



THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

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

The 2012 Energy Bill: A Modest Step for Florida's Energy Policy

by Lorena Holley

Florida is the third largest consumer of energy in the nation and, as such, it is imperative that Florida establish an energy policy that will secure a stable, reliable and diverse supply of energy to meet our state's long term needs. That is the objective of Florida's Agriculture Commissioner, Adam Putnam, who assumed responsibilities of the state's energy office in July 2011.

The state's energy office was created in 1975 under the Department

of Administration. Since then, it has exchanged hands multiple times, moving to the Department of Community Affairs, Department of Environmental Protection, and Executive Office of the Governor. Last year, during the 2011 legislative session, the legislature transferred the office to the Florida Department of Agriculture and Consumer Services (DACCS) under the leadership of Commissioner Putnam. Commissioner Putnam immediately initiated an audit

of grants that were managed by the office to ensure that taxpayer dollars were yielding results. He also created the first Florida Energy Summit, held in October 2011 in Orlando, where stakeholders in Florida's energy industry came together to discuss the future of energy development and consumption in Florida. Based on findings and ideas shared at the summit, Commissioner Putnam developed recommendations for the Florida Legislature to consider during the 2012 session.

See "2012 Energy Bill," page 19

From the Chair

by Martha M. Collins

June provides a great opportunity for a mid-year check on where the Section is currently and where we are heading. To serve the diversity of our close to 2,000 members, we have and will continue with our five substantive committees: Land Use; Pollution Assessment, Remediation, Management and Prevention; Water, Wetlands, Wildlife and Beaches; Young Lawyers; and Energy. Our webinars have proven to be very successful and we will be continuing to grow these programs, many at no cost to our members.

Our Section is very proud to offer financial and member support to several law school related seminars including the annual Public Interest Environmental Law Conference, by the University of Florida College Levin of Law, the Nelson Symposium at the University of Florida, the Environmental Justice Summit at Barry School of Law and the Environmental Summit at Coastal School of Law. We also provide financial support to students through the

Hopping Memorial Scholarship and the Maloney Writing Contest. The recipient of the Hopping Memorial Scholarship and winner of the Maloney Writing Contest will be announced at the Annual Update this August.

Our Section *Reporter* and the *Environmental and Land Use Law Treatise* continue to provide current information to our members on case law, regulatory, and legislative topics. The *Reporter* is provided quarterly and both the *Reporter* and the *Treatise* can be found on our website. The Section has also started and will continue a monthly electronic newsletter to keep our members informed of upcoming CLE's. Speaking of which...

We encourage all of our members to attend the Annual Update, August 9-11th, at the Sawgrass Marriott in Ponte Vedra Beach, FL. The Annual Update is the Section's premier CLE and a great way to learn more about and to become involved in the Section. We look forward to a great Annual

Update so spread the word far and wide and make time to join us. We look forward to seeing you there.

This is just a small snapshot of what the Section is doing. Keep an eye out as we are also updating our website. For more information on all Section activities and opportunities please visit www.eluls.org. Have a prosperous 2012, what is left of it!

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Supreme Court Offers Latest Ruling Involving the CWA in *Sackett*

by Tara Duhy and Kevin Hennessy

In *Sackett v. Environmental Protection Agency*, decided by the Supreme Court on March 21, 2012, Justice Scalia introduces Plaintiffs Chantell and Michael Sackett as “interested parties feeling their way,” around Clean Water Act (CWA) jurisdiction. In this latest opinion addressing the CWA, Justice Scalia presented the quandary facing all who are touched by the regulatory regime of the CWA. Summarizing the Court’s decisions as to the jurisdictional reach of the CWA over “navigable waters,” Scalia states that, after the Court’s fractured decision in *Rapanos v. United States*, interested parties are “left to feel their way on a case-by-case basis.” The question decided by the Court in *Sackett* is when the regulated are entitled to seek judicial review of decisions concerning the CWA’s reach.

The Sacketts purchased half an acre of land in a platted residential neighborhood in Priest Lake, Idaho. They subsequently obtained a building permit, filled the property to build their home, and were soon engulfed in a regulatory nightmare. The Sacketts were notified by the Environmental Protection Agency (EPA) that they had violated the CWA by illegally filling jurisdictional wetlands, and that they must immediately comply with an EPA order requiring removal of the fill and restoration of the property or face massive fines and penalties. The order directed the Sacketts to restore the property as specified in a detailed and costly plan. It also warned that if they did not comply with the order they would be subject to penalties of up to \$37,500 per day for violating the CWA and that the penalty would double for violating the restoration order.

The Sacketts immediately requested a hearing before the EPA to present arguments that their property was not a wetland subject to CWA regulation, however their request was denied. They then sought judicial review in Federal court. Both the District Court and the Ninth Circuit Court of Appeals declined to hear the Sackett’s case on the basis that the CWA precludes pre-enforcement judicial review of compliance orders. Essentially, the lower courts’ orders required the Sacketts

to forgo their plans to build a home on their property and spend more than the purchase price of the property to comply with the EPA order or suffer severe financial penalties all without the ability to challenge the EPA’s basis for jurisdiction.

The case was accepted by the United States Supreme Court on two questions: 1) whether the Sacketts could seek pre-enforcement review of the compliance order pursuant to the Administrative Procedure Act (APA), and 2) if they were unable to obtain pre-enforcement review, whether that inability violated the Sackett’s rights to due process. The EPA argued that compliance orders do not constitute final agency action because they are merely steps in the deliberative process and are therefore not ripe for judicial review until the EPA determines whether to file enforcement action against the parties who violated the orders.

The Court’s opinion, authored by Justice Scalia, held that the APA’s presumption in favor of judicial review entitled the Sacketts to a pre-enforcement hearing. As such, the Court did not need to reach the Constitutional Due Process issue. The Court’s decision was based on its determination that the compliance order was in fact final agency action as contemplated by the APA because in issuing the compliance order the EPA had come to a final determination as to the rights and obligations of the parties that had direct legal consequences. The Court also determined that the Sacketts did not have any other adequate legal remedy and that the CWA neither explicitly or impliedly precludes judicial review under the APA.

Of particular interest are the two concurring opinions by Justice Ginsburg and Justice Alito. Justice Ginsburg’s opinion emphasizes that the Court’s majority opinion is limited to the issue of agency jurisdiction and does not decide whether the terms and conditions of the compliance order were appropriate, a matter not readily apparent from the Scalia’s opinion. Justice Alito’s opinion, which focuses on the CWA’s nebulous definition of “water of the state” as the underlying cause of the dispute, calls for Congressional

action to rein in the EPA and put an end to the costly and inadequate solution of case-by-case judicial decision-making.

Both the Court’s majority opinion and the two concurring opinions voiced frustration over the confused state of the law regarding EPA’s jurisdiction over “navigable waters” and “adjacent wetlands.” The Court’s decision is especially interesting when compared with the legal reasoning in a two recent cases concerning the ability to challenge jurisdictional determinations under the CWA – *Fairbanks North Star Borough v. U.S. Army Corps of Engineers* and *New Hope Power Company v. U.S. Army Corps of Engineers*.

In *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, the Ninth Circuit Court of Appeals closed the gates of judicial review to property owners seeking relief from adverse CWA Section 404 jurisdiction determinations issued by the U.S. Army Corps of Engineers. The affected property owners in both *Sackett* and *Fairbanks* challenged the Government’s determination that jurisdictional wetlands existed on their private property. In *Fairbanks*, however, the court affirmed the lower court’s order holding that approved jurisdictional determinations do not constitute final agency action pursuant to the APA, reasoning that jurisdictional determinations merely represent the Corp’s opinion that jurisdiction does or does not exist and therefore do not have direct legal consequences. Thus, a challenge to a jurisdictional determination would not be ripe until the Corps ultimately denied a permit or initiated enforcement action against the parties.

As in *Sackett*, the APA provided plaintiffs in *New Hope Power Company v. U.S. Environmental Protection Agency* an avenue to challenge the Corp’s jurisdiction over wetlands under the CWA. In that case, a sugarcane grower and a renewable energy company sought a permit under Section 404 of the CWA to fill wetlands in the Everglades Agricultural Area for the purposes of constructing an ash monofill. The Everglades Agricultural Area (“EAA”) comprises approximately 700,000 acres south of Lake Okeechobee in southern Florida.

The area was drained and farmed by individual land owners since well before the federal government implemented the Central and Southern Florida Project for Flood Control and Other Purposes (“C&SF project”) to aid the process.

The property at issue did not constitute jurisdictional wetlands under the Corp’s Wetland Delineation Manual and had previously been designated as prior converted croplands. Nevertheless, the Corps asserted that the present-day, dry-land agriculture that existed for decades before the passage of the CWA was not the “normal circumstances” of the area as that term is used in the regulatory definition of “wetlands.” Rather, the Corps took the position that the normal circumstances of property within the EAA are the conditions that a project site would exhibit if the project site pumps were turned off and the site was abandoned for a minimum of one typical rainfall year, with the pumps and other structures associated with the C&SF project continuing to operate.

New Hope and Okeelanta brought suit under the APA alleging that the Corps’s position contained in a memorandum issued by Steven L. Stockton, Director of Civil Works, was improper rulemaking. Specifically, Plaintiffs argued that the Memorandum extended Corps jurisdiction over wetlands under the Clean Water Act and therefore constituted a substantive rule adopted improperly without the requisite notice. The court agreed with plaintiffs and issued an injunction prohibiting the Corps from applying the new rules.

The common thread between these three opinions is the dispute over the reach of jurisdiction over wetlands pursuant to the CWA, yet each court reaches different conclusions about when and how regulated parties can seek judicial review of this issue. As the EPA, Corps and regulated community continue to struggle, the Supreme Court’s *Sackett* decision places greater emphasis on what Justice Alito aptly described as the “notoriously unclear” reach of the CWA and represents

another strong signal to the EPA and Congress to provide clarity in this area.

Tara Duhy is a shareholder in the West Palm Beach office of Lewis, Longman & Walker, P.A. Ms. Duhy represents clients throughout environmental and administrative permitting processes involving endangered species, coastal development, the consumption, management and storage of surface waters and the dredging or filling of wetlands, including jurisdiction and permitting pursuant to the Clean Water Act, the Endangered Species Act and the National Environmental Policy Act. She can be reached at tduhy@llw-law.com or at (561) 640-0820.

Kevin Hennessy is a shareholder in the Bradenton office of Lewis, Longman & Walker, P.A. Mr. Hennessy’s practice focuses on administrative, environmental, governmental and land use law, with particular experience in litigation in those areas of law. He can be reached at khennessy@llw-law.com or at (941) 708-4040.

On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of May 14, 2012. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Martin County Conservation Alliance, et al v. Martin County, et al, Case No. SC11-2455. Petition for review of 1st DCA decision in *Martin County Conservation Alliance, et al v. Martin County*, Case No. 1D09-4956, imposing a sanction of an award to appellees of all appellate fees and costs following an earlier decision of the district court that “the appellants have not demonstrated that their interest or the interest of a substantial number of members are adversely affected by the challenged order, so as to give them standing to appeal.” Status: The Court accepted jurisdiction on May 11, 2012.

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

FIRST DCA

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

Smith v. Sylvester and DEP, Case No. 1D11-3605. Appeal from DEP final order dismissing petition for hearing because request for extension of time was not timely filed. The appellant argued the request was timely because, in computing the time, the agency should have added 5 days for mailing. Status: Reversed on March 12, 2012. 37 Fla. L. Weekly D613a.

Washington County v. NFWFMD, et al, and Northern Trust Company v. NFWFMD, et al, Case Nos. 1D11-3488 and 1D11-4484. Appeals from final orders by NFWFMD denying petitions for hearing with respect to portions of NFWFMD’s 2008 Region

III Regional Water Supply Plan. Status: Affirmed in part, reversed in part on March 16, 2012. 37 Fla. L. Weekly D658a.

City of Marathon v. Discount Rock and Sand and DEP, Case No. 1D11-3141. Appeal from DEP final order dismissing second amended petition for hearing because the allegations were not sufficient to show that the City has standing. Status: Affirmed *per curiam* February 16, 2012.

FT Investments v. DEP, Case No. 1D11-3052. Petition for review of DEP final order determining that FTI is not eligible for a third party defense to liability for cleanup and cleanup costs pursuant to s. 376.208(2)(d), F.S. Status: Oral argument held May 16, 2012.

Macla Ltd. II v. Okaloosa County, et al, Case No. 1D11-4975. Petition to review DEP final order granting joint coastal permit and authorization to use sovereign submerged lands for the restoration of 1.7 miles of shoreline just east of East Pass, a project known as the West Destin Beach Restoration Beach Project. Status: Oral argument held May 15, 2012.

Florida Case Law Update

by Gary K. Hunter, Jr. & Jacob T. Cremer

Dependent special district could not make valid non-ad valorem special assessment on real property owned by independent special district. *N. Port Rd. & Drainage District v. W. Villages Improvement District*, 82 So. 3d 69 (Fla. 2012).

A dependent special district controlled by a municipality levied non-ad valorem special assessments against real property owned by an independent special district. The independent special district filed a petition for writ of certiorari in circuit court challenging the assessments. The Second DCA reversed, holding that the dependent special district could not lawfully impose the special assessments on the independent special district's real property without statutory authority to levy the assessments against state land, based on *Blake v. Tampa*, 115 Fla. 348, 156 So. 97 (1934). *Id.* at 71. It then certified a question of great public importance.

The Florida Supreme Court approved the Second DCA's holding—but based on home rule powers under the Florida Constitution. The Supreme Court reaffirmed its holding in *Canaveral Port Authority v. DOR*, 690 So. 2d 1226, 1228 (Fla. 1996), that independent special districts do not have sovereign immunity (against assessments or otherwise). *Id.* at 71 n.3. Then the Supreme Court explained that it need not address whether *Blake* was still valid in light of the creation of home rule powers; it simply assumed, without deciding, that *Blake* did not apply. *Id.* at 71-72. Finally, the Supreme Court held that dependent special districts are subject to the limitations on home rule powers in section 166.021(3), Florida Statutes, which provides that municipalities may not legislate regarding subjects expressly prohibited by the constitution and subjects expressly preempted to state or county government by the constitution, by general law, or by county charter. *Id.* at 72. In this case, the assessments ran afoul of the prohibition because (1) the independent special district could not legally pay them based on its

enabling statute and (2) the dependent special district could not compel the independent special district (through the Florida Legislature) to pay. *Id.* at 72-73.

On second-tier certiorari, District Court of Appeal standard of review is the same, whether it is reviewing a circuit court appeal from county court or a first-tier certiorari review before a circuit court; DCA may grant second-decision tier certiorari relief to quash a circuit court decision that obeyed the controlling precedent of another DCA. *Nader v. Fla. Dep't of Hwy. Safety & Motor Vehicles*, - So. 3d -, 37 Fla. L. Weekly S130, 2012 WL 572985 (Fla. Feb. 23, 2012).

Nader refused to take a breath test after being arrested for driving under the influence of alcohol. The Department suspended Nader's license, and she requested an administrative hearing. After the hearing officer upheld the suspension, Nader filed a petition for writ of certiorari. The circuit court granted the writ, and the Department filed a petition for writ of certiorari before the Second DCA. The Second DCA granted the writ, quashing the decisions below and certified two questions of great public importance. The first question dealt with an issue of statutory implied consent under chapter 316, Florida Statutes, and will not be discussed here.

The second question was “may a district court grant common law certiorari relief from a circuit court's opinion reviewing an administrative order when the circuit court applied precedent from another district court but the reviewing district court concludes that the precedent misinterprets clearly established statutory law?” *Id.* at *1. The Florida Supreme Court granted review and answered in the affirmative, but only “so long as the decision under review violates a clearly established principle of law resulting in a miscarriage of justice.” *Id.* at *12.

In a lengthy discussion, Justice

Pariante explained the two types of certiorari review by a DCA of a circuit court decision. The first type is a review of a nonfinal order entered by the circuit court. *Id.* at *6. In this case, a DCA may only grant a petition if the order departs from the essential requirements of law, causing a material injury with no adequate remedy on appeal. *Id.* at *7. The second type of certiorari review by a DCA is of a circuit court decision, either by appeal from circuit court or by certiorari to review an administrative or quasi-judicial decision. *Id.* at *6. In review of this second type of certiorari, usually called “second-tier certiorari,” the DCA may only review whether the circuit court observed due process and whether the essential requirements of the law were followed. *Id.* at *8. Justice Pariante stressed that reviewing the “essential requirements of the law” means following the correct law but also that a DCA may not create new law. *Id.* Thus, following the correct law could mean following a statute, rather than following another DCA's misinterpretation of a statute. *Id.* In this case, the Supreme Court held, the circuit court was bound by a DCA opinion—and the Second DCA could grant certiorari in order to correct the miscarriage of justice that would have resulted if the opinion were allowed to stand. *Id.* at *9-11.

Bonds validated because beach renourishment constitutes a public purpose; bonds may be issued before a project has obtained all necessary permits. *Donovan v. Okaloosa Cnty.*, - So. 3d -, 37 Fla. L. Weekly S6, 2012 WL 16587 (Fla. Mar. 5, 2012).

Okaloosa County brought an action to validate revenue bonds for proposed beach restoration project. Property owners who were subject to assessments for bond repayment intervened. The circuit court validated the bonds. Property owners appealed to the Florida Supreme Court, as required by law. Upon review the Supreme Court explained that its review of the circuit court

was limited to whether the public body has authority to issue bonds; whether the purpose of the obligation is legal; and whether the bond issuance complies with the requirements of law. *Id.* at *2.

The Supreme Court held that the circuit court had jurisdiction to validate the county's bonds under chapter 75, Florida Statutes, which provides the statutory process for bond validation. *Id.* at *3. Second, it held that bonds may be validated before a project obtained before a project receives all necessary permits where the permit would likely be issued and where no irreparable harm can occur. *Id.* at *4-*5. Thus, the bond validation was not premature, even though a coastal construction permit had not yet been issued by DEP. The Supreme Court also held that beach renourishment, by its nature, fulfills a public purpose as determined by the Florida Legislature. *Id.* at *7. Finally, it held that bond's special assessment was legal because it was fairly apportioned among the specially benefitted properties. *Id.* at *8-*11.

Section 373.709, Florida Statutes, allows administrative challenges to water supply plans. Appellants, however, lacked standing to challenge the plan. *Washington Cnty. v. Nw. Fla. Water Mgmt. District*, - So. 3d -, 37 Fla. Law Weekly D658, 2012 WL 879284 (Fla. 1st DCA Mar. 16, 2012).

In 2008, the Northwest Florida Water Management District approved its Region III Regional Water Supply Plan. In 2010, the District gave notice of its intent to approve Bay County's application for a consumptive use permit that would use a well field near the Washington County line to extract inland ground water as an alternative water supply. *Id.* at *2. Appellants requested and received a formal administrative hearing; while this hearing was ongoing, appellants challenged the part of the Plan designating the inland ground water project as an alternative water supply source. The District entered final orders dismissing the petitions with prejudice, concluding appellants could not challenge its Plan. *Id.*

On appeal, the First DCA reversed in part, holding that the Plan was subject to challenge. It affirmed the result, however, because it held that

the appellants lacked standing to challenge the Plan. *Id.* at *1. The First DCA explained that water management districts develop regional water supply plans for areas where "existing sources of water are not adequate to supply water for all existing and future reasonable-beneficial uses." *Id.* (citing § 373.709(1), Fla. Stat.). Approval of a plan by a water management district governing board is not subject to the rulemaking requirements of chapter 120, but if the plan affects the substantial interests of a party it is subject to section 120.569, Florida Statutes. *Id.* (citing § 373.709(5), Fla. Stat.). Based on this statutory prerogative, the First DCA held that "the Legislature has envisioned circumstances in which a regional water supply plan can affect a party's substantial interests." *Id.* at *5. This case, however, did not present those circumstances. Under the test set forth in *Agrico Chemical Company v. DER*, 406 So.2d 478 (Fla. 2d DCA 1981), the plan did not immediately affect the interests that appellants asserted in their hearing petitions. Therefore, because "the Plan does not operate as to injure Appellants' asserted interests, and because Appellants can dispute Bay County's permit in a separate administrative proceeding," the appellants did not have standing.

Tenant could not be grandfathered into zoning ordinance, where landowner had voluntarily annexed the property into the municipality; once a property is annexed, it must comply with the ordinances of its new municipality. *N. Palm Beach v. S&H Foster's, Inc.*, 80 So. 3d 433 (Fla. 4th DCA).

A landowner leased a parcel just outside the limits of North Palm Beach to a pub. Outside of North Palm Beach, the pub had legally operated as an "after hours bar," serving until 5:00 am. After North Palm Beach granted the landowner's petition for voluntary annexation, the pub was subject to a North Palm Beach's ordinance prohibiting on-premises consumption of alcohol between 2:00 and 7:00 am. The pub requested, and the circuit court granted, grandfather status and an injunction against enforcement of the ordinance until the lease's expiration.

The Fourth DCA reversed. It held

that North Palm Beach had validly enacted its ordinance under section 562.14(1), Florida Statutes ("Except as otherwise provided by county or municipal ordinance, no alcoholic beverages may be sold, consumed, served, or permitted to be served or consumed in any place holding a license under the division between the hours of midnight and 7 a.m. of the following day..."). *Id.* at 437. Consequently, once the pub was annexed, it had to comply with the ordinance. *Id.* (quoting section 171.062(1), Florida Statutes: "An area annexed to a municipality shall be subject to all laws, ordinances, and regulations in force in that municipality ... upon the effective date of the annexation."). The lease supported this because it required the pub to "comply with all laws, ordinances, rules and regulations of governmental authority respecting [its] use, operation and activities." *Id.* at 434.

It is not appropriate for a court to defer to a local government's interpretation of its comprehensive plan; but a court must defer to the local government's interpretation of its land development code, where a private party brings suit to enforce an ordinance. *Pruitt v. Sands*, - So. 3d -, 2012 WL 1317228 (Fla. 4th DCA Apr. 18, 2012).

Landowners filed suit against their neighbor to enforce landscaping code provisions, alleging their neighbor's stand of palms was not a "hedge" within the meaning of the county's landscaping ordinance. The circuit court denied enforcement of the code, and landowners appealed, deferring to the county's interpretation of the code. On appeal, the Fourth DCA affirmed. It held that the county's interpretation of its own ordinance should be shown deference. *Id.* at *1. The landowners argued that *Pinecrest Lakes, Inc. v. Shidel*, 795 So.2d 191 (Fla. 4th DCA 2001), applied so that no deference should be given. The Fourth DCA explained, however, that *Shidel* only applied in the context of comprehensive plan consistency challenges under chapter 163, Florida Statutes. In this case, it would not be appropriate to extend *Shidel* because the ordinance involved a party bringing a private action to enforce an ordinance, rather than challenge it. *Id.*

USFWS Establishes Refuge for Manatees at Kings Bay

by Kelly Samek

The U.S. Fish and Wildlife Service (USFWS) has announced the finalization of a rule amendment creating a manatee refuge in the waters of Kings Bay, Citrus County, Florida, effective March 16, 2012. The action is founded on the USFWS's determination that certain water activities conducted in the area must be restricted to prevent the taking¹ of manatees. Title 50, Part 17 of the Code of Federal Regulations now reflects the establishment of a permanent Kings Bay manatee refuge, while keeping seven previously-established sanctuaries.² This follows the publication of an emergency rule temporarily establishing the Kings Bay refuge in 2010³ and the subsequent proposed rule published on June 22, 2011.⁴

Watercraft-related strikes are one of the leading causes of anthropogenic mortality for the Florida manatee.⁵ The USFWS has authority to designate manatee refuges and sanctuaries when substantial evidence demonstrates such action "is necessary to prevent the taking of one or more manatees."⁶ Sanctuaries are zones where "all waterborne activities are prohibited,"⁷ whereas within refuges, certain waterborne activities may be allowed while others are prohibited, and those activities allowed may be subject to restrictions. The authority to establish manatee protection areas labeled as refuges is separate and distinct from the authority to establish National Wildlife Refuges.⁸

In its discussion of the background for the rule, the USFWS noted that the Crystal River/Kings Bay area is part of the state's so-called "Nature Coast," "a northwestern Florida region marketed for outdoor recreational opportunities" including snorkeling and diving, kayaking and canoeing, waterskiing, and boating.⁹ Because Kings Bay is a significant natural warm-water shelter for manatees, manatee viewing is another prominent outdoor recreational opportunity important to the area.¹⁰ Unfortunately, according to the USFWS, "[t]he number of manatees struck and killed by watercraft in Kings Bay

is increasing, as are the number of public reports of"¹¹ harassment¹² of manatees.

The first studies of manatees and human interaction in Kings Bay were published in 1979, and soon thereafter the USFWS generated a regulatory process enabling the creation of manatee protection areas where water activities could be curtailed in order to reduce impacts to manatees.¹³ A little over a year later, three manatee sanctuaries were designated in Kings Bay¹⁴ and then, in 1983, the Crystal River National Wildlife Refuge—comprised of lands in and around Kings Bay acquired by the USFWS—was established. Three more manatee sanctuaries in 1994,¹⁵ followed by another in 1998,¹⁶ were added within Kings Bay to address increasing reports of harassment.

In promulgating its present rule, the USFWS has determined the current conditions at Kings Bay warrant further protections for the manatee population. Citing an increase in both the presence of manatees and human use in Kings Bay, along with incidences of watercraft-related manatee mortality in the area,¹⁷ the USFWS concluded that take of manatees is occurring and increasing in Kings Bay and that absent additional protections, take would likely occur into the future.¹⁸ Thus, its rule action established the Kings Bay manatee refuge, coextensive with the geographical area defined by a 2010 emergency rule effected to prevent imminent take of manatees.¹⁹ The refuge "includes all waters of Kings Bay, including all tributaries and adjoining water bodies, upstream of the confluence of Kings Bay and Crystal River . . ."²⁰ Watercraft speeds are regulated within the refuge, and twelve actions are specifically prohibited, including pursuing or feeding manatees.²¹ Although the refuge is year-round, the seven previously-established sanctuaries within its boundaries are in effect only from November 15 through March 31.²² Temporary no-entry areas may be

implemented and in effect for as long as necessary during the time that the sanctuaries are in effect or for up to fourteen consecutive days for cold weather events between April 1 and November 14.²³

Despite the findings of the USFWS, the establishment of the refuge has not been without its critics. The matter captured national attention when, in July of 2011, a Citrus County tea party activist was quoted as saying in regard to the federal proposal that "elevat[ing] nature above people" is "against the Bible and the Bill of Rights."²⁴ The opposition gained traction in the Florida legislature during the 2012 regular session, where House Memorial 611, urging Congress "to direct the United States Fish and Wildlife Service to reconsider the proposed rule to designate Kings Bay as a manatee refuge and in lieu of the rule partner with the state and local governments in seeking joint long-term solutions to manatee protection," was enrolled on March 5 after a 76-35 vote in favor in the chamber.²⁵

The USFWS recorded 415 written comments and 42 oral comments received during the 60-day public comment period following the publication of the proposed rule.²⁶ Comments in support represented the majority of comments received.²⁷ Comments in opposition, as characterized by the USFWS, included complaints that the agency provided insufficient public involvement in the process,²⁸ that the action would effectively end waterborne activity in the area,²⁹ and that the proposal constitutes an infringement on private property rights of riparian landowners.³⁰

The USFWS modified the proposed rule in response to concerns expressed related to human safety, in particular those indicating that closing water sports zones in the Bay would shift users into Crystal River, where such activity may prove more hazardous.³¹ After consulting with the Florida Fish and Wildlife Conservation Commission and the U.S. Coast Guard, the USFWS changed

its proposal to allow vessel operation at high speed up to 25 miles per hour during daylight hours between June 1 and August 15 (accommodating a summer water sports season) in an area of Kings Bay north of Buzzard Island. To avoid creating an attractive nuisance for manatees—which are known to approach anchored vessels—except for emergency purposes, anchoring is prohibited in this area while the zone is operational.³² The modifications have not proven effective in eliminating all opposition. A local group called Save Crystal River has mounted an email campaign and stated its intent to explore legal options to block the new refuge.³³

Endnotes:

¹ “Take,” as it is defined under the Endangered Species Act of 1973 (ESA), means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt any of the foregoing. Under the Marine Mammal Protection Act of 1972 (MMPA), “take” means to harass, hunt, capture, or kill, or to attempt to do so.
² 75 FR 15617 at 15618.
³ 75 FR 68719.
⁴ 75 FR 36493.
⁵ See 75 FR 15617 at 15618.
⁶ 50 CFR §17.103.
⁷ 50 CFR §17.103(a)(1).
⁸ Although Crystal River National Wildlife Refuge was established in 1983 with the intention of protecting manatees and their habitat, the authority to create the manatee refuges that are the subject of this article is a separate and distinct legal authority. See 16 USC §668dd-668ee; the National Wildlife Refuge System Administration Act of 1966 governs the

management of NWRs, including the Crystal River refuge complex consisting of the Chassahowitzka, Crystal River, Egmont Key, Passage Key, and Pinellas NWRs.

⁹ 75 FR 15617 at 15618.
¹⁰ Id.
¹¹ Id.
¹² The concept of harassment is subject to definition under both the ESA and the MMPA. Under the former, it is “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns” including breeding, feeding, and sheltering. 50 CFR §17.3. Under the latter, it is “any act of pursuit, torment, or annoyance which . . . has the potential to injure a marine mammal or marine mammal stock in the wild” or “has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.” 16 USC §1362(18).
¹³ 75 FR 15617 at 15620; 44 FR 60964.
¹⁴ 45 FR 74880.
¹⁵ 59 FR 24654.
¹⁶ 63 FR 55553.
¹⁷ 75 FR 15617 at 15627.
¹⁸ 75 FR 15617 at 15628.
¹⁹ 75 FR 68719.
²⁰ 75 FR 15617 at 15628.
²¹ 75 FR 15617 at 15629.
²² 75 FR 15617 at 15629. Owners of property adjoining no-entry areas, their guests, employees, and other designees are accorded an exception to allow idle-speed access within the no-entry areas for the purposes of accessing and maintaining their properties. 75 FR 15617 at 15630.
²³ 75 FR 15617 at 15629-15630.
²⁴ Craig Pittman, *Tea Party Members Tackle a New Issue: Manatees*, TAMPA BAY TIMES, July 13, 2011 available at www.tampabay.com/news/environment/wildlife/article1180112.ece.

²⁵ An identical Senate memorial (SM 1614) was laid on the table after the final House action. The Senate version had been heard in the Senate’s Environmental Preservation and Conservation Committee, where it received four yeas and three nays.
²⁶ 75 FR 15617 at 15621.
²⁷ Id.
²⁸ 75 FR 15617 at 15622.
²⁹ Id.
³⁰ Id.
³¹ 75 FR 15617 at 15622-15623.
³² 75 FR 15617 at 15623; 50 CFR §17.108(c)(iii)(A) and (B).
³³ On April 2, the Florida Fish and Wildlife Conservation Commission (FWC) received a petition to initiate rulemaking from Save Crystal River requesting repeal of certain provisions of 68C-22, Fla. Admin. Code, related to state-promulgated speed zones in Citrus County and requesting changes to a cooperative agreement between FWC and USFWS. Neither request would alter the federal rule action discussed herein. FWC denied the petition on April 26. A similar petition from the Citrus County Board of County Commissioners was received by FWC on April 30, followed shortly thereafter by a petition from the City of Crystal River and a second petition from Save Crystal River, Inc. As of the date of submittal of this article, no action had been taken in response.

Kelly Samek is an assistant general counsel with the Florida Fish and Wildlife Conservation Commission in Tallahassee where she assists in representing the Division of Habitat and Species Conservation. Any perspectives expressed in this article are the author’s own and do not necessarily represent the views of FWC or USFWS.



Mark Your Calendar!

2012 ELULS Annual Update

~ August 9-11 ~

Sawgrass Marriott • Ponte Vedra Beach

New Operating Agreement Among the ACOE, DEP and WMDS

by Susan Roeder Martin, South Florida Water Management District

A new operating agreement was entered into among the Army Corp of Engineers (ACOE), the Florida Department of Environmental Protection (DEP) and Florida's five water management districts (WMDs). The new operating agreement also applies to local governments where there has been a delegation of responsibilities in accordance with section 373.441, Fla. Stat. The purpose of this operating agreement is to coordinate the permitting, compliance and enforcement programs among the agencies concerning the regulation of activities that affect waters of the United States under the jurisdiction of the ACOE, and wetlands and other surface waters under the jurisdiction of DEP and the WMDs. The new operating agreement supersedes the agreement entered into among these parties on November 30, 1998.

The operating agreement includes provisions for permit application coordination, e-permitting, state water quality certification, state determination of consistency with the federally

approved state coastal management program, mitigation bank and in lieu-fee coordination, financial assurance documents and conservation easement or restrictive covenant protections.

The operating agreement includes provisions for the establishment of an interagency review team and team coordination for mitigation bank applications and the establishment of in-lieu fee programs required by 33 C.F.R. § 332.8(b).

Financial assurance for mitigation is also addressed. The operating agreement provides that the ACOE may determine that when DEP or a WMD accepts financial assurance pursuant to Part IV of Chapter 373, Fla. Stat, and those assurances adequately address ACOE financial assurance requirements, then the ACOE may determine that additional financial assurance is not necessary. In order to receive ACOE concurrence, the applicant must agree to certain ACOE requirements, including providing notice at least 120 days

in advance of a termination or revocation and 30 days notice in advance of a modification or partial release. DEP and the WMDs are not obligated to accept financial assurance mechanisms benefitting the ACOE which are not necessary to satisfy the requirements of Part IV of Chapter 373, Fla. Stat.

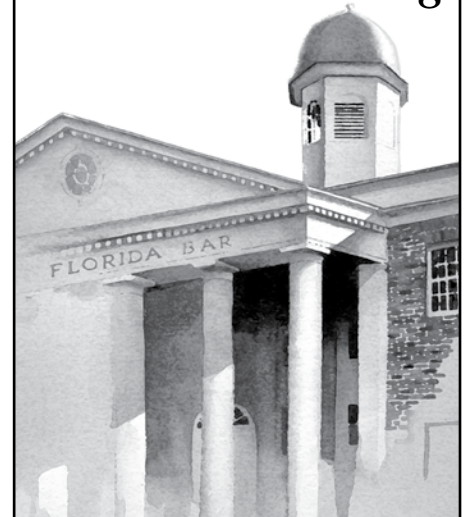
With regard to mitigation site protection pursuant to section 704.06, Fla. Stat., the ACOE may agree that the instrument provides sufficient site protection to satisfy ACOE requirements. These instruments are most commonly in the form of conservation easements. When the ACOE accepts the instrument provided to DEP or the WMD, the instrument must contain third party enforcement rights for the ACOE. This operating agreement does not require DEP and the WMDs to accept a site protection instrument on behalf of the ACOE when there is not a corresponding permit under Part IV of Chapter 373, Fla. Stat., for the activity that is subject to the ACOE permit.

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

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DEP Update

Effective December 30, 2011, the Department amended Chapters 62-550 and 62-560, F.A.C., to adopt three U.S. Environmental Protection Agency (EPA) rules – the Stage 2 Disinfectants and Disinfection By-products Rule (Stage 2 D/DBPR), the Long Term 2 Enhanced Surface Water Treatment Rule (LT2ESWTR), and the Ground Water Rule (GWR). These rules are part of the National Primary Drinking Water Regulations and adoption of these rules are required in order to maintain primacy over the public water system supervision program.

The Stage 2 D/DBPR was promulgated by EPA to provide for increased protection against the potential risks for cancer and developmental health effects associated with disinfection byproducts in community or non-transient, non-community water distribution systems. The Stage 2 D/DBPR builds on the Stage 1 D/DBPR by (1) requiring some community or non-transient, non-community water systems to complete an Initial Distribution System Evaluation to identify locations to monitor for total trihalomethanes (TTHM) and haloacetic acids (five) (HAA5) and (2) it bases compliance with the TTHM and HAA5 maximum contaminants

levels on a locational running annual average calculated for each monitoring location. The LT2ESWTR was promulgated to protect the public from illness due to Cryptosporidium and other microbial pathogens in public water systems that use surface water sources. The LT2ESWTR requires public water systems to monitor their surface water sources for Cryptosporidium and provide additional treatment depending on the average concentration of Cryptosporidium. The GWR was promulgated to provide for increased protection against microbial pathogens, specifically viral and bacterial pathogens, in public water systems that used ground water sources. The GWR requires public water systems to monitor their ground water sources for a fecal indicator and provide corrective action if a source is fecally contaminated. The proposed rule also updates the dated EPA regulation references in Chapters 62-550 and 62-560, F.A.C.

BOT and Indian River County v. Anthonasios and Kathleen Sevastopoulos (State Lands - Central District)

On December 15, 2010, Indian River County Circuit Court Judge Kanarek rendered final opinion

following a 2-day non-jury trial resolving a dispute regarding ownership of a portion of a mangrove island known as “No Name Island” and the surrounding submerged lands located in the Indian River. The final judgment, upon execution, will quiet title to No Name Island and the surrounding submerged lands in the name of the BOT, subject to the 1965 BOT dedication of the island to the County for use as a public park, and that Defendants’ have no property interest in the same. Plaintiffs, as the prevailing parties, are entitled to recovery of their respective costs from the Defendants.

Ronald Scott Morgan v. DEP

On April 3, 2012, the Third District Court of Appeal granted Appellant’s request for Oral Argument which is scheduled for June 5, 2012. The issue on appeal is whether the administrative law judge properly dismissed a petition to intervene in an enforcement case explaining that Chapters 120 and 403, Florida Statutes, allow intervention by a substantially affected party in licensing and permitting cases only and that persons with standing may challenge the end result of the enforcement action upon entry of final agency action.

Law School Liaisons

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

Eight graduates receiving an Honors Certificate in Environmental Law, Jurisprudence and Justice walked with their class in the Barry University School of Law commencement ceremony on May 12, 2012. Students Brooks Gentry, Mary Athey, Matthew Athey, David Asti, Kelly Brooks, Gregory Huamonte, Nicole Sodano, and Jacqueline Witherow will receive a

certificate and a notation on their transcript reflecting their concentrated study.

“The students completing this challenging program will be able to play an important role in addressing our current and future environmental concerns,” said Leticia M. Diaz, dean of the Barry University School of Law. “We are proud of them, and

we look forward to watching them put their knowledge and skills into action.”

Law students in the program must complete Introduction to Environmental Law, Jurisprudence, and Justice; Environmental Law; Administrative Law or Florida Administrative Law and Environmental Regulation; and an approved skills

Law School Liaisons continued....

LAW SCHOOL LIAISONS

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component. They must also complete two approved electives, one of which must be a writing course, and maintain a 2.5 grade point average in the concentration.

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

Center for Earth Jurisprudence Presents Nature Journaling Workshops

The Center for Earth Jurisprudence has expanded its programming to offer a series of Nature Journaling Workshops led by award-winning environmental writer and documentary filmmaker Bill Belleville. Mr. Belleville's latest book, *Salvaging the Real Florida: Lost & Found in the State of Dreams*, was recently awarded the National Outdoor Book Award for natural history literature.

Three workshops were held in April and May, and additional workshops are planned. Workshop participants learn the "art of seeing" and chronicling the nature experience in an interactive outdoor classroom setting. The workshops include a visit to the Lake Harney Wilderness Area in Geneva, Florida, a 300-acre preserve located on the banks of the St. Johns River. The property is part of the Seminole County Natural Lands program and contains historic sites and a variety of habitats.

Workshop participants were treated to flyovers by swallow-tailed kites and to the sight of a bald eagle grabbing a fish from the river. Writings and photographs from the workshops are blogged at www.Learning-toSeeNaturally.blogspot.com.

For more information about this and other CEJ events, please visit www.earthjuris.org or "like" CEJ on Facebook at www.facebook.com/earthjuris.

"True Wealth" Videos Now Online

Video excerpts, full-length video presentations, and presentation slides from the Future Generations conference, "True Wealth in a Green World," are now available online at www.earthjuris.org. The conference, which was held in February on the

Barry Law School campus, explored an expanded definition of wealth that is economically, socially and environmentally sustainable and featured environmental writer and filmmaker Bill Belleville, sharing lawyer Janelle Orsi, and micro-lending CEO Janie Barrera. Solo lawyer Kelly Swartz, simple living guru Tia Meer, and sustainability transition specialist Don Hall also presented.

The Future Generations conference represents an ongoing effort by the Center for Earth Jurisprudence to provide education and probe significant areas of the essential task of this generation: reconciling current human needs and the needs of future generations of all species.

To join the Center for Earth Jurisprudence mailing list and receive notification of future conferences and events, contact Jane Goddard at jgoddard@barry.edu or (321) 206-5788.

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



ELJJ Certificate Graduates and Barry Faculty - Prof. Linda Coco, Gregory Huamonte, Dean Leticia Diaz, Matthew Athey, Mary Athey, Nicole Sodano, Jaskirat Chahal (guest), David Asti, Sister Patricia Siemen, Prof. Patrick Tolan. Not pictured: Brooks Gentry, Kelly Brooks, Jacqueline Witherow, Prof. Judith Koons.



Nature Journaling Workshop - Nature journaling workshop participants head out to choose their spot to sit, observe, and write. Photo credit: Sandy Porche.

Law School Liaisons continued....

An Active Spring Semester at The Florida State University College of Law

by Profs. David Markell, Donna Christie and Hannah Wiseman

A Warm Welcome to a Distinguished New Faculty Member:

We are delighted to welcome Prof. Garrick Pursley, who will be joining the faculty this fall from the University of Toledo College of Law. Prof. Pursley received his B.A. and J.D. from the University of Texas and then clerked for Royce C. Lamberth of the United States District Court for the District of Columbia and Timothy B. Dyk of the United States Court of Appeals for the Federal Circuit; he also practiced at Sushman Godfrey, LLP in Dallas. Prior to his time at Toledo, Prof. Pursley was a Visiting Assistant Professor at the University of Texas School of Law. Prof. Pursley has been described as a “rising star” in the area of federalism, and he researches and writes in the fields of Constitutional and Legal Theory, Administrative Law, and Renewable Energy Law and Policy. Prof. Pursley has published or has publications forthcoming in the *Georgetown Law Journal*, *Texas Law Review*, *Alabama Law Review*, *Emory Law Journal* (co-authored with Prof. Hannah Wiseman), *Ohio State Law Journal*, and the *Duke Journal of Constitutional Law and Public Policy*, among others. He will be a terrific addition to our faculty, and we look forward to his arrival.

Our Environmental Law Distinguished Lecture 25th Anniversary Symposium:

The Florida State University College of Law marked the 25th anniversary of its Distinguished Environmental Lecture Series on March 14, 2012 with a symposium entitled *The Future of Ocean and Coastal Law & Policy*, co-sponsored by the Inter-American Seas Research Consortium. The Oceans Panel explored emerging issues in national and international ocean policy, while the Coastal Panel addressed strategies for making sea-level-rise adaptation “takings-proof.” Panelists included Prof. Josh Eagle, Professor of Law at University of South Carolina School of Law; Prof. Alison Rieser, Director

of the Graduate Ocean Policy Certificate Program (GOPC) and Dai Ho Chun, Distinguished Professor at University of Hawai‘i at Mānoa College of Social Sciences; Prof. William H. Rodgers, Jr., Stimson Bullitt Professor of Law at University of Washington School of Law; Prof. Michael Allan Wolf, Richard E. Nelson Chair in Local Government Law at University of Florida College of Law; Prof. John D. Echeverria, Professor of Law and Acting Director for the Environmental Law Center at Vermont Law School; and Dr. Richard McLaughlin, Endowed Chair for Marine Policy and Law at Harte Research Institute.

Our Spring 2012 Environmental Forum:

The Florida State University College of Law held a very successful Spring *Environmental Forum* in April 2012, entitled *Making One’s Case with the Government: Practical Issues & Strategies*. The College of Law co-sponsored the Forum with the Public Interest Committee of the Environmental and Land Use Law Section of The Florida Bar. The Forum featured distinguished panelists who have broad expertise in working in and with the government and representing different clients before it. Christopher T. Byrd, Senior Assistant General Counsel with the Florida Department of Environmental Protection’s Public Lands Section, served as the Forum moderator. Panelists were Janet E. Bowman (’87), Director of Legislative Policy & Strategies for the Florida Chapter of The Nature Conservancy; Charles Pattison, President of 1000 Friends of Florida; Mary Thomas (’05), Assistant General Counsel in the Executive Office of Governor Rick Scott; and Representative Michelle Rehwinkel Vasilinda, Florida House of Representatives.

Recent Student Externships:

Fall 2011:

Stephanie Dodson Dougherty (FSU Law 2012): Florida Fish and

Wildlife Conservation Commission
Natalie Bristol (FSU Law 2012):
Division of Administrative Hearings

Spring 2012:

Sarah Hayter (LL.M. Candidate):
Department of Environmental Protection (litigation)

Benjamin Melnick (FSU Law 2012):
Department of Environmental Protection (state lands)

Scott Stone (’11 / LL.M. Candidate):
Department of Environmental Protection (water)

Richard Gillis (FSU Law 2012):
Florida Fish & Wildlife Conservation Commission

David Brunell (LL.M. Candidate):
Earthjustice

Christopher Jurich (FSU Law 2012):
Leon County Attorney’s Office

Upcoming Student Externships:

Summer 2012:

Jarryd Rochford (FSU Law 2013):
Leon County Attorney’s Office

Brenda Roman (FSU Law 2013):
Department of Environmental Protection

Audrey Singleton (FSU Law 2013):
Department of Environmental Protection

Ashley Istler (FSU Law 2013):
Humane Society of the United States (Washington, DC)

Forrest S. Pittman (FSU Law 2013):
U.S. Environmental Protection Agency (New York, NY)

Katie Privett (FSU Law 2013):
Division of Administrative Hearings

Student Publications:

Jon Harris Maurer (FSU Law 2012), *Exempting Water Transfers: “A Watering Down of Congress’ Clear Statutory Protections,”* 27 JOURNAL OF LAND USE & ENVIRONMENTAL LAW ___ (2012 forthcoming).

Samuel Farkas (FSU Law 2012), *Third Party PPAs: Unleashing America’s Solar Potential,* 28 JOURNAL OF LAND USE & ENVIRONMENTAL LAW ___ (2013 forthcoming).

Forrest S. Pittman (FSU Law 2013), *Recent Developments,* 27 JOURNAL OF LAND USE & ENVIRONMENTAL

Law School Liaisons continued....

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LAW 189 (2012 forthcoming); *Recent Developments*, 28 JOURNAL OF LAND USE & ENVIRONMENTAL LAW __ (2013 forthcoming).

Environmental Moot Court Team:

The Environmental Moot Court Team, consisting of Kevin Schneider (FSU Law 2012), Trevor Smith (FSU Law 2013) and Angela Wuerth (FSU Law 2013), and coached by Tony Cleveland, Segundo Fernandez, and Preston McLane, participated in the 2012 National Environmental Law Moot Court Competition at Pace Law School in White Plains, New York in February. The Team reached the quarterfinals of the competition. Trevor Smith was named "Best Oral-ist" of the competition.

Alumni Updates and Honors:

Justin Green ('05) recently took

a position as an Environmental Administrator with the Florida Department of Environmental Protection. He works in the Division of Air Resource Management's Office of Permitting and Compliance in Tallahassee. Green oversees project air permitting as well as air compliance and enforcement matters across the State and oversees submission of compliance and enforcement data to EPA.

Thomas G. Pelham ('71) has been inducted into the College of Fellows of the American Institute of Certified Planners, one of the highest honors bestowed by the Institute. Admission to the College is based on significant contributions to the planning profession, exceptional accomplishments and leadership in planning and related fields over an extended period of time, and a demonstrated legacy for the profession and community. Pelham twice served as the Secretary of the Florida Department of Community Affairs, the former state land

planning agency, and played a central role in developing and implementing Florida's growth management system. His contributions include service as President of the American Planning Association's Florida Chapter, Chair of the Florida Bar Environmental and Land Use Law Section, local planning commission member, and authorship of many publications on Florida's planning and growth management systems.

We hope you will join us for one or more of our programs. For more information about our programs, please consult our web site at: <http://www.law.fsu.edu>, or please feel free to contact Prof. David Markell, at dmarkell@law.fsu.edu. For more information about our Environmental Law Program, please see our environmental brochure, available online at http://www.law.fsu.edu/academic_programs/environmental/documents/environmental_brochure_11.pdf.

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

As the 2011 - 12 academic year draws to a close, St. Thomas University School of Law's new LL.M. Program in Environmental Sustainability, directed by Professor Alfred Light, assessed its first year and found that, despite near-daily doses of unfortunate economic and budgetary news nationwide, there has been no shortage of enthusiasm for environmental initiatives locally.

Some of the nation's most outstanding thinkers in the fields of sustainability, ecology and environmental law gladly took time out of their schedules to come to St. Thomas Law and share insights with the students. Many of these courses were offered to the wider public for CLE credit. The Environmental Law and Policy seminar series featured 10 renowned professionals such as conservationist Dr. Anne Savage, Everglades restoration leader Shannon Estenoz, attorneys Michelle Diffenderfer, David Ledbetter of Ledbetter from Hunton & Williams, Neal McAliley, Howard Nelson, James Nutt and Kelly Brooks Smith,

fisheries manager Julie Morris, and technical consultant Chris Herin. Each week, these experts explored topics of state, federal and tribal environmental law, from a broad range of perspectives: property rights oriented conservatives, progressive ecosystem advocates, and government officials caught in the middle. By the end, students had a new understanding of the litigation strategies and scientific complexities that shape the field of environmental law and policy.

The LL.M. program features immersion courses to allow students to interact with professionals in varied disciplines linked to sustainability; again, across a spectrum of disciplines, we encountered an atmosphere of optimism and dedicated activity. Stan Bronson, executive director of the Florida Earth Foundation, led students on courses at a Loxahatchee Impoundment Landscape Assessment project – a 40-acre model of the Everglades that is representative of the whole system, where they heard from Dr. Nicholas Aumen and other

scientists. To offer insight into critical environmental justice issues surrounding farmworker safety, Professor Randall Abate, director of Florida A&M College of Law's Environment, Development & Justice program, led students to the farmworker community in Homestead. Students went to the Everglades Agricultural Area to gain a new perspective on sustainable projects in agriculture at the Florida Crystals' Okeelanta sugar mill, a giant, self-contained mill and refinery; and at a vegetable farm where Rick Roth, the animated vice president of the Florida Farm Bureau, explained how their environmental efforts dovetailed with policy in the State of Florida. Students learned about the complex reality of flood control and maintaining water quality behind the S-9 pump station's 18-inch, hurricane-resistant walls, and toured a county park rehabilitated from a CERCLA (Superfund) hazardous waste site to learn about the possibilities for reclaiming and reusing land.

Some intensive sessions took place on campus, among them: the Renewable Fuels Workshop, for which Steven W. Heller, chief legal officer of Epec Biofuels Holdings; James McDonald, of McLuskey & McDonald P.A.; and Professor Fred Light orchestrated an amazing lineup of 10 industry professionals to deliver targeted information about specific biofuels and feedstocks such as corn, sorghum, sugarcane, soy bean oil, algae and bio-genic wastes. The Climate Change and the Law workshop explored what is slated to remain one of the globe's hottest

topics in coming decades. Daniel Kreeger, executive director of the Association of Climate Change Officers, arranged for the students to hear perspectives about climate change policy and law "straight from the horse's mouth," from officials actually involved in advancing Washington climate change policy. The Green Buildings Workshop, with mechanical and nuclear engineer Charles J. Kibert, director of Powell Center for Construction & Environment at University of Florida, prepared participants to obtain the LEED (Leadership in Energy and

Environmental Design) Green Associate credential, an internationally recognized premier standard for environmentally sustainable buildings.

The program's second year gets underway in August with a short course with Professor John Dernbach, Widener University School of Law, about "Sustainable Development: Law and Institutions." To find out more about the program and courses available by remote access and/or for CLE credit, please visit www.stu.edu/law/environmentLLM or send us an e-mail at environmentLLM@stu.edu.

UF Law Update

by Mary Jane Angelo, Director, Environmental and Land Use Law Program

UF ELULP Program Ranks High

The Environmental and Land Use Law Program (ELULP) of the University of Florida Levin College of Law rose four places to fifth among public universities and ninth overall in the latest *U.S. News & World Report* rankings. The program's ranking has been steadily rising in recent years and our current ranking reflects the depth and breadth of our program, as well as the accomplishments and strong reputation of our faculty and students.

New UF Law Building Earns Gold LEED Rating

The recently dedicated Martin H. Levin Advocacy Center and the Allen and Teri Levin Advocacy Education Suite have earned the gold LEED rating for energy efficient and environmentally friendly design. The rating is based on features such as the use of low-flow faucets, waterless urinals, reflective building materials and designs to optimize energy performance. According to the LEED report, 1.5 tons of construction waste water was diverted from landfills during the building's construction and potable water use has been reduced by 55 percent from fittings and fixtures. The building was dedicated in March 2012.

Faculty Accomplishments

UF law ELULP faculty made numerous presentations and publications recently, including:

Christine A. Klein, Chesterfield

Smith Professor of Law; Director, LL.M. Program in Environmental and Land Use Law, made three presentations this spring: "Water Bankruptcy" at the Third Annual Meeting of the Association for Law, Property & Society, at Georgetown Law Center on March 2; "Compartmentalized Thinking and the Clean Water Act" at the Symposium on the 40th Anniversary of the Clean Water Act, at the George Washington Law School on March 23; "The National Flood Insurance Program" (panelist) at Vermont Law School's Symposium, After Irene: Law and Policy Lessons for the Future, on April 20.

She wrote two articles that were accepted for publication during the spring: *Water Bankruptcy*, 97 MINNESOTA L. REV. __ (2013) and *Compartmentalized Thinking and the Clean Water Act*, 4 GEORGE WASHINGTON J. ENERGY & ENVIRONMENTAL L. __ (2013). In addition, she participated on a committee of the National Academy of Sciences, National Research Council that released a co-written report in April: *Sustainable Water and Environmental Management in the California Bay-Delta* (2012).

Over the summer, she will present a paper at the Colorado Law and Duke Law Symposium, Natural Resources, Energy, and Environment in a Climate Change World (August 10). She will also complete revisions for the third edition of her casebook, Klein, Cheever & Birdsong, *Natural Resources Law: A Place-Based Book of Problems and*

Cases (Aspen, 3d. edition, forthcoming 2013).

Alyson Flournoy began a term as Senior Associate Dean for Academic Affairs last summer. She co-authored an article with 3L Allison Fischman, titled "Wetlands Regulation in an Era of Climate Change: Can Section 404 Meet the Challenge?" The article will be published as part of a symposium issue of the *George Washington Journal of Energy and Environmental Law* on the 40th Anniversary of the Clean Water Act. The two co-authors presented an early version of the paper at the PIEC and Allison Fischman also presented the paper at the GWU Symposium in April and to Professor Richard Hamann's Wetlands and Watersheds class.

Michael Allan Wolf, Richard E. Nelson Chair in Local Government Law, recently published: *THE SUPREME COURT AND THE ENVIRONMENT: THE RELUCTANT PROTECTOR*. CQ Press/Sage, 2012; and *A Yellow Light for "Green Zoning": Some Words of Caution About Incorporating Green Building Standards into Local Land Use Law*, 43 URBAN LAWYER 949 (2011).

He also made the following presentations: "Diamonds in the Rough or Snakes in the Grass?: Evaluating Recent Shifts in American Real Property Law." Eleventh Annual Richard E. Nelson Symposium (organizer). Levin College of Law, University of Florida. Gainesville. February, 2012; "History Counts: Four Questions for the *Stop the*

Law School Liaisons continued....

Beach Plurality.” Association for Law, Property, and Society Third Annual Meeting. Washington, D.C., March, 2012. With William Michael Treanor; “Strategies for Making Sea-Level-Rise Adaptation Strategies “Takings-Proof.”” Environmental Law Distinguished Lecture 25th Anniversary Symposium: The Future of Ocean and Coastal Law & Policy. Florida State University College of Law. Tallahassee. March, 2012; and “Haarvian Principles in the 21st Century.” Bettman Symposium. American Planning Association National Planning Conference. Los Angeles, California, April, 2012.

Jeff Wade, Director of Environmental Division, Center for Governmental Responsibility, participated in a conference as part of the run-up to the UN Rio+20 Conference on Sustainable Development, scheduled for June. The conference, titled “Contribution of International Environmental Law to Sustainable Development: Global and National Perspectives,” was held at the University of Delhi Faculty of Law in New Delhi, India. Wade presented a paper, “Coastal Development in an Unstable Climate: Precaution, Adaptation and Resilience,” and moderated a panel on marine pollution and coastal regulation.

ELULP Graduates LL.M., Certificate Students

Four UF law students received LL.M. degrees in Environmental and Land Use Law at the May, 2012, graduation. They are Reba Abraham, Cathryn Y. Henn, Kevin Wozniak, and Peter Morris. Alex Boswell-Ebersole will graduate in the summer.

Six J.D. graduates received Certificates in Environmental and Land Use Law: Chad Bickerton, Allison Fischman, Corbin Hanson, Heather Judd, Mary Ashley McCollough, and Jennilyn Thibault.

Student Publications

The LL.M. students have had a successful year writing and publishing. Cathryn Henn has had two articles accepted for publication: “The Trouble with Treasure: Historic Shipwrecks Discovered in International Waters,” 19 *Miami International & Comparative Law Review* (forthcoming 2012) and

“The Perfect Storm: Kivalina’s Descent into the Sea,” *University of Missouri Journal of Environmental and Sustainability Law* (forthcoming 2012). Peter Morris has had one article accepted for publication and is finalizing a second article for submission: “Recommitting to Regulation of the Consumer Credit Lending Industry,” *Dartmouth Law Journal* (forthcoming 2012) and “Monumental Seascape Modification Under the Antiquities Act,” (work in progress).

Costa Rica Summer Program Activities

The 2012 edition of the ELULP’s Costa Rica Program represents something of a departure from prior years. This year’s Program will bring law students together with PhD Fellows from the UF Water Institute for an intensive interdisciplinary field experience. In addition to the normal international and comparative law course load, students will work in small groups on skills based practicums involving policy issues related to the Tempisque River Basin in Northwest Costa Rica. The research is intended to support UF efforts to develop a more comprehensive program that addresses climate and water on the Pacific Coast of Mesoamerica.

UF’s ELULP Externships & Fellowships

ELULP students from UF will be working in a variety of programs and agencies during the summer, including externships at the National Oceanic and Atmospheric Administration, Florida Division of Administrative Hearings, The Nature Conservancy, The Center for Biological Diversity, The Audubon Society, Public Trust Environmental Law Institute of Florida, Alachua County Forever, Environmental Protection Commission of Hillsborough County, Brevard County, Seminole County, Environmental Secretariat of the Central American Free Trade Agreement in Guatemala, and the Florida Inland Navigation District in Miami.

Three students have received Conservation Law Fellowships, including Chelsea Sims, who will be working for the National Oceanic and Atmospheric Administration; Samantha Culp, who will be working for The Conservation Trust for Florida; and Gentry Mander who will fill a newly created externship with the Environmental Secretariat of the Central American Free

Trade Agreement in Guatemala City, Guatemala.

Mai Melissa Lee, who will be working for the Center for Biological Diversity, received the ELULP Minority Fellowship.

The 2011-2012 LL.M. Conservation Fellowship was awarded to Sekita Grant, who conducted research and drafted critical memoranda on behalf of environmental organizations such as The Nature Conservancy, Surfrider Foundation and Greenaction.

UF Law Conference in Argentina

The Center for Governmental Responsibility at the University of Florida Levin College of Law hosted the 13th Annual Conference on Legal and Policy Issues in the Americas on May 21-22, 2012, at the University of Buenos Aires Law School in Argentina. The conference examined current legal issues in the hemisphere and featured leading legal experts who discussed topics of judicial reform, mediation, comparative law, democracy and privacy, tax reform, trade and business, human rights, and environment and agriculture.

The panel on “Environment & Agriculture” explored comparative approaches to environmental management and enforcement. Major topics included the management of water resources and pesticide impacts.

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



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

2012 Ethical Challenges for the Environmental Lawyer and Consultant

Course Classification: Intermediate Level (1426R)

and

2012 ELULS Annual Update

Course Classification: Advanced Level (1427R)

August 9-11, 2012

**Sawgrass Marriott Golf Resort & Spa
1000 PGA Tour Boulevard
Ponte Vedra Beach, FL 32082
800-457-4653**

**Course No. 1426R/1427R
1428C**



SCHEDULE OF EVENTS

2012 Ethical Challenges for the Environmental Lawyer and Consultant (1426R)

Thursday

8:00 a.m. – 8:30 a.m.

Late Registration

8:30 a.m. – 8:35 a.m.

Opening Remarks/Introduction

8:35 a.m. – 9:20 a.m.

Rules Governing Ethical Practices for Attorneys and Consultants

*F. Joseph Ullo, Jr., Lewis Longman & Walker, P.A.
Roger B. Register, Cardno TBE*

9:20 a.m. – 10:05 a.m.

Ethical Aspects of RBCA Implementation: Who's on 1st, 2nd, or 3rd Base? A PE, PG, or Esq?

*James P. Oliveros, Golder Associates, Inc.
William D. Preston, William D. Preston, P.A.*

10:05 a.m. – 10:30 a.m.

Break

10:30 a.m. – 11:15 a.m.

Ethical, Legal and Technical Issues Associated with Reporting Contamination

*Daniel H. Thompson, Berger Singerman
J. Chris Herin, Geosyntec Consultants*

11:15 a.m. – 12:00 noon

Ethical Issues Related to Bidding and Contracting

*Ralph A. DeMeo, Hopping Green & Sams, P.A.
Bradley S. Pekas, ECT, Inc.*

2012 ELULS Annual Update (1427R)

12:45 p.m. – 1:30 p.m.

Late Registration

1:30 p.m.

Opening Remarks/Introduction

1:40 p.m. – 2:00 p.m.

Sustainable Railroad Development

Carl A. Gerhardstein, CSX Corporation

2:00 p.m. – 3:15 p.m.

Numeric Nutrient Criteria and Water Quality Standards Update

*David W. Childs, Hopping Green & Sams, P.A.
David G. Guest, Earthjustice
Andrew S. Bartlett, Department of Environmental Protection*

3:15 p.m. – 3:30 p.m.

Break

3:30 p.m. – 4:40 p.m.

Land Use and the Community Planning Act: One Year Later

*Suzanne Van Wyk, Bryant Miller and Olive
Janet E. Bowman, The Nature Conservancy
J. Thomas Beck, Department of Economic Opportunity*

4:40 p.m. – 5:25 p.m.

Legislative Update

*Lawrence E. Sellers, Jr., Holland & Knight, LLP
Terry E. Lewis, Lewis, Longman & Walker, P.A.*

5:25 p.m. – 5:30 p.m.

Session Summary and Announcements

5:30 p.m. – 6:30 p.m.

Reception

6:30 p.m. – 7:30 p.m.

EcoWalk

*E Sciences, Inc. and Water, Wetlands, Wildlife & Beaches
Committee*

Friday

Concurrent Sessions

A) Track A

B) Track B

8:30 a.m. – 9:20 a.m.

A) Air Quality Regulation Update

*Brian J. Accardo, Department of Environmental Protection
Scott Osbourn, Golder Associates, Inc.*

B) Keeping Up with the Board: Update on Sovereign Submerged Lands

*Ryan S. Osborne, Department of Environmental Protection
Edwin A. Steinmeyer, Lewis Longman & Walker, P.A.*

9:20 a.m. – 10:10 a.m.

A) Endangered Species and Habitat Conservation

*Harold G. "Bud" Vielhauer, Fish & Wildlife Conservation
Commission*

Douglas J. Rillstone, Broad & Cassel

B) Dismantling State Oversight of Local Land Use Decisions - Has the Pendulum Swung too far?

*Nancy G. Linnan, Carlton Fields P.A.
Robert Lincoln, Icard Merrill, P.A.*

10:10 a.m. – 10:25 a.m.

Break

10:25 a.m. – 11:15 a.m.

A) Competing Use of Water Resources

*Frank E. Matthews, Hopping Green & Sams, P.A.
Timothy A. Smith, St. Johns River Water Management
District*

B) Whose Beach is it Anyway?

*Angela Howe, Surfrider Foundation
Francine M. Ffolkes, Department of Environmental
Protection*

11:15 a.m. – 12:05 p.m.

A) Waste Cleanup Regulation Update

*Christopher D. McGuire, Department of Environmental
Protection
Joel Balmat, HSW Engineering*

B) The Encore: Tampa's Downtown Tempo District

*Roxanne M. Amoroso, Bank Of America Merrill Lynch
Leigh K. Fletcher, Kellerhals Ferguson Fletcher Kroblin, LLP*

12:05 p.m. – 1:45 p.m.

Section Annual Meeting and Awards Luncheon

1:45 p.m. – 2:25 p.m.

Swamps & Sinkholes - an Ethics Update for Land Use and Environmental Lawyers

Kenneth A. Tinkler, Carlton Fields

2:25 p.m. – 3:15 p.m.

Statewide Environmental Resource Permit Rule

*Jeffrey M. Littlejohn, Department of Environmental Protection
Mark W. Ellard, Geosyntec Consultants*

3:15 p.m. – 3:30 p.m.

Break

3:30 p.m. – 4:15 p.m.

Administrative Law Update

Mary F. Smallwood, GrayRobinson, P.A.

4:15 p.m. – 5:40 p.m.

General Counsel Roundtable

Moderator: Timothy J. Center, Collins Center

Thomas M. Beason, Department of Environmental Protection

Harold G. "Bud" Vielhauer, Fish & Wildlife Conservation Commission

David L. Jordan, Department of Economic Opportunity
John W. Costigan, Department of Agriculture & Consumer Services
Timothy A. Smith, St. Johns River Water Management District

5:40 p.m. – 5:45 p.m.

Closing Remarks

5:45 p.m. – 7:00 p.m.

Reception

CLE CREDITS

2012 Ethical Challenges for the Environmental Lawyer and Consultant (1426R)

General: 3.5 hours
Ethics: 3.5 hours

CERTIFICATION PROGRAM

(Max. Credit: 3.5 hours)

City, County, Local Gov't: 3.5 hours

Real Estate: 3.5 hours

State & Federal Gov't & Administrative Practice: 3.5 hours

2012 Environmental and Land Use Law Annual Update (1427R)

General: 12.5 hours
Ethics: 1.5 hours

CERTIFICATION PROGRAM

(Max. Credit: 12.5 hours)

City, County & Local Government: 12.5 hours

Real Estate Law: 12.5 hours

State & Federal Gov't & Administrative Practice: 12.5 hours

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

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A \$25 service fee applies to all requests for refunds. Requests must be in writing and postmarked no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. Registrants who do not notify The Florida Bar by 5:00 p.m., August 2, 2012 that they will be unable to attend the seminar, will have an additional \$150 retained. Persons attending under the policy of fee waivers will be required to pay \$150.

HOTEL RESERVATIONS

A block of rooms has been reserved at the Sawgrass Marriott Golf Resort & Spa, at the rate of \$129 single/double occupancy. To make reservations, call the Sawgrass Marriott Golf Resort & Spa directly at (800) 457-4653. Reservations must be made by 3:00 p.m. on 7/6/12 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

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TO REGISTER



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REGISTRATION

Register me for "2012 Ethical Challenges for the Environmental Lawyer and Consultant" and/or "2012 ELULS Annual Update"

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- Member of the Environmental & Land Use Law Section: \$115
- Non-section member: \$155
- Full-time law college faculty or full-time law student: \$78
- Persons attending under the policy of fee waivers: \$0

1427R

- Member of the Environmental & Land Use Law Section: \$450
- Non-section member: \$490
- Full-time law college faculty or full-time law student: \$320
- Persons attending under the policy of fee waivers: \$150

Reduced fee for both seminars 1426R and 1427R:

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- Non-section member: \$595
- Full-time law college faculty or full-time law student: \$348
- Persons attending under the policy of fee waivers: \$150

Members of The Florida Bar who are Supreme Court, Federal, DCA, circuit judges, county judges, magistrates, judges of compensation claims, full-time administrative law judges, and court appointed hearing officers, or full-time legal aid attorneys for programs directly related to their client practice are eligible upon written request and personal use only, complimentary admission to any live CLE Committee sponsored course. Not applicable to webcast. (We reserve the right to verify employment.)



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2012 ENERGY BILL

from page 1

Commissioner Putnam worked closely with members of the legislature to develop a bill that would put Florida's energy policy back on track.

The 2012 Energy Bill was introduced by Majority Leader Andy Gardiner in the Senate and Chairman Scott Plakon and Chairman Seth McKeel in the House. HB 7117 was designed to reduce market manipulation, barriers, and risk by promoting growth and increasing energy diversity in our state and passed both chambers of the Florida Legislature with overwhelming bipartisan support. While H.B. 7117 is a modest measure, it is significant in meaning because it is the first piece of comprehensive energy legislation passed by the legislature in four years and will become law July 1, 2012.

Most notably, perhaps, are the expired tax credits that were reinstated by the bill to promote the expansion of renewable energy production and investment in biofuel infrastructure in Florida.

- The Renewable Energy Technology Tax Refund Program, capped at \$1 million annually, exempts and provides for a refund on materials used in the distribution of biodiesel, ethanol, and other renewable fuels, including infrastructure, transportation and storage.

- The Renewable Energy Technology Tax Credit Program, capped at \$10 million, with each applicant being capped at \$1 million on an annual basis, offers a 75% tax credit for capital, operation and maintenance and research and development costs incurred while investing in the production, storage and distribution of renewable fuels.

- The Florida Renewable Energy Production Credit Program credits \$0.01 for each kilowatt-hour of electricity produced from renewable energy production and sold during a given tax year. The program is capped at \$5 million during the first year and \$10 million each year thereafter for three years, with applicant being limited to a cap of \$1 million on an annual basis. In the event that the tax credits are oversubscribed in a year, the legislation establishes a priority program whereby new facilities that begin production after May 2012, and smaller facilities are given first priority.

The reinstatement of these tax credits will reward investments in

renewable energy technologies, infrastructure and production. The tax credits are technology-agnostic and do not pick winners and losers. The marketplace will determine what form renewable energy investment will take. To be clear, these tax credits are not loan guarantees for future investment like the federal grants that funded Solyndra. Rather, they are tax credits toward actual spending, investment and job creation that takes place. Only the projects that invest in and benefit Florida will receive tax credits in return.

An independent economic analysis of the legislation, "Impact of Proposed Energy Tax Legislation for Florida" by John Urbanchuk, Technical Director – Environmental Economics of Cardno ENTRIX, determined that the bill's tax credits will generate economic growth and create jobs in Florida. According to the analysis, the combination of these incentives are projected to generate an annual average of \$28.7 million in new tax revenue over the fiscal year 2012-2016 and support as many as 3,350 new jobs in all sectors of the Florida economy by 2017. Thus, not only will the increased investment in the form of new capital expenditures generate new economic activity, the investments will increase the size, and presumably the quality, of the capital stock which will result in additional growth in real output in all sectors of the Florida economy.

The tax credits reinstated by the bill will be in effect for four years beginning with the tax year 2012. In anticipation of the bill becoming law in July 2012, DACS has initiated rulemaking in order to have rules in place for a seamless application process of the tax credit program. While the bill's tax credits are designed to incentivize economic growth in the energy industry, other measures of the bill are intended to support economic growth by eliminating counterproductive regulations and reducing burdens on businesses.

For example, the bill repeals the Renewable Portfolio Standard (RPS), a regulation that would have required a portion of Florida's electricity to come from renewable sources. The RPS, which would have impeded Florida's free market and raised prices for consumers, was mandated in 2008, and developed by the Florida Public Service Commission (PSC), but never ratified by the legislature.

The bill also amends Section 288.106, Florida Statutes, to clarify that an "electric utility" refers to those utilities that sell electricity on a retail basis. This clarification will avoid

misinterpretations of which entities are eligible for tax credits and will confirm that renewable energy producers do not sell energy on a retail basis and are thus eligible for certain tax credits. Further, with the creation of Section 366.94, Florida Statutes, the bill clarifies that electric vehicle charging stations are a service to the public and not the retail sale of electricity, thereby removing an undue burden on the industry and opening up a market for alternative vehicle fueling. This section also directs DACS to adopt rules to address definitions, method of sale, labeling requirements and price posting requirements to allow for consistency for consumers and the industry.

Another clarification in the bill addresses the sale of unblended gasoline. Though the sale of unblended gasoline is not illegal in Florida, this legislation amends Section 526.203, Florida Statutes, to make clear that retail dealers are not prohibited from offering unblended gasoline to consumers. The bill further directs DACS to develop a website where consumers will be able to find locations in Florida where they can purchase unblended gasoline, thereby raising awareness among consumers of availability of unblended gasoline.

Yet another way the bill reduces burdens on businesses is related to the cultivation of non-native plants species, algae, and blue-green algae for the purpose of biofuel and biomass production. The bill amends Section 581.083, Florida Statutes, to place all producers of non-native or genetically engineered plants and algae on equal footing for the special permitting process required by DACS. Currently, the statute requires special permit applicants to provide a financial security in the form of a bond or other financial instrument to ensure that DACS is reimbursed for eradication costs of any uncontained plantings. The amendments reduce the regulatory burden of producers of non-exempt species by allowing DACS greater flexibility and authority to lower or remove altogether the required financial security requirement over time based on scientific evidence and other practical factors. DACS is also given the authority to maintain a rule that contains a list of non-native and genetically engineered plants that are exempt from the special permitting process altogether.

Because the cheapest energy is the kilowatt not used, energy efficiency and conservation must be a component of any comprehensive energy policy. The

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2012 ENERGY BILL

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legislation promotes energy efficiency in a number of ways. The bill directs DACS to serve as a one-stop resource for consumers on cost savings associated with energy efficiency and conservation measures. Working with the PSC, the Florida Building Commission and the Florida Energy Systems Consortium, DACS will collect and present information to consumers via its website by July 1, 2013. The legislation also enables local governments to offer loans, grants or rebates to property owners who invest in energy efficiency improvements if a discretionary sales surtax is adopted through local referendum. Finally, the bill amends Section 255.257(3), Florida Statutes, to promote energy efficiency across state government by requiring that Department of Management Services (DMS), in coordination with DACS, further develop the state energy management plan and require uniform reporting requirements for state-owned buildings of 5,000 square feet or more. This will allow the state to identify opportunities to increase energy efficiency in government buildings. DACS is currently in the process of working with DMS in order to further develop the state energy management plan.

Measurement and evaluation are also an important part of this legislation. A number of components of the bill are designed to measure progress and growth in Florida's energy industry. This information will ensure that new policies are effective in meeting their objectives and will inform and shape future policy decisions and recommendations.

In order to assist in tracking the amount of renewable energy being used by Florida's utilities, the bill amends Section 186.801, Florida Statutes, to require utilities that submit an annual 10-year site plan to the PSC to include in their plans the amount of

renewable energy resources proposed, produced or purchased in Florida and how it will impact the utility's present and future energy capacity. Utilities will be required to submit this information beginning with their 2013 ten-year site plans.

The bill directs DACS to conduct a comprehensive statewide forest inventory analysis and study, utilizing the Geographic Information System, to identify where available biomass is located, determine the available biomass resources, and ensure forest sustainability within the State. DACS is directed to submit the results of the study to the President of the Senate, the Speaker of the House of Representatives, and the Executive Office of the Governor no later than July 1, 2013.

The bill also calls for an evaluation of the Florida Energy Efficiency and Conservation Act (FEECA), which was established to reduce the growth rates of peak demand and the overall growth rates of electricity consumption, with the overall goal of reducing the consumption of the finite resources used in electricity production. The PSC, in coordination with DACS, is directed to contract an independent study to evaluate specific provisions of FEECA, which shall include the incentives and disincentives associated with the provisions of the act, whether the programs create benefits without undue burden on ratepayers, and the models and methods used to determine conservation goals of utilities.

Even the tax credits established by the bill will be measured to determine their impact on the energy industry. The bill requires DACS to evaluate utilization of the tax credits on an annual basis. These reports will demonstrate the impact of the tax credits on the state and will hold recipients accountable for the information they are reporting to DACS. The annual report is due by February 1 of each year with the information in the report being provided by the recipient's applications for the tax credits – thereby

promoting transparency and ensuring accountability from the recipients of the tax credits.

While the passage of HB 7117 is a victory for Florida, it is only a first step in advancing Florida's energy industry. Commissioner Putnam will continue to work with key stakeholders in the energy industry and major consumers of energy toward securing a stable, reliable and diverse supply of energy to meet our needs.

On August 15-17 in Orlando, Commissioner Putnam will host the second annual Florida Energy Summit. Leaders from the energy, agriculture and financial industries, as well as representatives from academia and government, will come together to share ideas on diversifying the state's energy sources, spurring economic growth and promoting energy conservation. The agenda features discussions on the economic impact of growth in the energy sector and presentations of the emerging technologies coming from Florida's world-class universities. Visit www.floridaenergysummit.com for more information.

Lorena Holley is the General Counsel of the Florida Department of Agriculture and Consumer Services. Prior to joining the Department in January of 2011, Ms. Holley spent a number of years with the Florida Public Service Commission (PSC), most recently serving as a Senior Attorney with the Commission's Office of General Counsel Division of Appeals, Rules and Mediation. During her years at the PSC, Ms. Holley also served as a Chief Advisor to a Commissioner, advising on legal and policy issues related to the economic regulation of Florida's electric, gas, telecommunications, and water and wastewater utility industries. Ms. Holley also spent several years working for the law firm of Rutledge, Ecenia, Purnell & Hoffman, P.A., and as a staff attorney with Legal Services of Greater Miami, Inc. She received her J.D. in 1999 from the Texas Tech School of Law in Lubbock, Texas and is a member of The Florida Bar.