



# THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

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

## Preserving Open Space Through Agriculture – Part I

by Seth D. Chipman

### I. Introduction

The value placed on the importance of open space has increased as urban sprawl erases the existence of areas once proudly revered as countryside. Populations are realizing that the existence of open space plays a role in a community's vitality from an environmental, economic, and social perspective.<sup>1</sup>

Since agricultural entities occupy vast quantities of acreage viewed as open space, the connection between preserving open space by preserving

agriculture is only natural.<sup>2</sup> Hence, agricultural zoning is the most common method used to prevent the construction of residential subdivisions or urban sprawl.<sup>3</sup> There is also a connection between preserved open space and the expectation of a clean or even pristine environment within that open space. A disconnect, however, arises between agriculture and open space when the extent of pollutants generated from an agricultural operation are considered and the fact that agricultural sources of pollution

are virtually unregulated, as compared with the pollutants generated by non-agricultural entities.<sup>4</sup>

Preserving open space by encouraging agriculture use is a difficult yet viable solution to local growth management objectives for open space. If authorities can address effectively the environmental pollutants from agriculture use, the economic realities of farming and the monetary cost to the public, then the objectives of preserving open space through the preservation of agriculture can be re-

*See "Preserving Open Space," page 16*

## From the Chair

by Robert J. Riggio

August, the official start of this Section's new year, is also becoming a month that is all too frequently associated with nature's fury. Andrew, Charley and now Katrina. Who would have imagined that the small hurricane that was threatening to come ashore in Miami during the Section's Annual Update would grow into a monster causing so much devastation. The aftermath of this storm truly underscores the sometimes fickle power of the environment over the use of land.

It is my sincere hope, and I am sure my fellow Executive Council

members agree, that by the time this article is published, some sense of normalcy or at least a glimmer of light at the end of the tunnel will be available to the residents of the storm ravaged Gulf Coast. I would encourage each section member to consider how you might be able to help, and to do so.

Your Executive Council also considered how it might be able to provide help that might not otherwise be available. A veritable torrent of e-mails, culminated in a special meeting on Tuesday, September 6th, at which meeting your Council decided

*continued, page 2*

### **INSIDE:**

ELULS Forms Katrina Relief Program .....	3
Florida Caselaw Update .....	4
On Appeal .....	7
Department of Environmental Protection Update .....	10
Water Management District Update .....	12
Section Budget/Financial Operations ....	13
Kids, Kennedy, Kelo, Costa Rica & More: UF Law Environmental and Land Use Law Program Prepares for a Busy Year .....	14
FSU College of Law Has an Active Schedule for 2005-2006 .....	15

**CHAIR'S MESSAGE**

from page 1

to focus its efforts on providing assistance to the New Orleans area law students and law faculty who will have to relocate to other law schools until such time as their schools can resume classes. An ad hoc committee, chaired by Mary Hansen, was created to act as a clearinghouse to connect the needs identified by the Florida law school deans with suitable offers of assistance. With at least 150 students expected to relocate to Florida law schools, these students will most assuredly have basic needs that will need to be attended to such as housing, transportation, clothing, school supplies and living expenses. The Council also voted unanimously to establish a \$5,000.00 discretionary fund that can be used to provide direct assistance to law school students in need when it appears that all other forms of assistance have been exhausted. In addition, the Council voted to make a direct contribution by the Section to the American Red Cross.

This year also promises to be one of transition for the Section's Treatise on Florida Environmental and Land Use Law. The current three-volume set encompasses an up-to-date overview of virtually every facet of environmental and land use law of interest to a Florida practitioner. Preparation, review, proofreading and updating has involved countless volunteer hours by the authors, virtually all of whom are members of this Section, and Section member editors. Nevertheless, it has remained a very much under-utilized resource. All of this should change with the plan to make the treatise available on the Internet for Section members and to non-Section members on a fee basis. Like the old green books which it replaced, I am sure that once its readership increase, it too will be recognized as the single authoritative source on Florida environmental and land use law.


For those of you who may have an interest in certification, I am pleased to report that The Florida Bar Board of Legal Specialization and Education has recommended approval of the certification program in State

and Federal Government and Administrative Practice. Keith Rizzardi, who has worked tirelessly on this matter as a member of the Government Lawyer Section, also serves on our Executive Council. Our Section offered its support to this endeavor by establishing a committee, chaired by Past Chair Bob Fingar, to offer comments and assist Keith and his committee with their proposal. The Florida Bar encourages members of the Bar to seek certification, and I would encourage our many members who practice in these areas to consider seeking certification under this program once it is implemented fully.

The Section has always taken pride in its CLE programs and this year is no exception. One program, currently in the works that warrants some advance notice is a proposed one-day program in Washington, D.C. in April of next year. The current proposal is a half-day session at the Environmental Protection Agency and a half-day session at the Department of the Interior. The Capitol is always at its nicest at that time of year, and I suspect that if the cherry trees aren't in bloom, the tulips will be. Since out-of-state travel often requires advance calendar arrangements and travel plans, I would encourage all of our Section members to keep an eye out for more information on this program as it is finalized.

We are also most fortunate to be served by an energetic and enthusiastic group of affiliate members. The chair of our affiliates, Neil Hancock, will continue the active involvement of our affiliate members with Section activities. The attorney/affiliate mixers which have been held throughout the State have been especially successful. More of these are promised for the coming year and announcements about them will be forthcoming.

I am sure that during the course of the year there will be many opportunities for those of you to become more involved with the Section. Not only does the Section have standing committees that are always in need of help, but ad hoc committees that arise on an as-needed basis. The Section is always glad to have new faces on board. If serving the Section interests you, please feel free to call me or send me an e-mail. The coming year will most assuredly be an interesting one and I look forward to serving you.



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

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# ELULS Forms Katrina Relief Program

In record time, the ELULS Executive Council established an ad hoc assistance program for New Orleans law students and faculty who are relocating to Florida law schools for the Fall term. Approximately 150 relocatees are expected from Loyola and Tulane Universities.

The Section – through the various law school deans – is assisting with coordinating help for the needs of displaced students and faculty, including housing, transportation, jobs and

other living expenses. Florida lawyers have responded generously with offers of spare bedrooms, cars and even employment.

The Section, in conjunction with other Sections and the voluntary bars in the various Florida law school cities, expects to meet most of these needs through local donations and commitments. However, the Executive Council unanimously approved a \$5,000 discretionary fund to tide our guests over when local help is not

immediately available. All assistance will be handled through the deans.

The Section's service is listed on The Florida Bar web site at [www.floridabar.org](http://www.floridabar.org). Specific needs and offers of help should be posted on the Section's web site at [www.eluls.org](http://www.eluls.org), then click on "Discussion".

Until the situation in New Orleans is clarified, ELULS Chair Bob Riggio will maintain the operation of the ad hoc program.



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# Florida Caselaw Update

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

**The Florida Agricultural Lands and Practices Act, § 163.3162, F.S., does not prohibit counties from enforcing existing county ordinances regarding agricultural land, it only prohibits the adoption of new ordinances that do so. *J-II Investments, Inc. v. Leon County*, 2005 WL 1902569 (Fla. 1st DCA Aug. 11, 2005).**

Leon County filed an action requesting a temporary and permanent injunction enjoining J-II from continued “developmental” activities in violation of a county ordinance which required a permit before development activities occur. J-II responded that the land was not being “developed,” but instead was being used for agricultural purposes, including aquaculture and livestock pasture. J-II argued that the County did not have regulatory authority over agricultural activity under § 163.3162, F.S. Under this section, a “county may not exercise any of its powers to adopt any ordinance, resolution, regulation, rule or policy to prohibit, restrict, regulate, or otherwise limit any activity of a bona fide farm operation on land ....” The lower court granted summary judgment in favor of the County.

The First DCA affirmed the lower court’s entry of summary judgment and applied the plain language doctrine. Giving the statute its plain and obvious meaning, the court opined that § 163.3162, F.S., prevents the county from adopting any new regulations related to agriculture. Consequently, the First DCA found that this statute applied only to newly enacted ordinances, not existing ordinances. If the legislature had intended to divest counties of the ability to enforce existing statutes, it should have done so. Failing to do so, the statute cannot be said to preempt existing county regulations relating to agriculture.

**City of Tampa did not have statutory or common law duty to warn homeowner of allegedly**

**defective soil conditions in tract of land city designated as affordable housing. City neither owned or controlled the land, and therefore had no such obligation. *Dudley v. City of Tampa*, 2005 WL 1125018 (Fla. 2d DCA May 13, 2005).**

Homeowners appealed a grant of partial summary judgment that dismissed their claim of negligence against the City of Tampa. The homeowners alleged that they and their homes suffered substantial damage due to defective soil conditions that the City was aware of but failed to disclose.

In 1987, the City developed an Affordable Housing Program in which the city would designate a tract of land and work with a not-for-profit developer to develop the site as affordable housing. In this particular tract, the engineering company hired by the designated not-for-profit developer to test the soil conditions reported that the soil was not suitable for home construction. However, the developer continued with the project, developed the land and sold it to a homebuilder who built the homes owned by the plaintiffs.

Because the claim against the City was based in negligence, the Second DCA focused on whether the City had a duty to the homeowners under statute or common law. The Court did not identify any statutorily based duty. However, the Court concluded that it was more likely in this situation that a common law duty existed because when a governmental entity builds or takes control of property it has the same common law duties as a private landowner. Even recognizing this, the Court failed to impose a common law duty of care on the City, since the City did not own or develop the land at the time the alleged disclosure was required or at any other time. Because the City only facilitated the project by bringing together and advising various private entities for the benefit of the community, the City had no duty on which plaintiffs could base a negligence claim.

**City of Sanibel properly granted Verizon Wireless permission to erect a telecommunication tower on city owned land. *Verizon Wireless Personal Communications, L.P. v. Sanctuary at Wulfert Point Community Ass’n, Inc.*, 2005 WL 2086343 (Fla. 2d DCA Aug. 31, 2005).**

Homeowners’ association challenged Sanibel City Council’s approval of Verizon’s request to install a telecommunication tower on city-owned property. The City obtained the property as a result of an agreement entered into in 1982 between the City and Wulfert Point developers in resolution of litigation related to the development of the Wulfert Point property. Under this settlement, the developer was required to design, build, and convey to the City a wastewater treatment plant and the City was required to enact a PUD ordinance that set development regulations and standards for the Wulfert Point property.

During the quasi-judicial hearings conducted by the City on Verizon’s tower application, the Homeowners objected to the proposed location as a violation of the PUD and settlement agreement. Despite these objections, the City, relying on a newly enacted telecommunication ordinance, approved the application. The lower court quashed the City’s approval of Verizon’s application and Verizon appealed.

The Second DCA limited its review to whether the circuit court applied the correct law, and found that it had not when it looked to the settlement agreement and the PUD to settle the dispute. When the City Council approved the application, it was acting as a quasi-judicial board and in that capacity, the Council was applying existing law. Therefore, it did not have the authority to ignore, invalidate, or declare the telecommunication ordinance unenforceable. Thus, the City Council properly applied the telecommunication ordinance, which



expressly superseded any contrary provisions in the land development code, including those contained in the PUD.

**Department of Environmental Protection (DEP) cannot attach conditions to permits without holding an administrative hearing. *Tuten v. State of Florida, Dep't of Env'tl Protection, 906 So.2d 1202 (Fla. 4th DCA 2005).***

Tuten submitted a permit to DEP requesting permission to dredge a canal to provide material for a house pad. In a prior case before the Fourth DCA, *Tuten I*, the DEP was ordered to issue a default permit following a hearing to determine if conditions should be imposed on the permit to protect the environment. *Tuten v. State of Florida, Department of Environmental Protection (Tuten I)*, 819 So.2d 187 (Fla. 4th DCA 2002).

Two years after *Tuten I* was decided, the DEP had not issued a default permit nor scheduled an evidentiary hearing. Tuten filed a Motion to Show Cause (with the 4<sup>th</sup> DCA) as to why a default permit without conditions should not be granted due to the extensive delay. Eleven days after the motion was filed, DEP issued a permit with certain general and specific conditions believed necessary to protect the public and the environment. Under §§ 120.569 & 120.57, F.S., the default permit and all conditions set forth therein are final unless a petition for an administrative hearing is filed within 21 days of the permit being issued. Rather than timely filing the petition for an administrative hearing, Tuten appealed to the Fourth DCA.

The Fourth DCA reversed the issuance of the default permit and remanded the matter back to the DEP to hold an evidentiary hearing on the permit conditions. The Fourth DCA also ordered the DEP to follow the ruling issued in *Tuten I*, and conduct an administrative hearing prior to the issuance of the default permit. Absent clear permission, DEP did not have authority to alter the mandate of the Fourth DCA in *Tuten I*.

**In an inverse condemnation action the property owner must be permitted to introduce expert witnesses to prove the fair value of the property. *Savage v. Palm***

***Beach County, 2005 WL 2086197 (Fla. 4th DCA 2005).***

Unit 11 is a 1,760 acre tract of land in Palm Beach County that is highly susceptible to periodic flooding. In 1986, The Indian Trails Improvement District was given the task of constructing improvements to the existing drainage system to facilitate access and allow residential development. The area remained unsuitable for residential development because the district was unable to obtain the permits needed to construct the improvements.

In 1996, the County began to purchase parcels from willing sellers in the area. Four years later, a resolution was passed authorizing the County to acquire the land through various means, including condemnation. In October, 2003, Palm Beach County began condemnation proceedings against property owners in Unit 11. The subject litigation contests the value attributed to the properties in several of the condemnations. The property owners hired two engineers who testified that the permits were not issued to the improvement district because the agencies in charge of permitting wanted the land to be used as a wildlife corridor. The land owner's property appraiser testified that the only reason the area was blighted and valued well below the neighboring lands, was because of the failure to grant the required permits to allow development.

The lower court granted the County's motion in limine which prevented admission of the engineers' testimony. The court also excluded the appraiser's testimony because it was based on the unsupported and speculative assumptions of the engineers. The property owners appealed, arguing that the trial court erred by excluding their experts' testimony.

The Fourth DCA agreed and reversed. The state and federal constitutions require that a property owner be fairly and adequately compensated for property that is taken. The Fourth DCA held that when the court denied the jury access to the testimony offered by the engineers, it excluded relevant testimony regarding the lost potential value of the property, how it occurred and when. The engineers' testimony regarding the suitability of residential development in Unit 11, the permitting pro-

cess, and whether the County was responsible for the blight was within their area of expertise and should have been admitted. Furthermore, this error was exacerbated when it was used to exclude the testimony of the property appraiser since that testimony was predicated on the testimony of the engineers. Therefore, the property owners were deprived of the opportunity to prove the fair value of their property.

**County regulation of a private property owner's landfill constituted a taking when the landfill could neither be used as a landfill or filled and converted to an alternate use. *Osceola County v. Best Diversified, Inc., 2005 WL 1787438 (Fla. 5th DCA July 29, 2005).***

Peter Huff & Best Diversified, Inc. operated a forty-acre construction and demolition debris landfill in Osceola County. Huff's applications for conditional use were denied repeatedly beginning in 1996 because of numerous complaints by neighboring land owners of odors emanating from the landfill. In 1999, Huff sued the County and the Florida Department of Environmental Protection seeking damages under inverse condemnation and the Bert J. Harris, Jr. Private Property Rights Protection Act. Later that year, Huff withdrew his request for administrative review of the Department's denial of his permit to operate his landfill. He also filed a "Notice of Acceptance of Agency Action" in which he accepted the defendants' denial of his permit but reserved the right to maintain this action for inverse condemnation and the Private Property Rights Protection Act violation.

The lower court found that Huff was entitled to relief under the Harris Act and his inverse condemnation claim. Huff elected the remedy of inverse condemnation and was awarded \$1,415,000.

On Appeal, the Fifth DCA found that the lower court erred in reviewing the action. If the County or the Department acted improperly, Huff should have sought appropriate administrative and judicial review of those actions. Failing to do so, Huff should not have been able to challenge the propriety of the denial of the conditional use approval and per-

*continued...*

## FL CASELAW UPDATE

from page 5

mit. The Fifth DCA then addressed whether Huff was entitled to compensation based on the denial of his requests for conditional use and a development permit. The Court stated that when the government regulation is to control a nuisance just compensation is not required.

The final question presented was whether there was a taking because Huff was denied an opportunity to close the landfill. Huff asserted that, after being denied the permit, he was trying to bring construction and demolition debris in to fill the landfill in preparation for a final cover of dirt and vegetation to close the landfill. The County responded that to bring any fill, even clean fill, would require a closure plan "approved by the department" (DEP). However, a DEP employee testified that the DEP does not regulate clean fill and therefore Huff's attempt to bring clean fill onto the property to close down the landfill should not have been stopped by the County. Based on this testimony, the Fifth DCA confirmed the lower court's ruling that Huff could neither reopen the landfill for use nor close it to make it available for other use. Therefore, the property had no economically beneficial use and Huff was entitled to compensation from the County for taking his property through inverse condemnation. The Fifth DCA reversed the judgment against DEP because it was the County's actions, not DEP's that prevented any use of the property.

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# On Appeal

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

*Note: Status of cases is as of September 22, 2005. Readers are encouraged to advise the authors of pending appeals that should be included.*

## Florida Supreme Court

*Vanderbilt Shores Condominium Association, Inc., et al. v. Collier County, et al.*, Case No. SC05-54. Appeal of Second DCA dismissal of action filed by condominium associations for declaratory relief and mandamus, challenging county's issuance of building permit for construction of condominium. 891 So.2d 583. Status: Petition for review denied June 23. 907 So.2d 1172 (Fla. 2005).

*Crist v. Department of Environmental Protection*, Case No. SC03-844. Petition by the Attorney General to review a First DCA decision holding that the trade secrets exemption in what is now section 812.045, F.S., should be read to exempt from disclosure as public records all trade secrets meeting the definition in section 812.081, regardless of whether such documents are stored on or transmitted by computers, to the extent those documents were submitted to a public agency under a written claim of confidentiality. The court held that the exemption applied to public records disclosures even though it is contained in a chapter entitled "Computer-Related Crimes" and not the Public Records Law, Chapter 119, F.S. *SePro Corp. v. Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1<sup>st</sup> DCA 2003), *reh'g denied* (2003). Status: Review denied August 29.

## First DCA

*Miccosukee Tribe of Indians v. DEP*, Case No. 1D04-3157. Appeal of a DOAH final order on the Everglades Phosphorus Criterion Rule, 62-302.540, FAC, approving the rule as a valid exercise of the Department's delegated legislative authority. DOAH Case No. 03-2872RP (Final Order entered June 17, 2004). Status: Affirmed *per curiam* on July 19. 906 So.2d 1064 (Fla. 1<sup>st</sup> DCA 2005).

*Butler Chain Concerned Citizens, Inc. v. DEP*, Case No. 1D04-3941. Appeal of a DEP final order holding that the petitioner failed to prove standing to challenge a consent agreement between DEP and the developer that allowed dredging and filling of sovereign submerged lands in Lake Butler, as the developer's removal of muck and a tussock in the cove would improve water quality in the lake. Status: On July 29, the court affirmed for lack of standing. 907 So.2d 1257 (Fla. 1<sup>st</sup> DCA 2005).

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

*Florida Wildlife Federation, et al v. St. Johns County and DCA*, Case No. 1D04-3511. Appeal of final order determining comprehensive plan amendments to be in compliance. Status: Dismissed *per curiam* July 18 for lack of standing for failing to demonstrate that their business interests are "adversely affected" by the challenged order. Motion for rehearing denied. 2005 WL 1660806 (Fla. 1<sup>st</sup> DCA 2005); 30 Fla. L. Weekly D 1714.

*The St. Joe Company v. Rawlis Leslie, Deborah Crosby, et al.*, Case No. 1D04-5462. Appeal of a circuit court's grant of class certification for property damage claims arising out of disposal of paper mill waste under theories of nuisance, trespass, unjust enrichment, strict liability, negligence and statutory liability under Fla. Stat. 376.313. Status: Reversed and remanded on July 29. 2005 WL 1788830 (Fla. 1<sup>st</sup> DCA 2005); 30 Fla. L. Weekly D1839. Motions for rehearing and rehearing *en banc* denied. Petition for review filed in Florida Supreme Court on September 21.

*Montgomery Land Co., et al v. City of Jacksonville*, Case No. 1D04-5329. Appeal from order rejecting a chal-

lenge to a City ordinance that requires a permit and mitigation for removal of certain trees. Status: Oral argument held September 20.

## Fourth DCA

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

*Tuten v. DEP*, Case No. 4D04-1253. Appeal from order issuing environmental resource permit to dredge canal to provide fill material for building pad. In a prior decision, the Fourth DCA required DEP to issue a default permit. *Tuten v. DEP*, 819 So.2d 187 (Fla. 4<sup>th</sup> DCA 2002). DEP subsequently issued the permit with conditions, and the landowner appealed. Status: On July 20, the court reversed the issuance of the default permit and remanded to DEP to conduct an administrative hearing pursuant to the court's instruction. 906 So.2d 1202 (Fla. 4<sup>th</sup> DCA 2005).

## Fifth DCA

*St. Johns River Water Management District v. Womack*, Case No. 5D03-2493. Appeal of a circuit court decision ordering the District to pay Womack \$262,383 in damages pursuant to 42 U.S.C. s. 1983, for denying Womack equal protection under the laws and holding that the District's action constituted an unreasonable exercise of police power in violation of s. 373.617, F.S. Status: On September 16, the court reversed (although the court said it was reluctant to do so in light of the trial court's "factual finding of impropriety during the District's proceedings"). 2005 WL 2253833 (Fla. 5<sup>th</sup> DCA 2005).

*St. Johns River Water Management District v. Koontz*, Case No. 5D04-2113. Appeal of final judgment in inverse condemnation case. Status: Denied *per curiam* on June 24;

*continued...*



## ON APPEAL

from page 7

motion for rehearing *en banc* denied. 908 So.2d 518 (Fla. 5<sup>th</sup> DCA 2005).

*Brevard County v. Charles R. Stack, Trustee, etc., et al.*, Case No. 5D05-1270. In this appeal, Brevard County claimed that the Bert Harris Act violated the Florida Constitution's eminent domain provision, that it was an unlawful delegation of legislative power, and that it created an unconstitutional gift of public funds. Status: Review denied on August 12.

*St. Johns/St. Augustine Committee, etc. v. City of St. Augustine, et al.*, Case No. 5D04-3519. Petition for review of order from the circuit court relating to modifications of a Planned Unit Development (PUD) for a proposed development which was recently annexed into the City. Status: Review denied on September 2, 2005 WL 2104610 (Fla. 5<sup>th</sup> DCA 2005); 30 Fla. L. Weekly D2077.

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

### U.S. Supreme Court

*Honeywell International Inc. v. Interafaith Community Organization*, Case No. 04-1560. Petition to review a Third Circuit decision upholding a district court decision that the community group had proven an "imminent and substantial endangerment" to health and the environment under the RCRA citizen suit provision, affirming the district court's finding that the hexavalent chromium found

in the soil at the Honeywell site exceeded New Jersey standards by an average of more than 7,500 ppm and that excavation and removal of the contamination was necessary to eliminate the threat of exposure. Significantly, the appellate court held that citizens were not required to exhaust administrative remedies before filing suit under RCRA's citizen suit provision. Status: Petition denied June 20. 125 S.Ct. 2951

*Kelo et al. v. New London, CT*, Case No. 04-108. Petition to review a decision of the Connecticut Supreme Court holding that the City of New London was entitled to take property by eminent domain to facilitate the development of a new major drug research complex; the Fifth Amendment's public use requirement authorizes eminent domain of property for the sole purpose of "economic development" to potentially increase tax revenues and improve the local economy. 843 A.2d 500 (Ct. 2004). Status: Affirmed June 23. 125 S.Ct. 2655. Petition for rehearing denied. 2005 WL 2000781.

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

*Carabell v. U.S. Army Corps of Engineers*, Case No. 04-1389. Appeal of Sixth Circuit ruling that a wetland separated by a manmade berm from a ditch that connects to navigable waters through tributaries still qualifies for CWA protection, even though there is no hydrological connection between the wetland and the ditch. Status: Distributed for Conference of October 7, 2005.

### Fourth Circuit

*United States v. Duke Energy Corp.*, Case No. 04-1763. Appeal of district court decision that EPA's definition of "modification" in the new

source review (NSR) program must be consistent with the definition in the new source performance standard (NSPS) program, holding that an "emissions increase" means an increase in the hourly rate of emissions, as it is defined under NSPS, not an increase of actual emissions measured on an annual basis, as EPA contended. As a result, the company could increase actual emissions by expanding its operating hours, as long as the hourly emission rate did not increase. 278 F. Supp. 2d 619 (M.D. N.C. 2003). Status: The court affirmed on June 15. 411 F.3d. 539.

*Ohio Valley Environmental Coalition, et al. v. Bulen, et al.*, Case No. 04-2129. Appeal of a district court decision barring the U.S. Army Corps of Engineers from issuing general discharge permit Nationwide 21 (NWP 21) for mountaintop mining in the southern district of West Virginia, on the ground that the permits unlawfully allow placement of mining debris into streams below (a practice called "valley fills") using procedures Congress never intended for general permits under section 404 of the CWA. The Justice Department is arguing that the decision will lead to inconsistent application of the NWP 21 nationwide. *Ohio Valley Environmental Coalition v. Bulen*, Case No. CIV.A.3:03-2281, 2004 WL 1576726 (S.D.W.Va. July 8, 2004), *modified in part*, 2004 WL 2384841 (Aug. 13, 2004), *reconsideration denied* (Aug. 31, 2004). Status: Oral argument held September 19.

### Seventh Circuit

*Texas Independent Producers & Royalty Owners Assn. v. EPA*, Case No.03-3277. Challenge to various aspects of the NPDES stormwater general permit for construction activities on the ground that the requirements are vague or arbitrary and capricious. Status: The court upheld the general permit on June 13, holding that it did not violate the Clean Water Act's provisions requiring public notice and comment or the Endangered Species Act consultation requirement. Rehearing and rehearing *en banc* denied August 26. 410 F.3d 964.

### Eleventh Circuit

*Southern Waste Systems, LLC v.*



*City of Delray Beach, et al.*, Case No. 04-13035. Appeal of a summary judgment declaring that a contractual agreement between the City and Waste Management, Inc., was unconstitutional, and enjoining its enforcement because it violates the Commerce Clause. Status: On August 16, the court reversed the judgment, vacated the injunction and remanded. 2005 WL 1958367; 18 Fla. L. Weekly Fed. C 845.

## D.C. Circuit

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

*U.S. Telecom Association & CenturyTel, Inc. v. FCC*, Case No. 03-1443. Petition to review a FCC rule on the grounds that the FCC failed to conduct an assessment under the Regulatory Flexibility Act, which requires agencies to justify their proposed rules and explain how the rule(s) may affect small businesses. Status: On March 11, the court remanded the rule to require the FCC to conduct the requisite assessment. This could impact other agency rulemakings. 400 F.3d 29. On August 26, the court denied a motion for attorneys' fees brought against the FCC.

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

*Minnesota Power v. EPA*, Case No. 05-1246; *North Carolina v. EPA*, Case No. 05-1244. Various petitions challenging EPA's Clean Air Interstate Rule (CAIR), which was issued March 10. The CAIR implements an

emissions trading system to reduce emissions of sulfur dioxide and nitrogen oxides from power plants. Status: The cases have been consolidated. EPA's motion to hold the cases in abeyance pending agency action is pending.

*Commonwealth of Massachusetts v. EPA*, Case No. 03-1361. Petition by a dozen states challenging EPA's decision not to regulate carbon dioxide and other greenhouse gases from vehicles under the Clean Air Act. Status: A three-judge panel of the court denied the petitions on July 15. 415 F.3d 50. A petition for rehearing and rehearing *en banc* was filed August 29.

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

*New York v. EPA*, Case No. 03-1380. Challenge to EPA's New Source Review rule amendments published on October 27, 2003, which expands the "routine maintenance/equipment replacement" exclusion from review under the New Source Review/Prevention of Significant Deterioration (NSR/PSD) programs. The rule amendments were scheduled to take effect on December 26, 2003. Status: EPA denied reconsideration of the rule on June 6. Order establishing briefing schedule entered August 31.

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

413 F.3d 3.

*American Iron & Steel v. EPA*, Case No. 00-1435. Petition to review EPA's final air pollution monitoring rule and performance standard published August 10, 2000, requiring use of continuous opacity monitors. Status: The EPA and Petitioners have begun settlement discussions and agree that maintaining the stay of litigation while these discussions occur will serve the interests of the parties and judicial efficiency. EPA was due to file a status report on September 12.

*Commonwealth of Massachusetts, et al. v. USEPA*, Case No. 03-1361. Appeal by multiple states and environmental groups of EPA's denial of a petition asking it to regulate carbon dioxide and other greenhouse gas emissions from new motor vehicles under the Clean Air Act. EPA concluded that it did not have statutory authority to regulate greenhouse gas emissions from new motor vehicles and that, even if it did, it would not exercise the authority at this time. EPA's determination was based, at least in part, on contradictory evidence as to whether greenhouse emissions from new motor vehicles have caused or will cause a significant change in global climate. EPA also relied on the lack of regulatory approaches to reduce such emissions. Status: The court found that the EPA Administrator properly exercised his discretion under the Clean Air Act by not regulating greenhouse gas emissions from new motor vehicles.

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# Department of Environmental Protection Update

by Angela Dempsey

**MICCOSUKEE TRIBE OF INDIAN AND THE FRIENDS OF THE EVERGLADES v. NEW HOPE SUGAR et al**, 906 So.2d 1064 (Fla. 1<sup>st</sup> DCA 2005) - Petitioners challenged an Administrative Law Judge's (ALJ) final order upholding the Everglades phosphorus rule (62-302.540, F.A.C.) as a valid exercise of DEP's delegated legislative authority. On July 19, 2005, the First DCA issued a per curiam affirmance without opinion (PCA) in the consolidated appeals brought by the Miccosukee Tribe and the Friends of the Everglades to challenge ALJ Maloney's June 2004 final order. The rule establishes a phosphorus standard of 10 parts per billion for the entire freshwater area of the Everglades Protection Area and requires the use of best available phosphorus reduction technology to ultimately achieve the water quality standard. As part of its intensive schedule designed to improve water quality in America's Everglades, the State is operating more than 36,000 acres of constructed wetlands that use plants to remove nutrients naturally from water flowing into the 2.4 million-acre marsh. Florida is on schedule to construct an additional 5,000 acres of treatment marsh by 2006 and another 15,000 acres by 2009. The appellants did not file a motion for rehearing nor did they seek further review with the Florida Supreme Court.

**DEPARTMENT OF ENVIRONMENTAL PROTECTION v. HENRY HARDY, JR. and MARY HARDY**, 907 So.2d 655 (Fla. 5<sup>th</sup> DCA 2005) - On July 29, 2005, the Fifth DCA reversed a judgment and jury verdict of over \$1.5 million against DEP for an alleged loss of property and other profits. The suit began as a mortgage foreclosure action brought by AVCO Financial Services of Florida, Inc. against the Hardys and DEP, which held a lien on the Hardys' property. The Hardys then filed cross-claims against DEP for negligence, negligent supervision and trespass. In 1991,

DEP conducted an inspection of the Hardy's business, AAA Tree Service, after receiving complaints that they were filling their wetlands and despoiling Lake Griffin, in Longwood, Florida. When the Hardys failed to restore the wetlands, DEP initiated formal wetlands and solid waste proceedings. Although the Court noted that the Hardys failed to identify a basis for the claims until day four of the six-day trial, the "negligent enforcement" claims were based on DEP's alleged wrongful assertion of wetlands jurisdiction. The Fifth DCA concluded that no statutory or common law duty arose with respect to the negligence claim and that the Hardy's failed to prove any of the elements of negligent supervision or trespass. In ordering the lower court to enter a judgment for DEP, the DCA went on to explain that the state's obligation to investigate complaints and enforce environmental regulations are discretionary functions and therefore are immune from suit pursuant to *Trianon Park Condo Ass'n v. City of Hialeah*, 468 So.2d 912 (Fla. 1985).

**BUTLER CHAIN OF CONCERNED CITIZENS, INC. v. DEP**, 907 So. 2d 1257 (Fla. 1<sup>st</sup> DCA 2005) - On July 29, 2005, the First DCA per curiam affirmed a DEP final order issued by the Department on August 2, 2004, after an administrative hearing conducted in December 2003. The final order held that Butler Chain of Concerned Citizens (BCCC) lacked standing to challenge a May 2003 consent order between Windermere Botanical Garden (WBG) and the Department. The May 2003 consent order addressed dredge and fill violations committed by WBG in wetlands and surface waters of Lake Butler, in Orange County, by requiring WBG to pay a civil penalty. The ALJ concluded that BCCC did not have standing to challenge the consent order because BCCC did not meet the first prong of the three-pronged test established in *Agrico*

*Chemical Co. v. Dept. of Environmental Regulation*, 406 So.2d 351 (Fla. 1982); the ALJ found that petitioner's substantial interests were not adversely affected by the proposed agency action.

**BEVERLY PENZELL, et al., vs. M & M CONSTRUCTION GROUP CORP., et al.**, 30 Fla. L. Weekly D2110a - On September 7, 2005, the Third DCA held that a DEP lien took priority over an assigned mortgage when distributing the excess proceeds of a tax sale. DEP had obtained a final judgment against of the property owner, Dana Investments, Inc.(Dana) on February 12, 2003 and properly recorded it in April 2003. In finding Dana and its co-defendants liable for RCRA and CERCLA violations, the judgment granted injunctive relief ordering an immediate site assessment and any necessary cleanup, and retained jurisdiction to determine civil penalties. Due to Dana's failure to pay property taxes, the property was sold at a tax sale on December 3, 2004 to M & M Construction Group Corp.(M&M), which resulted in excess proceeds of \$122,600. On January 20, 2004, Bank of America assigned its mortgage on the property to Beverly Penzell. M&M filed an action to quiet title on its tax deed and both Penzell and DEP sought distribution of the excess proceeds. The DCA recognized that §197.582(2), Fla. Stat., requires that governmental liens be satisfied before other claims and therefore DEP's lien took priority over Penzell's mortgage. Additionally, the Court noted that Penzell had actual or constructive notice of DEP's April 2003 recorded judgment. The Court also found that the judgment, which established liability but did not fix a monetary award amount, constituted a valid lien because it ordered the parties to comply with clear and definite tasks, and thus created a duty to obey, not a mere expectancy, thereby distinguishing *Perez v. Pearl*, 411 So.2d 972 (Fla. 3d DCA 1982).

**OSCEOLA COUNTY, FLORIDA, ET AL. v. BEST DIVERSIFIED, INC., AND PETER L. HUFF, ET AL.**, 30 Fla. L. Weekly D1831 - On July 29, 2005, the Fifth DCA reversed a judgment and jury verdict against DEP in an inverse condemnation case where the plaintiffs failed to seek appropriate administrative and judicial review of DEP's and Osceola County's actions. Not only did plaintiffs dismiss their administrative appeal of DEP's permit renewal denial, but they also filed a notice specifically "accepting" DEP's and the County's actions and waiving any further right to challenge those actions. Plaintiffs alleged that defendants had made it impossible for plaintiffs to operate a landfill on their property as a result of DEP's permit denial and the County's denial of a request for a conditional use. Plaintiffs further alleged that the defendants' actions made it impossible for the plaintiff to close the construction and demolition debris landfill. In 1996, after investigating odor complaints, DEP found that the plaintiffs' operation constituted a public nuisance. Prior caselaw has held that a regulation controlling a public nuisance cannot effect a taking, see Keshbro, Inc. v. City of Miami, 801 So.2d 864 (Fla. 2001). Therefore, the Court found that there had been no taking as a result of the operation of the landfill. However, the Court did find that when the County prohibited Huff from bringing in clean fill to grade, slope and prepare the site for closure in accordance with DEP's rules, that act denied Huff all reasonable economic use of the land, thereby preserving that portion of the judgment against Osceola County. This case also includes an interesting 5 page concurrence/dissent by Judge Griffin in which she concludes that the \$1.5 verdict is the largest verdict based on the least evidence she has ever seen and the verdict should be reversed in its entirety.

*Angela Dempsey is an Assistant General Counsel in the Department of Environmental Protections Office of General Counsel.*

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# Water Management District Update

## Expedited Permitting Under Section 403.973, Florida Statutes, is Applied to the Scripps Project

by Susan Roeder Martin, Senior Specialist Attorney

The South Florida Water Management District (“District”) issued an environmental resource permit (“ERP”) for a surface water management system to serve a biotechnology research park for the Scripps Research Institute (“Scripps”) along with supporting commercial, institutional, residential and educational uses. Palm Beach County (“County”) is the current owner of the 1,919-acre citrus grove and sand mining site which will be the home to Scripps. As the property owner, the County applied to the District for environmental resource and water use permits. The District issued notice of its intent to issue the ERP and that was challenged by the Florida Wildlife Federation, Jupiter Farms Environmental Council, Audubon Society of the Everglades, Palm Beach County Environmental Coalition and several private individuals (“Petitioners”).

The permit application was approved for expedited permitting pursuant to Subsection 403.973(15)(b), Florida Statutes. The purpose of expedited permitting is to “encourage and facilitate the location and expansion of those types of economic development projects which offer job creation and high wages, strengthen and diversify the state’s economy, and have been thoughtfully planned to take into consideration the protection of the state’s environment.” Section 403.973, Florida Statutes. Projects approved for expedited permitting are subject to the same substantive standards and review that apply to other permits, however the review period is shortened. Existing agency nonprocedural standards for permit applications are not modified. Subsection 403.973(16), Florida Statutes.

Projects approved for expedited permitting can request a summary

proceeding under Section 120.574, Florida Statutes. When a project is approved for expedited permitting, there are two main variations in the summary proceeding process. First, the Section 120.574, Florida Statutes, requirement that all parties must agree in writing to the summary proceeding is waived for “state of the art biomedical research” institutions. In addition, under Section 120.574, Florida Statutes, the administrative law judge’s decision is final agency action. However, by contrast, Subsection 403.973(15)(a), Florida Statutes, provides that the administrative law judge’s decision shall be in the form of a recommended, rather than final order for projects subject to the expedited permitting process.

The request for summary hearing must be made within fifteen days after service of the initial order. Hearings are to be conducted within 30 days. However, the Scripps hearing was delayed slightly due to the two hurricanes that struck Palm Beach County shortly after the petitions were filed. Discovery, in a summary proceeding, is limited to the informal exchange of documents and witness lists.<sup>1</sup> Motions under Section 120.574, Florida Statutes, are limited to those requesting a continuance or a pre-hearing conference.

The summary hearing itself is the same as a normal administrative hearing. All parties have the right to present evidence, respond, conduct cross examination and present rebuttal evidence. Subsection 120.574(2)(c), Florida Statutes.

Many issues were raised in the Scripps final hearing. However the most interesting issue concerned the ERP requirement that an applicant must demonstrate that its activities will not be harmful to water resources and will “not be inconsistent with the overall objectives of the Dis-

trict”. Sections 373.414 and 373.416, Florida Statutes. In this area, the objectives of the District focus on the Congressionally-approved Comprehensive Everglades Restoration Plan (CERP) pertaining to restoration of the Northwest Fork of the Loxahatchee River. The Petitioners contended that development should not be allowed on the site because it would be inconsistent with CERP and the site should instead be reserved for potential future use by the District as a reservoir. Administrative Law Judge Arrington did not agree and found that reasonable assurances had been provided demonstrating that the site was not needed for a reservoir. Instead, Palm Beach County included a 250-acre natural flow-way in its project design to facilitate a route from a storage area to the south to the river.

Pursuant to Subsection 120.574(2)(f), Florida Statutes, the decision of the administrative law judge must be issued within 30 days after the conclusion of the final hearing or filing of the transcript, whichever is later. The District had ten working days from receipt of the recommended order to issue a final order. The District adopted the Administrative Law Judge’s Order on December 8, 2004. This decision was appealed to the Fourth District Court of Appeal. Oral arguments were held on May 18, 2004, and a per curiam affirmance was issued on the same day as the oral argument. *Palm Beach County Environmental Coalition v. South Florida Water Management Dist.*, 902 So. 2d 812 (Table) (Fla. 4th DCA 2005).

### Endnote:

<sup>1</sup>The discovery process can be extended upon a showing of necessity but only if it can be completed not later than five days prior to the final hearing. Subsection 120.574(2)(a)2, Fla. Stat.

## Section Budget/Financial Operations

	2004-2005 Budget	2004-2005 Actual	2005-2006 Budget
<b>REVENUES:</b>			
Dues	\$ 44,500	\$ 44,745	\$ 62,300
Affiliate Dues	\$ 4,000	\$ 3,220	\$ 4,000
Dues Retained by TFB	\$ (23,850)	\$ (23,532)	\$ (23,850)
<b>TOTAL DUES</b>	<b>\$ 24,650</b>	<b>\$ 24,433</b>	<b>\$ 42,450</b>
Course Income	\$ 10,000	\$ 10,200	\$ 9,000
Audiotape Sales	\$ 8,000	\$ 10,769	\$ 8,000
Sponsorship	\$ 12,000	\$ 16,225	\$ 12,000
Reimbursement of Loss	\$ 0	\$ (980)	\$ 0
Investment	\$ 7,850	\$ 7,645	\$ 11,596
Material Sales	\$ 300	\$ 105	\$ 300
Credit Card Fee	\$ 0	\$ (5)	\$ 0
<b>TOTAL REVENUE</b>	<b>\$ 62,800</b>	<b>\$ 68,392</b>	<b>\$ 83,346</b>
<b>EXPENSE</b>			
Staff Travel	\$ 2,537	\$ 2,867	\$ 2,695
Postage	\$ 1,200	\$ 1,032	\$ 1,200
Printing	\$ 500	\$ 48	\$ 100
Newsletter	\$ 5,500	\$ 2,642	\$ 5,500
Membership	\$ 2,000	\$ 2,045	\$ 2,000
Supplies	\$ 50	\$ 0	\$ 50
Photocopying	\$ 500	\$ 289	\$ 500
Officer Travel Expense	\$ 3,000	\$ 2,264	\$ 3,000
Meeting Travel Expense	\$ 8,000	\$ 3,112	\$ 8,000
CLE Speaker Expense	\$ 1,000	\$ 0	\$ 1,000
Committee Expense	\$ 1,000	\$ 169	\$ 1,000
Board or Council Meetings	\$ 3,000	\$ 2,038	\$ 3,000
Bar Annual Meeting	\$ 2,000	\$ 1,614	\$ 2,000
Section Annual Meeting	\$ 17,000	\$ 15,445	\$ 17,000
Retreat	\$ 6,000	\$ 1,478	\$ 6,000
FSU Law Journal	\$ 1,000	\$ 0	\$ 1,000
Land Use Law Manual	\$ 0	\$ 0	\$ 18,000
Public Interest Committee	\$ 500	\$ 0	\$ 500
Awards	\$ 2,500	\$ 881	\$ 2,500
Scholarship	\$ 6,000	\$ 0	\$ 6,000
Law School Liaison	\$ 10,000	\$ 4,500	\$ 10,000
UF Speaker Series	\$ 1,000	\$ 0	\$ 1,000
Dean Maloney Contest	\$ 1,000	\$ 1,007	\$ 1,000
Access to Justice	\$ 3,000	\$ 500	\$ 3,000
Website	\$ 5,500	\$ 5,157	\$ 8,000
Council of Sections	\$ 300	\$ 300	\$ 300
Operating Reserve	\$ 6,809	\$ 0	\$ 10,485
Miscellaneous	\$ 500	\$ 48	\$ 500
<b>TOTAL EXPENSE</b>	<b>\$ 91,396</b>	<b>\$ 47,436</b>	<b>\$ 115,330</b>
<b>BEGINNING FUND BALANCE</b>	<b>\$ 164,070</b>	<b>\$ 183,784</b>	<b>\$ 165,662</b>
<b>PLUS REVENUE</b>	<b>\$ 62,800</b>	<b>\$ 68,392</b>	<b>\$ 83,346</b>
<b>LESS EXPENSE</b>	<b>\$ (91,396)</b>	<b>\$ (47,436)</b>	<b>\$ (115,330)</b>
<b>PLUS NET OPERATIONS FROM WORKSHOPS</b>	<b>\$ (6,341)</b>	<b>\$ (10,204)</b>	<b>\$ (5,622)</b>
<b>ENDING FUND BALANCE</b>	<b>\$ 129,133</b>	<b>\$ 194,536</b>	<b>\$ 128,056</b>

### SECTION REIMBURSEMENT POLICIES:

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

# Law School Liaisons

## Kids, Kennedy, Kelo, Costa Rica & More: UF Law Environmental and Land Use Law Program Prepares for a Busy Year

by Thomas T. Ankersen, Legal Skills Professor and Director, UF Law Conservation Clinic

Construction weary students and faculty celebrated the completion of the Levin College of Law's new state of the art library and classroom facility with a dedication by retiring Supreme Court Justice **Sandra Day O'Connor**. Environmental and Land Use Law Program students and faculty have launched an ambitious agenda designed to enhance the Levin College of Law's growing reputation in the field.

### PUBLIC INTEREST CONFERENCE GOES NATIONAL

Where better to begin than with the students, who "NAELed" down a coup of their own. Third year law students Nathan Bess, Leslie Utiger and recent graduate Quilla Trimmer-Smith traveled to Pace Law School and returned with the rights to host the annual conference of the National Association of Environmental Law Societies (NAELS), which will be bundled with the always popular annual spring Public Interest Environmental Conference (PIEC), a Section CLE staple. That was enough for **Robert F. Kennedy Jr.**, who agreed to serve as the opening speaker. Kennedy, who works in Pace's environmental law clinic, has represented the Hudson Riverkeeper and promoted the creation of Riverkeeper's throughout the nation, including Florida. The PIEC's liquid connection continues with the work of Conference Co-Chair Heather Halter who convinced National Geographic underwater explorer and ocean champion **Sylvia Earle** to deliver a Keynote. Kids won't be left out of this one, however. The PIEC is working with UF's Center for Children's Literature and Culture to support the conference's overarching theme of Intergenerational Equity. An entire track will be devoted to those most vulnerable to environmental insults, capped off with a grand finale featuring UF Law alum **Carol Browner**. Mark your calendar for March 9-11

as students and speakers from around the country celebrate an environmental law spring break in Gainesville.

### NEW TAKES ON TAKINGS SYMPOSIUM

Land use and local government is featured this Fall as the Program sponsors the 5<sup>th</sup> annual Richard E. Nelson Symposium, under the direction of Professor Michael Wolf. Wolf and a host of distinguished scholars and practitioners from around the country will offer their take on new state and federal takings cases. Among Wolf's guests for this CLE event are distinguished law faculty from the University of Michigan, Notre Dame, Fordham and Pepperdine, along with UF Law's own Mark Fenster. Judges and practitioners from throughout the state will serve as respondents in what promises to be lively discourse on the ever-evolving takings jurisprudence. The Program will take place at the Hilton University of Florida Conference Center and begins with an evening reception on November 17<sup>th</sup>. For further information contact Barbara DeVoe, Director of Conference Planning at [devoe@law.ufl.edu](mailto:devoe@law.ufl.edu) or 352-273-0615.

### FACULTY HIGHLIGHTS

Program faculty have been busy as well. Professor Mary Jane Angelo taught a module on environmental dispute resolution in the ELULP's Costa Rica study abroad program. Legal Skills Professor Tom Ankersen and CGR Associate in Law Richard Hamann were named statewide legal extension specialists by Florida Sea Grant, which provides marine and extension services to Florida's coastal constituencies, especially in the area of recreational boating and the environment. Putting students in the field, Ankersen's Conservation Clinic has partnered with the Florida Department of Community Affairs to

provide assistance to small coastal communities enrolled in DCA's Waterfronts Florida Program.

### COSTA RICA ANYONE??

At the CLE Committee meeting in Amelia Island consideration was given to partnering with UF Law's Joint Program in Environmental Law with the University of Costa Rica to host a Section seminar or workshop in that country. Legal Skills Professor Tom Ankersen directs the Program, which has previously hosted Conferences for the ABA Section on Natural Resources and Environmental Law (2002) and the law school's annual Law in the Americas Conference (2004). In order to better serve the interests of the Section it would be helpful to know what sort of subject matter members think would be most usefully provided in a Costa Rica setting. Suggestions can be provided to Ankersen ([ankersen@law.ufl.edu](mailto:ankersen@law.ufl.edu)) or to Richard Hamann ([hamann@law.ufl.edu](mailto:hamann@law.ufl.edu)), who also teaches in the Program.

*Ethics Questions?*



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# FSU College of Law Has an Active Schedule for 2005-2006

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

FSU College of Law's nationally recognized environmental law program has a full schedule of activities for the 2005-2006 academic year, including the following:

1) The *Journal of Land Use and Environmental Law's* Distinguished Lecture Series – the *Journal*, ranked nationally among specialty journals based on citation count, will feature Professors Jim Salzman of Duke University Law School, and Douglas Kysar of Cornell University as its Distinguished Lecturers. The *Journal's* student Executive Board for this year includes: Editor-in-Chief Zachary Ross, Executive Editors Melanie Shoemaker and Matthew Scanlan, Research Editor Peter McKernan, Associate Editor Jennifer McCoy, and Administrative Editor Shakila Faqeer.

2) The Law School *Environmental Forum* Series, a series that provides a neutral forum for the discussion of

timely environmental issues, will focus on the Supreme Court's *Kelo* decision in its Fall *Forum*. A spring *Forum* will be held as well. Last year's Fall *Forum* focused on the protection of Florida's springs while the spring *Forum* addressed hurricane response issues.

3) The Law School is organizing an academic *Symposium* on Ecosystem Services for April 2006 that will feature leading scholars from throughout the United States.

4) The Law School – through its Faculty Workshop series, its Environmental Certificate Program and the Symposium on Ecosystem Services – will host a distinguished group of scholars during the school year. These visiting scholars include Professors Alexandra Klass, William Mitchell College of Law; Douglas Kysar, Cornell Law School; Nancy McLaughlin, University of Utah; Jim Salzman, Duke University; Michael

Vandenbergh, Vanderbilt University; John Nagle, Notre Dame; and Deborah Donahue, University of Wyoming.

5) The student-led Environmental Law Society will once again have a busy schedule during the year as the sponsor of a variety of activities at the law school. This year's officers include: President - Amanda Sampaio, Vice-President - Ryan Mahler, Secretary - Ali Stevens, and Treasurer - Mike Mikdisi.

We hope you'll join us for one or more of our programs. For more information, please consult our web site at: [www.law.fsu.edu](http://www.law.fsu.edu), or contact Professor David Markell, at [dmarkell@law.fsu.edu](mailto:dmarkell@law.fsu.edu). Our environmental brochure, is also available online at [http://www.law.fsu.edu/academic\\_programs/environmental/images/environmental\\_brochure04.pdf](http://www.law.fsu.edu/academic_programs/environmental/images/environmental_brochure04.pdf). This brochure includes considerable information about the environmental law program at FSU.

## Internet Mailing List

by Joe Richards, Internet Committee Chair

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

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## PRESERVING OPEN SPACE

from page 1

alized.

This Note will examine the lack of recourse that a local government has to protect its own local environment from zoning decisions designed to preserve agriculture, and what can be done to offset the negative implications of preserving open space through agriculture. First, this Note will assess how zoning decisions in Florida are implemented. Second, it will look into how local governments are prevented from enacting local pollution control laws after zoning decisions are made. Third, this Note will consider the pollution from agriculture operations and the federal and state governments' regulatory response to agriculture and its pollution. Fourth, this Note will explore objectives that must be met to accomplish the preservation of open space through agriculture, and what land use and zoning techniques serve those objectives. Lastly, this note will consider what combination of land use and zoning tools may work to accomplish the preservation of open space through agriculture in a sustainable manner.

## II. Setting the Stage for Local Zoning Decisions and Farmland Preservation

### A. The Growth Management Act and Comprehensive Plans

The State of Florida enacted the Local Government Comprehensive Planning and Land Development Act in 1985. The purpose of the Act (also known as the Growth Management Act),<sup>5</sup> is intended to empower a local government's ability to foster orderly growth.<sup>6</sup> The Act is also intended to promote a municipality's natural and economic assets and support beneficial uses of land and other resources.<sup>7</sup> The intent of the Growth Management Act is to aid in the prevention of urban sprawl through conservation, development strategies, utilization of natural and economic assets, and protection of the natural resources within a municipality's jurisdiction.<sup>8</sup>

In order to accomplish the goals of the Act, a local government is required to create a comprehensive plan in accordance with the Growth

Management Act, and submit the plan to the Department of Community Affairs for review.<sup>9</sup> The comprehensive plan includes required and optional elements that set forth a roadmap for the balanced future economic, social, physical, environmental, and fiscal development of the area.<sup>10</sup> A local government's comprehensive plan must also acknowledge the goals and policies in the state's comprehensive plan.<sup>11</sup> Contrary to the Growth Management Act, the State Comprehensive Plan is not binding, being that the degree to which a local government will make expenditures promoting the goals and policies of the state comprehensive plan is left to the discretion of the local government.<sup>12</sup> Florida's comprehensive plan, however, has several goals and policies relevant to the preservation of open space through agriculture.<sup>13</sup>

Rule 9J of the Florida Administrative Code is used to determine whether a local government's comprehensive plan is in compliance with the requirements of the Growth Management Act, as well as regional plans, the State Comprehensive Plan, and the unique attributes of an area under the jurisdiction of the local government.<sup>14</sup> Rule 9J specifically cites the protection of agriculture as one of its many tools for determining whether a comprehensive plan is "discouraging the proliferation of urban sprawl."<sup>15</sup> One of the thirteen indicators used to determine if a comprehensive plan does not discourage urban sprawl is whether a plan "fails to adequately protect adjacent agricultural areas and activities, including silviculture,<sup>16</sup> and including active agricultural and silvicultural activities as well as passive agricultural activities and dormant, unique and prime farmlands and soils."<sup>17</sup>

### B. The Agricultural Land Practices Act - Agriculture's Effective Use of Growth Management Legislation

Effective July 1, 2003, the Agricultural Land Practices Act (ALPA) was enacted as part of the Growth Management Act.<sup>18</sup> The purpose of ALPA is to "protect reasonable agricultural activities conducted on farm lands from duplicative regulation."<sup>19</sup> ALPA sets forth the direct and indirect benefits that agriculture provides to the

citizens of Florida.<sup>20</sup>

.....that agricultural activities constitute unique and irreplaceable resources of statewide importance; that the continuation of agricultural activities preserves the landscape and environmental resources of the state, contributes to the increase in tourism, and furthers the economic self-sufficiency of the people of the state; and that the encouragement, development, and improvement of agriculture will result in a general benefit to the health, safety, and welfare of the people of the state...

ALPA prohibits a local government from enacting "any ordinance, resolution, regulation, rule, or policy" intended to regulate a farm operation.<sup>21</sup> A farm operation is defined by Florida's Right to Farm Act<sup>22</sup> as land designated as agricultural land for ad valorem tax purposes.<sup>23</sup> ALPA qualifies its prohibition of duplicative local regulations on agriculture, by stipulating that "best management practices, interim measures, or regulations developed by the Department of Environmental Protection (DEP), the Department of Agriculture and Consumer Services (DACCS), or a water management district" are to be implemented in order for the agricultural operation to enjoy its immunity from local regulations.<sup>24</sup> Most agricultural operations are exempt from local regulation, even though the nature of the best management practices, interim measures, and regulations that ALPA refers to have been held to be non-compliant with the State's "statutorily imposed duties" to protect the waters of the state from pollution.<sup>25</sup>

### C. The Binding Effect of the Growth Management Act

The State of Florida mandates that local governments adopt comprehensive plans consistent with the requirements of the Growth Management Act, the goals and policies of the State Comprehensive Plan, and the Strategic Regional Plan.<sup>26</sup> The elements of a local government's comprehensive plan must be based on reliable data and analysis,<sup>27</sup> and deadlines for the generation of a local government's comprehensive plans are established by the state land planning agency.<sup>28</sup>

Private and public development on

land covered by the comprehensive plan must be consistent with the plan, even when a developer's reliance on a local government's eighteen month old approval of a proposal is deemed to be inconsistent with the town's comprehensive plan.<sup>29</sup> In *Village of Key Biscayne v. Tesaurus Holdings Inc.*, the third DCA confirmed the binding effect of the Growth Management Act and the Petitioner's Comprehensive Plan. The court of appeals quashed the lower court's order on the basis of the denial of due process, which invalidated the Village of Key Biscayne's decision to renege on a provisional yet erroneous approval of a developer's proposal to construct residential housing in an area zoned general and commercial.<sup>30</sup>

### **III. The Relationship Between Elements in the Growth Management Act and Agriculture**

The Growth Management Act includes mandatory and optional elements in a comprehensive plan.<sup>31</sup> The required elements that relate to the preservation of open space via farmland preservation include: the future land use element,<sup>32</sup> the combined general sanitary sewer, solid waste, drainage, potable water, and natural groundwater aquifer recharge element,<sup>33</sup> the conservation element,<sup>34</sup> the recreation and open space element,<sup>35</sup> and the intergovernmental coordination element.<sup>36</sup>

#### **A. The Future Land Use Element**

The future land use element is significant because as it designates the distribution and intensity of land use for "residential uses, commercial uses, industry, agriculture, recreation, conservation, education, public buildings and grounds, other public facilities, and other categories for public and private uses of land."<sup>37</sup> It acts as a roadmap for a community's development that is derived from core state requirements and a community's goals and policies combined with its predictions of its own economy and population growth.<sup>38</sup> This element considers a host of land uses, forcing a community to determine whether agriculture is compatible with its other land uses or whether an area zoned agriculture could meet the intent of other land

uses, such as conservation or recreation and open space, while allowing for the existence of a viable agricultural operation. The future land use element, however, provides an all or nothing approach, calling for the "elimination of nonconforming uses which are inconsistent with the character of the community."<sup>39</sup>

The State of Florida endorses creative strategies to development "which may better serve to protect environmentally sensitive areas, maintain the economic viability of agricultural and other predominantly rural land uses..."<sup>40</sup> Whether the future land use plan is considered a crutch for agriculture or a sincere effort to protect open space and discourage urban sprawl, the element encourages the designation of rural land stewardship areas (RLSAs).<sup>41</sup> This provision offers expansive state support to facilitate local governments' desire to designate land as "predominantly agriculture, rural, open, open-rural, or a substantially equivalent use."<sup>42</sup> RLSAs could be construed as a crutch, because the DCA promotes the establishment of RLSAs through economic incentives and development strategies amongst other measures,<sup>43</sup> referenced in non-descript terms. The use of generalized language facilitates the use of RLSAs for pretextual reasons, such as for immunity on behalf of agricultural interests. In addition, there is growing sentiment among commentators that agricultural entities have been provided with excessive economic incentives despite the fact that it is a small facet of the US economy.<sup>44</sup>

#### **B. General Sanitary Sewer, Solid Waste, Drainage, Potable Water, and Natural Groundwater Aquifer Recharge Element**

The general sanitary sewer, solid waste, drainage, potable water, and natural groundwater recharge element is relevant to farmland preservation because it requires a local government to identify land areas covered under their comprehensive plan that are considered areas of "prime groundwater recharge."<sup>45</sup> This element requires that zoning and land use decisions be made while giving "special consideration" to local groundwater resources and waste disposal<sup>46</sup> that have inherent relevance to an agricultural operation.

A typical farming operation may require the withdrawal of large volumes of fresh water from a groundwater aquifer and the disposal of mass volumes of wastewater to the ground surface overlying that same source of fresh water. Agricultural operations are prevalent in many areas of Florida, where prime drinking water aquifers are naturally unprotected from pollutants.

Those areas considered by regional water management districts to be located in areas that allow water to migrate into the Floridan or Biscayne Aquifers are specifically referenced in this section.<sup>47</sup> It is notable that this element requires that soil surveys be conducted in areas served by septic tanks to determine whether soils are suitable for septic tanks.<sup>48</sup> The same requirement mandating the evaluation of soils' permeability and ability to treat contaminants is not applied to agricultural operations, even though an animal operation will typically dispose of wastewater to the same media as a septic system, albeit in industrial quantities. In this regard, the operation of an agricultural facility may be of detriment to an area of "prime groundwater recharge" with respect to the contamination of groundwater resources. However, the existence of an agricultural entity in such an area may be a feasible means of preserving an area of "prime groundwater recharge," since agricultural operations are typically not conducive to the construction of impermeable surfaces, contrary to commercial, residential, or industrial land uses.

#### **C. Conservation Element**

The conservation element is intended to "promote the conservation, use, and protection of natural resources, including...water recharge areas...soils...and other natural and environmental resources."<sup>49</sup> Consistent with the conservation element, ALPA states that "the continuation of agricultural activities preserves the landscape and environmental resources of the state."<sup>50</sup> This element requires that a local government consider several factors that may be relevant to and may also be in conflict with operations including:<sup>51</sup> areas where soil erosion has occurred,<sup>52</sup> areas encompassing recreationally or commercially valuable wildlife and

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## PRESERVING OPEN SPACE

from page 17

vegetative features,<sup>53</sup> the existence of pollutants generated by an entity,<sup>54</sup> and the current and projected needs and sources for water.<sup>55</sup> Technically, a local government is prohibited from allowing the existence of an activity that is known to be detrimental to water resources, wildlife, or vegetative communities.<sup>56</sup>

A paradox exists between ALPA's indirect references to agriculture's ability to be an asset to the conservation element,<sup>57</sup> and the fact that many agricultural operations are identified as the cause of excessive rates of soil erosion by wind and water,<sup>58</sup> the source of contaminants known to be detrimental to water quality<sup>59</sup> and a user of excessive quantities of groundwater at rates disproportionate to other commercial users.<sup>60</sup>

### D. The Recreation and Open Space Element

The recreation and open space element requires that a system of public and private sites be dedicated to recreational uses which include open space.<sup>61</sup> While the recreational attributes of a private farm may not be obvious on its face, it is increasingly recognized that the presence of open space near urban areas is associated with psychological well-being of the general populace.<sup>62</sup> In addition, recreational use statutes allow owners of large tracts of land to limit their liability for injuries suffered during recreational uses in the event they are willing to allow the public's use of their farmland for a recreational purpose, such as hunting or hiking.<sup>63</sup>

### E. Intergovernmental Coordination Element

The intergovernmental coordination element requires that local governments coordinate and collaborate with the state comprehensive plan, regional comprehensive plans, and the comprehensive plans of adjacent municipalities.<sup>64</sup> The objective of this element is "to identify, and resolve incompatible goals, objectives, and policies," set forth by neighboring municipalities.

This element's relationship to ag-

riculture arises when the land area covered by an agricultural entity is, by either, its size or location, of a nature that a zoning or land use decision would trigger an obvious effect on other municipalities.<sup>65</sup> The importance of this element could also arise when a local government adheres to the Legislature's recognition of the advantages in adopting "innovative and flexible planning and development strategies and creative land use planning techniques,"<sup>66</sup> such as those techniques associated with the use of viable agricultural operations to preserve open space. An example could be a local government's use of transferable development rights where a farmer is given development rights in the jurisdiction of a local government different from the jurisdiction where his farm, designated for preservation, is located. The importance the Growth Management Act places on maintaining "the economic viability of agriculture and other predominantly rural uses" is certain to place strains or benefits on entities beyond the jurisdiction of one local government.<sup>67</sup>

## IV. The Prevention and Preemption of a Local Government's Attempt at Self Preservation

### A. The Groundwork for Invalidation of Local Ordinances Based on Conflict or Preemption

The Growth Management Act encourages local zoning decisions designed to preserve agriculture<sup>68</sup> and, at the same time, provides a framework that protects agricultural entities from measures introduced at a local level in response to the adverse consequences of an agricultural operation, such as pollution, that may have been enabled by a local zoning decision.<sup>69</sup> If a local government were to attempt to pass an ordinance regulating an agricultural operation, it could be inconsistent with state law and invalidated in one of two ways:<sup>70</sup> 1) it could conflict with state statute or 2) a state statute could speak directly to the subject matter of the local statute, in which the local statute could be expressly or impliedly preempted.<sup>71</sup> In *City of Miami Beach v. Rocio Corp.*, the court invalidated ordinances passed by the City to delay the conversions of apartments to condominiums due to a shortage in apartments. The court considered

whether the local ordinances were invalid based on preemption or conflict with Section 718, Florida Statutes, the Florida Condominium Act.<sup>72</sup> The court held that nothing in Section 718's language expressly preempted the subject area of condominiums to the state. However the local ordinance conflicted with State law because it prohibited an activity that was permitted by the Florida Condominium Act.<sup>73</sup>

### 1. In Conflict with State Statutes.

Article VIII of the Florida Constitution gives municipalities the authority to "...exercise any power for municipal purposes except as otherwise provided by law."<sup>74</sup> Most local governments have home-rule authority<sup>75</sup> which provides "autonomy to a local government conditional on its acceptance of certain terms."<sup>76</sup> The Growth Management Act gives a local government the authority to plan for and regulate development.<sup>77</sup> However, "development" excludes "the use of any land for the purposes of growing plants, crops, trees or other agricultural or forestry products; raising livestock; or other agricultural purposes."<sup>78</sup> The extent of a local government's authority of self governance is limited to local legislation that is "not inconsistent with general or special law."<sup>79</sup>

For instance, this limitation could hamper a local government's ability to request that a livestock operation determine whether its waste disposal practices (i.e. spraying untreated waste onto the ground surface) are contaminating the local groundwater resources. Barring certain circumstances, it might also be inconsistent with current State environmental laws to require that livestock operation install monitoring wells to insure that its practices are not degrading Waters of the State based on the language of Florida Statutes regulating pollution and agriculture.<sup>80</sup>

The powers and duties granted to local government initially suggest that local governments may regulate pollution concurrently with state authorities.<sup>81</sup> However, state legislation favorable to agricultural interest would likely conflict with efforts to regulate at the local level, invalidating any proposed local pollution control regulations.<sup>82</sup> Agricultural activities are effectively exempt from state

and local planning decisions, while the implementation of the measures used to preserve agricultural land are largely imposed on local government.

**2. State Preemption.** In addition to the limitation placed on local government authority by the powers and duties granted to county government,<sup>83</sup> the power of local government is also stifled by express and implied preemption.

**i. Express Preemption.** Express preemption is the unambiguous intention of the Legislature to limit a local government's powers, in certain instances, to adopt ordinances, regulations, rules, or policies. The language found in ALPA<sup>84</sup> and the Florida Right to Farm Act<sup>85</sup> expressly preempts a local government's power to regulate agricultural operations.<sup>86</sup> If a local government were to challenge the statute's preemptory language, the court will simply follow the statute's "clear and obvious meaning" and forgo any exercise of statutory interpretation or any search for alternate legislative intent.<sup>87</sup> An exception might exist when a statute contains generalized language, as in *Hillsborough County v. Florida Restaurant Association*, where the County was not preempted from exercising its police powers when it decided to require local establishments selling alcohol to post signs warning of the dangers of the consumption of alcohol. Despite preemptive language in the state statute, the County prevailed due to a lack of a pervasive legislative scheme to prevent local legislation. The court held that "express preemption cannot be implied or inferred."<sup>88</sup>

The Growth Management Act expressly preempts local governments from regulating agricultural activities by excluding those activities from its definition of "development."<sup>89</sup> ALPA expressly preempts counties from imposing regulations on "an activity of a bona fide farm operation on land classified as agricultural land for ad valorem tax purposes" provided the farm operation adheres to "best management practices, interim measures, or regulations adopted by the DEP, DACS or water management district."<sup>90</sup>

**ii. Implied Preemption.** Implied preemption occurs when a legislative scheme is so pervasive that it shows an intention to preempt in an area and, where strong public policy reasons support preemptive assertions.<sup>91</sup> In *Lowe v. Broward Co.*, the appellant argued that the Florida Statutes, in the area of domestic relationships, impliedly preempted Broward County's Domestic Partnership Act — which allowed same sex "domestic partners,"<sup>92</sup> — because domestic relations is an area solely of state concern.<sup>93</sup> The court held that the Act did "not encroach upon an area reserved to the State," based on its reading of the Act.<sup>94</sup> It is likely that a local ordinance targeted towards agriculture would be viewed as a conflict with Florida's existing legislative scheme to protect agriculture.

It could also be argued that the Florida Legislature has a history of establishing a pervasive scheme that protects agriculture from regulation, as demonstrated by the Florida Right to Farm Act<sup>95</sup> and the comparatively lenient environmental controls only recently imposed on agriculture.<sup>96</sup> Even without the Growth Management Act's addition of ALPA in 2003, which speaks directly to the prohibition of local attempts to regulate agriculture from an environmental standpoint,<sup>97</sup> local efforts to regulate would still more than likely be invalidated by implied preemption.

## **V. Florida's Regulation of - Pollution from Agriculture and Local Attempts to Regulate Pollution from Agriculture Operations**

Under current Florida law, pollution control statutes are not applied to agricultural operations to the same degree that they are applied to other entities generating a waste or releasing hazardous substances, such as nitrogen, to the ground.<sup>98</sup> For example, under section 403.707(2)(e), Florida Statutes, a hog farm that applies manure to its fields at greater than agronomic rates is exempt from any groundwater monitoring requirements<sup>99</sup> or, a row cropper that applies excess volumes of pesticides to his crops is exempt from regulation under Water Pollution Control Permits.<sup>100</sup> As a result, a local government's initiatives to preserve open space through agricultural zon-

ing may result in an adverse and unregulated effect on its environment as well as run afoul of the spirit of preserving the natural environment as found in the Growth Management Act and Florida's own comprehensive plan.<sup>101</sup>

## **A. Florida's Regulation of Pollution and Agriculture**

The State's role in regulating most sources of pollution is governed under the Florida Air and Water Pollution Control Act (PCA), which empowers the Florida DEP to regulate air and water pollution through the adoption of rules and regulations.<sup>102</sup> Pollution is defined as:

the presence in the outdoor atmosphere or waters of the state of any substances, contaminants, noise, or manmade or human-induced impairment of air or waters or alteration of the chemical, physical, biological or radiological integrity of air or water in quantities or at levels which are or may be potentially harmful or injurious...to animal or plant life... or which unreasonably interferes with the enjoyment of life or property, including outdoor recreation unless authorized by particular law.<sup>103</sup>

The following "agricultural" activities, which are effectively free from state regulatory controls and exempt from local regulatory controls, could be considered as sources of pollution under the PCA: a crop farmer's over application of fertilizer to his crops, a dairy farmer's storage of untreated cow urine and liquefied manure in an unlined lagoon and its subsequent discharge to a nearby spray field, or even a retail fertilizer sales facility's nitrogen laden storm water runoff into roadside ditches.<sup>104</sup>

## **B. Florida's Regulation of Local Governments' Effort to Regulate Pollution**

In theory local entities appear to have the ability to apply their own pollution control requirements<sup>105</sup> pending DEP approval and provided that they are equal to or more stringent than those of the DEP.<sup>106</sup> The DEP, at its discretion, may delegate its exclusive permitting authority to local pollution control organizations.<sup>107</sup> According to the DEP, it only reviews local pollution control regulations under three circumstances: i)

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## PRESERVING OPEN SPACE

from page 19

when the DEP deems the local ordinance a local pollution control program, ii) when the local government requests a delegation of authority from the DEP, and iii) when there is an operating agreement between the DEP and the local entity that delegates authority to the local government.<sup>108</sup> Barring the preemptive language of ALPA and Florida's Right to Farm Act, which could nullify a local attempt to regulate an agricultural activity, a local government could preserve open space through agriculture use while protecting their local environment, by the use of land development regulations (LDRs).<sup>109</sup> For instance, a local government could require that an assessment of soil and groundwater be completed to determine a site's suitability for the application of wastewater from a proposed dairy farm following the municipality's designation of that area as agriculture on its Future Land Use Map. According to the DEP, the LDR would only require DEP approval under the three conditions described above.<sup>110</sup>

In practice, however, courts have held that a local pollution control program requires the approval of the DEP regardless of preexisting conditions.<sup>111</sup> In *Fl. Rock v. Alachua County*, the petitioner challenged the validity of a proposed local clean air ordinance in Alachua County. The petitioner argued that because the ordinance was stricter than federal and state clean air requirements and because the ordinance had not been approved by the DEP, it was invalid on the basis of the language of Section 403.182(1), Florida Statutes. Although the court ruled in favor of the respondents, holding that the ordinance was not a LDR nor was it unconstitutional, it nonetheless applied a "plain reading" of Section 403.182, Florida Statutes, and ruled that a local ordinance is unenforceable without the approval of the DEP.<sup>112</sup> The Florida Rock holding conflicts with DEP's position that local governments have a variety of avenues to implement local pollution control ordinances. Furthermore, it confirms the roadblocks that a local government would face in complimenting

zoning decisions designed to preserve open space through agricultural zoning and incentives, with LDRs or other pollution control ordinances designed to protect a municipality's local environment from air and water pollution from an agriculture operation.

### VI. Agricultural Pollution and the Costs of Using Agriculture to Preserve Open Space

Agricultural sources of pollution remain largely unabated and unregulated by state and federal authorities.<sup>113</sup> State growth management policies encourage local governments to embrace agriculture as a means of preserving open space.<sup>114</sup> The safe harbor given to agriculture, combined with its use to preserve open space could prove detrimental to a local environment.

#### A. Overview

"Farmers and ranchers are often the best stewards of the land. We can achieve more by working with them and capitalizing on their intimate knowledge of the land they depend on and the land they love."<sup>115</sup> This statement by the Secretary of Interior represents a common perception of agriculture and is perhaps why the Growth Management Act and Florida's Comprehensive Plan treat agriculture as a savior of Florida's natural resources<sup>116</sup> despite the fact that agriculture is identified as the leading source of pollution of surface and groundwater because of the over application of nutrients and pesticides to the ground and the lack of erosion and sedimentation control practices designed to prevent the erosion of topsoil from denuded fields.<sup>117</sup> In Florida, for example, the application of pesticides on row crops has increased steadily over time.<sup>118</sup>

Non-point source and point source pollution are largely responsible for the degradation of surface waters and groundwater resources in Florida and elsewhere.<sup>119</sup> Non-point source pollution is a collection of diffuse sources that are introduced into waters of the state through wind, rain, or stormwater runoff.<sup>120</sup> Examples of non-point sources include runoff from a farm, runoff from a parking lot, stormwater discharges, or return flow from agricultural irrigation systems.<sup>121</sup> A point source is "any specific,

confined and measurable place from which a pollutant is or may be discharged."<sup>122</sup> An example of a classic point source is a pipe or other man made conveyance that is discharging pollutants into a stream or river.<sup>123</sup> A point source that is regulated under the Clean Water Act, such as a discrete discharge from a municipal waste water treatment facility to surface water, would be subjected to highly regulated effluent limits and ongoing reporting requirements in the form of discharge monitoring reports<sup>124</sup> that measure compliance.

Non-point source pollution poses more significant problems because of the complexities involved in the identification of its sources and its poorly established regulatory framework, particularly with respect to agriculture at the federal and state level.<sup>125</sup>

#### B. The Regulation of Non-point Source Pollution

Reduction of non-point source pollution is one of the most significant challenges involved in improving the ambient quality of surface and groundwater in Florida.<sup>126</sup> A report to Congress conducted in 1989 from the National Research Council on Section 319 of the Clean Water Act, identified agriculture as the single largest source of non-point source pollution.<sup>127</sup> In Florida, non-point source pollution is the largest contributor of contaminants to Waters of the State.<sup>128</sup>

The composition of non-point source pollution from agriculture uses is the result of undocumented and unregulated discharges of fertilizers, pesticides, herbicides, and liquefied animal waste.<sup>129</sup> The major impacts of non-point source pollution from agricultural operations are the introduction of hazardous substances (particularly nitrogen and phosphorus) to surface and groundwaters, the introduction of ammonia to the atmosphere, and the erosion of topsoil from unvegetated tracts of land which cause unnatural levels of sedimentation and turbidity in surface waters thereby reducing the capacity of surface waters and starving surface waters of oxygen.<sup>130</sup>

Keeping with the spirit of the relaxed levels of regulatory authority imposed on agriculture by ALPA, the Growth Management Act, and Florida's Right to Farm Act, the Fed-



eral Government and the State of Florida have been slow to regulate non-point source pollution from agricultural sources.

In 1972, the federal government first recognized non-point source pollution from agricultural sources in Section 208 of the Federal Water Pollution Control Act (CWA).<sup>131</sup> Section 208 directed states to implement plans that would identify and control non-point source pollution from agricultural activities.<sup>132</sup> In response to influential agricultural interests opposing “command and control regulation,”<sup>133</sup> states were required to comply with Section 208 “to the extent feasible.”<sup>134</sup> As a result, only one hundred and seventy six plans were generated.<sup>135</sup> As a result, Section 208 was ineffective because of its seemingly voluntary and relaxed standard of compliance.<sup>136</sup>

In 1977, Congress amended Section 208 of the CWA to include a “Rural Clean Water Program” which offered farmers a cost sharing program for the implementation of best management practices<sup>137</sup> designed to mitigate sources of non-point source pollution. Once again, this program was voluntary and received limited funding from Congress.<sup>138</sup>

In 1987, Congress amended the CWA to include Section 319, officially adding the reduction of non-point source pollution as a goal of the CWA.<sup>139</sup> Essentially, Section 319 required states to identify navigable waters that could not sustain additional non-point sources and still maintain water quality standards.<sup>140</sup> Section 319 also directed states to arrive at methods of reducing identified non-point sources, such as with the implementation of best management practices.<sup>141</sup> Unfortunately, Section 319 has been characterized as a failure due, in part, to the actual appropriations as compared with the proposed levels of funding.<sup>142</sup> In addition, the consequence of a state’s failure to comply with the requirements of Section 319 was insignificant.<sup>143</sup> Instead of imposing financial penalties or incentives designed to encourage compliance with Section 319’s directives, the financial and political cost of regulating powerful agricultural interests was lifted from the states and transferred to the federal government.<sup>144</sup>

It is significant that in Florida,

non-point source pollution from sources other than agriculture, such as urban areas, construction sites, or other impermeable or semi-permeable surfaces that generate storm water, is regulated through a permitting system.<sup>145</sup> Non-point source pollution from agricultural lands is effectively exempt from notice and permit requirements in accordance with Rule 62-030(e), FAC.<sup>146</sup>

### C. The Regulation of Point Source Pollution

In Florida, the only agricultural entities that have been deemed to be a point source, and thus subject to NPDES permitting, are concentrated animal feeding operations (CAFOs) that contain a threshold number of animals,<sup>147</sup> or animal feeding operations (AFOs) that have a direct discharge to a surface water through a man-made conveyance device.<sup>148</sup> For example, a facility must house at least 700 mature dairy cattle<sup>149</sup> or 2500 swine weighing greater than 55 pounds to be considered a CAFO.<sup>150</sup> All other agricultural operations in Florida are considered non-point sources.

The federal government’s regulation of potential point sources from AFOs was found to be deficient by the Second Circuit Court of Appeals.<sup>151</sup> The Court held that the rule requiring that CAFOs obtain NPDES permits was flawed from the perspective of being protective of the environment, because: 1) it allowed the issuance of NPDES permits without a full understanding of the quantity of nutrients being discharged as compared with the amount of nutrients being absorbed by vegetative uptake and volatilization, and 2) it allowed for the issuance of NPDES permits that lacked a farm’s terms for its management of nutrients and adequate public participation.<sup>152</sup>

Florida’s treatment of AFOs has, at least in the Second Judicial Circuit, been deemed to violate the Florida Constitution and Florida Statutes.<sup>153</sup> The Florida Constitution requires that “adequate provision shall be made by law for the abatement of air and water pollution...and for the conservation and protection of natural resources.”<sup>154</sup> Florida Statutes exist that fulfill the requirement of the Florida Constitution,<sup>155</sup> however AFOs have been partially ex-

empted from complying with Florida’s pollution control requirements,<sup>156</sup> and other agricultural entities have been exempted entirely from Florida Statutes that administer environmental control.

Local governments that preserve open space through agriculture under the direction of Florida’s Growth Management Act, Florida’s Comprehensive Plan and perceptions of agriculture’s environmental stewardship, have perhaps been lured into environmental complacency. The lack of regulatory authority given to local governments and the safe harbor given to agriculture by federal and state government could be described as “a polluter’s dream come true, a nightmare for the rest of us.”<sup>157</sup>

### Endnotes:

<sup>1</sup> Elisa Paster, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 NAT. RESOURCES J. 283, 284 (2004).

<sup>2</sup> Julian Conrad Juergensmeyer, & Thomas E. Roberts, *Land Use Planning and Development Regulation Law* § 12.3 (2003).

<sup>3</sup> Paster, *supra* note 1 at 292.

<sup>4</sup> David Zaring, Note, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act’s Bleak Present and Future*, 20 HARV. ENVTL. L. REV. 515, 515 (1996).

<sup>5</sup> Land Use and Environmental Regulation, 3-37 Florida Real estate Transactions § 37.02[1], Local Government Comprehensive Planning and Land Development Act.

<sup>6</sup> FLA. STAT. ANN. § 163.3161(3) (LexisNexis 2005).

<sup>7</sup> *Martin County v. Yusem* 690 So.2d 1288, 1292 (Fla. 1997).

<sup>8</sup> FLA. STAT. ANN. § 163.3161(3) (LexisNexis 2005).

<sup>9</sup> FLA. STAT. ANN. §§ 163.3164(20), 163.3167(2) (LexisNexis 2005).

<sup>10</sup> FLA. STAT. ANN. § 163.3177(1) (LexisNexis 2005).

<sup>11</sup> FLA. STAT. ANN. § 163.3177(10)(b) (LexisNexis 2005).

<sup>12</sup> FLA. STAT. ANN. § 163.3177(10)(b) (LexisNexis 2005).

<sup>13</sup> FLA. STAT. ANN. §§ 187.201 (5), (7), (9), (10), (12), (14), (15), (21), (22), (23) (LexisNexis 2005). These statutory sections are goals and policies in Florida’s Comprehensive Plan that relate to agriculture and respectively refer to health, water resources, natural systems and recreational lands, air quality, hazardous and nonhazardous materials and waste, property rights, land use, the economy, agriculture, and tourism.

<sup>14</sup> FLA. ADMIN. CODE ANN. r. 9J-5.001(1) (LexisNexis 2005).

<sup>15</sup> FLA. ADMIN. CODE ANN. r. 9J-5.006(5)(a) (LexisNexis 2005).

<sup>16</sup> WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY, 1085 (1984): Definition “Silviculture” - Care and cultivation of forest trees.

<sup>17</sup> FLA. ADMIN. CODE ANN. r. 9J-5.006(5)(a)5 (LexisNexis 2005).

<sup>18</sup> Fla. Real Estate Transactions (MB) §  
*continued...*

## PRESERVING OPEN SPACE

from page 21

37.02[11] (2004).

<sup>19</sup> FLA. STAT. ANN. § 163.3162(2) (LexisNexis 2005).

<sup>20</sup> FLA. STAT. ANN. § 163.3162(2) (LexisNexis 2005).

<sup>21</sup> FLA. STAT. ANN. § 163.3162(4) (LexisNexis 2005).

<sup>22</sup> FLA. STAT. ANN. § 823.14 (LexisNexis 2005).

<sup>23</sup> FLA. STAT. ANN. § 193.461(1) (LexisNexis 2005).

<sup>24</sup> FLA. STAT. ANN. § 163.3162(4) (LexisNexis 2005).

<sup>25</sup> *Save our Suwannee Inc. v. Dep't of Env't'l Protection*, No. 2001-CA-001266 (2<sup>nd</sup> Cir. Mar. 5, 2004).

<sup>26</sup> FLA. STAT. ANN. § 163.3177(10)(b) (LexisNexis 2005).

<sup>27</sup> FLA. STAT. ANN. §§ 163.3177(8), (10)(e) (LexisNexis 2005).

<sup>28</sup> FLA. STAT. ANN. § 163.3167(2) (LexisNexis 2005).

<sup>29</sup> *Vill. of Key Biscayne v. Tesaurus Holding*, 761 So.2d 397, 398 (Fla. Dist. Ct. App. 2000).

<sup>30</sup> Id.

<sup>31</sup> FLA. STAT. ANN. §§ 163.3177(3)(a), (5), (6)(a)-(i), (7)(a)-(k) (LexisNexis 2005).

<sup>32</sup> FLA. STAT. ANN. § 163.3177(6)(a), (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.006 (LexisNexis 2005).

<sup>33</sup> FLA. STAT. ANN. § 163.3177(6)(c), (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.011 (LexisNexis 2005).

<sup>34</sup> FLA. STAT. ANN. § 163.3177(6)(d), (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.013 (LexisNexis 2005).

<sup>35</sup> FLA. STAT. ANN. § 163.3177(6)(e), (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.014 (LexisNexis 2005).

<sup>36</sup> FLA. STAT. ANN. § 163.3177(6)(h), (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.015 (LexisNexis 2005).

<sup>37</sup> FLA. STAT. ANN. § 163.3177(6)(a), (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.006 (LexisNexis 2005).

<sup>38</sup> FLA. STAT. ANN. § 163.3177(6)(a), (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.006 (LexisNexis 2005).

<sup>39</sup> FLA. STAT. ANN. § 163.3177(6)(a) (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.006 (LexisNexis 2005).

<sup>40</sup> FLA. STAT. ANN. § 163.3177(11)(a) (LexisNexis 2005).

<sup>41</sup> FLA. STAT. ANN. § 163.3177(11)(a) (LexisNexis 2005).

<sup>42</sup> FLA. STAT. ANN. § 163.3177(11)(d) (LexisNexis 2005).

<sup>43</sup> FLA. STAT. ANN. § 163.3177(11)(d) (LexisNexis 2005).

<sup>44</sup> Zaring, *supra* note 4, at 543 (1996).

<sup>45</sup> FLA. STAT. ANN. § 163.3177(6)(c) (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.011 (LexisNexis 2005).

<sup>46</sup> FLA. STAT. ANN. § 163.3177(6)(c) (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.011 (LexisNexis 2005).

<sup>47</sup> FLA. STAT. ANN. § 163.3177(6)(c) (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.011 (LexisNexis 2005).

<sup>48</sup> FLA. STAT. ANN. § 163.3177(6)(c) (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.011 (LexisNexis 2005).

<sup>49</sup> FLA. STAT. ANN. § 163.3177(6)(d) (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.013 (LexisNexis 2005).

<sup>50</sup> FLA. STAT. ANN. § 163.3162(2) (LexisNexis 2005).

<sup>51</sup> FLA. STAT. ANN. § 163.3177(6)(d) (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.013(1)(a)1-5, b, c (LexisNexis 2005).

<sup>52</sup> FLA. STAT. ANN. § 163.3177(6)(d) (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.013(1)(a)4 (LexisNexis 2005).

<sup>53</sup> FLA. STAT. ANN. § 163.3177(6)(d) (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.013(1)(a)(5) (LexisNexis 2005).

<sup>54</sup> FLA. STAT. ANN. § 163.3177(6)(d) (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.013(1)(b) (LexisNexis 2005).

<sup>55</sup> FLA. STAT. ANN. § 163.3177(6)(d) (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.013(2)(b)(2) (LexisNexis 2005).

<sup>56</sup> FLA. STAT. ANN. § 163.3177(6)(d) (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.013(c)1-10 (LexisNexis 2005).

<sup>57</sup> FLA. STAT. ANN. § 163.3162(2) (LexisNexis 2005).

<sup>58</sup> J. B. Ruhl, *Three Questions for Agriculture about the Environment*, 17 J. LAND USE & ENTL. L. 395, 401 (2002).

<sup>59</sup> Id.

<sup>60</sup> Id.

<sup>61</sup> FLA. STAT. ANN. § 163.3162(2) (LexisNexis 2005).

<sup>62</sup> Juergensmeyer, *supra* note 5, at 512.

<sup>63</sup> Id. at 540.

<sup>64</sup> FLA. STAT. ANN. § 163.3177(6)(h) (LexisNexis 2005); FLA. ADMIN. CODE ANN. r. 9J-5.015 (LexisNexis 2005).

<sup>65</sup> FLA. STAT. ANN. § 163.3177(6)(h) (LexisNexis 2005).

<sup>66</sup> FLA. STAT. ANN. § 163.3177(11)(b) (LexisNexis 2005).

<sup>67</sup> FLA. STAT. ANN. § 163.3177(11)(a) (LexisNexis 2005).

<sup>68</sup> FLA. STAT. ANN. §§ 163.3161(3), .3162(2), .3177(11)(d) (LexisNexis 2005).

<sup>69</sup> FLA. STAT. ANN. § 163.362(4) (LexisNexis 2005).

<sup>70</sup> *Tallahassee Mem'l Reg'l Med. Ctr. Inc. v. Tallahassee Med. Ctr.*, 681 So.2d 826, 831 (Fla. 1<sup>st</sup> DCA 1996).

<sup>71</sup> *Lowe v. Broward*, 766 So.2d 1199, 1207 (Fla. 4<sup>th</sup> Dist. Ct. App., 2000).

<sup>72</sup> *City of Miami Beach v. Rocío*, 404 So.2d 1066 at 1067 (Fla. 3<sup>rd</sup> Dist. Ct. App., 1981).

<sup>73</sup> Id. at 1071.

<sup>74</sup> FLA. CONST. art VIII, §(2)(b).

<sup>75</sup> FLA. STAT. ANN. §§ 125.01(1), 163.361(2) (LexisNexis 2005).

<sup>76</sup> BLACK'S LAW DICTIONARY 738 (7<sup>th</sup> ed. 1999).

<sup>77</sup> FLA. STAT. ANN. §163.3161(2) (LexisNexis 2005).

<sup>78</sup> FLA. STAT. ANN. §163.3164(g)(6) (LexisNexis 2005).

<sup>79</sup> FLA. STAT. ANN. §125.01 (LexisNexis 2005).

<sup>80</sup> FLA. STAT. ANN. §125.01(1)(k) (LexisNexis 2005).

<sup>81</sup> FLA. STAT. ANN. §166.021(3) (LexisNexis 2005).

<sup>82</sup> FLA. STAT. ANN. §166.021(1) (LexisNexis 2005).

<sup>83</sup> FLA. STAT. ANN. § 166.021(1) (LexisNexis 2005).

<sup>84</sup> FLA. STAT. ANN. § 163.3162(4) (LexisNexis 2005).

<sup>85</sup> FLA. STAT. ANN. § 823.14(6) (LexisNexis 2005).

<sup>86</sup> FLA. STAT. ANN. § 163.3162 (LexisNexis

2005).

<sup>87</sup> *Arthur Young & Co. v. Mariner Corp.*, 630 So.2d 1199, 1202 (Fla. 4<sup>th</sup> Dist. Ct. App. 1994); *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984).

<sup>88</sup> *Hillsborough Co. v. Florida Restaurant Association*, 603 So.2d 587 (Fla. 2<sup>nd</sup> Dist. Ct. App. 1992).

<sup>89</sup> FLA. STAT. ANN. § 163.3164(6) (LexisNexis 2005).

<sup>90</sup> FLA. STAT. ANN. § 163.3162(4) (LexisNexis 2005).

<sup>91</sup> *Lowe v. Broward*, 766 So.2d 1199, 1207 (Fla. 4<sup>th</sup> Dist. Ct. App., 2000).

<sup>92</sup> BROWARD CO., FLA., CODE § 16 ½ -53(b)(1)-(5) (1999).

<sup>93</sup> *Lowe*, 766 So.2d at 1211.

<sup>94</sup> Id.

<sup>95</sup> FLA. STAT. ANN. § 823.14(2) (LexisNexis 2005).

<sup>96</sup> FLA. ADMIN. CODE ANN. 62-670 (1996).

<sup>97</sup> FLA. STAT. ANN. § 163.3162(4) (LexisNexis 2005).

<sup>98</sup> FLA. STAT. §§ 403.021(1)(2), .064(16), .067(d)(1), (2), .088, .0885, .7045(2)(b), .706(5), .707(2)(e), .927, (2002); FLA. ADMIN. CODE ANN. 62-670 (1996).

<sup>99</sup> FLA. STAT. § 403.707(2)(e)(2002).

<sup>100</sup> FLA. STAT. § 403.088(2002).

<sup>101</sup> FLA. STAT. ANN. §§ 163.3162(4), 187.201(17) (LexisNexis 2005).

<sup>102</sup> FLA. STAT. §§ 403.061(7), (13) (2002).

<sup>103</sup> FLA. STAT. § 403.031(7) (2002).

<sup>104</sup> FLA. STAT. § 403.061(7) (2002).

<sup>105</sup> FLA. STAT. § 403.182(1)(a) (2002).

<sup>106</sup> FLA. STAT. § 403.182(1)(b) (2002).

<sup>107</sup> FLA. STAT. § 403.182(2) (2002).

<sup>108</sup> Thomas T. Ankerson & Richard Hannan, *Implementation of the Model Land Development Code for Florida Springs Protection*, Conservation Clinic University of Florida College of Law, April 7, 2004, at 28; citing affidavit of Betsy Hewitt, Deputy General Counsel of DEP.

<sup>109</sup> FLA. STAT. § 163.3164(23) (LexisNexis 2005).

<sup>110</sup> *supra*, note 107.

<sup>111</sup> Implementation of the Model Land Development Code for Florida Springs Protection pg. 28 citing *Fl. Rock Ind. v. Alachua Co.*, 721 So.2d 741, 743 (Fla. 1<sup>st</sup> Dist. Ct. App. 1998).

<sup>112</sup> Id.

<sup>113</sup> Ruhl, *supra* note 57, at 403.

<sup>114</sup> FLA. STAT. §§ 163.3164(2), 187.201(22) (LexisNexis 2005).

<sup>115</sup> Ruhl, *supra* note 57, at 401, quoting Sec. Interior - Gale Norton - Endangered Species and Wetland Report, Mar., 2001.

<sup>116</sup> FLA. STAT. §§ 163.3162(2), 187.201(22) (LexisNexis 2005).

<sup>117</sup> Ruhl, *supra* note 57, at 401.

<sup>118</sup> Id.

<sup>119</sup> MICHAEL T. OLEXA, AARON LEVITEN, and KELLY SAMEK, FLORIDA SOLID and HAZARDOUS WASTE REGULATION HANDBOOK: CLEAN WATER ACT (CWA) (University of Florida IFAS Extension) (2003), available at <http://edis.ifas.ufl.edu>.

<sup>120</sup> Id.

<sup>121</sup> Id.

<sup>122</sup> Id.

<sup>123</sup> Id.

<sup>124</sup> FLA. STAT. § 403.0885 (2002); FLA. ADMIN. CODE § 62-620 (2000).

<sup>125</sup> FLA. DEP'T. OF ENV'T. PROTECTION, DIV. OF WATER RES. MGMT., BUREAU OF WATERSHED MGMT., STORMWATER / NONPOINT SOURCE MGMT. SECTION, FLA. NONPOINT SOURCE MGMT. PROGRAM

UPDATE, at 23 (1999).

<sup>126</sup> Id., at 11.

<sup>127</sup> Zaring, supra note 4, at 518.

<sup>128</sup> Id.

<sup>129</sup> Ruhl, supra note 57, at 404.

<sup>130</sup> NATURAL RESOURCES CONSERVATION SERVICE, AGRICULTURAL WASTE MANAGEMENT FIELD HANDBOOK 3-1 to 3-25 (1999).

<sup>131</sup> Zaring, supra, note 4, at 522.

<sup>132</sup> Id, citing 33 U.S.C.S § 1288(b)(1)(A) (1994).

<sup>133</sup> Id., at 523.

<sup>134</sup> Id, citing 33U.S.C. 1288(b)(2)(F) (1994).

<sup>135</sup> Id., at 523.

<sup>136</sup> Id., at 524.

<sup>137</sup> “Best Management Practices (BMPs)” means schedules of activities, prohibitions of practices, maintenance procedures, and other managemnt practices to prevent or reduce the pollution of waters.

<sup>138</sup> Id., at 525.

<sup>139</sup> Id., citing 33 U.S.C.S § 1251(a)(7) (1994).

<sup>140</sup> Id., citing 33 U.S.C.S. §§1329(a)(1)(A)-(B)(1994).

<sup>141</sup> Id.

<sup>142</sup> Id., at 527.

<sup>143</sup> Id., citing 33 U.S.C.C §§ 1329(d)(3), (e)(1994).

<sup>144</sup> Id., citing [33 USC 1329(d)(3), (e) (1994).

<sup>145</sup> FLA. ADMIN. CODE § 62-025 (LexisNexis 2005).

<sup>146</sup> FLA. ADMIN. CODE § 62-030(e) (LexisNexis 2005).

<sup>147</sup> FLA. ADMIN. CODE § 62-670.200(3) (1996).

<sup>148</sup> FLA. ADMIN. CODE § 62-670.400(3)(f)1, 2 (1996).

<sup>149</sup> FLA. ADMIN. CODE § 62-670.670(3)(b) (1996).

<sup>150</sup> FLA. ADMIN. CODE § 62-670.670(3)(c) (1996).

<sup>151</sup> *Waterkeeper Alliance Inc. v. EPA*, 2<sup>nd</sup> Circuit Court of Appeals Summary, Ass’n of State and Interstate Water Pollution Control Adm’r.

<sup>152</sup> Id.

<sup>153</sup> *Save our Suwannee Inc. v. Dep’t of Env’tl Protection*, No. 2001-CA-001266, at 2 (2<sup>nd</sup> Cir. Mar. 5, 2004).

<sup>154</sup> Id.

<sup>155</sup> FLA. STAT. § 403.087 (2002).

<sup>156</sup> *Save our Suwannee, at Inc. et al. v State of Florida DEP*, Case No. 2001-CA-001266 (March 5, 2004) at 2.

<sup>157</sup> Zaring, supra note 4, at 539; quoting Norman Mineta (D - Cal.) reaction to H.R. 961.

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