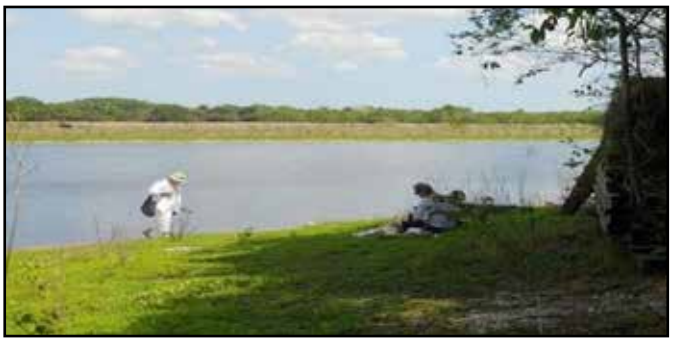
Landscape painter Jim Draper will display photographs and large-scale original paintings in an appetizer to his full-scale exhibit, "Feast of Flowers" on October 25, 2012, at the Barry University School of Law in Orlando. "The Art of Conservation" will focus on the intersection of aesthetic choices and environmental stability and sustainability, exploring the idea of nature as bountiful, consumable, and vulnerable. His presentation will be followed by a panel discussion on conservation.

Learn more about these presentations by visiting the CEJ website, www.EarthJuris.org. To join the Center for Earth Jurisprudence mailing list and receive notification of future conferences and events, contact Jane Goddard at jgoddard@barry.edu or (321) 206-5788. You can also stay informed by "liking" CEJ on Facebook at www.facebook.com/earthjuris.

Center for Earth Jurisprudence Offers Fall Nature Journaling Workshops

The Center for Earth Jurisprudence will offer Nature Journaling Workshops on October 21, 2012, and November 4, 2012, led by award-winning environmental writer and documentary filmmaker Bill Belleville. His latest book, S*alvaging the Real Florida: Lost & Found in the State of Dreams*, was recently awarded the National Outdoor Book Award for natural history literature.

Workshop participants will explore the "art of seeing" and chronicling



Journaling workshops include time to observe, reflect, and write.

Law School Liaisons continued....

the nature experience in an interactive outdoor classroom setting. The workshops include a visit to the Lake Harney Wilderness Area in Geneva, Florida, a 300-acre preserve located on the banks of the St. Johns River. The property is part of the Seminole County Natural Lands program and contains historic sites and a variety of habitats.

Earlier workshops included sightings of pileated woodpeckers, swallow-tailed kites, bald eagles, and a manatee, as well as numerous native plant species that thrive in the preserve. Writings and photographs from the workshops are blogged at www.LearningtoSeeNaturally.blogspot.com.

For more information about these workshops, contact jgoddard@barry.edu, call (321) 206-5788, or visit www.EarthJuris.org.

Save the Date: Blue Water, Green World Conference

The Center for Earth Jurisprudence will present the 4th Annual Future Generations Conference, "Blue Water, Green World," on February 8, 2013, at the Barry University School of Law in Orlando. The conference will focus on the successes and failures of water policies in Florida and lessons to be learned from water policies in other jurisdictions. CLE credit will be offered.

For more information about this event and to register, contact jgoddard@barry.edu, call (321) 206-5788, or visit www.EarthJuris.org.

Founded in 2006, the Center for Earth Jurisprudence is an initiative of the Barry University School of Law to advance a transformative Earth-centered paradigm that advocates protecting the intrinsic value and legal rights of nature. The Center's work includes research, education, publication, and policy advocacy.

A Look Back at 2011-2012 and a Look Ahead to the 2012-2013 Academic Year at The Florida State University College of Law

by Profs. David Markell, Donna Christie, Shi-Ling Hsu, and Hannah Wiseman

The recently concluded 2011-2012 academic year was an active and successful one for the Environmental Program at the Florida State University College of Law, and we are looking forward to some terrific new colleagues and another very productive year beginning this fall. We're delighted to report on several Alumni Updates featuring members of the Section towards the end of this column.

A Brief Summary of the 2011-2012 Academic Year

U.S. News & World Report again ranked our Environmental Program in the nation's top 10. We were ranked # 8 nationally and 1st in the southeast.

Professor Hannah Wiseman joined us in January 2012. Prof. Wiseman is an expert in land use and energy law, with a particular interest in hydraulic fracturing. In recent months she has been much in demand to share her insights about the opportunities and challenges inherent in tapping natural gas resources through fracturing techniques, including a trip to Washington, D.C. this spring to discuss fracking issues with Congressional staff.

Professor Hannah Wiseman

Our Fall 2011 *Environmental Forum*, which focused on *A New Era for Land Use Management in Florida: So What Happens Next?*, featured leading Florida land use lawyers **Tom Pelham** (FSU College of Law '71), **Robert C. Apgar** ('77), **Nancy G. Linnan** ('74), and **David A. Theriaque** ('89), as well as **Charles Pattison**, Executive Director of 1000 Friends of Florida. Two distinguished professors, **Sara C. Bronin**, Associate Professor of Law and Program Director of the Center for Energy & Environmental Law at the University of Connecticut School of Law, and **Christine A. Klein**, Chesterfield Smith Professor & Director, LL.M. Program in Environmental & Land Use Law at the University of Florida Levin College of Law, guest lectured during the Fall 2011 semester to our Environmental Certificate students and provided faculty workshops on environmental issues.

Our Spring 2012 semester was marked by the 25th Anniversary Symposium on *The Future of Ocean and Coastal Law & Policy*, convened in honor of the 25th Anniversary of our Distinguished Lecture Series. The symposium featured distinguished professors from throughout the United States. Our Spring 2012 *Environmental Forum*, which we co-sponsored with the Section, was entitled *Making One's Case with the Government: Practical Issues &*

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Strategies. Participants included **Janet E. Bowman** ('87), Director of Legislative Policy & Strategies for the Florida Chapter of the Nature Conservancy, **Christopher T. Byrd**, Senior Assistant General Counsel with the Florida Department of Environmental Protection's Public Land Section, **Mary Thomas** ('05), Assistant General Counsel in the Executive Office of Governor Rick Scott, Representative **Michelle Rehwinkel Vasilinda**, and Charles Pattison of 1000 Friends of Florida. **Emily Hammond Meazell**, Associate Professor of Law at the Wake Forest University School of Law, and **Sarah Schindler**, Associate Professor of Law at the University of Maine School of Law, visited the campus in the Spring to participate in our Environmental Certificate program and to give faculty workshops on environmental and land use topics.


Jon Harris Maurer

Our students have continued to garner honors for their work in environmental and land use law. Our Environmental Moot Court team made it to the quarterfinals of the national Environmental Moot Court Competition. **Trevor Smith** ('13) was named the "Best Oralist" in the entire competition. **Mr. Smith** was also selected as the recipient of the 2012 Wade L. Hopping Memorial Scholarship by the Environmental and Land Use Law Section of The Florida Bar. **Caitlin L. Jenkins** ('12) and **Jon Harris Maurer** ('12) were awarded first and second place, respectively, in the Maloney Writing Competition sponsored by the Environmental and Land Use Law Section of The Florida Bar. Ms. Jenkins' article was entitled "No Net Loss Policy for Water Management in Jon Harris Maurer ('12) Florida;" Mr. Maurer's was entitled "Ocean Acidification, Marine Sanctuaries, and Adapting Remedies to Climate Change."

Our students continued to take advantage of our location in Tallahassee by completing *pro bono* work and externships with a broad range of statewide and local environmental and land use organizations, including: the Florida Department of Environmental Protection, the Florida Division of Administrative Hearings, the Florida Fish & Wildlife Conservation Commission, the Alachua Conservation Trust, the Big Bend Conservancy, Earthjustice, and the Leon County Attorney's Office. Enterprising students also arranged externships with the Humane Society of the United States (Washington, D.C.) and the U.S. Environmental Protection Agency Region 2 Office (in New York City).

The following 2012 graduates earned an Environmental Certificate: **Sean J. Anderson** with honors, **Lori Beail-Farkas**, **Stefan Cange** with honors, **Stephanie Dodson Dougherty** with honors, **Natasha John**, **Ian S. Macdonald** with honors, **Jessica Marlowe** with honors, **Jon Harris Maurer** with highest honors, **Benjamin Melnick**, **Jeremy Monckton** with honors, **Hastings Read** with high honors, and **Jonathan Matthew Shook**.

Looking Ahead to 2012-2013

We are delighted to welcome two new professors with expertise in environmental and land use law. **Professor Shi-Ling Hsu** joins us from the University of British Columbia School of Law. An expert in cost-benefit analysis and climate change, Prof. Hsu recently co-authored an op ed piece in the New York Times about a possible carbon tax entitled "The Most Sensible Tax of All." **Professor Garrick Pursley** joins us from the University of Toledo Law School and has written extensively about energy and other issues.


Professor Shi-Ling Hsu


Professor Garrick Pursley

We congratulate the student members of this past year's *Journal of Land Use and Environmental Law* Board: **Rachel L. Bentley**, Editor-in-Chief, **Andrew Holway** and **Jeremy Monckton**, Executive Editors, **Brittany Bailey**, Associate Editor, **Amanda Gibson**, Administrative Editor and **Forrest Pittman**, Senior Articles Editor, and welcome the FY 2012-13 Board: **Katherine Weber**, Editor-in-Chief, **Daria Glagoleva** and **Kyle Weismantle**, Executive Editors, **Courtney Oakes**, Associate Editor, **Erika Barger**, Administrative Editor and **Mr. Pittman**, continuing as Senior Articles Editor.

We also congratulate the officers of this past year's Environmental Law Society: **Stephanie Dodson Dougherty**, President, **David Henning**, Vice President, **Andrew Thornquist**, Secretary, and **Kyle Weismantle**, Treasurer, and welcome the FY 2012-13 officers: **David Henning**, President, **Lora Minicucci**, Vice-President, **Sarah Spacht**, Secretary, and **Kristen Summers**, Treasurer.

We are working on a rich set of programs for the coming academic year, which will focus on energy, environmental, and land use issues. We will provide updates in future columns and encourage ELULS members to monitor our website for details http://www.law.fsu.edu/academic_programs/environmental/index.html.

Alumni Updates and Honors:

Zachary R. Kobrin ('11) published his article, "Sustainable Procurement is Smart Procurement: A Primer for Local Governments to Successfully Implement Sustainable Procurement Policies," in the *Texas Environmental Law Journal* in February 2012. Mr. Kobrin joined the law firm of Lydecker Diaz in Miami, Florida as an associate attorney.

Lindsay C. Walton ('11) recently took a position with the Florida Department of Environmental Protection. She will be working on issues involving institutional controls.

Chasity H. O'Steen ('03) and **John R. Jenkins** ('84) co-authored an article about water utility infrastructure issues in Florida entitled "We Built It and They Came! Now What? Public-Private Partnerships in the Replacement Era," published in the *Stetson Law Review* in Winter 2012.

Terry E. Lewis ('79) and **Anne Longman** ('79) along with a few

Law School Liaisons continued....

other shareholders from Lewis, Longman & Walker, P.A. were selected as 2012 Florida Super Lawyers in the area of Environmental Law.

David S. Dee ('79) has been selected by his peers for inclusion in the 2012 edition of *The Best Lawyers in America*, which named Dee as the 2012 Lawyer of the Year in Tallahassee in the area of Environmental Litigation. Chambers USA also recently included Dee in its 2012 directory of *America's Leading Lawyers for Business*. This is the seventh consecutive year that Chambers has recognized Dee's work in the area of environmental law. Dee practices environmental, land use, and administrative law in the Tallahassee firm of Gardner, Bist, Wiener, Wadsworth, Bowden, Bush, Dee, LaVia & Wright, P.A.

Paul H. Amundsen ('78) joined the law firm of Lewis, Longman & Walker, P.A. as Of Counsel in the Tallahassee office. He previously served as the managing shareholder of Ruden McClosky's Tallahassee office. Amundsen is a member of the Environmental & Land Use Law Section of The Florida Bar and the International Air & Waste Management Association.

In January 2012, **Cari L. Roth** ('83) was appointed by Governor Rick Scott as chair of the Florida Environmental Regulation Commission. She has served on the commission since 2005. Roth practices at Bryant Miller Olive in Tallahassee, where she chairs the firm's Land Use and Governmental Consulting practices. She concentrates in the areas of environmental and land use law and governmental affairs.

We hope you will join us for one or more of our programs. For more information about our programs, please consult our web site at: *http://www.law.fsu.edu*, or please feel free to contact Prof. David Markell, at dmarkell@law.fsu.edu. For more information about our Environmental Law Program, please visit *http://www.law.fsu.edu/academic_programs/environmental/index.html.*

UF Law Update

Submitted by Mary Jane Angelo, Director, Environmental and Land Use Law Program, University of Florida Levin College of Law

New Faculty

W. Thomas Hawkins, Adjunct Professor, Attorney, W. Thomas Hawkins, P.A., is a graduate of the Emory University School of Law and holds a Master of Science in Real Estate from the University of Florida. Hawkins began his legal career in Gainesville, Florida practicing in the areas of local government and land use law. Representing a municipality, community groups and real estate owners and developers, Hawkins' work has included drafting ordinances; handling Comprehensive Plan Amendments, rezonings and Developments of Regional Impact; and advising a Community Redevelopment Agency and City Commission. Since 2008, Hawkins has served as Gainesville City Commissioner, At-Large. He has served as the Mayor-Commissioner Pro Tem of the City of Gainesville, the Chair of the Metropolitan Transportation Planning Organization for the Gainesville Urbanized Area, the Chair of the Gainesville Community Redevelopment Agency and is a member of the North Central Florida Regional Planning Council. Hawkins teaches Florida Land Use Law at the Levin College of Law and Land Use Law in the Department of Urban and Regional Planning.

Visiting Faculty

Visiting faculty at UF law's ELULP program are: Oscar A. Avalle, Guatemala Country Manager, Resident Representative, World Bank; Maria Magdalena Kenig-Witkowska, Institute of International Law, Head, Chair of European Law, University of Warsaw, Poland; Robert Sokolow, Co-Director of the Carbon Mitigation Initiative and Director of Siebel Energy Grand Challenge, Princeton Environmental Institute at the Princeton University; Martina Elisabeth Schlögl, Johannes Kepler University of Linz, School of Law, Linz, Austria; Otton Solis, Economist and Founding President of Costa Rica's Citizens Action Party, three-time former Costa Rican's presidential candidate, 2008 UF Center for Latin American Studies Bacardi Family Eminent Scholar for Spring 2008; Roberto Virzo, University of Sannio, Benevento, Italy; and Jiaxian Zhu, Executive Director, China Center of Environmental Financial Law, Central University of Finance and Economy, Beijing, China.

New Courses

New environmental courses at UF law include: "EU Environmental Law," taught by Maria Magdalena Kenig-Witkowska, Institute of International Law, Head, Chair of European Law, University of Warsaw, Poland; "International Environmental Law," taught by Stephen Powell, International Trade Law Program Director; "The Supreme Court and the Environment," taught by Michael Allan Wolf, Professor, Richard E. Nelson Chair in Local Government Law; "Florida Land Use Law," taught by Adjunct Professor Thomas Hawkins of W. Thomas Hawkins, PA, Gainesville; "Regulating Climate Change: Carbon Finance," taught by Foreign Enrichment Program Visiting Professor Jiaxian Zhu, CUFE Professor, Beijing, China; "International Law of the Sea," taught by International Visiting Professor Roberto Virzo, University of Sannio, Benevento, Italy; and "Agricultural Policy and the Environment," taught by Mary Jane Angelo, ELULP Director and UF Research Foundation Professor.

UF Law Faculty/Students Busy During Summer 2012

Annual Americas Conference in Argentina

"Environment and Agriculture" was a featured panel at UF law's Center for Governmental Responsibility's 13th Annual Conference on Legal and Policy Issues in the

Law School Liaisons continued....

Americas on May 21-22, 2012, at the University of Buenos Aires Law School in Argentina. The conference examined current legal issues in the hemisphere and featured leading legal experts who discussed topics of judicial reform, mediation, comparative law, democracy and privacy, tax reform, trade and business, human rights, and environment and agriculture.

The environment and agriculture panel explored comparative approaches to environmental management and enforcement, with experts from Argentina, Brazil and Florida. Major topics included the management of water resources and pesticide impacts with special attention to the connections between the environment and agriculture, and the development of agricultural best practices.

Panelists included Tim McLendon, Staff Attorney, Center for Governmental Responsibility, University of Florida Levin College of Law, who chaired the panel; Robertson Fonseca de Azevedo, State Prosecutor, Ministério Público of State of Paraná, Brazil; Paulo Roberto Pereira de Souza, Doctor of Environmental Law, State University of Maringá, Paraná, and University of Marilia, São Paulo, Brazil; Michael T. Olexa, Professor & Director, Agricultural and Natural Resources Law Center, Department of Food and Resource Economics, Institute of Food and Agricultural Sciences, University of Florida; Richard Hamann**,** Associate in Law, Center for Governmental Responsibility, University of Florida Levin College of Law; Néstor Cafferatta, Professor of Environmental Law, University of Buenos Aires Law School; and Silvia Nonna, Academic Secretary and Professor of Environmental Law, University of Buenos Aires Law School.

Costa Rica Summer Program

The Costa Rica Program offers students the unique opportunity to study international and comparative environmental law from a Latin American perspective through the study abroad program in Coast Rica. The program brought together law students and Ph.D. Fellows from UF's Water Institute for an intensive interdisciplinary field experience. Students worked in small groups on skills-based practicums involving policy issues related to the Tempisque River Basin in Northwest Costa Rica. The research supports UF's efforts to develop a more comprehensive program to address climate and water on the Pacific Cost of Mesoamerica.

Student Externships

UF law students enrolled in the Environment and Land Use Law Program added new externship opportunities this summer. ELULP students participating in summer externships are: Nick Barshel, Public Trust Environmental Law Institutes of Florida; Rachael Bruce, Florida Division of Administrative Hearings; Samantha Culp, Florida Conservation Trust; Carly Grimm, The Nature Conservancy; Devon Haggitt, Alachua County Forever; Rose Kasveck, Brevard County Attorney's Office; Le Mai, Center for Biological Diversity; Gentry Mander, Environmental Secretariat of the Central American Free Trade Agreement, Guatemala; James Myers, Seminole County Attorney's Office; Caitlin Pomerance, Audubon of Florida; Chelsea Sims, National Oceanic and Atmospheric Administration; Bethany Wagner, Hillsborough County Environmental Protection Commission; and David Lappano, Florida Inland Navigation District, Miami.

Faculty Accomplishments

UF law ELULP faculty were published extensively during 2011-12, including:

Mary Jane Angelo: • "Progress Toward Restoring the Everglades: the Fourth Biennial Review, 2012" (coauthor as member of Committee on Independent Scientific Review of Everglades Restoration Progress) (National Research Council of the National Academy of Sciences, forthcoming October 2012) • "Survey of Florida Water Law" in Waters and Water Rights (Robert E. Beck, ed.) (Matthew Bender & Co., Inc., 2012 annual update) • "Reclaiming Global Environmental Leadership: Why the United States Should Ratify Ten Pending Environmental Treaties" (with Rebecca Bratspies, David Hunter, John H. Knox, Noah Sachs, and Sandra Zellmer), Center for Progressive Reform White Paper No. 1201 (2012) • "Small, Slow and Local: Essays on Building a More Sustainable and Local Food System," 12 Vermont J. Envtl. L. 1 (2011) • "Water Quality Regulations and Policy Evolution" (with Kati Migliaccio) in Water Quality, Concepts, Sampling, and Analysis (Yuncong Li and Kati Migliaccio, eds.) (CRC Press, 2011).

Tom Ankersen: • "Turtles Without Borders: The International and Domestic Law Basis for the Shared Conservation, Management and Use of Sea Turtles in Nicaragua, Costa Rica and Panama" (with Gabriela Stocks, Franklin Paniagua & Sekita Grant), J. Int'l Wildlife L. Pol'y (in review, 2012) • "Large Woody Material: Science, Policy And Best Management Practices In Florida Streams" (with Linhoss, A. Cameron, H. Hall, and S. Blair), The Florida Scientist (in press, 2012) • "Comprehensive Sea Grass Restoration in Southwest Florida: Science, Law And Eco-Regional Planning" (with A. Hotaling and B. Lingle), 4:1 Sea Grant L. Pol'y J. 61-79 (2011) • Special Editor and Introduction to the Special Issue: Focus on Florida, Sea Grant L. Pol'y J. Vol. 4, No. 1 (Summer 2011) • "Anchoring Away: Government Regulation and The Rights of Navigation in Florida. 3rd Edition" (with R. Hamann and B. Flagg) (Sea Grant TP-180, March 2011).

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Christine Klein: • Natural Resources Law: A Place-Based Book of Problems and Cases (Aspen, 3d ed. forthcoming Jan. 2013) • "Water Bankruptcy," 97 Minnesota L. Rev. (forthcoming 2013) • "Compartmentalized Thinking and the Clean Water Act," 4 G. Wash. J. Energy & Envtl. L. (forthcoming Jan. 2013) • "Sustainable Water and Environmental Management in the California Bay-Delta," (co-author as member of Committee on Sustainable Water and Environmental Management in the California Bay-Delta) (National Research Council of the National Academy of Sciences, 2012) • "Survey of Florida Water Law" in Waters and Water Rights (Robert E. Beck, ed.) (Matthew Bender & Co., Inc.) (2011 annual update) • "A Review of the Use of Science and Adaptive Management in California's Draft Bay Delta Conservation Plan," (co-author as panel member to Review California's Draft Bay Delta Conservation Plan) (National Research Council of the National Academy of Sciences, 2011) • "The Dormant Commerce Clause and Water Export," 35 Harvard Envtl. L. Rev. 131 (2011).

Michael Wolf: • The Supreme Court and the Environment: The Reluctant Protector (CQ Press/Sage, 2012) • General Editor, Powell on Real Property™ (quarterly updates) (Matthew Bender-LexisNexis, 2000-present) • "A Yellow Light for "Green Zoning": Some Words of Caution About Incorporating Green Building Standards into Local Land Use Law," 43 Urban Lawyer 949 (2011).

Save-the-Dates for ELULP Activities

Professor Christine Klein announces the dates of the annual Spring 2013 Environmental Capstone Colloquium. The dates are: January 10, 17, 24, 31; February 7, 14, 21, and 28. The series is sponsored by Hopping Green and Sams, P.A., in Tallahassee. The theme will be "All About Endangered Species" in honor of the 40th anniversary of the Endangered Species Act.

The 19th Annual Public Interest Environmental Conference is scheduled February 21-23, 2013. The conference theme is the 40th anniversary of the Endangered Species Act.

The 12th Annual Richard E. Nelson Symposium will be held February 8, 2013, at the UF Hilton. The topic is "Preemption" and will include topics on firearms, immigration, hydrofracking, and energy.

GROUNDWATER REGULATION

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internal document entitled "HB 503 IMPLEMENTATION PLAN, DIVISION OF WASTE MANAGEMENT, March 26, 2012," states this about Section 12: "No action needed; essentially mimics language in Chapter 62-520, Ground Water Classes, Standards and Exemptions."

This article will examine the extent, if any, to which Section 12 really alters existing law. Because of the way the provision is written, to understand the intent of the provision should require an examination of both existing groundwater rules and the history of groundwater rulemaking back to 1978, and this article will do so. This does not mean, of course, that others interpreting the new language will take that path. If a decision-maker does not do so, the full effect of Section 12 could prove to be very hard to predict. This is particularly true given that the House of Representatives "Final Bill Analysis" dated May 8, 2012, for HB503[1] simply describes what Section 12 says, without much if any elaboration.

The Language of Section 12

Section 403.061, Fla. Stat., enumerates the Department's general powers and duties. Subsection 403.061(11) authorizes the Department to establish ambient air quality and water quality standards, including the authority to "to establish reasonable zones of mixing for discharges into waters." In addition to making some minor technical changes, Section 12 adds the following elaboration upon Subsection 403.061(11):

> For existing installations as defined by rule 62-520.200(10), Florida Administrative Code, effective July 12, 2009, zones of discharge to groundwater are authorized horizontally to a facility's or owner's property boundary and extending vertically to the base of a specifically designated aquifer or aquifers. Such zones of discharge may be modified in accordance with procedures specified in department rules. Exceedance of primary and secondary groundwater standards that occur within a zone of discharge does not create liability pursuant to this chapter or chapter 376 for site cleanup, and the exceedance of soil cleanup target levels is not a basis for enforcement or site cleanup.

One constructive thing the Final Bill Analysis did do was to explain what the term "existing installations as defined by rule 62-520.200(10)" means, by restating what that rule says—in relevant part, as follows:

> any installation which had filed a complete application for a water discharge permit on or before January 1, 1983, or which submitted a ground water monitoring plan no later than six months after the date required for that type of installation as listed in former Rule 17-4.245, F.A.C. (1983), and a plan was subsequently approved by the Department; or which was in fact an installation reasonably expected to release contaminants into the ground water on or before July 1, 1982, and operated consistently with statutes and rules relating to ground water discharge in effect at the time of the operation.

To a reader unfamiliar with the regulatory structure of the Department's groundwater rules, as partially cited in Section 12, the amendment could be read to provide for a potentially significant change in existing groundwater law—essentially, as explained below, to reduce significantly the soil and groundwater cleanup requirements

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that may have previously existed, at least in limited circumstances. In any event, there is no guarantee that a court or administrative law judge will interpret the language in a way that is consistent with the professed intent of either the drafters of Section 12 or the original referenced rules. To facilitate a better understanding of Section 12, this article will revisit the history of the groundwater rulemaking to provide a better understanding of what the terminology in Section 12 was in fact intended to mean.

The Department's Initial Efforts at Groundwater Regulation

The first effort to develop standards for Florida's groundwater came when that part of the Department then known as the Florida Department of Environmental Regulation adopted comprehensive water quality standards in 1978, to become effective January 1, 1979. The purpose of the rule adoption was a "unified revision of the Department's water quality standards," as required by recent revisions to the Federal Water Pollution Control Act.[2] The Department's new rule for the first time established specific groundwater quality criteria, at Fla. Admin. Code Rule 17-3.071[3], to be applicable outside a "zone of discharge," which was defined in Fla. Admin. Code Rule 17-3.021(27) as "a volume underlying or surrounding the point of discharge within which an opportunity for the treatment, mixture or dispersion of wastes into receiving groundwaters has been afforded."

Rule 17-3.071, Fla. Admin. Code, established "general criteria" for groundwater. It stated that the groundwater quality criteria in Rule 17-3.101 and 17-3.151 would apply except within zones of discharge. The rule also created a "Groundwater Quality Task Force" to refine the groundwater quality standards further, and set a repeal date for the groundwater quality criteria if new standards were not promulgated by then. The two referenced rule sections, in turn, created two classes of groundwater. Rule 17-3.101 applied to "Class I-B Groundwaters," defined as those containing total dissolved solids of less than 10,000 milligrams per liter (i.e., potable water). Those waters had criteria similar to those of the then-existing potable drinking water criteria, which at the time were mostly limited to certain metals, nitrates, radioactivity and a few pesticide compounds. Rule 17-3.151 applied to "Class V-B Groundwaters," those containing more than 10,000 milligrams. The Class I-B criteria did not apply to these waters, only certain general minimum criteria.

Rule 17-4.245, Fla. Admin. Code, in turn established the first permitting structure for ground water discharges. The basic structure was to set forth permits for discharges to groundwater within zones of discharge based upon certain environmental considerations, provided the discharges were free from certain "minimum criteria" designed to avoid harm to animal, plant and aquatic life and not a "serious danger" to the public health, safety or welfare. The rule further provided that zones for groundwater discharges existing on the effective date of the rule "shall be deemed to extent to the property limits of the discharger" unless the discharger could justify and obtain a larger zone.

In other words, the 1979 groundwater rules established a permitting structure for new discharges to groundwater, but essentially gave existing installations zones of discharge to the property line, and in any event were intended as an interim regulatory program. The Groundwater Quality Task Force then set to work developing new rules, and the Department developed its own team of rule writers. Eventually, the Department adopted comprehensive changes (including changing the spelling of "groundwater" to "ground water"), which established a much more comprehensive regulatory structure for ground water regulation, which was called at the time the "Ground Water Rule," which went into effect January 1, 1983.[4]

The Department's "Ground Water Rule" and Existing Installations

Of particular relevance to understanding Section 12 is the treatment of "existing installations" in the Ground Water Rule. As previously noted, the 1979 version grandfathered all existing discharges and allowed new discharges, provided their plumes did not cause exceedences of water quality criteria outside of zones of discharge, which extended to property boundaries, with some further limitations. The 1979 version made no effort, however, to define exactly what was meant by existing discharges, and there was no indication in any prior Department rules as to how those existing discharges were regulated or even tracked.

The Ground Water Rule moved the groundwater quality classification system to a new Fla. Admin. Code Rule 17-3-403. The regulatory structure continued in a completely re-written Fla. Admin. Code Rule 17-4.245, subsection (4) of which sized groundwater zones of discharge for new facilities based upon specific resource-based criteria, as opposed to the property-line zones allowed under the 1979 rule. At Fla. Admin. Code Rule 17-3.402, the rule also established "minimum criteria," which were categories of contaminants that could not be discharged to ground water at all, whether or not a zone of discharge existed. Existing discharges, however, otherwise remained grandfathered by zones of discharge to the property line, unless some other zone was established.

Determining what the term "existing installation" meant, therefore, had critical regulatory importance. Former Rule 17-4.245(1)(c), stated that the term meant "any installation having filed a complete application for a water discharge permit on or before January 1, 1983, or in fact discharging to ground water on or before July 1, 1982." Excluded was "any installation under a Department Order to obtain a ground water permit," which had to apply by a date certain and comply with other requirements. Former Fla. Admin. Code Rule 17-4.245(6)(c) then contained a "Plan submission and timetable" that listed dates by which existing installations had to install ground water monitoring plans if they had none at the time of rule promulgation. The current Fla. Admin. Code Rule 62-520.200(10) definition incorporates this list when it refers to "the types of discharge and the dates in former Rule 17-4.245, F.A.C. (1983), by which a written ground water monitoring plan was required to be submitted to the Department."

As stated in former Fla. Admin. Code Rule 17-4.245(1)(a), the approach under the Ground Water Rule was to include monitoring plans and zones of

discharge as part of other permits that the Department required of these facilities, unless the facility had no other permit. Thus, the overall strategy under the Rule was a gradual phasing in of groundwater regulatory requirements for existing facilities, permitted or otherwise. The difference in the language between the old and current version of the existing installation provisions was essentially a reflection of the fact that the language had to be updated because all of the timetables had already been met. At the same time, however, the concept of existing installations needed to remain in effect so that those installations could often continue to benefit from having more generous zones of discharge granted to them than for newer facilities.

The Regulatory Structure as Set Forth in Section 12

Section 12 addresses how existing installations should be regulated by stating, "Exceedance of primary and secondary groundwater standards that occur within a zone of discharge does not create liability pursuant to this chapter or chapter 376 for site cleanup, and the exceedance of soil cleanup target levels is not a basis for enforcement or site cleanup." While this language has no specific counterpart in the original Ground Water Rule, it is consistent with the grandfathering concept that an existing installation as then defined obtained its zones of discharge through the process established under that Rule and its predecessor, and that the size of that zone remains to this day unless the Department subsequently took affirmative steps to modify it through a subsequent permitting review. What the new statutory language does, in essence, is make more explicit what was more implicit in the Ground Water Rule—that prior to any such modification, such a facility could not be subject to enforcement proceedings for having water quality violations within a zone of discharge, which were originally established to the property line, unless they violated the minimum criteria or the Department made the size of the zone smaller or eliminated it as part of a permit issuance or modification process.

The final clause of Section 12, that "exceedance of soil cleanup target levels is not a basis for enforcement or site cleanup," has some ambiguity to it. The soil cleanup criteria, which are set forth in Table II to Fla. Admin. Code Chapter 62-777, are based only partially on primary and secondary groundwater criteria, and in any event are calculated in an different manner—micrograms per kilogram as opposed to micrograms per liter. This raises the question of how the enforcement exception actually fits into the overall rule structure. When the soil cleanup criteria were established in 2005, and then implemented by rule, both the legislature and the Department recognized that these criteria constituted guidance, not Department-enforceable standards.[5] The purpose of final clause, therefore, is essentially to restate the obvious in order to address any concern that the Department may attempt to treat the soil target cleanup criteria as standards anyway. Nonetheless, if the Department then takes the position that the contaminated soils will leach into groundwater at levels in excess of the groundwater quality criteria, that battle would remain joined nonetheless.

Is Everything Completely Clear Now?

While Section 12 may have been intended simply to reiterate existing law, as the preceding tortured explanation demonstrates, figuring out what is current law may not be crystal clear, particularly to someone either not familiar with the history or having some other view of it. The foregoing summary is only a brief review of highlights. Particularly for owners of facilities that want to claim that their facilities should be considered by the Department, or a court, of having met the 1983-based definition of an "existing installation," it could become a very complicated exercise to trace the history of the lawfulness of their groundwater discharges, including when they first occurred, not only from a regulatory standpoint, but also from a commercial one. Assume, for example, that one is trying to determine liabilities for prior property owners where a groundwater discharge occurred several or more decades ago, and it is not clear whether the discharge was lawful when it occurred, or how long it continued. Might this provision be used by a former property owner to disclaim liability? Presumably such an argument already exists, but the legislative imprimatur of Section 12, for whatever the original intent, could create new legal arguments.

As to the soil target cleanup levels, if that language does have purpose, does this mean that the Department or a court could interpret the phrase as an "*exclusio unis*" implication that the soil target cleanup levels could apply to facilities other than "existing installations," or apply outside of their zones of discharge, notwithstanding the fact that the levels were established as guidance only? Or, at a minimum, might the Department insist that the legislature has thus confirmed that the burden (at least other than for existing installations) has been placed on a permit holder to prove that the exceedances would not result in groundwater contamination in excess of the water quality criteria?

Any even greater ambiguity might exist for a facility that stopped actively discharging to groundwater prior to 1979—and never had a permit with groundwater monitoring or entered into a consent order with the Department to undertake site cleanup. Such a facility might argue that since the conduct was not expressly prohibited as of 1979 from discharging to groundwater, it remains an "existing installation" that "operated consistently with statutes and rules relating to ground water discharge in effect at the time of the operation," as stated in the existing installation definition, because there were no specific groundwater permitting requirements in effect prior to 1979. The Department's response would likely be that the Ground Water Rule was intended to capture all of those facilities over time, either through permitting or enforcement. Arguably, however, the Rule did not capture all discharges, only those specifically spelled out in the Rule.

A person pushing this argument might also take the position that, given that the Department has the burden of proof in enforcement proceedings, it would be up to the Department to prove that the facility became subject to the Ground Water Rule's monitoring and permitting or cleanup requirements beginning in 1982. There could be some significant proof problems in establishing, in such a context, when the discharges began and stopped.

In many instances, such a scenario would be unlikely because the

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contaminants at issue could include chemicals in addition to those subject to primary or secondary ground water standards—the so-called "minimum criteria." In such situations, however, the Department has the burden of establishing whether a substance in fact fits the minimum criteria definition.

An example of an area where the effort to find an unregulated existing installation could bear fruit involves arsenic. Arsenic in soils and ground water is common in many places in Florida, has been so for many years, and has both a ground water criterion and a soil cleanup target level. Arguably, if the arsenic was in the soil prior to 1979, either because it occurs naturally or because it was applied, for example, as a pesticide, but no arsenic has been added since then, someone could argue the existence of the arsenic makes the area an "existing installation" that warrants a zone of discharge exempting it from groundwater or soils site rehabilitation.

A counter to this argument is that such soils have not been treated as existing installations under Department rules previously, and so should not be treated as such now. Now, however, the existing installation language has a legislative imprimatur, which perhaps should require a re-examination of this issue. But then once again—this is all speculation over a brand new piece of legislation that has just gone into effect.

The purpose of this article has not been to suggest that the Department or the proponents of Section 12 are incorrect in asserting that the language does not significantly change existing law, or that the proponents were trying to pull a fast on one the Department in stating that they were just trying to clarify existing law. The point, rather, is that understanding what the new law says requires, as this article has proposed one should do, a review of the entire history of the groundwater rulemaking in order to understand the law fully by putting it into a proper context—and then wondering whether a court would do the same. In other words, it remains to be seen what if any significance will come of this legislation.

Endnotes:

[1] The Final Bill Analysis can be found at http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0503z1.ANRS.DOCX&DocumentType=Analysis&BillNumber=0503&Session=2012

[2] The Department's rule filings, including its "Written Statement of Facts and Circumstances Justifying the Proposed Amendments," from which this statement comes, are dated August 18, 1978, and can be found in the Secretary of State Archives.

[3] After the Department of Environmental Protection was created as a result of the merger of the Florida Department of Environmental Regulation with the Florida Department of Natural Resources, the rules were moved from Chapter 17 to Chapter 62, Florida Administrative Code.

[4] The rules were filed with the Secretary of State on November 3 and December 10, 1982, and can be found in the Secretary of State Archives.

[5] *See,* § 376.30701, Fla. Stat.; Fla. Admin. Code Rule 62-777.150(7).

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