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

Preserving Open Space Through Agriculture – Part II

by Seth D. Chipman

VII. Objectives to Preserve Open Space Successfully Through Agriculture and The Available Tools Individually Meeting Those Objectives

When local and state governments try to preserve open space and farmland, a host of considerations are taken into account and a variety of institutionalized non-zoning approaches and approaches that are tied more closely to zoning and land use are used. The institutionalized approaches include right to farm statutes, preferential tax treatment, or subsidizations. The zoning and land use approaches include clustering, districting, zoning, or the transfer of development rights. The zoning and land use approaches, particularly as they relate to environmental issues, will be discussed in greater detail.

A viable solution to preserving open space through agriculture may be attainable if attention is given to the following objectives: 1) the community at large must be assured that its environment and health and safety are not at risk as a result of zoning decisions founded on the preservation of open space through agriculture; 2) farming must remain economically viable in the area targeted for open space and agriculture; and 3) the cost to the public at large for preserving open space must remain low or proportional to the benefits realized by the public. Certain considerations and techniques to preserve open space through agriculture are relevant to more than one of these objectives.

A. The Environmental Objec-

See "Preserving Open Space," page 14

Message from the Chair

by Robert J. Riggio

Coming soon, to a computer screen near you: *The Treatise on Environmental and Land Use Law*. Thanks to the efforts of Gary Hunter, our Treasurer who also chairs the Section's CLE Treatise committee, and Joe Richards, chair of the Internet Committee, a digital version of the Treatise is rapidly becoming a reality. At the last Executive Council meeting, arrangements were approved for loading the Treatise onto the Section's website and creating password access for Section members. Once these efforts are completed, all Section members will have access to all three volumes of the Treatise and the wealth of information contained in them.

Another unsung internet service provided by the Section is our very own listserv. The listserv provides a quick and efficient means of keeping the hundreds of Section members who use it informed of Section and Section-related activities. It also provides a forum for the occasional discussion of a topic of interest. It is free and you only need to visit the Section's website and click on *list1@eluls.org* to sign on. Then, you will be asked to provide your name and current email address to complete the subscription process. I am

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interested in what those of you who are subscribers think of this service and welcome any ideas on how it might better serve its role. Please make use of the suggestion box at the Section's website to leave your feedback on these items.

Two affiliate mixers have been held since the last issue of the Reporter. Mixers are after-hours affairs co-sponsored by affiliate firms, law firms and the Section, that provide an opportunity for attorneys and consultants to mingle and discuss common interests in pleasant surroundings. The first mixer was held in early October in Fort Lauderdale, and the second, was held in Tampa, at the Rusty Pelican, timed to follow the Executive Council meeting. This mixer was well received and drew an interesting cross section of consultants and attorneys. A third mixer is planned for Gainesville to coincide with the Section's March Executive Council meeting and just before the Public Interest Conference. Much of the credit for the success of these affairs lies with our affiliates, and this year, especially Neil Hancock, the Affiliate Membership chair.

The Section is also exploring alternative methods of providing CLE. Web seminars, which are delivered over the internet, are one promising methodology that the Affiliate membership is testing. Their first trial seminar, held on November 30th, was titled "Forensic Assessment Tools" and dealt with the use of forensic tools as they relate to environmental issues such as distinguishing sources in mixed plume discharges. This trial seminar had over 50 attendees which was very encouraging. Our thanks to Steve Hilficker, who set it up.

Another new Section initiative, arising out of the efforts of Michelle Diffenderfer, the Section's Secretary and ABA liaison, is a partnering with the ABA to fund a Minority Fellowship Program. This year the program will fund a summer internship at a government agency or public interest organization for one Minority Fellow law student who will work on legal matters in the fields of environment, energy, natural resources and/or land use law. Application materials are available at *http://www.abanet.org/environ/committees/lawstudents/2006minorityfellowship/2006Minority Fellowship*.

Minority Fellowship Program

by Michelle Diffenderfer, ABA Liaison

The Florida Bar's Environmental and Land Use Law Section (ELULS) is partnering with the American Bar Association's Section of Environment, Energy and Resources to create and fund a Minority Fellowship Program in Florida. The program is designed to encourage minority law students to study and pursue careers in environmental and/or land use law and is open to first and second year law students.

The program will fund one Minority Fellow law student for a summer internship at a government agency or public interest organization in Florida for $5,000.00. The Fellowship guidelines require an 8-10 week minimum (40 hours per week) commitment wherein the recipient will work on legal matters for a government agency or a public interest organization in the fields of environment, energy, natural resources and/or land use law.

In addition, each recipient will be expected to attend the Annual Update meeting of the ELULS and will be assigned a mentor from the Section to aid in the pursuit of a career in environmental and/or land use law.

If you know of students that may be interested, please tell them about this program and direct them to the application materials which can be found at *http://www.abanet.org/environ/committees/lawstudents/2006minorityfellowship/2006MinorityFellowshipApplication.doc* Applications need to be postmarked by January 31, 2006. If you have any questions please contact Jackie Werndli at *jwerndli@flabar.org*.

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

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Internet Mailing List

by Joe Richards, Internet Committee Chair

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

Florida Caselaw Update

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

St. John's River Water Management District avoids judgment for equal protection violation despite a finding that the District set aside their public responsibilities in favor to favor of an environmental organization. *St. Johns River Water Management Dist. v. Womack*, 2005 WL 2253833 (Fla. 5th DCA Sept. 16, 2005).

Womack owned 7.6 acres of land that included 4 acres of forested wetlands. In an attempt to improve the property, Womack retained a professional engineer to prepare and obtain a "management and storage of surface waters permit" from the District. It became apparent to the engineer, after submitting five different applications to resolve district "objections," that the District simply was not going to permit the project. No final action was taken on the applications prepared by the engineer. Womack, frustrated with the attempts, submitted his own self-made application which was denied through final action by the district. Thereafter, Womack sued the District for a number of causes of action including equal protection violation. The trial court specifically found that applications were denied because the Chairman of the Governing Board (who required that the applications be denied) colluded with and controlled District personnel. This finding formed the basis of the equal protection judgment in favor of Womack.

Despite this finding and judgment, the appellate court found that the "self-made" application failed to satisfy the District's regulations. The Court noted that even Womack's professional engineer testified that the self-made application was insufficient. Because the underlying application was insufficient, the District' denial of the application was proper, despite the misconduct. The Court implied that had Womack required that the District take final action on one of the engineer's applications that met the District's regulations, the judgment could have been affirmed. However, the Court reluctantly reversed the judgment on the equal protection claim.

An administrative petition challenging comprehensive plan amendment must be made within 30 days of amendment's effective date rather than the date the city commission votes to adopt the amendment. *Payne v. City of Miami*, 2005 WL 3054154 (Fla. 3d DCA Nov. 16, 2005)

The Miami City Commission approved an ordinance adopting a comprehensive plan amendment on June 24, 2005. Under the City's Charter, the ordinance becomes effective when the mayor signs the ordinance or 10 days after adoption if the mayor fails to veto the ordinance. In this case, the ordinance became effective 10 days after adoption because the Mayor did not veto or approve the ordinance within 10 days of its adoption. Thus, the ordinance became effective on Tuesday, July 6, 2005. The petition challenging the comprehensive plan was filed on August 5, 2005, within thirty days of the ordinance's effective date.

The Court rejected the Department of Community Affairs' conclusion that the term "local government adoption" in Section 163.3187(3)(a), Fla. Stat., meant 30 days from the City Commission' adoption of the amendment. The Court noted that it is the adoption of the amendment by the City (not the city commission) that is the triggering event. In this case, the City of Miami did not adopt the amendment until the Mayor signed the ordinance approving it or failed to act within 10 days. Accordingly, the Court held the administrative challenge was timely.

Use of park property for a telecommunications tower violated a deed restriction limiting use of property only for "passive park purposes." *AT&T Wireless Services of Florida, Inc. v. WCI Communities, Inc.*, 30 Fla. L. Weekly D2130 (Fla. 4th DCA September 7, 2005).

WCI Communities, Inc. (WCI) sued AT&T and the City of Coral Springs after the City permitted and AT&T constructed a telecommunications tower in a city park over WCI's objections. WCI is the successor in interest to the entity that granted the park property to the City. The deed conveying the park property contained a restriction that the property "would be used and maintained solely for passive park purposes" unless written consent from the grantor, or its successor was obtained.

Despite this restriction, the City adopted a telecommunication tower ordinance that allowed towers to be located in parks and recreation areas greater than five acres in size. The City later entered into a lease with AT&T of 1,600 sq. ft of park property for the construction of a tower and related equipment. Thereafter, the City approved a building permit for the tower. WCI later filed suit seeking injunctive relief and alleging that the tower violated the deed restriction. The trial court granted injunctive relief finding that AT&T and the City, aware of the deed restriction, never sought WCI's consent. The court further found that the public was excluded from the area leased (as it was surrounded by a fence) and the city received financial benefit from the commercial venture. Finding no ambiguity in the deed restriction the trial court found the use of the park for a telecommunications tower was not a "passive park purposes."

On appeal, AT&T and the City fared no better. The Court rejected the appellants' attempt to define the issue of whether the tower is a passive use. Rather the issue was whether the tower was a park purpose that was also a passive use. The Court found that the tower provided no park purpose since the tower was located there to fill in AT&T's telecommunication grid for monetary gain. The appellants next argued that any violation was "de minimis" and injunctive relief was not available. The Court found that even a minor violation of the deed restric-

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tion was still a violation because the scope of an easement is defined by what is granted, not by what is excluded. While the Court recognized that in some instances, some incidental use of properties that are restricted to residential use is permissible, that is the case only where the use is incidental to the primary use and so inconsequential that it is still in substantial harmony with the purpose of the covenants. The Court found that the tower was not incidental to a "passive park purposes."

Lastly, the court affirmed the trial court's injunctive relief which gave AT&T and the City two years to the remove and relocate the tower.

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On Appeal

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

Note: Status of cases is as of December 8, 2005. Readers are encouraged to advise the authors of pending appeals that should be included.

FLORIDA SUPREME COURT

The St. Joe Company v. Rawlis Leslie, Deborah Crosby, et al., Case No. SC05-1729. Appeal of a circuit court's grant of class certification for property damage claims arising out of disposal of paper mill waste under theories of nuisance, trespass, unjust enrichment, strict liability, negligence and statutory liability under Fla. Stat. 376.313. Status: Petition for review denied December 7.

FIRST DCA

Victor Lambou, et al. v. Wakulla County, et al., Case Nos. 1D05-1722 and -2990. Consolidated appeals of non-final agency action by the Department of Community Affairs partially dismissing petitions for hearing on Wakulla County comprehensive plan amendment consistency. Status: Appeal filed April 14.

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

THIRD DCA

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

FOURTH DCA

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

FIFTH DCA

Volusia County v. Florida Dept. of Environmental Protection, Case No. 5D05-3183. Appeal of Deputy General Counsel's enforcement letter regarding wooden "conservation zone" marker posts on County beaches. Status: Voluntarily dismissed November 2.

Osceola County, et al. v. Best Diversified, Inc., and Peter L. Huff, et al., Case Nos 5D04-216, 5D04-217. Appeal by Osceola County and DEP from a final judgment awarding damages for inverse condemnation under the Bert J. Harris Jr. Private Property Rights Protection Act. Damages were awarded to the owner and operator of a construction and demolition debris landfill who were denied permits to continue operating the landfill due to residents' complaints and DEP's finding that the operation constituted a public nuisance. Status: Affirmed in part and reversed in part on July 29—2005 WL 1787438 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D 1831]; motion for rehearing *en banc* pending.

U.S. SUPREME COURT

Rapanos v. United States, Case No. 04-1034; *Carabell v. U.S. Army Corps of Engineers,* Case No. 04-1384. A group of property developers has asked the court to review whether the Clean Water Act requires permits for wetlands not currently hydrologically connected to navigable waters. Status: *Certiorari* granted on October 11.

NSWMA v. Pine Belt Regional Solid Waste Management Authority, Case No. 04-1333. Petition for review of opinion by the Fifth Circuit determining that plaintiffs lack standing to challenge flow control laws because they do not transport waste from inside the Authority's boundaries to non-Mississippi disposal facilities. *NSWMA v. Pine Belt Regional Solid Waste Management Authority,* 389 F.3d 491 (5th Cir. 2004). The appellate court did not address the lower court's rejection of the distinction between "private" and "public" sector disposal facilities under the Commerce Clause. *NSWMA v. Pine Belt Regional Solid Waste Management Authority,* 261 F.Supp.2d 644 (S.D. Miss. 2003). Status: *Certiorari* denied October 3.

Alabama v. North Carolina, Case No. 132, original jurisdiction. Motion for leave to file bill of complaint to settle a dispute among the seven member states of the Southeastern Low-Level Radioactive Waste Compact pursuant to the Court's original jurisdiction, regarding North Carolina's withdrawal from the Compact in 1999 and liability for $90 million in sanctions based on that withdrawal. Status: The Court agreed to hear the bill on June 16, 2003. On November 17, 2003, the Court appointed a special master to mediate the suit.

FOURTH CIRCUIT

Ohio Valley Environmental Coalition, et al. v. Bulen, et al., Case No. 04-2129. Appeal of a district court decision barring the U.S. Army Corps of Engineers from issuing general discharge permit Nationwide 21 (NWP 21) for mountaintop mining in the southern district of West Virginia, on the ground that the permits unlawfully allow placement of mining debris into streams below (a practice called "valley fills") using procedures Congress never intended for general permits under section 404 of the CWA. The Justice Department is arguing that the decision will lead to inconsistent application of the NWP 21 nationwide. *Ohio Valley Environmental Coalition v. Bulen,* Case No. CIV.A.3:03-2281, 2004 WL 1576726 (S.D.W.Va. July 8, 2004), *modified in part,* 2004 WL 2384841 (Aug. 13,

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2004), *reconsideration denied* (Aug. 31, 2004). Status: On November 23, the court affirmed in part, vacated in part and remanded. 2005 WL 3117317.

SIXTH CIRCUIT

NSWMA v. Daviess County, Case No. 04-6498. Appeal from district court ruling that County's flow control law violates the Commerce Clause, and rejecting the County's argument that it is allowed to direct waste under the *United Haulers* public/private distinction. Status: Oral argument held November 29.

SEVENTH CIRCUIT

Texas Independent Producers & Royalty Owners Assn. v. EPA, Case No.03-3277. Challenge to various aspects of the NPDES stormwater general permit for construction activities on the ground that the requirements are vague or arbitrary and capricious. Status: The court upheld the general permit on June 13, holding that it did not violate the Clean Water Act's requirements of public notice and comment or the Endangered Species Act consultation requirement. Rehearing and rehearing *en banc* denied August 26. 410 F.3d 964. Motion to dismiss without prejudice denied October 6.

NINTH CIRCUIT

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

ELEVENTH CIRCUIT

Sierra Club v. Tennessee Valley Authority, Case No. 04-15324. In a citizen suit action under the Clean Air Act, grant of summary judgment for TVA is reversed as to certain alleged violations where a state agency's use of a 2% *de minimis* rule throughout the period in question was an illegal, unilateral modification of Alabama's EPA-approved state implementation plan. Upheld is the district court's holding that sovereign immunity bars the assessment of civil penalties against the TVA in this action. Status: Remanded on November 22 for further proceedings. 2005 WL 3110516.

Alabama v. U.S. Army Corps of Engineers, Case No. 03-16424. Georgia and the US Army Corps of Engineers appealed a denial of their agreement to allow Atlanta to draw an additional 210 million gallons per day of water from Lake Lanier on the Chattahoochee River. Florida and Alabama have objected to the agreement because they allege it would deprive them of water they are entitled to from the Chattahoochee River, including potential harm to the oysters in Apalachicola Bay. Status: Reversed on September 19.

Atlantic Green Sea Turtle, et al. v. County Council of Volusia County, et al., Case No. 05-13683. Appeal of an order dismissing counts of complaint filed under Endangered Species Act and Administrative Procedure Act. Status: Notice of appeal filed July 1. Motion to dismiss pending.

D.C. CIRCUIT

Alabama Power v. U.S. Petition to review a district court decision throwing out most of an enforcement case brought against Alabama Power for new source review (NSR) violations under the Clean Air Act and agreeing with the power industry's interpretation of when an "emissions increase" occurs for purposes of NSR applicability. *U.S. v. Alabama Power,* 372 F.Supp.2d 1283 (N.D. Ala. June 3, 2005). Status: Petition to review filed June 6 by the Utility Air Regulatory Group; the state of New York and several environmental groups responded on June 10.

Environmental Integrity Project v. EPA, Case No. 04-1083. Challenge to two of EPA's Part 70 rules governing the Clean Air Act's Title V monitoring requirements, the "periodic monitoring" rule and the "umbrella" rule. The court held that the final rule that revised EPA's interpretation of those provisions was invalid because it was not a "logical outgrowth" of EPA's proposed interim rule and violated the Administrative Procedure's notice and comment requirements. Status: The court vacated and remanded the rule on October 7. Motion for rehearing pending. 425 F.3d 992 (D.C.Cir., Oct. 7, 2005).

Association of Home Builders v. U.S. Army Corps of Engineers, Case No. 04-5221. Appeal of challenge to Corps rule defining term "discharge of dredged materials" to include all mechanized landclearing within regulated waters. Trade groups alleged that permit requirement for activities such as bulldozers clearing trees or digging of channels near lakes and rivers oversteps the agency's authority, which is limited to activities that result in "additions" of pollutants. The U.S. District Court for the District of Columbia dismissed the lawsuit in March 31, 2004 under the theory that the rule was not "ripe" for judicial review. NAHB asserted that rule is ripe because it has an immediate impact on all those engaging in mechanized landclearing by subjecting them to the permit process. Status: Oral argument held October 14.

Association of Irritated Residents v. EPA, Case No. 05-1177. Petition to review an agreement between EPA and operators of concentrated animal feeding operations (CAFO) that would allow CAFOs to avoid prosecution for past violations of the Clean Air Act if they participate in an emissions study to allow EPA to gather emissions data. Status: Petition filed May 27. The petitioners' unopposed motion to hold the case in abeyance was granted August 3. Motion to dismiss pending.

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

Minnesota Power v. EPA, Case No. 05-1246; *North Carolina v. EPA,* Case No. 05-1244. Various petitions chal-

lenging EPA's Clean Air Interstate Rule (CAIR), which was issued March 10. The CAIR implements an emissions trading system to reduce emissions of sulfur dioxide and nitrogen oxides from power plants. Status: The cases have been consolidated. EPA's motion to hold the cases in abeyance pending agency action is pending.

Commonwealth of Massachusetts v. EPA, Case No. 03-1361. Petition by a dozen states challenging EPA's decision not to regulate carbon dioxide and other greenhouse gases from vehicles under the Clean Air Act. Status: A three-judge panel of the court denied the petitions on July 15. 415 F.3d 50. A petition for rehearing and rehearing *en banc* was denied December 2.

Natural Resources Defense Council v. EPA, Case No. 04-1323. Challenge to emission limits issued on July 30 for hazardous air pollutants from makers of plywood and composite wood products, particularly focusing on provisions exempting facilities found to present a low risk to human health. The challengers have also filed a petition with EPA requesting reconsideration of the rulemaking. Status: Challenge filed September 28, 2004; order entered July 29 granting motion to continue to hold case in abeyance pending settlement discussions.

New York v. EPA, Case No. 02-1387. Challenge to EPA rule amendments granting additional exemptions from NSR/PSD requirements. Status: On June 24, the court upheld major portions of EPA's rule for measuring increases in emissions that trigger new source review/prevention of significant deterioration review (upholding EPA's definition of "modification"), but rejected certain aspects of the rule, including a recordkeeping exemption and exemptions for pollution control projects and clean unit designations. 413 F.3d 3. Petition for rehearing pending.

American Iron & Steel v. EPA, Case No. 00-1435. Petition to review EPA's final air pollution monitoring rule and performance standard published August 10, 2000, for requiring use of continuous opacity monitors. Status: EPA and Petitioners have begun settlement discussions and agreed that maintaining the stay of litigation while these discussions occur will serve the interests of the parties and judicial efficiency. Next status report is due January 9, 2006.

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Department of Environmental Protection Update

by Kelli M. Dowell, Senior Assistant General Counsel

NEW SOURCE REVIEW REFORM - On December 31, 2002, the United States Environmental Protection Agency (EPA) promulgated final regulations, effective March 3, 2003, which were characterized as "New Source Review Reform." The regulations affect the process of determining whether a facility making a change in its operations or modifying an existing emissions unit would involve or avoid application of "Prevention of Significant Deterioration" (PSD) permitting. The changes were made to Part 51 and Part 52 of Title 40 of the Code of Federal Regulations. 40 CFR Part 51 addresses requirements for state implementation plans (SIPs) while 40 CFR section 52.21 is EPA's PSD regulation for areas and circumstances not covered by SIPs.

In April 2005, DEP published Notices of Rule Development thereby initiating rulemaking on these new EPA regulations. DEP held two rule workshops on May 26 and August 2, 2005. On September 30, 2005, DEP published Notices of Rulemaking for four rule chapters affecting multiple rules. An adoption hearing held October 28, 2005 resulted in several changes. Notices of Change were published November 18, 2005.

During the course of the rulemaking, litigation was proceeding in the United States Court of Appeals for the District of Columbia Circuit, *NY et al. v. EPA et al.*, No. 02-1387. The case was decided June 24, 2005 and the Court upheld portions of the EPA December 2003 rulemaking, vacated other portions and remanded still other portions back to EPA. Since DEP was under a January 6, 2006 deadline for completing its rulemaking, DEP conferred with EPA Region 4 and decided to adjust its current rulemaking proposals to include only those matters upheld by the court and to revisit the other matters at a later date depending on the results of any appeals or rehearings. The portions of the EPA regulation vacated by the D.C. Circuit and which were omitted from DEP's rulemaking include a "Clean Unit" exclusion from PSD analysis and all non-Clean Air Act "pollution control project" exclusions from PSD analysis.

The rulemaking project at DEP includes changes to four rule chapters: 62-204, 62-210, 62-212 and 62-296, Florida Administrative Code (FAC).

The rulemaking in chapter 62-204 mainly affects procedures for modeling ambient air impacts expected to occur from proposed projects at facilities. The rulemaking in chapter 62-296 affects only acrylonitrile producing facilities that previously were subject to PSD analysis. The main changes affecting the bulk of the regulated community are located at Rules 62-210.200 (definitions), 62-210.370 (reporting and recordkeeping), 62-212.400 (prevention of significant deterioration) and 62-212.720 (plant-wide applicability limits), FAC. Other changes to chapters 62-210 and 62-212 include general permitting requirement changes at rules 62-210.300 and 62-212.300, FAC; public notice requirements for the new plant-wide applicability limits at rule 62-210.350, FAC; and changes to the application form at rule 62-210.900, FAC.

The major impact of the "New Source Review Reform" rulemaking, at both the federal and the state level, is in the methodology that is used to determine whether a proposed modification requires PSD analysis. PSD analysis is required when any addition or modification to a facility increases emissions by a significance level. The significance levels for the affected pollutants have not changed (although they have been moved from rule 62-212.400 to rule 62-210.200) but the baseline and future emissions measurements have. Previously the baseline was an average of the emissions from the affected units for the past two years. Now the baseline is an average of emissions from any 24-month period within the past 10 years (5 years for electric utility units) and the period can differ for each pollutant. Previously the baseline was compared to the potential emissions of the affected units after the change (except for electric utility units). Now the baseline is compared to the projected actual emissions of the affected units resulting from the change. The new methodology is intended to be a more accurate reflection of economic cycles.

In addition, because "projected actual emissions" are used as a measurement, that requires the facility to maintain records so that DEP can check the accuracy of the projections. DEP has created additional recordkeeping and reporting requirements at rule 62-210.370, FAC. The recordkeeping and reporting requirements will affect all facilities that submit Annual Operating Reports (AORs) under pre-existing DEP rules. DEP expects that reporting will be more consistent as a result of these changes.

Another change that was caused by the "New Source Review Reform" is the "plant-wide applicability limit" (PAL) that is created at rule 62-212.720 and caused changes to rules 62-210.200 and 62-210.350, FAC. The PAL is a type of plant-wide emissions cap that includes some increase over baseline emissions but limits overall emissions at a level that precludes the application of PSD. The concept is intended to provide operational flexibility at a plant by allowing increased use of specific units or production lines and limiting the operation of others so as to keep overall emissions stable.

According to the current schedule, DEP intends to adopt these rule changes on or slightly before December 29, 2005 with an effective date of January 2006.

DEP'S NEW DEPUTY SECRETARY FOR REGULATORY PROGRAMS AND ENERGY – On November 28, 2005, Mike Sole replaced Allan Bedwell as DEP's Deputy Secretary for Regulatory Programs and Energy. As Deputy Secretary, Sole will oversee DEP's six regulatory district offices and the divisions of Air Resource Management, Waste Management, and Water Resource Management. Prior to his current position

at DEP, Sole served as the agency's Chief of Staff, where he assisted Secretary Castille with the establishment of priorities and policies for the Department, while coordinating and monitoring their implementation to ensure departmental goals and objectives were accomplished. Sole has held several other positions with DEP during his 14 years, leading the Bureau of Petroleum Storage Systems, Bureau of Beaches and Wetlands Resources, and the Division of Waste Management.

ACF UPDATE - The ACF litigation arises out of the Army Corps of Engineers' operation of reservoirs in Georgia (e.g., Lake Lanier) for water supply and recreational uses (which are not the reservoirs' originally authorized purposes) cause reductions in flows in downstream states. The litigation has taken place in three federal district courts and two courts of appeals. In 1990, Alabama, later joined by Florida, sued the Corps, later joined by Georgia, in the Northern District of Alabama. That litigation was stayed for more than a decade while the three states attempted to reach agreement on how to share the waters of the Apalachicola Chattahoochee Flint river basin.[1] One condition of the stay was that the Corps would not enter into new water withdrawal contracts within the ACF without the permission of Alabama and Florida.

In 2003, the ACF Compact negotiations failed, largely due to the Corps' secret water supply agreement with Georgia, which was a settlement of litigation brought by hydropower customers against the Corps in D.C. District Court. Alabama and Florida intervened in the D.C. litigation in order to protest the settlement; Alabama and Florida also obtained a preliminary injunction from the N.D. Alabama court against the implementation of the settlement because the settlement by the Corps was a violation of the stay order. The D.C. District Court approved the settlement conditioned on the N.D. Alabama court lifting its injunction, and dismissed the case. Alabama and Florida appealed these orders to the D.C. Circuit, while Georgia and the Corps appealed the N.D. Alabama court's preliminary injunction to the Eleventh Circuit.

In the third district court case, Georgia sued the Corps in the Northern District of Georgia, claiming that water supply was an authorized purpose of Lake Lanier. That case was ultimately abated in favor of the N.D. Alabama case. Georgia also appealed the abatement order to the Eleventh Circuit.

The ACF litigation is now centered in the Northern District of Alabama where, over vigorous opposition from Georgia and the Corps, Florida and Alabama were allowed, in August 2005, to file amended complaints. The Corps answered those complaints (as well as complaints by intervenors), but Georgia and the Atlanta Regional Commission have (ARC) moved to dismiss or for more definite statement. Briefing on those motions is now complete.

In March 2005, the D.C. Circuit reversed the D.C. District Court's order of dismissal, holding that the case was not moot because the court's approval of the parties' settlement was contingent on the dissolution of Judge Bowdre's preliminary injunction, which, in February, Judge Bowdre had refused to do. On remand, Florida and Alabama moved to vacate the order approving the settlement as an advisory opinion. However, the case was stayed pending a final decision by the Eleventh Circuit on the validity of Judge Bowdre's injunction.

The Eleventh Circuit affirmed the Northern District of Georgia's abatement of the Georgia case pending resolution of the N.D. Alabama case. The Eleventh Circuit also rejected appellants' challenges to the jurisdiction of the N.D. Alabama court. However, the panel concluded that Judge Bowdre's injunction was an improper remedy for the violation of a stay order. Florida and Alabama moved for rehearing, en banc, on the grounds that the panel decision was inconsistent with recent Eleventh Circuit precedent concerning injunctions under the All Writs Act. Georgia and ARC also moved for rehearing as to the court's statement that Lake Lanier was not authorized for water supply. The Eleventh Circuit has denied all motions for rehearing, so it is most likely that the D.C. Circuit case will resume soon.

Endnotes:

[1] Alabama also negotiated to protect its interests in the Alabama Coosa Tallapoosa (ACT) river basin.

South Florida Water Management District

Florida Wildlife Federation and Sierra Club Inc. v. United States Army Corps of Engineers and Colonel Robert M. Carpenter — "The Scripps Case"

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

On September 30, 2005, the United States District Court for the Southern District of Florida (Court) issued an Order on the merits in response to Cross Motions for Summary Judgment in the case of *Florida Wildlife Federation v. U.S. Army Corps of Eng'rs*, No. 05-CV-80339, 18 Fla. L. Weekly Fed. D1001 (S.D. Fla. Sept. 30, 2005) (Order on Summary Judgment). The Order on Summary Judgment concluded that the Army Corps of Engineers (Corps) violated the National Environmental Policy Act (NEPA) by issuing a permit to Palm Beach County (County) for the Scripps Research Institute (Scripps) at the County-owned Mecca Farms site without adequate environmental review. In summary, the Court did not find that the project was unpermittable, but instead, concluded that additional evaluation was necessary. This article discusses the Order on Summary Judgment and the subsequent Order on Remedies. [*Florida Wildlife Federation v. U.S. Army Corps of Eng'rs*, No. 05-CV-80339, 19 Fla. L. Weekly Fed. D44 (S.D. Fla. Nov. 10, 2005) (Order on Remedies).

The entire Scripps site is 1,919 acres in size; the challenged permit was for a 535-acre portion of the site. There is a system of ditches on the property which are connected to a tributary of the Northwest Fork of the Loxahatchee River. These ditches are, therefore, considered Waters of the United States. The Complaint filed by the Florida Wildlife Federation and Sierra Club, Inc. (Plaintiffs) alleged that the Corps acted arbitrarily and capriciously by failing to consider the impact of the entire 1,919 Scripps development; the Corps segmented the project unlawfully to avoid a finding of significance; the Corps' environmental analysis failed to consider all environmental concerns; and, the Corps performed an inconsistent and insufficient alternatives analysis. (Order on Summary Judgment, p. 19) The Plaintiffs alleged that the Corps' action violated NEPA; the Clean Water Act and the Rivers and Harbors Act of 1899. The Plaintiffs requested that the Court find that the permit issued by the Corps was invalid and require the Corps to prepare an Environmental Impact Statement (EIS) that addressed the entire scope of the planned development.

The County asked that the Court find that the 535 acres could be reviewed independently from the remaining acres as well as any other potential impacts because the 535-acre project had independent utility and could be constructed solely without the need for the remaining development. (Order on Summary Judgment, p. 8)

The Corps argued that the proposed project "would not have a significant impact on the environment" because the issuance of the Section 404 permit was a "federal" action, but not necessarily a "major" federal action, triggering the requirements of NEPA. (Order on Summary Judgment, pp. 19, 20) Because the Corps found no significant impact, the Corps did not prepare an EIS and, instead, issued the permit. The Corps also determined that the public hearing requested in comments was not needed because all the issues raised during the comment process had been identified and resolved. The finding of no significant impact and the decision not to prepare an EIS was a final administrative decision reviewable under the Administrative Procedures Act. (Order on Summary Judgment, p. 11)

The Corps argued that it had properly limited the scope of its analysis to the aspects of the project over which it had sufficient "control and responsibility" to warrant federal review, in this case the 535 acres. The Corps further argued that the project had independent utility because it would be constructed without the need for the construction of other projects in the project area. The Corps acknowledged that it was aware of plans for future development; that it would have jurisdiction over the next phases of development; and, that it anticipated applications for those future phases. (Order on Summary Judgment, p. 22)

The Court found that the filling of wetlands in the ditches on the 535 acres was not discrete because the ditches ran throughout the site. (Order on Summary Judgment, p. 23) The "anti-segmentation rule," which holds that an agency cannot evade its responsibilities under NEPA by artificially dividing a major federal action into smaller components, was applied to find no significant impact. (Order on Summary Judgment, p. 23) The Order states that segmentation occurred in two ways: first, when the Corps limited its analysis to the 535 acres instead of the entire 1,919-acre site and, second, when the Corps authorized the extension of PGA Blvd. without considering its projected connection to the Bee Line Highway across wetlands. The Court found that ending an extension of PGA Blvd. in a cul-de-sac, as was proposed in the project design, was not a logical terminus. The Order stated that permitting the first part of the road without considering the future effects was an arbitrary and capricious determination that the project did not have any significant environmental impacts. (Order on Summary Judgment, p. 30)

The Corps argued that it only needed to consider the effects of cumulative actions that were already

proposed. It declined to consider planned future development. The Corps stated that it would evaluate the cumulative impacts of future potential development when applications are received. (Order on Summary Judgment, p. 49) The Court did not agree with this approach and found that the future development of at least the remainder of Mecca Farms was being actively pursued and thus was not speculative. The 1,919 acre site was not a series of projects but, instead, an integrated whole. Although the project had independent utility, it was not intended to stand alone. (Order on Summary Judgment, p. 52)

The Corps' rules require an analysis of alternative sites. In this case, five alternative locations were considered. The Corps considered the economic development of the entire 1,919 acre project in its alternatives analysis, not just the 535 acres in Phase I. The Court found that alternatives and benefits analysis did not match the scope of the impact analysis. The information the County submitted for the alternatives analysis stated that other identified sites did not meet the size requirements. The Court found that the scope of the alternatives analysis incorporated consideration of the entire project rather than limiting it to the scope of the proposal before the Corps, which was improper. The Court further found that since the alternatives analysis was not properly limited in scope, the Court could not ascertain whether environmental considerations were adequately addressed. (Order on Summary Judgment, pp. 57-59)

After ruling in the Plaintiffs' favor on the Motion for Summary Judgment, the Court directed the parties to file memoranda on remedies. On November 10, 2005, the Court entered its ruling on those remedies. [*Florida Wildlife Federation v. U.S. Army Corps of Eng'rs*, 18 Fla. L. Weekly Fed. D1015 (S.D. Fla. Nov. 10, 2005)] The Plaintiffs' Memorandum on Remedies requested that the Court set aside the Corps' permit; order the Corps to perform an EIS that took into account the effects of all reasonably foreseeable impacts identified in the Court's September 30, 2005, Order or the administrative record; and enjoin all development of the project pending completion of the environmental review. The Corps, the County and Scripps asked the Court to remand the matter to the Corps for further consideration in light of the Court's Order and to take no further action.

The Corps, the County and Scripps contended that the Court did not have jurisdiction to enjoin the County or Scripps because the action was against the Corps only for violations of NEPA, a federal statute that only requires compliance by the Corps. The County and Scripps were not named as defendants in the case and were heard only as *Amici Curiae* during the merit phase of the litigation and were only granted intervener status during the remedial phase. (Order on Remedies, p. 12)

While injunctions are generally issued only against a party, a court has the power to enjoin third parties but only under limited circumstances and when necessary to ensure the effectiveness of its orders. [28 U.S.C. s1651(a)] (Order on Remedies, p. 13) In this case, the Court found that while no cause of action had been asserted against the County or Scripps, injunctive relief was necessary in order to give effect to the Court's September 30, 2005, ruling. (Order on Remedies, p. 15) The Court found that the Plaintiffs had suffered irreparable injury, not just the harm from the direct dredging and filling of wetlands, but also the harm that arose from allowing the Corps to permit a large "growth-inducing" development in an environmentally sensitive area without first considering all the "reasonably foreseeable indirect and cumulative effects of such action." (Order on Remedies, p. 17)

The Court found that if construction was not enjoined "these as yet unexamined effects would begin to take place and no amount of subsequent environmental analysis would undo them." (Order on Remedies, p. 17) Since injunctive relief is not mandatory under NEPA, the Court balanced various equitable factors to determine whether an injunction was appropriate in this instance. An injunction may be granted if the moving party has prevailed on the merits and demonstrated that irreparable injury will be suffered unless the injunction issues; that the threatened injury to the movant outweighs any damage the injunction may cause to the opposing party; and the issuance of an injunction would not be adverse to the public interest. Once this has been shown, then the Plaintiffs have the burden of demonstrating that the harm from continued construction outweighed the harm to the party that would be enjoined.

The Court found that equity weighed in the County's and Scripps' favor as to certain components of the construction plan and therefore elected to exclude those components from the scope of the injunction. First, the jurisdictional wetlands on the 40-acre site where the 3 buildings will be constructed were filled before the action was filed. Second, when Scripps received the land, Scripps was not itself required to obtain any federal permits to initiate construction. Third, Scripps has a $5 million gift which requires permanent facilities be constructed on the 44-acre site within the current construction schedule. (Order on Remedies, p. 24)

Judge Middlebrooks found that the facts weighed against enjoining Scripps' construction of its 3 buildings and that this limited construction would not be adverse to the public interest. The Court found that carefully tailored injunctive relief could allow some construction while still ensuring a "full and fair environmental review." (Order on Remedies, p. 24) All construction was enjoined with the exception of the 3 buildings, the completion of Seminole Pratt-Whitney Road which was more than forty percent complete, the construction of a pipeline which will also serve other facilities, and mitigation designed to compensate for the harm caused by dredging and filling of jurisdictional wetlands. Finally, the matter was remanded to the Corps for reconsideration in light of the Court's September 30, 2005, Order.

Southwest Florida Water Management District

by Karen A. Lloyd, Assistant General Counsel

Atlantic Multidecadal Oscillation and Minimum Flows and Levels

Dr. Marty Kelly, Manager of the District's Ecological Section, has produced an important report titled "Florida River Flows and Patterns and the Atlantic Multidicadal Oscillation" (the "Report"). The Report was peer reviewed by an independent panel of experts that stated:

> *"Overall, we find the arguments in the report persuasive, the methods sound, and the conclusions well founded. We find no serious scientific flaws or technical errors in the work.* ***The results have profound implications for water management****, especially the establishment of instream flows (Minimum Flows and Levels, abbreviated MFLs) and water allocation and, for our understanding of the hydrology and long-term ecosystem dynamics of Florida's river."*

> *"In our opinion, this work represents one of the more important contributions to hydrologic science in Florida (and perhaps elsewhere) in the past several decades…"*

The Report is divided into three sections. It begins with a discussion of river flow patterns throughout Florida, showing a south to north difference in the timing or seasonality of flows. It then discusses changes in stream flow due to differences in rainfall as influenced by the Atlantic Multidecadal oscillation (AM)) showing how this causes a significant multidecadal south to north difference in river flow volumes across Florida. Finally, it discusses significant differences in flows for a select number of sites within the District with an emphasis on how climate and anthropogenic factors may have affected these river flows. The report can be found at *www.watermatters.org* under the Documents and Publications link.

This work is now reflected in the District's establishment of Minimum Flows for rivers.

Minimum Flows for the Alafia and Myakka

On December 1, 2005, the Governing Board approved Minimum Flows for the upper segment of the Myakka River, from Myakka City to SR 72, and the freshwater segment of the Alafia River at the USGS Lithia Gage. As is described more fully under the middle Peace River Minimum Flows, below, the District proposes to establish Minimum Flows based on three blocks - seasonal low, medium and high flow periods. Short-term and long-term compliance standards are also proposed for the Minimum Flows.

The methodology that was used to establish the proposed Minimum Flows was submitted to peer review. The peer review panel found particular merit with, and endorsed strongly, several concepts that were incorporated in the Alafia and Myakka River MFLs. These include:

1. Identifying **benchmark periods,** based on different phases of the Atlantic Multidecadal Oscillation (AMO), for identifying the most protective minimum flows

2. Applying **multiple, independent approaches** to identify the most protective minimum flows in each seasonal block, including fish passage depth, wetted perimeter inflection points, habitat availability for several fish species, macroinvertebrate diversity and changes in the number of days of inundation of floodplain features.

3. Specifying minimum flows in terms of allowable **percent flow reductions** that vary by season and flow conditions.

Middle Peace River – Adoption of Minimum Flows

On October 25, 2005, the Governing Board approved Minimum Flows for the middle Peace River. No petitions for hearing were filed. The Minimum Flows will become effective in February 2006. The middle Peace River extends from Zolfo to Arcadia. The actual flows in the middle Peace River are meeting the minimum flow standards. Water withdrawals now cannot interfere with the maintenance of the Minimum Flows.

Minimum Flows for the middle Peace River are seasonal and flow

dependent. Two standards are flow based and are applied continuously regardless of the season. The first is a Minimum Low Flow threshold of 67 cfs at the Arcadia Gage. The second is a Minimum High Flow threshold of 1,362 cfs at the Arcadia Gage. The Minimum High Flow is based on changes in the number of days of inundation of floodplain features. There are also three seasonally dependent or Block specific Minimum Flows. The Block 1 (which runs from April 20 through June 25) and Block 2 (which runs from October 27 of one year to April 19 of the next) Minimum Flows are based on potential changes in habitat availability for fish species and macroinvertebrate diversity. The Block 3 (which runs from June 26 to October 27) Minimum Flow is based on changes in the number of days of connection with floodplain features.

Water Shortage Rules, 40D-21, F.A.C., Approved by Governing Board

On October 25, 2005, the District's governing board approved amendments to Chapter 40D-21, F.A.C. that substantially rewrite the District's Water Shortage Plan required by Section 373.246, F.S., and incorporate the water shortage measures authorized by Section 373.175, F.S. All persons and operations that are supplied water by a private well or a utility system are covered by the Water Shortage Plan. The changes will be effective in February 2006.

The District's water shortage plan was first adopted in 1984. Since that time the District has gained extensive experience in managing water shortages. The proposed amendments reflect that experience and knowledge gained as a result of the droughts and other water shortage events that have occurred since 1984.

The proposed amendments include:

Part I includes updated definitions and new definitions.

Part II describes the District's overall program of monitoring conditions in anticipation of and during a Water Shortage. Part II also identifies and quantifies the factors that the District will consider in declaring or rescinding a Water Shortage. These indicators include regional rainfall, average stream flow, the Aquifer Resource Indicator, the CPC Predictions, the Palmer Drought index, the 6-month Standard Precipitation Index, and the Weekly U.S. Drought Monitor. The rules include a method for expressing the severity of a Water Shortage in terms of four Water Shortage phases and procedures for implementing a Water Shortage declaration. The four phases are Phase I, Moderate Water Shortage, Phase II Severe Water Shortage, Phase III Extreme Water Shortage, and Phase IV Critical Water Shortage. Other factors have been modified to assure compliance with new requirements of the Florida Department of Environmental Protection set out in Chapter 62-40, Water Resource Implementation Rule, F.A.C.

Part III establishes the procedures for declaring and implementing a Water Shortage Emergency when the provisions of Part II are not sufficient to protect the water resource and its users.

Part IV describes how the District, in conjunction with local governmental entities and law enforcement officials, will enforce the provisions of a declared Water Shortage or Water Shortage Emergency. The proposed rules include clarification of local enforcement and planning responsibilities regarding violations of the Water Shortage Plan and preparation for water shortage events. A new incentive, referred to as a "water shortage mitigation plan," is now included in the Plan. Under the Plan, local water suppliers are given the option to submit a water shortage mitigation plan to the District for approval. The plan is customize for the local water supplier's system and may be implemented in lieu of selected provisions of the Water Shortage Plan.

Part V classifies each user according to the source of water supply, type of water use and method of withdrawal. These classifications are utilized in conjunction with parts I, II, III and VI. The use classifications include Indoor Uses, Essential Uses, Commercial and Industrial Uses, Agricultural Uses, Landscape Uses, Cemeteries, Golf Courses, Driving Ranges and Other Athletic Play Areas.

Part VI presents water use restrictions and other response mechanisms for each Water Shortage Phase and Water Use Class. Various combinations of these response mechanisms may be used by the District to achieve the desired effect during any phase of a Water Shortage or a Water Shortage Emergency. Voluntary water use reduction goals of 5, 10 and 20% for Phases II, III and IV, are included to aid public notice efforts and to engage the public in necessary demand reduction.

The Governing Board may order extensive rewording of the Phases I and II measures and response mechanisms to manage the water shortage, especially Lawn and Landscape irrigation provisions. The proposed rules add a fourth phase to address a Critical Water Shortage.

The type of notice, method of delivery and the recipients of a notice of Water Shortage has been updated. In addition, notice must be mailed to fire and rescue agencies in addition to the public, water use permittees and local governments to alert those agencies of water resource conditions so that they may better coordinated water use activities with the District.

The response mechanisms have been enhanced with science-based enhancements, such as: seasonal shifts in lawn watering days, use of property size to determine watering hours, and a revised establishment period for new plants.

The Water Use Permit "conservation credits" approach within the Southern Water Use Caution Area is an alternative to traditional restrictions for non-mulched crops and is included in the Phase II, III and IV response mechanisms.

A copy of the draft of proposed amendments and supplemental material are available from the District's website *www.watermatters.org*.

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

The District is nearing completion of rule development for the SWUCA Minimum Flows and Levels and the regulatory portion of the recovery strategy that will address water resource issues related to salt water intrusion, the upper Peace River flows and Lake Wales Ridge lake levels. The Board set December 9, 2005 as the deadline for comments on the October 3, 2005 draft rules. The Board is targeting the February 2006 Board meeting for approval of the draft rules. The current draft rules are on the District's website at www.swfwmd.state.fl.us/waterman/swuca/SWUCA.htm.

tive and Methods to relieve the Environmental Issue

Significant roadblocks are imposed on a local government's ability to protect its environment and its citizens' quality of life by using local pollution control ordinances to address agricultural pollution. Ironically, the safe harbor given to agriculture from regulatory measures at the local level seems to conflict with concepts found in the seminal zoning case, *Euclid, Ohio v. Ambler Realty Company*. In *Euclid*, the Supreme Court established that the Village of Euclid may justify the validity of its ordinance regulating the locations of commercial and residential land uses, and "all similar laws and regulations," through the use of its police power[158] to protect the health, safety and welfare of its citizens. The Court elaborated on this use of the police power, pointing out that the decision to declare an object or an activity a nuisance should be based "not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances of the locality."[159] Under *Euclid*, it stands to reason that if a municipality adopts a land development regulation that is designed to preserve open space on the basis of its police power, then it should also be able to use its police power to regulate uses, such as regulating the amount of fertilizer that a farmer applies to row crops that are in close proximity to a surface water body.

As discussed, Florida's Growth Management Act encourages the preservation of agriculture, premised on its natural and cultural significance,[160] and prevents subsequent environmental regulations from being imposed on agriculture operations.[161] Some tools that could aid a local government's ability to regulate agriculture and reap the benefits of a farm's open space include, but are not limited to, Areas of Critical State Concern (ACSC), location, agricultural zoning, agricultural districts, clustering, transferable development rights, and conservation easements.

1. Areas of Critical State Concern. The DCA is permitted "from time to time" to designate certain areas of land as areas of critical state concern.[162] ACSC designation is applicable to areas that are facing unique challenges in the form of growth management and development,[163] such as a community that wishes to maintain the character and protect the environment of its agriculturally zoned land. The purpose of ACSC designation in a discrete geographic area is as follows:

> to protect the natural resources and environment of this state as provided in s. 7, Art II of the State Constitution, ensure a water management system that will reverse the deterioration of water quality and provide optimum utilization of our limited water resources, facilitate orderly and well-planned development, and protect the health, welfare, safety, and quality of life of the residents of this state.[164]

ACSC designation increases the level of state regulatory oversight of land use decisions within the limits of the ACSC[165] and deemed to be of regional significance.[166] Conceivably, agricultural lands that a local government targets to preserve open space could be designated an ACSC if that land had attributes that are considered to be environmentally significant, such as a farm located on land that is a groundwater recharge or a wilderness area.[167]

After land is designated an ACSC, a list of state agencies is developed that have programs that are relevant to the area's designation.[168] DCA then must coordinate and recommend actions that the local government and state agency must take to guide development within the area so that it is consistent with the basis for the ACSC designation and avoids the dangers that could result from uncontrolled development of the area.[169] The eligibility requirements for ACSC designation that would be relevant to agricultural operations include "an area containing, or having a significant impact upon, environmental or natural resources of regional or statewide importance;[170] or an area containing, or having a significant impact upon historical resources."[171] Florida's Growth Management Act and its State Comprehensive Plan refer to agriculture as significant to Florida's cultural and natural resources.[172]

For instance, a large number of farming operations, such as dairy and poultry farms, exist in the Suwannee River Basin of North Central Florida, which is known to be a high recharge area for the Floridan aquifer[173] and an area with pristine spring fed surface waters. If a town in the Suwannee River Basin identified areas around it where it wanted to preserve open space through agriculture use, the town could seek ACSC designation based on the recharge characteristics of the Floridan aquifer and the threat that farming operations in the designated area could pose to the Floridan aquifer. Because of this land's environmental significance, an ACSC designation would impose on certain state agencies, such as the DEP and DACS, The obligation to insure that nutrients, in the form of animal waste or fertilizer, are applied to row crops and spray fields at rates that insure that the Floridan Aquifer and the community's ground water resources remain unpolluted by nitrogen,[174] or to impose regulations that would prevent the erosion of soils from denuded or recently harvested fields, that could choke a nearby surface water body with sediment. ACSC designation could also trigger environmental regulations that would help a town preserve open space through farmland without sacrificing its water resources.

ACSC designation is not intended to be permanent,[175] nor is it intended to act as a moratorium on a community's desired path of development.[176] Instead, it is supposed to be a tool that introduces additional layers of regulatory oversight over activities conducted within its boundaries. However, there are limitations to the use of the tool, such as the problems that arise when a municipality wants to remove an ACSC designation or remove property from ACSC designation.[177] Section 380.05, Florida Statute, was revised, as a response to the problems that arise with the removal of an ACSC designation, to insure "prompt elimination of the State role."[178]

While there are no instances where land was designated as an ACSC because of its open space and agricultural attributes, there is noth-

ing in the statute that would preclude using such a designation as a means of serving interests that go beyond its original purpose. For example, a specified area in the Suwannee River Basin as ASCS could be designated based on protection of the Floridan aquifer from agricultural pollutants, even though a municipality's core interest in the designation would be the preservation of open space through agriculture as well as gaining environmental regulatory protections beyond that available without ACSC designation. This is significant, because Section 380.05(2)(a), Florida Statutes, was challenged successfully in *Askew v. Cross Keys Waterways* because overly broad criteria were used to designate an area an ACSC.[179] In 1979, Section 380.05(2), Florida Statutes, was amended to narrow the scope of these criteria; however the plain language of the statute could still be construed as all encompassing.[180] It would seem beneficial, therefore, to identify a specific reason, such as aquifer recharge, as the basis for the designation, as opposed to relying on the expansive criteria of the statute. The most definitive requirement in the statute is the requirement that the designated area not exceed more than five percent of the state's land.[181]

The use of ACSC to address the environmental pitfalls that can arise when agriculture uses are used to preserve open space is attractive for several reasons: 1) the definitive steps for ACSC de-designation, eventually removing the government's presence, should appease powerful agricultural interests' known distaste for government regulations or "command and control regulation;"[182] 2) the importance placed on ACSC de-designation also promotes a program that would allow an affected landowner, such as a farmer, to assimilate the regulatory requirements that would be triggered by ACSC designation into his operations, while knowing that the high costs associated with proving ongoing compliance are finite; 3) numerous agricultural entities are found in areas recognized by the FDEP and Water Management Districts as groundwater recharge areas;[183] and 4) the Florida Legislature refers to agriculture in its zoning and non-zoning statutes in a manner that comports with Section 380.05, Florida Statutes.

2. Location of Farming Operations

An additional matter that can reduce the potential for environmental degradation to occur as a result of the preservation of open space through agriculture is a heightened degree of attention to the physical attributes of the land targeted for open space preservation and farming. From an environmental perspective, some land is better suited for farming than others.[184] Communities striving to preserve open space through agriculture use should consider the location of farmland that will best assimilate the strains that agriculture can place on the local environment and target those areas for open space and farming.[185]

Some issues that should be considered when determining what and where farmland that will put the least strain on a local environment should be located includes: i) soil chemistry, which could lessen the amount of fertilizer that the farmer must apply to his fields, thereby decreasing cost and the potential for the contamination of ground and surface waters;[186] ii) soil drainage, which affects the amount of agricultural or storm water runoff, and thus the amount of non-point source pollution, and the extent to which soils will naturally treat wastewater that is applied to a field before percolating into the local aquifer;[187] iii) topography, which could affect the rate at which soils are eroded from denuded or recently harvested fields;[188] iv) locations of nearby surface waters, which may be the receiving bodies for storm water runoff or the migration of contaminated groundwater;[189] and v) the location and the condition of the ambient groundwater table, which will affect the degree to which groundwater becomes contaminated and the quantity of fresh water that will be available to the farmer.[190]

a. Sliding Scale. One zoning technique that can be applied to agriculture which considers the physical attributes of land is sliding scale zoning from a qualitative standpoint.[191] For instance, development would be promoted on lands with soil qualities that are not conducive to farming, and development would be prohibited on lands with naturally fertile soils.[192] This would reduce the amount of fertilizer that is needed for the production of crops in areas targeted for open space and farming. The sliding scale concept could also be applied to natural resources and environmental concerns from the farmer's and public's perspectives. Attention could be directed towards a variety of physical attributes of the land including: locations of naturally fertile soils, groundwater with features that are conducive to high rates of withdrawal and natural protections, topography best suited for farming, locations of surface water bodies, vertical distance between the ground surface and groundwater, or even features of the land that are conducive to harnessing the migration of nuisance type odors.

b. Cluster Zoning. Cluster zoning is useful in the protection of environmentally sensitive areas because it delineates those areas within a parcel of land that are to be used for development of those areas that are to be used for open space.[193] The environmentally sensitive areas of the parcel are identified and the locations of land uses are designated accordingly. Agricultural use is a recognized land use in areas zoned for cluster development.[194] Cluster zoning could be likened to a sliding scale concept, except that the sliding scale method would not include residential development in the same or common parcel.[195]

Cluster zoning is not used widely due, in part, to the question of its effectiveness since it tends to result in clustered urban sprawl.[196] In addition, clustering is not amenable to large scale or "factory style" farming primarily because areas intended for open space and agriculture are usually leased to the farmer by homeowners associations and it is the association's members who often object to the environmental nuisance type conditions associated with larger farming operations.[197] Clustering could be effective when a community is willing to specify the location for residential development and limit the maximum lot size to less than one acre, resulting in a "compact hamlet or village configuration."[198] Theoreti-

continued...

cally, this strategy maximizes the number of inhabitants in a small area, leaving larger areas available for open space and providing a larger buffer zone for a viable farming operation without upsetting the local environment.[199]

B. The Economic Objective, Takings, Land Use Methods to Achieve the Economic Objective

1. The Family Farm and Critical Mass. When decisions on whether agriculture should be used as a tool to preserve open space are made by planners and local officials, the economic realities of farming should be balanced with the actual goals and objectives of the non-farming interests.[200] For example, one trend that arises out of the realities of economic survival is the transformation of large numbers of small family farms at and beyond the urban fringe to smaller numbers of "factory style" farms that specialize in producing product at maximum rates and in industrial quantities.[201] It is becoming increasingly difficult for smaller farms to survive because of the dropping prices of commodities and the rising costs of production.[202]

Smaller family farms are more consistent with Florida's Growth Management Laws than "factory style" farms.[203] Authorities must consider the "critical mass" concept — where the relationship between small farms and the necessary uses needed to support small farms – such as mechanics, retail feed and fertilizer facilities, and farm supply centers – are all in close proximity to each other – in order for the smaller farm to survive.[204] These supporting uses and the small farm need one another to survive economically.[205]

2. Takings Challenges. Not only is economic viability of a farm dependent upon the farming and non-farming parties supporting the relegation of land to agriculture, but some economic use of the land is necessary to stave off fifth amendment takings claims that may occur after a local government decides to downzone an area to agricultural use for the purpose of maintaining open space.[206]

The threshold for economic viability is poorly defined in the case law. The Supreme Court in *Penn Central Transportation Co. v. City of New York* opted to make a case by case inquiry on the question of when a regulation requires that "economic injuries caused by public action be compensated by government."[207] The Court applied three factors that are to be considered when determining whether governmental action constitutes a taking: 1) the economic impact of the regulation on the claimant; 2) the regulation's interference with investment backed expectations; and 3) the character of the government action.[208] It is conceivable that a farmer's could challenge a land use ordinance designed to preserve open space as a taking because it would interfere with the farmer's investment backed expectation of retiring on the proceeds received from the sale of his farm to a developer. In *Penn Central*, the court held that since the City's landmark ordinance did not entirely preclude the plaintiff's profitable use of the property or "investment backed expectation," the ordinance did not constitute a taking.[209]

In *City of Miami Beach v. Zorovich*, the plaintiffs challenged the City's zoning classification because it prevented them from constructing a motel in a neighborhood with two other motels and a high rise apartment building. The Court held that a landowner did not have a constitutional entitlement to make the "highest and best use of his land," thus invalidating a zoning ordinance.[210] An attack on a zoning ordinance will only be sustained upon a showing of "complete deprivation," preventing all uses of the property.[211] In *Zorovich*, the fact that a residential dwelling was permitted, albeit less profitable, was fatal to his claim.

The dissent in *Lucas v. South Carolina* points out the unfairness of this "all or nothing" approach and criticized the lack of any quantification of economic value that is considered in a takings challenge. Justice Blackmun's dissent indicates that compensation for the taking of all economic use is not consistent with the lack of compensation for a taking of a percentage of economic use.[212] Under Justice Blackmun's view, a farmer could be entitled to compensation equal to the difference between the value of the farm as an agricultural operation and the value of the farm from a development perspective. The *Lucas* dissent is significant for farmers because the difference between the value of a farmer's land for agricultural purposes and its value for development purposes is usually substantial, making the *Zorovich* situation seem insignificant in comparison.

Despite these challenges, the use of agricultural zoning to preserve open space through the preservation of farmland is usually upheld.[213]

3. Agricultural Districts and Agricultural Zoning. Agricultural districts help maintain the economic viability of farming because they set aside areas of farmland large enough to sustain farming operations sufficient to support nearby support uses needed for the affordable operation of a farm.[214] Agricultural districting addresses the critical mass issue by encouraging and enabling the existence of the agricultural support industries. It also aids in preserving a population that will be more likely to act as a cohesive political force with common goals,[215] as opposed to a segmented population with opposing priorities, whether they are founded on the importance of preserving farmland for the purpose of open space or the importance of preserving farmland for the purpose of growing crops or raising livestock.

Agricultural zoning differs from agricultural districting, in that agricultural zoning deals with specific land uses and is a zoning tool that can be used within an agricultural district.[216] Agricultural districting generally provides an entire cache of zoning and non-zoning tools, such as tax benefits and right to farm statutes, designed to protect farmers from common law lawsuits under certain conditions.[217]

C. Low Monetary Cost and Benefits to the Public

Preserving open space through agriculture use at no cost to the public is ideal, but at the same time this may be difficult because it may be inequitable to ask farmers to cater to

a public purpose without compensation.[218] The least expensive techniques available to local governments are agricultural zoning ordinances and transfer of development rights.[219]

1. Agricultural Zoning Ordinances. Agricultural zoning ordinances – such as exclusive agricultural zoning, area based zoning, large lot zoning, and cluster zoning – are the simplest and least expensive means of preserving open space through agriculture.[220] They are not voluntary and they do not rely on financial incentives for their implementation.[221] Agricultural zoning strives to eliminate incompatible uses of the land and maintain the area's rural character.[222] Its effectiveness in the preservation of open space is born out by the fact property values are kept low through the enforcement of restrictions on development.[223]

The down side to agricultural zoning ordinances, as with many ordinances, is the fact that it is susceptibility to changes based on the political ideology of government leaders.[224] Furthermore, while agricultural zoning has a low cost for the public, that benefit comes at the expense of the farmer who generally sees a loss in the value of his property as a result of the agricultural zoning.[225]

In turn, the use of agricultural zoning poses a greater risk of exposing the taxpayers to a potentially costly defense of Fifth Amendment takings claims and puts local governments on the constant defense of requests for variances or re-zonings which risk undermining the original purpose of the agricultural zoning ordinance and the credibility of a municipality's comprehensive plan.

2. Transferable Development Rights. Transferable Development Rights (TDRs) can be used to preserve open space and agriculture because the cost of preservation is sustained by private land speculators.[226] A TDR program establishes sending and receiving areas which are targeted, respectively, for preservation and development.[227] For instance, a farmer in a sending or preservation area would be barred from developing his land and, in return, would receive development rights that could be sold or used in a receiving or development area.[228]

TDRs are similar to cluster development. However, cluster development locates development and agriculture on the same parcel of land, whereas the locations of preservation and development areas in TDRs can be substantially removed from one another. TDRs are not as effective as cluster development in the protection of the environment from agricultural pollution, however sending areas in a TDR are more likely suited for large scale farming operations.

Although the Florida Legislature encourages TDRs and refers to them as "innovative land development regulations,"[229] TDRs are not widely used. One problem with TDRs is that the locations of sending areas are largely speculative if there is no urban area where development rights can be used or any available buyer to acquire the development right. The lack of marketability and resale value is common and gives rise to legal challenges based on takings and due process by landowners in receiving areas.[230] TDRs could be a viable tool if the legislature were to create a receiving market, such as a development rights bank that would purchase the development right prior to the availability of the market.[231] Such a proposition, however, increases the expense imposed on taxpayers.

Florida Courts have ruled in favor of TDR programs in response to takings challenges. In *Hollywood v. Hollywood, Inc*., the Court upheld the down zoning of the plaintiff's property because it was reasonably related to a legitimate public purpose.[232] *Glisson v. Alachua County*, concerned TDRs and other land use regulations that were passed in accordance with the Growth Management Act. The Court held that the inclusion of land development regulations in a comprehensive plan, as a pretext to avoiding a facial takings challenge, did not render the TDR or plan "confiscatory."[233]

VIII. The Solution in Effectively Using Agriculture to Preserve Open Space

The economic and environmental objectives that are relevant to preserve open space successfully through agriculture will always be connected. The objective of instilling environmental stewardship into agriculture use is a critical challenge, primarily because a clean environment is expensive[234] and reversing longstanding government protections of agriculture will be difficult politically.[235] "The legacy of safe harbor…will haunt us relentlessly."[236] The solution will vary depending on whether safe harbor is lifted or remains in place.

A. Safe Harbor Lifted

The benefit of imposing effective environmental regulations on agriculture uses is obvious.[237] The most logical regulatory tool to be used to impose environmental regulations on agricultural use is the Clean Water Act.[238] Measures could be taken to expand the scope of agricultural activities that are deemed point sources and thus required to meet NPDES permitting requirements beyond the large livestock operations (CAFOS) that are currently subject to those requirements.[239] In Florida, the legality of imposing NPDES permitting requirements on large animal feeding operations (CAFOS) has been upheld and, at least the Second Circuit has directed the state to expand NPDES permitting to all animal feeding operations.[240] There is no indication that these requirements could not be applied to crop based and livestock agricultural operations across the board, beginning with nutrient management initiatives and reporting requirements for the discharge of chemicals and effluent. In addition, TMDL initiatives designed to protect the ambient quality of surface waters and Section 404 wetlands permitting programs could be imposed on agriculture to a greater extent.[241]

An alternative to imposing the costs of environmental compliance on the farmer would be to shift the financial burden of compliance to the sources of the constituents that make up the pollutants emanating from agricultural operations.[242] This could be accomplished by implementing a system that forces chemical manufacturers and wholesale distributors of fertilizers, herbicides, and pesticides to place strict limitations on the amount of chemicals sold to the individual farmer, based on the physical attributes of his particular operation.[243]

continued...

B. Safe Harbor Remains

If agricultural interests maintain a degree of safe harbor from environmental regulations, then the use of agriculture to preserve open space as an attractive growth management tool will entail a form of environmental bribery or "green payments,"[244] combined with a program of sliding scale zoning that takes into account the interests of the farming and non-farming communities.

Germany has successfully preserved eighty-four percent of its country for agricultural and forestry purposes[245] despite a population density that is "eight times greater than that of the United States."[246] Germany's strategies include a variety of zoning and non-zoning approaches, many of which are similar to those techniques used in the United States.[247] Two general differences from those employed in the US are: 1) the German mentality that private property should be widely accessible to the public for relaxation recreational purposes,[248] and 2) the higher degree of incentives that Germany gives its farmers to reduce agricultural pollution.[249] In Germany, farmers can receive money in exchange for implementing measures that will reduce the burden on the environment.[250] These measures are directed at less intensive uses of the land, and range from a regulated crop and livestock rotation program to a temporary cessation of farming altogether.[251]

A US program that would preserve open space through agriculture could use some available tools such as ACSC, when environmentally sensitive areas are at risk, along with the aspects of the selected techniques used in Germany, such as payment to manage a farm's environmental impact better and a more open mentality with regards to public access to private lands.

Local governments may need to merge concepts of heritage, culture, recreation, and relaxation, with a pristine environment in order to implement a program that pays American farmers to ignore profitable opportunities or temporarily shut down an operation for environmental reasons.[252] In return for a local tax that could be construed as "polluter gets paid," local taxpayers could be permitted to enter and utilize the private agricultural land for recreational purposes. The public will be more likely to support the imposition of a tax earmarked for enticing farmers to preserve open space with minimal pollution, if it is receiving a tangible benefit beyond a clean environment. Those that associate agriculture with pollution or place a high importance on a clean environment may be in a minority, particularly in a community with agricultural interests, so the funding of the payment for farmers must be founded on a wide range of principles.[253] Furthermore, economic studies have demonstrated that dollar for dollar, the cost-benefit ratio to the public of earmarking land for open space far outweighs the monetary benefits of using the same land for development purposes.[254] The public will respect and support initiatives that are shown to ultimately benefit their bank accounts.

The farmers should uphold their end of the bargain by adopting measures that do not require expensive methods of determining compliance or effectiveness. For instance, in Florida certain agricultural operations adhere to best management practices (BMPs),[255] which are intended to reduce the discharge of pollutants from agricultural operations. State and federal legislation have mentioned BMPs for years. However, based on the current ambient quality of waters of the state in Florida, BMPs appear to fall short when it comes to meeting meaningful environmental objectives.[256] Agricultural BMP directives in Florida have no means of measuring effectiveness reliably, such as through reporting requirements, compliance monitoring or enforcement mechanisms.

Measures that will show immediate results include sophisticated programs of sliding scale zoning, crop and livestock rotation, and selected venues for pulsated or permanent reductions in the intensity of farming. Sliding scale zoning could direct planners and farmers to consider the physical features of the land and the types of farming operations, from a social and scientific perspective, that are most appropriate for use in an area. Authorities could site farms better based on intensity. A less intensive or organic farm that nets a higher profit for its product could operate viably year round in close proximity to residential areas, on more expensive land, or near environmentally sensitive land features. A more intensive operation should be staged further away from residential and environmentally sensitive areas and could be targeted for more regular rotations of crops of livestock or breaks in its operation.

Local governments cannot rely on state and federal authorities to protect their environment following planning decisions. If local authorities can teach the public that open space should be pristine and that it will be costly, then open space preservation through agriculture use can be achieved through zoning and land use tools.

Conclusion

The scenes of silos, cows in a pasture, and endless rows of corn rightfully bring feelings of serenity to the rural and urban resident. There is no argument that society as a whole, is better off with pastures than pavement. Florida's growth management statutes and policies have good intentions in their efforts to advance agriculture and open space. However, legislators and much of society has treated agriculture as a benign entity.

Agriculture was left behind during the first generation of environmental regulations in the 1970s, when legislation such as the Clean Water Act helped cleanse industrial pollution. The CWA has always acknowledged the unseen forms of contamination, such as non-point source and groundwater pollution. However, planners, legislators, and society as a whole are slow to react to forces that do not trigger the human senses immediately. A lack of focus on the less obvious forms of pollution (non-point source and groundwater) may have contributed to the indestructible culture of safe harbor for farming, allowing agriculture to enjoy exemptions from regulations that other industries have now assimilated into their bottom line. It is the invisible forms of pollution that will destroy

natural resources if society does not demand that authorities control growth management and preserve open space with a broader perspective of the potential sources of pollution.

ENDNOTES

[158] *Eucid Ohio v. Ambler Realty*, 272 US 365, 387 (1926).
[159] Id., at 388.
[160] FLA. STAT. § 163.3162(1) (LexiNexis 2005).
[161] FLA. STAT. § 163.3162(4) (LexiNexis 2005).
[162] FLA. STAT. § 380.05(1)(a) (LexiNexis 2005).
[163] David Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U.L. REV, 223, 233 (1993).
[164] Olexa, supra, note 118, quoting FLA. STAT. § 380.05(1)(a), (LexiNexis 2005).
[165] FLA. STAT. § 380.05(1)(a) (LexiNexis 2005).
[166] Powell, supra, note 161 at 333.
[167] FLA. STAT. § 380.05(2)(a) (LexiNexis 2005).
[168] FLA. STAT. § 380.05(1)(a) (LexiNexis 2005).
[169] FLA. STAT. § 380.05(1)(a) (LexiNexis 2005).
[170] FLA. STAT. § 380.05(2)(a) (LexiNexis 2005).
[171] FLA. STAT. § 380.05(2)(b) (LexiNexis 2005).
[172] FLA. STAT. §§ 380.05(2), 187.201(22) (LexiNexis 2005).
[173] *Issues, Florida Chapter Agriculture*, Sierra Club Chapter site, at 2 (2005) available at: http://florida.sierraclub.org/Agriculture.asp.
[174] The Floridan aquifer is a source of groundwater used by many Floridians as a primary source of water. In some parts of the State, the Floridan Aquifer is unconfined in that it has no natural source of protection such as a clay layer. In areas where the Floridan aquifer is unconfined, it is recharged (replenished) directly by precipitation, and it is more susceptible than areas where the Floridan Aquifer is confined or semi-confined (clay layer present), to contaminants that are placed on the ground surface.
[175] FLA. STAT. § 380.05(1)(b)(3) (LexiNexis 2005).
[176] FLA. STAT. § 380.05(1)(b) (LexiNexis 2005).
[177] Powell, supra, note 161 at 335.
[178] Id., quoting note 687.
[179] *Askew v. Cross Keys Waterways*, 372 So.2d 913, 919 (Fla. 1978)
[180] FLA. STAT. §§ 380.05(2)(a), (b) (LexiNexis 2005).
[181] FLA. STAT. §§ 380.05(2) (LexiNexis 2005).
[182] Zaring, supra, note 4, at 523.
[183] supra, note 171 at 2.
[184] Paster, supra, note 1 at 284.
[185] Id.
[186] Supra, note 129, at 5-7 through 5-12.
[187] Id.
[188] Supra, note 129, at 8-1 through 8-4.
[189] Id.
[190] Supra, note 129, at 7-15 through 7-17.
[191] Paster, supra, note 1, at 293.
[192] Id.
[193] Id, at 294.
[194] Id. at 295.
[195] Id.
[196] Id at 296.
[197] Id.
[198] Randall Arendt, *Basing Cluster Techniques on development densities appropriate to the area,* JOURNAL OF THE AM. PLANNING ASS'N, at 2 (Jan. 1997).
[199] Id.
[200] Juergensmeyer, supra, note 2 at 544.
[201] John Becker, *Promoting Agricultural Development Through Land Use Planning Limits*, 36 REAL PROP. PROB. & TR. J. 619, 622 (2002).
[202] Sandra B. Zellmer & Scott A. Johnson, *Biodiversity in an Around Mcelligot's Pool*, 38 IDAHO L. REV. 473, 483 (2002).
[203] Becker, supra note 199 at 623.
[204] Juergensmeyer, supra, note 2 at 525.
[205] Id.
[206] Paster, supra, note 1 at 292.
[207] *Penn Central Transp. Co. v. New York City*; 438 US 104, 124 (1978).
[208] Id.
[209] Id. at 136.
[210] *City of Miami Beach v. Zorovich*, 195 So.2d 31, 36 (Fla. 3rd. Dist. Ct. App., 1967).
[211] Id.
[212] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1047 (1992) (Blackmun, J., dissenting).
[213] David L. Szlanfucht, *How to Save America's Depleting Supply of Farmland*, 4 DRAKE J. AGRIC. L. 333, 349 (1999).
[214] Sandra A. Hofman, *Syposium: Environmental Law: More Than Just A Passing Fad: Note: Farmland and Open Space Preservation In Michigan: An Empirical Analysis*, 19 U. MICH. J.L. REF. 1107, 1138 (1986).
[215] Id.
[216] Paster, supra, note 1, at 310.
[217] Hoffman, supra not 212, at 1139.
[218] Terence J. Center, *Preserving Rural-Urban Fringe Areas and Enhancing the Rural Environment: Looking at Selected German Institutional Responses*, 11 ARIZ. J. INT'L & COMP. LAW 27, 42 (1994).
[219] Paster, supra, note 1, at 298.
[220] Id.
[221] Szlanfucht, supra, note 211, at 348.
[222] Id.
[223] Id.
[224] Id.
[225] Paster, supra, note 1, at 298.
[226] Id., at 307.
[227] Id., at 306.
[228] Szlanfucht, supra, note 211, at 346.
[229] FLA. STAT. § 163.3202(3) (LexiNexis 2005).
[230] U.S. CONST. amend. V.
[231] Szlanfucht, supra, note 211, at 348.
[232] *City of Hollywood v. Hollywood Inc*. 432 So. 2d 1332, 1338 (Fla. 4th Dist. Ct. App., 1983).
[233] Id.
[234] Ruhl, supra, note 57 at 402.
[235] Id. at 404.
[236] Id. at 403.
[237] Zellmer, supra, note 200, at 482.
[238] Id., at 500.
[239] Id.
[240] *Save our Suwannee Inc. v. Dep't of Envt'l Protection*, No. 2001-CA-001266, at 2 (2nd Cir. Mar. 5, 2004).
[241] Id.
[242] Zelmer, supra, note 200, at 502.
[243] Id.
[244] Ruhl, supra, note 57, at 405.
[245] Center, supra, note 216, at 30.
[246] Id.
[247] Id.
[248] Id. at 33. Section 27 of Germany's Federal Act on Land Use Planning contains a right for persons to enter rural private lands.
[249] Id. at 35.
[250] Id.
[251] Id.
[252] Id. at 41.
[253] Id.
[254] Tim Baker & Laurie Macdonald, *Investing in Nature The Economic Benefits of Conserving Natural Areas in Northeast Florida*, DEFENDERS OF WILDLIFE, at 22-25.
[255] FLA. ADMIN. CODE § 62-620.200(3) (2000); "Best Management Practices (BMPs)" means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters.
[256] Letter from David Bookbinder and Eric Huber, Senior Attorneys, Sierra Club (March 17, 2004); Letter references *Save our Suwannee Inc. v. Dep't of Envt'l Protection*, No. 2001-CA-001266 (2nd Cir. Mar. 5, 2004) at 2. *Save our Suwannee* asserts that Florida has "failed to exercise control over activities required to be regulated under the NPDES regulations." BMPs has historically been the only environmental control introduced to agriculture. The imposition of NPDES permitting requirements for CAFOS was partly in response to the ineffectiveness of BMPs. Other farming operations, such as small animal feeding operations and crop farmers have experienced less exposure to BMPs than CAFOs.

Seth D. Chipman *is a third year student at Florida Coastal School of Law. He is a geologist and works part time for the Florida DEP, Northeast District. "Preserving Spaces Through Agriculture" was the second place winner of the 2005 Dean Frank E. Maloney Writing Contest sponsored by The Florida Bar Environmental and Land Use Law Section.*

Law School Liaisons

FSU College of Law Hosts Leading Scholars as Part of Spring 2006 Symposium on the Law and Policy of Ecosystem Services

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

In recent years the FSU College of Law's environmental law program has offered a substantial number of programs on important environmental issues through its *Environmental Forum* series (held each semester), and lectures by distinguished environmental law professors from around the country who visit the law school to share their ideas about the current state of the law and its likely future directions. We've been very pleased with the reception these programs have received – there is clearly a great deal of interest in the State about environmental issues – and we have a sense that our programs have helped educate the public and advance the debate about the future of environmental protection in a constructive way. We've been very fortunate to include leading members of the Section in our *Environmental Forum* series and we look forward to continuing to do so in the future.

Following our recent very successful fall *Forum* on the *Kelo* decision and the issue of eminent domain, the College of Law will, this spring, in addition to our *Environmental Forum* and a distinguished lecture by Professor Douglas Kysar of Cornell Law School, host an innovative Symposium that will feature an extraordinary array of leading scholars, including Tony Arnold (Louisville), Deb Donahue (Wyoming), Don Elliott (Yale), Dale Goble (Idaho), Neil Hamilton (Drake), Dennis Hirsch (Capital), David Hodas (Widener), Oliver Houck (Tulane), John Nagle (Notre Dame), Jan Neuman (Lewis & Clark), Jim Salzman (Duke), Dan Tarlock (Chicago-Kent), and Sally Collins and Rob Doudrick from the U.S. Forest Service.

The Symposium, *The Law and Policy of Ecosystem Services,* will examine the potential impact of ecosystem services (for example, the value of wetlands in filtering water and thereby improving water quality, and the value of trees in the climate change arena) on environmental law and policy. Should property rights in ecosystem services be more clearly defined? How should ecosystem services be recognized in common law property and tort doctrine? Do current regulatory frameworks adequately account for ecosystem service values? Can information, incentive, and market-based instruments help? Overall, how can we operationalize a law and policy of ecosystem services? These issues are of importance to scholars as well as to policy makers and practitioners.

For those interested in exploring these issues in detail, FSU's law review will publish the proceedings of the Symposium in a special issue.

Please visit our web site, *http://www.law.fsu.edu/*, for more information on the upcoming Symposium, as well as for information about Professor Kysar's lecture and our spring *Forum*.

Takings Conference, Speaker Series, and Public Interest Environmental Conference at University of Florida

by Alyson Flournoy

Successful Nelson Symposium Held in November

Can the government force you to sell your home to make way for a factory or shopping mall? Should a city council have the power to take land for development by private companies? And should the courts intervene when they do? These were some of the questions aired at the Richard E. Nelson Symposium held on November 17-18 in Gainesville. Some one hundred practicing lawyers, law students, and law professors attended the symposium, which brought together some of the nation's most respected scholars on property rights to take up both sides of the debate.

The conference, which was organized by Michael Allan Wolf – who holds the Richard E. Nelson Chair in Local Government Law at the Levin College of Law – and co-sponsored by the ELULS and the City, County and Local Government Law Section of the Florida Bar, centered around *Kelo v. New London*, the recent case in which the U.S. Supreme Court ruled that cities could use the power of eminent domain to take land for economic development purposes. The symposium is sponsored by the Nelson Chair, funded through a gift from the late Richard E. Nelson and his wife Jane.

Speakers included Professor Wolf from UF, Professor James Krier from the University of Michigan, Notre Dame Professor Nicole Stelle Garnett, who spoke on the political economy of just compensation, Fordham University Associate Professor Eduardo Penalver, who spoke on exactions in the wake of *Lingle*, Pepperdine Chair in Constitutional Law Douglas Kmiec, and Mark Fenster, Associate Professor at UF, who spoke on land use bargaining under the Court's functional equivalence approach to taking.

Spring Speaker Series begins January 26

This spring, the Environmental and Land Use Law Program at the University of Florida's College of Law will offer its second annual Environmental Speaker Series in conjunction with its Capstone Colloquium. The Colloquium is an innovative course co-taught by law faculty, featuring nationally prominent scholars from around the country as guest lecturers. All sessions will begin at 3:00 p.m.:

January 26: Christopher Bzdok, Olson, Bzdok & Howard, P.C. (Traverse City, Michigan) (topic to be announced).

February 16: John Echeverria, Executive Director, Georgetown Environmental Law & Policy Institute, *Defending Takings Lawsuits.*

March 2: Mark Fenster, Associate Professor of Law, University of Florida College of Law, *The State and Local Legislative Response to Nollan and Dolan.*

March 23: Sarah Krakoff, Associate Professor, University of Colorado College of Law, *Consuming Wilderness.*

March 30: James R. Rasband, Professor of Law and Associate Dean of Academic Affairs, Brigham Young University Law School, *Buying Back the West.*

The Speaker Series is made possible by generous support of our three Gold Sponsors: the Environmental and Land Use Law Section of The Florida Bar, Hopping Green and Sams, P.A., and Lewis Longman & Walker, P.A. Interested members of The Florida Bar are invited to attend on a space-available basis. For reservations and scheduling updates, please call Professor Christine Klein (352-273-0964).

Twelfth Annual Public Interest Environmental Conference March 9-11

This year's Public Interest Environmental Conference – organized by the students at the law school with the support and co-sponsorship of the Public Interest Committee of the ELULS – promises to be outstanding. The main portion of the conference will take place between Thursday March 9 and Saturday March 11, with a special kick-off presentation on Wednesday March 8 when Robert F. Kennedy, Jr. will speak that evening, co-sponsored by Accent. This year's conference highlights a variety of themes including children and the environment and rhetoric and the environment, as well as panels focusing on a wide range of issues affecting Florida's ecosystems.

The theme of the conference is "In Fairness to Future Generations" and Professor Edith Brown Weiss of Georgetown – who wrote the book from which the theme is drawn – will be one of our plenary speakers. Richard Louv, author of "Last Child in the Woods: Saving Our Children from Nature Deficit Disorder," will speak at the opening reception on Thursday March 9. Sylvia Earle, National Geographic Underwater Explorer and former Chief Scientist for NOAA will be the keynote speaker at the banquet on Friday evening. Among other notable speakers, former EPA Administrator Carol Browner will be speak on Saturday March 11. As soon as the agenda is finalized, it will be available on the conference website, where you can register online at *www.ufpiec.org*.

CLE Committee Notes

by Mary Hansen, CLE Committee Chair

Seminar confirmation and policy were topics of concern at the Section's Continuing Legal Education Committee meeting on November 3rd. In the "new" department, the Committee is exploring a seminar that would train circuit and county judges in the fundamentals of environmental and land use law.

The Section has to absorb 100% of any seminar losses if CLE Program deadlines are missed. This means that Program chairs must meet brochure and written materials deadlines; Presenters, beware, when you volunteer as faculty, there WILL be nagging

Upcoming ELUS seminars include "Environmental Law, Experts, and Ethics" on January 27th in Orlando; the Public Interest Environmental Conference in Gainesville March 9-11 (which will also include an affiliate mixer); a Federal Environmental Law workshop scheduled for late April in Washington, D.C.; and the "Mechanics of Code Enforcement" on May 19th in Orlando. Also in the works – for 2007 – is the first ELUS seminar that is co-sponsored with the Real Property, Probate and Trust Law Section. This seminar will address those areas of environmental and land use law that concern ELULS members and real property practitioners.

Two major resources for seminar faculties and steering committees are in process. The first, the updated Program Chair Manual, will be available by December, 2005. In addition, Carl Eldred is heading up the effort to compile lists of ELULS speakers by subject and based on audience comments. This will be used to assist Program Chairs in the selection of the best speakers possible.

More information is available at *www.eluls.org*.

Ethics Questions?
Call The Florida Bar's ETHICS HOTLINE: 1/800/235-8619

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Environmental & Land Use Law Section present

Environmental Law, Experts, and Ethics

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

One Location: January 27, 2006
Rosen Plaza Hotel • 9700 International Drive • Orlando, FL • (407) 996-9700
Course No. 0315R

8:00 a.m. – 8:20 a.m.
Late Registration

8:20 a.m. – 8:30 a.m.
Opening Remarks/Introduction
Kirk L. Burns, South Florida Water Management District

8:30 a.m. – 9:20 a.m.
Daubert v. Merrell Dow Pharmaceuticals: Thirteen Years Later
Speaker addresses current state of law regarding admissibility of expert testimony, tracing history of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and its progeny, with a focus on environmental law decisions.
Matthew P. Coglianese, Bilzin Sumberg Baena Price & Axelrod LLP, Miami

9:20 a.m. – 10:10 a.m.
Practical Considerations Regarding the Admissibility and Use of Expert Testimony in Environmental Law Cases
Discussion of case law associated with frequently occurring problems concerning expert testimony including: preparation of Rule 26(a), F.R.C.P., expert witness reports, use of hearsay evidence by experts, admissibility of draft expert publications, differences between state and federal law regarding the admissibility of expert and scientific testimony, and the scope of permissible discovery of experts.
Kirk L. Burns, South Florida Water Management District

10:10 a.m. – 10:30 a.m.
Break

10:30 a.m. – 11:20 a.m.
Regulatory Takings and Property Rights Update
Speaker addresses recent federal and state case law concerning regulatory takings, as well as other decisions and regulations affecting property rights, including *Kelo v. City of New Haven*, recent Bert Harris Act decisions, and 2005 amendments to Florida Statutes.
Ronald L. Weaver, Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, P.A., Tampa

11:20 a.m. – 1:00 p.m.
Lunch (on your own)

1:00 p.m. – 1:50 p.m.
Florida Environmental Law Update
Topic addresses significant federal and state Florida court decisions over the past three years dealing with statutory and common law causes of action associated with soil and groundwater contamination.
John J. McNally, Shook Hardy Bacon, LLP, Miami

1:50 p.m. – 2:40 p.m.
Clean Water Act Update
Discussion of recent CWA and Florida Pollution Control Act decisions and regulatory actions of significance, including TMDL issues, changes to water quality standards and procedures, 404 permits, attempts at delegation of the 404 permitting program, MS4s, and NPDES discharge permits.
Terry Cole, Oertel, Fernandez, Cole & Bryant, P.A., Tallahassee

2:40 p.m. – 3:30 p.m.
Civil and Criminal Environmental Enforcement Update
Topic covers recent case law and guidance addressing civil and criminal enforcement in environmental cases, as well as over-filing.
Aliki A. Moncrief, Florida Department of Environmental Protection, Tallahassee

3:30 p.m. – 3:50 p.m.
Break

3:50 p.m. – 4:40 p.m.
All Appropriate Inquiry: Recent Changes in CERCLA and State Due Diligence and Reporting Requirements, and Related Ethical Issues
Speaker discusses EPA's finalization of the "all appropriate inquiry" rule required under 2002 CERCLA amendments, new state law disclosure requirements for off site contamination, common law theories for disclosure, and related ethical issues.
Richard L. Maguire, Rogers Towers, Jacksonville; James P. Oliveros, Golder Associates, Jacksonville

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