



THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

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

From the Chair

by Joe Richards, Pasco County Attorney's Office

Thank you for the opportunity to serve as chair. It is going to be an interesting year, with lots of change likely for the state of Florida. We will have a new governor, perhaps a shake-up in Congress. We are faced with an oil spill recovery. Hometown Democracy is looming and the economy continues to struggle. As a section we are working hard to respond to these changes. We are responding to the economic reality by emphasizing more lunchtime webinars and fewer all-day CLE programs. We are also developing rapid response, hot topic webinars. The substantive committees are positioned to present these hot topic seminars while the issues are still fresh. We also plan to involve the membership in the development of next year's Annual Update seminar. If you are on the Section's

listserve, you have already received the call for presentations.

This year's Annual Update seminar was a great success and I would like to thank the CLE committee chair, Nicole Kibert and the program chairs, Kelly Samek and Tara Duhy for preparing an engaging and informative program. I would also like to again thank all our sponsors: E Sciences, Inc.; ARCADIS, Inc.; St. Thomas University School of Law LL.M. Program in Environmental Sustainability; Cardno TBE; Golder Associates Inc.; Geosyntec Consultants; Lewis, Longman & Walker, P.A.; ENVIRON International Corp.; Gray-Robinson, P.A.; Collins Law Group; PELA GeoEnvironmental; HSW Engineering, Inc.; and Environmental Consulting & Technology, Inc. The Seminar would not have been the success it was

without their support and attendance.

For the membership, I would like to say: Ask not what your section can do for you, but what you can do for your section! Can you write an article for the Bar Journal? Is there a brief you're working on that could be turned into a Journal column? Can you contribute an article to the Section Reporter? Or perhaps you are willing to mentor a young lawyer or law student. Maybe you could serve on a special committee examining procedures for quasi-judicial hearings held by local governments. You might bring new ideas we haven't thought of and we welcome your input. There are many ways to become involved and I encourage you to do so. You can contact us through the website or Facebook or call me anytime. Thank you again.

Trends in Disclosure of Environmental Conditions

by Sidney F. Ansbacher, GrayRobinson, P.A.

Disclosure of environmental conditions is a pervasive and vexing issue in transactions. Unlike many states, Florida remains a common law jurisdiction regarding most disclosure of latent defects, including environmental conditions. Accordingly, determination of whether and how a seller, or buyer, should have raised or found known or suspected environmental issues creates an after the fact analysis by a court that does no party any good in preparation of transactional docu-

ments. This short article attempts to feature just a few of the common law and statutory issues that common law determination creates, including recent developments.

I. The *Stamovsky* Conundrum

Okay, this is a cheap gimmick, in order to mention one of my favorite decisions, *Stamovsky v. Ackley*, 169 A.D.2d 254, 572 N.Y.S.2d 672 (N.Y.A.D. 1 Dept. 1991).¹ Nonetheless, it presents good lessons in the furthest

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Florida Case Law Update

by Gary K. Hunter, Jr. & D. Kent Safriet, Hopping Green & Sams, P.A.
September, 2010

Commercial fisherman sufficiently stated causes of action for economic damages under section 376.313, Florida Statutes, and common law negligence theories where they alleged defendant negligently released pollutants, which release negatively affected the fishery products the fisherman could catch and sell. *Curd v. Mosaic Fertilizer, LLC*, -- So. 3d --, 2010 WL 2400384 (Fla. June 17, 2010).

On certified questions, the Florida Supreme Court addressed whether statutory or common law theories permit commercial fishermen to recover for economic losses resulting from the negligent discharge of pollutants, despite the fact that the fishermen do not own any property damaged by the pollution. Commercial fishermen alleged that a fertilizer storage facility owner was responsible for a spill from one of the facility's contaminated wastewater ponds which resulted in the loss of underwater plant life, fish, and other marine life, thereby reducing the supply of fish and causing damage to the reputation of the fishery products the fishermen were able to catch and sell.

The trial court dismissed for failing to state a cause of action because section 376.313(3), Florida Statutes, did not permit a recovery for a party that does not own or have possessory interest in the property damaged by pollution. Further, the trial court determined the suit failed to state a cause of action under traditional

principles of negligence as the court declined to recognize an independent duty of care to protect the fishermen's purely economic interests. The Second DCA affirmed the trial court's rulings, but certified the two issues to the Florida Supreme Court.

Oddly while citing to the definition of "damage" from Part I (the "Oil Prevention and Pollution Control Act") of Chapter 376, Florida Statutes, which definition requires the "destruction to or loss of any real or personal property," the Florida Supreme Court construed section 376.313, Florida Statutes (from Part II of the Statute commonly referred to as the "Pollutant Discharge Prevention and Removal Act") to provide for a private cause of action for the fishermen in the absence of alleged loss or damage to property. In so doing, the Court noted the "far-reaching" statutory scheme designed to prevent and remedy pollution, and elected to broadly apply this section to the fishermen's alleged loss.

Applying principles of common law negligence, the Court determined the nature of the owner's "business and the special interests of commercial fishermen in the use of the public waters" created a duty of care owed the fishermen. Using the link between duty and foreseeability, the Court noted it was foreseeable that if pollutants stored at the facility were released into public waters, marine life and human activity would potentially be damaged. The fishermen,

who were commercially licensed and dependent on the public waters for earning a livelihood, created a particularized interest that was within the zone of risk. The majority opinion did not address the limits to which this analysis extends; however, Justice Polston's concurring opinion does note the limits to which the majority opinion extends, and further suggests that given the environmental media impacted by the spill that the proper cause of action may lie in Part I (the "Oil Prevention and Pollution Control Act") rather than under section 376.313, Florida Statutes, found in Part II of Chapter 376.

Finally, after a thorough recitation of the scope of the economic loss doctrine, the Court rejected its application to either cause of action, finding its narrow implications inconsistent with the facts of the fishermen's case.

Residents sufficiently alleged standing based on participation in recreational activities in area surrounding proposed development under section 163.3215, Florida Statutes, because the section requires difference in degree, not in kind, of harm. Further, comprehensive plan policy allowing redesignation of lands based on determination by water management district was unambiguous. *Nassau County v. Willis*, -- So. 3d --, 2010 WL 2196459 (Fla. 1st DCA June 3, 2010).

The First DCA determined that residents challenging consistency of the approval of a planned unit development ("PUD") with Nassau County's ("County") comprehensive plan sufficiently alleged standing; however, the comprehensive plan was unambiguous, and the First DCA overruled the trial court and remanded for reinstatement of the ordinance approving the PUD.

Prospective developers submitted a proposal to change Crane Island's land use designation from wetlands to PUD pursuant to the Comprehensive Plan policies, which provided that the water management district could determine whether wetland designated

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lands were wetlands or uplands. The water management district determined 71.58 acres currently designated wetlands were in fact uplands. Relying upon the district's determination, the County redesignated that acreage as uplands, which increased the permissible density, and approved the PUD. Several County residents filed a complaint challenging the consistency of the development project with the Comprehensive Plan, arguing they were adversely affected parties whose recreational activities would be negatively impacted by the proposed development. Applying the judicial standard of strict scrutiny, the trial court quashed the County's ordinance, recognized the standing of the plaintiffs, and determined that the PUD was inconsistent with ambiguous provisions in the Comprehensive Plan.

On appeal, the First DCA emphasized the legislature's "broad legislative grant of standing" under section 163.3215, Florida Statutes, affirming that plaintiffs' connection to the property – kayak tours, photographing habitat and wildlife, and study and advocacy of growth management impact on the area – constituted the necessary threshold for standing, an adverse interest exceeding in degree, if not in harm, the general interest in community good shared by all persons.

The First DCA found the Comprehensive Plan policy allowing the County to redesignate lands, which would change the permissible density after an independent determination by the water management district, was unambiguous and permissible. In sum, where the Comprehensive Plan provides for redesignating wetlands based on the water management district independent determination, the County's approval of a PUD on these grounds was consistent with the unambiguous provisions of the Comprehensive Plan.

There is no due process violation in preventing non-party participants from cross-examining witnesses in a quasi-judicial proceeding approving amendment to a PUD. *Carillon Community Residential Inc. v. Seminole County*, -- So. 3d --, 2010 WL 2628692 (Fla. 5th DCA July 2, 2010).

The Fifth DCA denied a petition

for second tier certiorari of the circuit court's approval of Seminole County's ("County") approval of an amendment to a planned unit development ("PUD"). In addition to concluding the circuit court afforded the petitioner due process and did not depart from the essential requirements of law, the Fifth DCA considered whether the petitioners were denied due process when the County denied their request to cross-examine witnesses during the quasi-judicial hearing on the PUD amendment. In concluding the petitioners due process rights were not violated, the Fifth DCA distinguished between parties and participants in a quasi-judicial hearing. Noting that Florida law has no requirement for all participants to be allowed to cross-examine witnesses in a quasi-judicial proceeding, the court found petitioners had suffered no deprivation of procedural due process. Additionally, the Fifth DCA observed that these hearings involve many interested nearby landowners and are not controlled by strict rules of evidence and procedure, but rather the process due is dictated by the function of the proceeding and the nature of interests affected. Citing the circuit court's due process analysis, the Fifth DCA echoed the impracticality of allowing cross-examination of all witnesses by all non-party participants during a quasi-judicial land use hearing.

Inverse condemnation cause of action against city and state accrued four years after landowners were denied permits to construct or date city adopted special master's recommendation of denial for the landowner's beneficial use determination application. *Compare McCole v. City of Marathon*, 36 So. 3d 750 (Fla. 3d DCA 2010), with *Beyer v. City of Marathon*, 37 So. 3d 932 (Fla. 3d DCA 2010).

In a pair of cases, the Third DCA twice addressed when an inverse condemnation action accrues for purposes of the statute of limitations. In the 1970s both the McColes and Beyers acquired their respective parcels, which were in unincorporated Monroe County ("County"). In 1986, the County adopted the State Comprehensive Plan, which included the beneficial use determination ("BUD") process that allowed an administra-

tive determination of whether they have been deprived of all beneficial use of their property. Then in 1996, the County adopted its Year 2010 Comprehensive Plan. In 1999, the City of Marathon ("City") was incorporated and included both parcels within its limits.

In 1989, the McColes sought authorization from the Florida Department of Environmental Regulation and the County to construct a single family home, and both applications were denied in 1989. In 2003, the McColes filed a BUD application due to the previous denials; the special master recommended denial based on the lapse of time, which recommendation was adopted by the City. Upon denial, the McColes sued the city for inverse condemnation. Then in 2007, the McColes submitted a new application to the Department of Environmental Protection seeking to build a single family home. After DEP denied the permit, the McColes sued the state for inverse condemnation. The trial court granted summary judgment for the City and state finding the claims time-barred. Relying on the four-year statute of limitations period set forth in Chapter 95, Florida Statutes, the Third DCA held that a landowner must appeal a permit denial or file a BUD application within at least four years of a clear determination as to the permissible use of a property—which necessarily includes examining whether further attempts at obtaining approval would be fruitless. In the McColes's case, the final determination occurred in 1989 when both the County and the State denied permits for construction of a single family home, and the submission of a BUD application fourteen years later was insufficient to "revive" the claim as the application submission occurred outside the four-year statute of limitations.

Comparatively, the Beyers purchased an offshore island that through the decades was repeatedly subjected to more restrictive zoning designations, ultimately excluding all development on the property pursuant to classification in 1996 as a bird rookery. In 1997, the Beyers submitted a BUD application, which at the City's direction, was re-filed in 2002. After the City lost the application, the Beyers again filed their application in 2003. The City ultimately

continued...

CASE LAW UPDATE

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adopted the special master's recommended denial of the Beyers' BUD on September 27, 2005. Reversing the trial court's order of summary

judgment against the Beyers based on the passage of four year statute of limitations, the Third DCA rejected suggestions that the time period began at the enactment of the Comprehensive Plan. Instead, the court emphasized the Beyers' claim was an as-applied takings argument, not a facial takings, and therefore

not ripe until the plaintiff has obtained a final decision regarding the application of the regulations to the plaintiff's property. In the case of the Beyers, where they timely appealed the City's denial of their BUD, the court found this was the final decision triggering the statute of limitations time period.

On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of August 13, 2010. Readers are encouraged to advise the author of pending appeals that should be included.

U.S. SUPREME COURT

Stop the Beach Renourishment, Inc. v. FDEP, Case No. 08-1151. Petition for review of decision by the Florida Supreme Court concluding that, on its face, the Beach and Shore Preservation Act does not unconstitutionally deprive upland owners of littoral rights without just compensation. 33 Fla. L. Weekly S761a (Fla. 2008). Status: Affirmed June 17, 2010.

FLORIDA SUPREME COURT

SJRWMD v Koontz, Case SC09-713. Petition for review of 5th DCA decision in *SJRWMD v. Koontz*, affirming trial court order that the District had effected a taking of Koontz's property and awarding damages. 34 Fla. L. Weekly 123a (Fla. 5th DCA 2009). Status: Oral argument held April 5, 2010.

Curd v. Mosaic Fertilizer, LLC, Case No.: SC08-1920. Petition for review of 2nd DCA decision affirming the trial court's dismissal of class-action lawsuit for alleged economic damages after contaminated water was released into Tampa Bay, killing fish and crabs. 33 Fla. L. Weekly D2193a (Fla. 2nd DCA 2008). Status: Quashed June 17, 2010.

SFWMD v Miccosukee Tribe, Case No. SC09-1893. Petition to invoke all writs jurisdiction directing the Third District Court of Appeal to transfer to the Court the consolidated cases of *New Hope Sugar Company, et al. v. SFWMD*, Case No. 3D09-2357, and

Miccosukee Tribe v. SFWMD, Case No. 3D09-1960, so the Court can protect and exercise its mandatory and exclusive jurisdiction over matters currently pending before the Court: *Miccosukee Tribe v. SFWMD*, Case No. SC09-1817 and *New Hope Sugar Company v. SFWMD*, Case No. SC09-1818 (the validation appeals). Status: Order granting writ entered February 8, 2010.

Miccosukee Tribe v. SFWMD, Case No. SC09-1817 and *New Hope Sugar Company v. SFWMD*, Case No. SC09-1818. Petition for review of the validation of a bond issue to restore part of the Everglades. Status: Oral argument held April 7, 2010.

Keesler et al v. Community Maritime Park Associates, Inc. Case No. SC10-910. Petition for review of decision by 1st DCA affirming trial court order determining that the Sunshine Law gives appellants the right to be present but not to speak at public meetings. 32 So.3rd 659 (Fla. 1st DCA 2010). Status: Petition filed May 14, 2010.

FIRST DCA

Lowe's Home Centers, Inc. v. DCA, Case No. 1D09-4383. Petition for review of final order of Administration Commission finding that Lowe's amendment to Miami-Dade Comprehensive Plan is not in compliance. Status: Notice of appeal filed August 31, 2009.

Jacqueline Lane vs. International Paper, etc. et al. Case No. 1D10-1893. Petition for review of final order adopting the ALJ's ultimate conclusions that IP provided reasonable assurances that its effluent would not adversely affect the biological

community; that granting the permit will be in the public interest; that the discharge would not be unreasonably destructive to the quality of the receiving waters; that the proposed project complies with the DEP's anti-degradation policy; and that the consent order establishes reasonable terms and conditions to resolve the enforcement action for past violations and is the order that establishes a schedule for achieving compliance with all permit conditions. Status: Notice of appeal filed April 15, 2010.

James Hasselback vs. FDEP, etc, et al., Case No. 1D10-1850. Petition for review of DEP final order determining that petition challenging intent to issue Coastal Construction Control Line Permit was untimely notwithstanding that the Petitioner did not receive actual notice of the agency action, because Petitioner received constructive notice through the law firm that represented him and because another Cape Haven Townhome owner had implied authority to serve as his agent for receipt of notices. Status: Notice of appeal filed April 12, 2010.

Izaak Walton Investors v. Town of Yankeetown and DCA, Case No. 1D10-1732. Petition for review of final order rejecting developer's challenge to determination that plan is in compliance. The developer contended that the Town had not allocated sufficient land for commercial uses to accommodate anticipated growth over the planning timeframe. Status: Notice of appeal filed April 5, 2010.

THIRD DCA

New Hope Sugar Company, et al. v. SFWMD, Case No. 3D09-2357, and

Micosukee Tribe of Indians of Florida v. South Florida Water Management District, Case No. 3D09-1960. Petition for review of SFWMD final order denying, for lack of standing, appellants' requests for administrative hearing on SFWMD's decision to enter into a contract for the purchase of U.S. Sugar property for purposes of Everglades restoration and preservation. **Status:** oral argument held December 2, 2009; on February 8, 2010, the Florida Supreme Court granted a petition to invoke all writs jurisdiction and directed the district court of appeal to transfer the cases to the Court. See Case No. SC09-1893, above.

FOURTH DCA

Flagler Center Properties, LLP, et al v. FDEP, Case No. 4D10-4979. Petition for review of final order issuing an Environmental Resource Permit and Letter of Consent to Use Sovereignty Submerged Lands authorizing Palm Beach County to undertake a project in the Lake Worth Lagoon known as the South Cove Restoration Project. **Status:** All briefs have been filed.

Rosenblum v Zimmet, Case No. 4D10-3049. Petition for review of DEP final order finding that Zimmet was entitled to a single family dock exemption for his project and rejecting Rosenblum's claim that his navigation would be impeded to and from the south side of his dock. **Status:** Notice of appeal filed July 26, 2010.

FIFTH DCA

St. John's Riverkeeper, Inc. v. SJRWMD, Case No. 5D09-1644; *City of Jacksonville v. SJRWMD*, Case No. 5D09-1646. Petition for review of SJRWMD final order granting consumptive use permit to Seminole County for withdrawal of surface water from the St. John's River for public supply and reclaimed water augmentation. **Status:** Oral argument held July 6, 2010.

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Internet Marketing Tips for New, Small Law Firms

By Debra Regan

An unprecedented series of law firm layoffs has thousands of lawyers looking for work. Many are hanging out their own shingle for the first time either as solo practitioners or as part of two- to five-partner "micro" firms. To turn the pink-slip trend into a profitable new business quickly in this tough economy, every non-billable hour needs to generate leads and build business. The following are Internet marketing tips for budding sole practitioners and micro practices:

Advertise online. Print yellow page advertising alone won't cut it. The investment for a one-time, print display ad is an expense unsupported by demonstrated or measurable data. Investment in online marketing will likely yield more qualified leads and enable easier measurement of ROI as compared to a similar investment in print advertising or print directories.

Invest in a professionally designed and developed website. A polished, professional website is a must-have for anyone launching a new firm, regardless of size. In 2008, 32 percent of solo attorneys and 20 percent of firms with two-to-five attorneys did not have a website, according to a 2008 Harris Interactive study on marketing among small law firms. Don't be one of these unfortunate few.

"Consumerize" your website. When prospects seek an attorney, they want someone with obviously good credentials, but they also want to know what kind of person their attorney is. Pepper in some personal data about schools, hobbies, and outside interests.

Incorporate video on your site. Develop an introductory video of the managing partner that showcases personality as well as expertise. Post the video in the web (and YouTube) and even consider a TV spot down the road.

Get listed in and link to online directories. Identify all online directories available for posting attorney and firm profiles. This includes attorney specific portals and social networking sites. Link to these on your website and don't forget to add your firm's website to each online listing you post.

Hire an expert. You practice law and let others grow your business! Consider outsourcing your internet marketing campaign to qualified experts. First, ask for a consultation and determine a comfortable budget (earmark usually 2-5 percent of monthly budget as a good start point). Let the experts generate leads for your fledgling practice.

Optimize your website. Search engine optimization experts can be tremendously helpful in improving online visibility and optimizing a firm's organic search rankings. Select a search marketing team that offers transparent and results-driven metrics.

Engage in pay-per-click advertising. No firm is too small to reap tangible benefits from pay-per-click campaigns. Ensure your marketing experts select appropriate keywords, based on analysis, that are geographically and topically suited to your firm. This strategy helps favorably position small firms to directly compete with larger firms in your market.

Understand and use appropriate metrics. Learn how success and ROI are measured in an online marketing campaign. While you don't need to be an expert, you do need to understand the difference between organic and paid search, as well as "clicks," "impressions," and conversions." Tracking leads is an appropriate metric used by only 20 percent of attorneys. Visit <http://law.lexisnexis.com/lmc/identify-opportunities.asp> to get more tips on how to track leads.

Be responsive! While your internet marketing team brings in qualified leads, put a system in place to respond to each one. Make a phone call, send an e-mail in response to an inquiry, or schedule a meeting. Keep these leads in a simple database so when you're ready to send the first newsletter from the firm, clients and prospect lists are easily accessible. Don't forget to reference the LexisNexis marketing checklist at <http://law.lexisnexis.com/lmc/marketing-checklist.as> to get the marketing wheels turning!

Debra Regan is vice president of Law Firm Marketing Services at LexisNexis.

Army Corps to Initiate Three Regional Mining EIS Projects

by Susan L. Stephens, Shareholder, Hopping Green & Sams

The U.S. Army Corps of Engineers (Corps) recently stated that it intends to require three regional or “areawide” environmental impact statements (AEIS) to evaluate the impacts of and alternatives to mining in central and south Florida. First, a Phosphate Mine AEIS will be conducted in the area known as the “Bone Valley” or Central Florida Phosphate Mining District of Florida. This area consists of six counties across several watersheds in central and southwest Florida where phosphate deposits are known to occur and is expected to address the cumulative impacts of past, present, pending, and reasonably anticipated future phosphate mine projects in the region. Second, a Southwest Florida Mine AEIS will be undertaken to address past, present, and pending sand and limestone mine projects in Collier, Lee, and Hendry Counties. Finally, once those projects are concluded, the Corps is expected to initiate an Everglades Agricultural Area Mine AEIS addressing past, present, and pending sand and limestone mine projects in Palm Beach County.

The implications of the decision to prepare an area-wide mining EIS are significant in three principal respects: (1) no permits for the pending mine projects will be issued in the area covered by the project until the final AEIS is issued; (2) applicants for pending Corps permits and/or existing mine operators will jointly be required to fund the AEIS projects, which will be prepared by an outside contractor; and (3) it would be expected that preparation of the AEIS specifically addressing mining impacts in those regions will answer mounting criticisms from certain vocal environmental interest groups that have been calling for a regional AEIS for mining, particularly phosphate mining. However, it is unlikely that any AEIS that allows mining to continue will ultimately satisfy these mining opponents. The true goal appears to be to strengthen Corps permitting decisions from judicial attack.

NEPA Requirements Generally

The National Environmental Policy

Act (NEPA) requires that each federal agency prepare an environmental impact statement (EIS) for “every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment . . .” 42 U.S.C. § 4332(2) I. It is a procedural, not substantive, statute; it does not mandate a particular result or selection of the alternative least damaging to the environment, it simply requires that the agency have considered all of the relevant impacts. Issuance of an individual dredge and fill permit by the Corps pursuant to Section 404 of the Clean Water Act (404 permit) can be considered a “major Federal action” triggering an EIS if the project will have “significant” effects. Decisions by the Corps as to the proper scope of an EIS and whether a project will trigger the “significance” level necessary to prepare an EIS are reviewed under the arbitrary and capricious standard of the federal Administrative Procedure Act (APA), 5 U.S.C. §§701-706.

The first step under NEPA is preparation of an environmental assessment (EA), required for all major federal actions. If at the end of the EA (during which the Corps is required to take a “hard look” at the impacts of the project), the Corps determines there will be no significant effect on the human environment, it issues a “Finding of No Significant Impact” (FONSI), and no EIS is required. If, however, the agency determines the proposed action to be permitted will have a significant effect on the human environment, an EIS is required. In determining the significance of the effects, Council on Environmental Quality (CEQ) regulations require the agency to consider the context and intensity of the environmental impacts. Generally, the case law turns on the magnitude, significance, and size of the action as an indicator of its potential impact on the quality of the human environment. Even if the effects are significant, an EIS is not required if changes, safeguards or other measures will reduce impacts to a minimum. *C.A.R.E. Now, Inc. v. FAA*, 844 F.2d 1569, 1576 (11th

Cir 1988). Per the Corps’ own rule, most 404 permits should normally require only an EA. 33 CFR §230.7(a). Notwithstanding, the trend in recent judicial decisions has been to ratchet up the NEPA analysis required of the federal government, resulting in concern that standard NEPA documents relied upon in the past will not be sufficient going forward to satisfy the courts.

Individual vs. Regional EIS

Under NEPA, the CEQ regulations require that an agency consider “connected actions,” “cumulative actions,” and/or “similar actions” within a single EIS. 40 C.F.R. §1508.25. “Connected actions” are closely related and therefore should be discussed in the same impact statement. *Id.* §1508.25(a) (1). “Cumulative actions” are defined as actions which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the EIS. *Id.* §1508.25(a)(2). Finally, “similar actions” are those, “which when viewed with other reasonably foreseeable or proposed agency action, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.” *Id.* §1508.25(a)(3). The regulations stated that “an agency may wish to analyze these similar actions in the same impact statement [and it] should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.” *Id.* §1508.25(a). Thus, the Corps has the discretion to consider “similar actions” which collectively or regionally may have an adverse environmental consequence. Therefore, while in the ordinary course, NEPA analysis is on a project-specific basis (an EA is prepared in connection with a specific permit application, and the Corps decides, based on that EA, to either issue a FONSI or prepare an EIS), NEPA directs the Corps in the appropriate case to collectively consider multiple pending projects with similar environ-

mental consequences. Again, the decision to collectively analyze multiple projects is subject to the arbitrary and capricious standard of the APA.

This regional or comprehensive approach to an EIS has been recognized as appropriate by the U.S. Supreme Court in certain situations, where several similar projects are pending at the same time. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). However, while the *Kleppe* Court recognized and agreed generally “with respondents’ basic premise that § 102(2)(C) may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time,” applying NEPA to prospective future projects is more problematic. *Id.* at 409 (emphasis added). Emphasizing that NEPA only applies to “proposals for major federal action,” the Court rejected a four-part “balancing test” used by the Court of Appeals in determining that the mere contemplation of regional development plan or program triggered the requirement to prepare a regional or programmatic EIS. *Id.* at 403-06. Instead, the Supreme Court found “no evidence in the record of an action or proposal for an action of regional scope.” *Id.* at 400 (emphasis added). Accordingly, the Court upheld the federal respondents’ decision not to prepare a comprehensive EIS under the deferential “arbitrary and capricious” standard or review. *Id.* at 412-15. The Court stated: “Even if environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements.” *Id.* at 413-14 (footnotes omitted). Thus, the scope of the proposed Mine AEISs may necessarily be limited by the *Kleppe* decision with regard to future mine projects.

The Decision to Require Mining AEISs

In accordance with its own regulations, the Corps had previously typically issued EA/FONSI determinations for mine permits because it had determined that the proposed project, as mitigated, would not have significant effects. However, the Lake Belt litigation challenging Corps 404 permits and NEPA documents for limestone mine permits and pending federal challenges to Corps permitting decisions for a phosphate mine in

Hardee County and three limestone mines in Palm Beach County, as well as calls for a comprehensive EIS from environmental activists and EPA, have led the Corps to reconsider its longstanding practice and prepare comprehensive EIS documents that will address regional and cumulative effects of mining in three parts of the state.

A fairly aggressive schedule has been tentatively established for both the Phosphate Mine AEIS and the Southwest Florida Mine AEIS. For the Southwest Florida AEIS, Corps staff in Fort Myers has indicated a 15-month schedule from start to finish from the date permit applicants are formally noticed in writing that the AEIS will be undertaken. It is expected that the primary focus of this AEIS will be on mine projects with pending federal permit applications. Staff in the Fort Myers Office involved in the Southwest Florida Mining AEIS include Tunis McElwain, the Director of the Fort Myers Regulatory Office of the Corps, Susan Blass and Lauren Diaz, who will be the points of contact for the AEIS.

The Corps has advised public and private stakeholders that it intends to hold a public scoping meeting in October, with the goal of initiating the Phosphate Mine AEIS in January 2011 and completing it 18 months thereafter. The scope and projects or activities to be included in this AEIS has not yet been established, but the Phosphate Mine AEIS is expected to be significantly broader in terms of both area and projects considered than the Southwest Florida Mine AEIS. Staff involved in the Phosphate Mine AEIS include Steve Sullivan, Cynthia Woods, Angela Riddle, and Mark Peterson.

It is likely that the EAA Mine EIS will address only pending applications. No schedule has yet been established for this AEIS given the pending litigation; it is expected the Corps will wait until litigation is concluded in that case before deciding on a scope for the EAA Mine EIS.

Until the final AEIS document for each region is issued, the Corps anticipates that no mining permit will be issued in the interim.

Endnote:

¹ See *Sierra Club v. VanAntwerp*, No. 09-10877 (11th Cir. 1/21/10); *Sierra Club v. Flowers*, 423 F.Supp. 1273 (S.D. Fla. 2006); and *Sierra Club v. Strock*, 495 F. Supp. 2d 1188 (S.D. Fla. 2007).

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Update on the Status of the Statewide Stormwater Quality Rule

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

Status

On May 25, 2007, the Department of Environmental Protection (DEP) initiated rule development to adopt new unified stormwater quality permitting rules for Florida ("statewide rule"). The statewide rule will be set forth in a new Chapter 62-347, F.A.C. and will be applied in Environmental Resource Permits (ERP). The statewide rule will incorporate by reference a detailed Applicant's Handbook, which provides the technical criteria for application of the statewide rule. In order to assist with the development of the statewide rule, a Technical Advisory Committee was established and met ten times to provide input. The proposed statewide rule and the Applicant's Handbook are available at the DEP website found at www.dep.state.fl.us/water/wetlands/erp/rules/stormwater/index.htm.

In May, 2010, the first round of workshops on the statewide rule was conducted by the DEP, in coordination with the water management districts. The next step is for the agencies to meet to discuss comments received and make additional modifications to

the proposed Applicant's Handbook. Additional workshops are expected to be conducted throughout the state later this year. It is anticipated that the statewide rule will not be effective until sometime after July 1, 2011.

Statewide Unified Stormwater Rule Development

One of the goals of the proposed statewide rule is to address uncertainty by providing stormwater quality treatment design and performance standards that can be applied statewide. Also, since stormwater quality rules were initially published in Florida in 1982, research has led to the conclusion that nutrients are a major concern. The new statewide rule will reflect new research on design and performance standards and will emphasize today's understanding of the impact of nutrient discharges from surface water management systems on water quality.

The statewide rule will assist the state in addressing the adverse effects of nutrients on water quality through scientifically and technically sound permitting criteria. The nutrients addressed in the statewide rule are total nitrogen and total phosphorus (hereinafter referred to as "nutrients"). This statewide rule will establish stormwater quality treatment requirements establishing the minimum level of stormwater treatment and design criteria for the construction, operation, and maintenance of stormwater management systems. The statewide rule will provide for geographic differences in physical and natural characteristics, including rainfall patterns, topography, soil types and vegetation.

Legislation will be sought in the 2011 legislative session to authorize certain processes and proposed rule provisions. One such provision would allow the water management districts and delegated local ERP programs to implement the statewide rule without the need to adopt it pursuant to Section 120.54, Fla. Stat. (2009).

Criteria for Evaluation

The new statewide rule will con-

tinue to use a reasonable assurance standard for the evaluation of permit applications. The statewide rule proposes a performance standard requiring a minimum level of treatment sufficient to accomplish the lesser of an eighty-five percent reduction of the post-development average annual loading of nutrients from the project or a reduction to provide that the post-development average annual loading of nutrients do not exceed the nutrient loading from the project area's natural vegetative community types.

The statewide rule will provide for the reduction of stormwater volume as a method for reducing pollutant loads. This may be accomplished through low impact designs; reduction in directly connected impervious areas; retention; and stormwater reuse.

Methodologies will be set forth for the calculation of post and pre-development hydrology and loading. A treatment train approach will be emphasized. A treatment train is a series of Best Management Practices (BMPs) or other treatment set forth in a series, like cars on a train. Existing and additional BMPs will be considered in the new statewide rule. BMPs under the statewide rule are expected to include: retention systems; biofiltration systems; exfiltration trenches; swale systems; wet detention; stormwater reuse; vegetated natural buffers; green roofs and cistern systems; pervious pavement systems; and disconnection of impervious areas. In the future, additional BMPs may include: Florida Friendly Landscapes, preservation of natural on-site vegetation; and low soil compaction practices. Source controls may assist in meeting rule requirements. Examples are street sweeping; litter control; minimization of fertilizer and pesticide use; and, the use of Florida Friendly fertilizer with low phosphorus. Additional research is currently occurring at DEP regarding the quantification of nonstructural BMPs in order to provide a method for determining credit within the context of the statewide rule. Other research is also underway.



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Department of Community Affairs Update

by Richard E. Shine, Assistant General Counsel

COMPREHENSIVE PLANNING

Department of Community Affairs v. Polk County and Safari Wild, LLC, DOAH Case No. 10-0544DRI

The Department appealed a Polk County Development Order issued to Safari Wild for a project located in the Green Swamp Area of Critical State Concern. Safari Wild sought approval to operate a game farm with up to 750 Asian and African grazing in multi-species herds to be viewed by the public for an entrance fee. The Department's petition maintained that the Safari Wild project was not a recreational low intensity use, rather a commercial land use prohibited by the Polk County Comprehensive Plan and Land Development Regulations. The Administrative Law Judge's July 30, 2010 Recommended Order found that the Safari Wild Project and activities authorized by the Development Order constituted "development" as defined in section 380.04, Florida Statutes; that the project is inconsistent with the Polk County Comprehensive Plan and Land Development Regulations; and that the Florida Land and Water Adjudicatory Commission quash the Polk County Development Order and deny permission to Safari Wild to develop the project.

Richard Burgess v. DCA, City of Edgewater and Hammock Creek Green, LLC - DOAH Case No. 09-2080

Mr. Burgess challenged the Department's Cumulative Notice of Intent finding the City of Edgewater's comprehensive plan amendment approving the Restoration development "in compliance." Restoration is a 5,000+ acre development adjacent to the west side of Interstate 95. The Department initially found the development not "in compliance," however the City and Developer agreed to many changes through settlement negotiations. Of note, the City and Developer agreed to cluster development onto the eastern 1/3 of the property that abuts I-95. In doing so, two proposed sprawling residential

portions of the development were eliminated, creating a compact, highly dense and intense transit oriented development. Further, the City and Developer agreed to restore the natural wetland functions of the remaining portions of the parcel and place them under a conservation easement. In the Recommended Order, Judge Canter noted that a needs analysis is one of many factors the Department takes into consideration when reviewing Future Land Use Map amendments under section 163.3177, Florida Statute and recommended that the Department issue a final order finding the plan amendment "in compliance."

U.S. Funding Group, LLC. Manatee County, Department of Community Affairs, Florida Biomass Energy, LLC, and Patron Holdings - Doah Case No. 09-6014GM

Manatee County changed the land use designation on a parcel of property owned by Intervenor, Patron Holdings, LLC, from Industrial Light (IL) to Public/ Semi-Public-1 (P/SP(1)). The new land use designation allows, among other things, the use of the property as an alternative fuel electrical generating facility. The property is under contract to be sold to Intervenor, Florida Biomass Energy, LLC, who intends to construct and operate a biomass plant on the property. On September 29, 2009, Respondent, Department of Community Affairs, published its Notice of Intent to Find Manatee County Comprehensive Plan Amendment in Compliance. On October 20, 2009, Petitioner, U.S. Funding Group, LLC, who owns property in the immediate vicinity of the subject property, filed with the Department its Petition for Administrative Hearing alleging that the map change was not in compliance with the Manatee County Comprehensive Plan. In the Recommended Order, the ALJ found that the Petitioner has failed to establish beyond fair debate that the amendment is not in compliance. Because the property was classified as IL before the amendment, all of the IL uses in that category

have been evaluated and determined by the County to be appropriate in terms of location, impact, and intensity. A County comprehensive plan policy states that the future land use category listings of uses are "generalized," they are not "all inclusive," and they "may be interpreted to include other land uses which are similar to or consistent with those set forth in the general range of potential uses." The IL uses are similar in character and intensity to the type of uses listed in the P-SP(1) category. For these reasons, it is fairly debatable that the plan amendment is consistent with FLUE Policy 2.2.1.22.2, Rule 9J-5.006(3), and Section 163.3177(6)(a), Florida Statutes. Therefore, the ALJ concluded that the plan amendment adopted by Ordinance No. 09-31 is in compliance.

Florida Communities Trust

In a major conservation deal completed on July 28, 2010, nearly 58 acres of critical habitat for the endangered West Indian manatee are now preserved from development with the acquisition of the City of Crystal River's Three Sisters Springs. The Three Sisters Springs is located in Citrus County and contains a five pristine springs which will be managed as a wildlife refuge that will protect a critical manatee congregating area and provide a passive nature park in the heart of the City of Crystal River. Multiple partners at the local, state and national level played a role in acquiring the 58-acre property.

The agreement transfers the land to the City of Crystal River and the Southwest Florida Water Management District (SWFWMD). The state's Florida Communities Trust program will hold a conservation easement on the site, and the city and SWFWMD will enter into an agreement with the U.S. Fish and Wildlife Service, which will manage the property as an addition to Crystal River National Wildlife Refuge. SWFWMD will construct flow through wetlands to capture and treat urban runoff now directly entering canals adjacent to the prop-

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erty, which, along with the main springs, are critical cold weather manatee habitats.

Funding for the \$10.5 million project came from a variety of sources: \$3.3 million in federal funding through the Land and Water Conser-

vation Fund and the North America Wetlands Conservation Act, secured with the help of U.S. Senator Bill Nelson, Congresswoman Ginny Brown-Waite and Congresswoman Debbie Wasserman Schultz; nearly \$5 million in state funding from the Florida Forever/Florida Communities Trust program and SWFWMD; \$300,000 from the City of Crystal River, Citrus County and the Citrus County Tourist Development Council; and nearly

\$2 million through the fundraising efforts of The Conservation Fund, the National Wildlife Refuge Association, the Friends of Chassahowitzka National Wildlife Refuge Complex, the Save the Manatee Club, the Felburn Foundation, Jane's Trust and many individuals in the local community. The Brunckhorst Foundation and the Milton and Tamar Maltz Family Foundation provided additional support.

DEP Update

by West Gregory

DEEPWATER HORIZON OIL SPILL:

On Tuesday, April 20, 2010, an offshore oil drilling platform, Deepwater Horizon, exploded in the Gulf of Mexico near Louisiana. The rig, owned by Transocean Ltd, was under contract to BP. Submerged at the bottom of the Gulf, the well discharged significant amounts of oil. The Florida Department of Environmental Protection has been designated the lead state agency for responding to the Deepwater Horizon oil spill along Florida's shoreline and as the natural resource damage Trustee for Florida.

The Governor issued Executive Orders on April 30, May 3, 11, 20, 28, and June 18 authorizing emergency powers to state agencies in order to respond to the oil spill. The Department issued an Emergency Order on May 12 (and later amended on June 10 and June 18) outlining the actions BP and its contractors and local governments may take to respond to the oil spill. These orders suspend strict application of certain statutes and rules for oil spill response related activities when adhering to those statutes and rules would frustrate actions necessary to cope with the emergency. Some activities do not require notice or permission from the Department, while other activities do require Department review and approval through the issuance of field authorizations or permits.

In the Department's role as nat-

ural resource damage Trustee for Florida, the Department's focus has broadened to include recovery and compensation and restoration efforts related to natural resource damages, in addition to response and cleanup. The Department formed a Trustee Steering Committee with the Trustees from the U.S. Department of Interior, the National Oceanic and Atmospheric Administration, and other states bordering the Gulf of Mexico to work cooperatively to assess the injuries caused by the oil spill and to develop restoration projects for the Gulf of Mexico that will compensate the Trustees for those injuries. Much of the baseline sampling and pre-assessment sampling documenting impacts within Florida waters are complete. In upcoming months, the Department will be documenting the extent of the injuries to Florida's natural resources, soliciting public input on possible restoration projects, and developing emergency and long term restoration projects that will be the basis for negotiations with the parties responsible for the oil spill.

Due to the success of the static kill operation and the progress toward a permanent well-kill, the State Emergency Operations Center transitioned to a Level 2. The State Emergency Response Team remains focused on protecting Florida's businesses, residents, visitors, and communities from any oil remaining in the Gulf of Mexico.

For the latest information on the Deepwater Horizon Oil Spill, please visit: <http://www.dep.state.fl.us/deepwaterhorizon/default.htm>.

STOP THE BEACH RENOURISHMENT v. WALTON CO. AND DEP:

In a unanimous opinion, the United States Supreme Court affirmed the decision of the Florida Supreme Court in *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008). The ruling upheld the facial constitutionality of chapter 161, Florida Statutes (the Beach and Shore Preservation Act), based on its determination that the Florida Supreme Court's opinion was "consistent with...background principles of state property law." Specifically, the Court observed that "Florida law as it stood before the decision below" provided that the State could "fill in its own seabed, and the resulting sudden exposure of previously submerged land was treated like an avulsion for purposes of ownership;" thus, "[t]he right to accretions was...subordinate to the State's right to fill." Under the Act, following restoration, the erosion control line—reflecting the boundary between state owned lands and private uplands—was "identical" to the "pre-existing mean high-water line." The Court concluded: "Although the opinion does not cite *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927)], and is not always clear on this point, it suffices that its characterization of the

littoral right to accretion is consistent with *Martin* and the other relevant principles of Florida law we have discussed.” While the Court was divided regarding the issue of “whether the judiciary can ever effect a taking,” it unanimously concluded that the Florida Supreme Court’s decision did not: “Because the Florida Supreme Court’s decision did not contravene the established property rights of petitioner’s Members, Florida has not violated the Fifth and Fourteenth Amendments.”

Z.K. Mart, Inc. v. DEP: 1st DCA Case No: 09-3022:

Z.K.Mart challenged the Department’s order imposing administrative penalty and requiring Z.K. Mart to resume necessary cleanup activity on the property it owned and operated. Z.K. Mart argued that it did not have the financial ability to undertake such activities and should be excused from the penalties and remediation responsibilities based on section 376.303(1)(i), Fla. Stat. The Court held that Department was not required to consider responsible party’s financial status as impacting party’s ability to comply with its obligations under pertinent statutes and rules. Section 376.303(1)(i), Fla. Stat., provides that when the Department

undertakes remediation activities on its own, it may pursue recovery of expenses and costs for removal of pollutant “unless it finds the amount involved too small or the likelihood of recovery too uncertain.” The Court found that the statute has no applicability where Department pursued administrative remedy under section 403.121(2). The Court also rejected the argument that case be held in abeyance until resolution of responsible party’s lawsuits against its insurer rejected because the party’s responsibilities are not dependent on availability of insurance coverage.

AMENDMENTS TO CHAPTER 62-640, F.A.C., BIOSOLIDS:

On May 20, 2010, the Environmental Regulatory Commission (ERC) approved the Department’s proposed amendments to Chapter 62-640, F.A.C., which contains regulations for domestic wastewater residuals (biosolids), to improve biosolids land application site accountability and management, address growing nutrient concerns, and support public confidence in the beneficial use of biosolids. While the Department is proposing numerous revisions to Chapter 62-640, F.A.C., the primary proposed changes include requiring site permitting for biosolids land ap-

plication sites, requiring nutrient management plans, and requiring distributed and marketed Class AA biosolids to be fertilizers. On June 11, 2010, a notice of change was published modifying the proposed rules amendments with changes passed by the ERC. The Department filed the rule with the Secretary of State. It became effective on August 29th.

AMENDMENTS TO FLORIDA’S SURFACE WATER CLASSIFICATION SYSTEM RULE NOS. 62-302.400 and 62-302.530, F.A.C.:

On May 20, 2010, DEP’s Environmental Regulation Commission approved amendments to the State’s surface water classification system to add a new sub-classification of Class III waters, termed Class III-Limited. This new classification recognizes that designated uses (like swimming and aquatic life use support) of some artificial and altered waters are limited by human-induced physical or habitat conditions. While no waters were changed in classification as part of this rulemaking, this new sub-classification provides an option for local stakeholders to petition DEP for reclassification of wholly artificial waters or substantially altered waters if they can demonstrate that no existing uses will be lost in the

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St. Thomas University School of Law - LL.M. Program in Environmental Sustainability

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reclassified or downstream waters. The Class III-Limited classification has the same water quality criteria as Class III, but Site-Specific Alternative Criteria (SSACs) may be established for nine parameters (nutrients, bacteria, dissolved oxygen, alkalinity, specific conductance, transparency, turbidity, biological integrity, or pH) as part of the reclassification. The SSACs must be set at levels that support the limited uses and cannot be set at levels lower than existing water quality. As such, reclassification will not allow lowering of water quality in the reclassified waters, but will allow better focusing of limited restoration resources on water bodies that can truly be restored. The rule amendments were filed with the Department of State on July 16, 2010, and became effective August 5, 2010.

SITE SPECIFIC ALTERNATIVE CRITERIA IN THE LOWER FENHOLLOWAY RIVER AND COASTAL WATERS (RULE 62-302.800, F.A.C.):

On January 30, 2009, DEP received a petition from Buckeye Florida, L.P., to establish site specific alternative criteria (SSAC) for transparency, iron and dissolved oxygen in the lower Fenholloway River and near-shore coastal waters, pursuant to rule 62-302.800, F.A.C.

On May 20, 2010, DEP's Environmental Regulation Commission approved a transparency SSAC in accordance with rule 62-302.800(2), F.A.C., for the lower Fenholloway River and coastal waters, which establishes alternative transparency criteria to protect both phytoplankton and submerged aquatic vegetation. The rule was filed with the Department of State on July 16, 2010, and became effective August 5, 2010. On July 14, 2010, the Secretary of DEP issued two other SSACs by final order for iron and dissolved oxygen in the lower Fenholloway River and near-shore coastal waters in accordance with rule 62-302.800(1), F.A.C.

All three SSACs fully protect the

designed use of the waters and will replace the default transparency criteria in Rule 62-302.530, F.A.C., for these waters.

STATUS OF EPA'S PROPOSED NUMERIC NUTRIENT CRITERIA FOR FLORIDA LAKES AND FLOWING WATERS:

On January 14, 2009, the Environmental Protection Agency (EPA) issued a determination letter under the Clean Water Act (CWA) section 303(c)(4)(B) that numeric water quality standards for nutrients are necessary to meet the requirements of the CWA for the State of Florida. The determination letter established a schedule for criteria development, with criteria for lakes and streams due by January 14, 2010, and criteria for estuaries due by January 14, 2011. A press release issued on January 16, 2009, announced that EPA and DEP would work closely and collaboratively to gather, analyze and adopt such numeric nutrient criteria.

In August of 2009, EPA agreed to a Consent Decree with several environmental groups that bound EPA to a schedule for promulgating numeric nutrient criteria for the State of Florida. EPA agreed to promulgate numeric nutrient criteria for Florida streams and lakes by October 15, 2010, and Florida's estuaries by October 15, 2011.

On January 26, 2010, EPA published its draft numeric nutrient criteria for Florida's lakes and flowing waters (including canals) in the Federal Register. EPA held six public workshops in Florida on February 16, 2010 (Tallahassee), February 17, 2010 (Orlando), February 18, 2010 (West Palm Beach), April 13, 2010 (Fort Myers), April 14, 2010 (Tampa), and April 15, 2010 (Jacksonville), to solicit public comment on its proposed draft rule. On April 28, 2010, DEP submitted extensive comments to EPA on EPA's proposed numeric nutrient criteria.

By letter dated March 17, 2010, EPA notified DEP that it decided to delay promulgation of the downstream protection values and to address this issue in the 2011 estuary and coastal rulemaking. In June of 2010, EPA and the plaintiff environmental groups agreed to a modi-

fication to the Consent Decree that extends the deadlines for promulgating 1) numeric nutrient criteria for estuarine and coastal waters, 2) downstream protection values for estuarine waters, and 3) numeric nutrient criteria for South Florida flowing waters (including canals). The new schedule requires EPA to propose criteria for these waters by November 14, 2011, and finalize such criteria by August 15, 2012. By letter dated June 7, 2010, EPA notified DEP of the modified rule adoption schedule and its intent to request an independent public peer review by the Science Advisory Board.

EPA's January 14, 2009 Determination Letter, the January 16, 2009 Press Release, the DEP's Numeric Nutrient Criteria Development Plan, DEP's extensive comments on EPA's proposed criteria submitted to EPA on April 28, 2010 (with a five page summary), and numerous other related documents are available on DEP's numeric nutrient criteria website at <http://www.dep.state.fl.us/water/wqssp/nutrients/index.htm>.

OF NOTE:

The 29th Annual International Submerged Lands Management Conference will be held via a webinar series in the fall of 2010. The Florida Department of Environmental Protection's, Office of Coastal and Aquatic Managed Areas will host the series which consists of 8 panels on the topics of Sea Level Rise and Property Rights; Submerged Resources in the Face of a Changing Climate; Mapping, Modeling and the Use of GIS in the Management of Submerged Lands Resources; Submerged Lands Restoration and Nurseries; Managing the Balancing Act: Recreational Boating Use and Protecting Submerged Land Resources; Managing Cultural Resources on Submerged Lands; Conservation and Management of Submerged Lands and Related Resources; and Deepwater Horizon Oil Spill. In addition, the series will kick off September 7 with a keynote address. CLE credit is pending for the Sea Level Rise and Property Rights session. To view dates and times of the lectures and to register visit: <http://www.submergedlandsconference.com/>.

Law School Liaisons

Exciting Developments in Florida State University College of Law's Environmental and Land Use Program (Summer 2010)

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

We are delighted to report that the most recent (2010) *U.S. News & World Report* ranks Florida State University College of Law's Environmental Law program 5th in the United States, the highest ranking ever for the program.

This column provides an update on upcoming programs at the College of Law and on our students' recent accomplishments.

Upcoming Programs

The Program in Environmental and Land Use Law is planning a number of programs and will host a variety of speakers during the 2010-2011 academic year. Our *Distinguished Environmental Lectures* and *Environmental Forums* are open to the public, and we welcome Section members. For all events, please contact Program Assistant Jeremy Lightner at jlightne@law.fsu.edu for more detailed information.

We invite Section members to join us for our first major event of the new academic year, the Fall 2010 *Distinguished Environmental Lecture*, which will be held at the College of Law on September 22nd at 3:15 p.m. Our featured speaker is Professor Kirsten Engel, Professor of Law at the University of Arizona James E. Rogers College of Law. Prof. Engel is a nationally recognized scholar in a variety of areas of environmental and administrative law, including federalism and climate change. The lecture will be followed by a reception.

The College of Law's Fall 2010 *Environmental Forum* will focus on the Gulf oil spill. We will keep the Section apprised as we complete the planning for this important program.

The College of Law will also welcome Professors Hannah Wiseman, University of Tulsa School of Law, and Blake Hudson, Stetson Univer-

sity College of Law, to campus this fall for faculty workshops and as guest lecturers for our Environmental Certificate Seminar. Professors Lesley McAllister of San Diego Law School, and Michael Wara, of Stanford Law School, will join us in the spring for faculty workshops and as guest lecturers for the Environmental Certificate Seminar. In addition, three speakers will contribute their wisdom to Professor Robin Craig's Florida Water Law course in the Fall: Janet Llewellyn, head of the Water Resources Division of the Florida Department of Environmental Protection; Jon Glogau, special counsel in the Florida Attorney General's Office; and Cynthia Barnett, author of *Mirage: Florida and the Vanishing Water of the Eastern U.S.*

Jody Freeman, the Archibald Cox Professor of Law at Harvard University School of Law and a leading scholar in the fields of administrative and environmental law, will give our Spring 2011 *Distinguished Environmental Lecture* on March 16th at 3:15 p.m.

For more information about our *Distinguished Lectures* and our *Environmental Forum* series, and to keep apprised of other programs at the College of Law, please see: http://www.law.fsu.edu/academic_programs/environmental/events.HTML.

The College of Law's 2010 Environmental Certificate Graduates

We are pleased to congratulate, and recognize, our 16 graduates this year who completed the requirements for our Environmental and Land Use Law Certificate:

Kaitlyn Bagnato
Crystal Bickoff (Honors)
Jennifer Davis (Honors)
Oscar Gertsch (Honors)
Charles Goddard

Jamie Horne
Brandon Howes (Honors)
Benjamin Cooper Lord (Honors)
Bonnie Malloy (High Honors)
Megan McDonough
Kyle McNulty
Hillary Powell (Highest Honors)
Margaret Seward (High Honors)
Sarah Shuler (High Honors)
Karen Mollie Smith (Highest Honors)
John Truitt

Other College of Law Student Honors and Accomplishments

We are delighted that our students continue to reap honors for their written work. Our students swept this year's Frank Maloney Environmental Law Writing Competition, sponsored by the Section. Kristy Sweat, FSU College of Law '10, was named the first place winner, Melanie Leitman, FSU College of Law '11, earned second place honors, and Bonnie Malloy, FSU College of Law '10, was the third place recipient. Another of our students, Christian Perrin Cutillo, FSU College of Law '11, is publishing her comment on electronic waste in the online edition of the *Harvard Law & Policy Review*.

Abigail Dean, FSU College of Law '11, interned with the U.S. EPA's Region 8 office in Denver, Colorado during the 2010 Summer and will be interning with the U.S. Department of Justice Environment and Natural Resources Division's Denver office in the Fall. Rebecca Lowrance, FSU College of Law '11, received an ABA diversity fellowship in environmental law to work with the Everglades Law Center. Ms. Lowrance also received a Florida Bar Foundation fellowship to work with the Legal Aid Society of Palm Beach County. Brian Kenyon, FSU College of Law '11, is working this summer with the U.S. EPA Office of the Administrative Law Judges, in Washington, D.C.

Law School Liaisons continued....

Stetson University College of Law: Environmental Law Updates

Stetson University College of Law continues its commitment to environmental education and service from the local to the global scale. Stetson's environmental programs are coordinated through its **Institute for Biodiversity Law and Policy**. Recent and upcoming activities include the following:

15th Annual Stetson International Environmental Moot Court Competition: The event is now the world's largest moot court competition that focuses exclusively on global environmental issues. This year's problem is based on the BP/Deepwater Horizon spill and examines the responsibility for transboundary harm associated with oil pollution and chemical dispersants. Law students will compete in regional moots in Africa, Asia, Europe, North America, and South America. The top teams will then be invited to the International Finals, which the University of Maryland will host in March 2011. Stetson will host the North American Rounds in January 2011. If you are interested in judging oral rounds or the memorials, please contact Prof. Brooke Bowman at bowman@law.stetson.edu.

Ramsar Scientific and Technical Review Panel (STRP) Workshop: In February 2010, Stetson became the

first law school in the world to sign a memorandum of cooperation with the Ramsar Secretariat, a Switzerland-based body that oversees the Ramsar Convention, a treaty devoted to wetland conservation. Last spring Stetson students presented case studies on the management of transboundary wetlands to the STRP via videoconference. This fall Stetson will host STRP representatives for an October workshop that will examine issues related to "no net loss" policies and wetland mitigation. The workshop's objective is to produce a resolution and guidance for consideration by the Convention's 160 parties at its next meeting in Romania in 2012.

13th International Wildlife Law Conference: Stetson will hold the conference at the University of Granada in June 2011. Sessions will focus on the Convention on Migratory Species, Marine Pollution, Whales, and Critiques on the Effectiveness of Multilateral Environmental Agreements. If you are interested in presenting, please contact Dr. Wil Burns at wiliamcgburns@comcast.net.

Conservation Banking Case Studies: In the spring and summer several Stetson students, under the supervision of Prof. Royal C. Gardner, prepared a dozen case studies on conser-

vation banking for The Conservation Fund for use in a national training course in West Virginia. The case studies ranged from a Florida panther bank to a Carolina heelsplitter mussel bank to multispecies banks in California. Stetson will use these case studies in its Ecosystem Banking Workshop, a voluntary enrichment program for students. Over the course of the year, students in the workshop examine market-based approaches to restoring wetlands, conserving endangered species habitat, improving water quality, and reducing greenhouse gas emissions. The workshop serves as a feeder program for internships with regulatory agencies, mitigation companies, and environmental groups.

Fall Biodiversity Lectures: Each semester, the Biodiversity Institute sponsors several lectures, which are free and open to the public. This fall, presenters will include Dr. Frank Muller-Karger of the University of South Florida who will discuss the BP/Deepwater Horizon spill, Craig Pittman of the St. Petersburg Times who will talk about his new book on manatees, and Ramsar Deputy Secretary General Nick Davidson and Ramsar STRP Chair Heather Mackay who will provide updates on global wetland conservation efforts.

St. Thomas University School of Law – LL.M. in Environmental Sustainability

In fall 2011, St. Thomas University School of Law in Miami will welcome the inaugural class of its new LL.M. degree in Environmental Sustainability. The one-year program is designed to equip lawyers and graduating law students with the legal tools and experience necessary to work in environmental law in today's changing world. In addition to obtaining foundational knowledge about laws

and policies affecting the natural environment, students will acquire the practical skills needed by government agencies, business or advocacy.

The program's emphasis on the applied aspects of environmental sustainability provides insights sought by employers who must ensure that economic performance is bolstered by strategies that minimize harm to the environment. Intensive, one-credit

modules led by professionals allow the LL.M. program to respond quickly to current events, while externships focus on the real-world application of environmental laws and principles. And since effective legal approaches for environmental issues should be grounded in an understanding of the science underpinning environmental issues, the program will help students develop their capacity to un-

derstand and work with scientists, engineers and other environmental professionals.

Dr. Alfred R. (Fred) Light, a recognized leader in the field of environmental law and a member of the St. Thomas University law faculty since 1989, is director of the LL.M. program. He holds a Ph.D. from the University of North Carolina at Chapel Hill and a J.D. from Harvard. He

has a distinguished record in both private practice and academia and is widely published in law journals in the areas of Superfund and Everglades restoration. Professor Light is joined by faculty and staff with decades of experience with sustainability issues and major environmental organizations.

Today, global sustainability is caught between the pincers of slow

degradation and crisis. By creating a new generation of leaders in environmental sustainability law, St. Thomas University School of Law is equipping students with the training they need to become part of the solution. Interested individuals are encouraged to contact us with questions at environmentLLM@stu.edu; please visit www.stu.edu/law/environmentLLM for more information.

University of Florida Levin College of Law Update

by Alyson C. Flournoy

Read the latest news from the UF Environmental and Land Use Law Program in our program newsletter at <http://www.law.ufl.edu/elulp/events.shtml> and find out the answers to these questions and more:

- ❖ Who were the distinguished speakers who addressed Dimensions of Sustainability in the Spring 2010 Environmental Speaker Series?
- ❖ What initiatives in Central and South America did students and faculty in the Costa Rica Summer Program support this year?
- ❖ Where did the new Marine and Coastal Law and Policy Spring Break Field Course take students and faculty?
- ❖ When can prospective LLM and certificate students apply for the new ELULP Fellowships?
- ❖ How did some students and faculty find themselves up to their ears in alligators this summer?
- ❖ What Bob Dylan album inspired the theme for the 16th Annual PIEC?

If you'd like to be added to our email list to hear about environmental and land use law programs at UF, just send us an email at elulp@law.ufl.edu. We'll feature detail on upcoming events at UF Law in the next update.

In the meantime, mark your calendars for two annual events that will be held in Gainesville next February. The Nelson Symposium on Local Government Law will be held at the UF Hilton on Friday, Feb. 11, 2011, with a focus on three coastal/beach issues: judicial takings, global warming ad-

aptation, and the oil spill. The Public Interest Environmental Conference will be held on the UF Law campus on Feb. 24-26 with a focus on our energy future. Stay tuned for more details about these programs, our Environmental Speaker Series, and recent Conservation Clinic successes.

Faculty Research 2009-2010

Here's a summary of the research on environmental and land use law our faculty published in the last year or so. If you'd like a copy of any of the articles, please feel free to drop an email to Lena Hinson at elulp@law.ufl.edu and we'll send you a link to anything that's available online.

Mary Jane Angelo Professor

"Corn, Carbon and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment," 17 *George Mason L. Rev.* 593 (2010) • "Valuing Nature: The Challenge of a National Environmental Legacy Act" (with Mark T. Brown), in *BEYOND ENVIRONMENTAL LAW: POLICY PROPOSALS FOR A BETTER ENVIRONMENTAL FUTURE* (Alyson C. Flournoy and David M. Driesen, eds.) (Cambridge University Press 2010) • "Stumbling Toward Success: A Story of Adaptive Law and Ecological Resilience," 87 *Nebraska L. Rev.* 950 (2009) • "Modernizing Water Law: The Example of Florida" (with Christine Klein & Richard Hamann), 61 *Florida L. Rev.* 403 (2009)

Mark Fenster

Associate Dean for Faculty Development; Samuel T. Dell Term Professor; University of Florida

Research Foundation Professor

"Seeing the State: Transparency as Metaphor," 62 *Administrative Law Review* 617 (2010) • "The Stubborn Incoherence of Regulatory Takings," 28 *Stanford Environmental L. J.* 525 (2009)

Alyson Craig Flournoy

UF Research Foundation Professor; Alumni Research Scholar; Director, Environmental and Land Use Law Program

Editor (with David M. Driesen), *BEYOND ENVIRONMENTAL LAW: POLICY PROPOSALS FOR A BETTER ENVIRONMENTAL FUTURE* (Cambridge Univ. Press 2010), and contributor of one chapter: "The Case for a National Environmental Legacy Act" • *The Future of Environmental Protection: The Case for a National Environmental Legacy Act, A Center for Progressive Reform White Paper*, available at: http://www.progressivereform.org/articles/NELA_1002.pdf (co-authored with Ryan Feinberg, Margaret Clune Giblin, Heather Halter, and Christina Storz) (January 2010) • "Protecting a Natural Resource Legacy While Promoting Resilience: Can It Be Done?," 87 *Nebraska L. Rev.* 1008 (2009) • "Recommendation No. 5: Adopt Model National Environmental Legacy Act—NELA," in *Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice* (Climate Legacy Initiative, Vermont Law School, 2009)

Dawn Jourdan

Assistant Professor; Assistant Professor, Urban and Regional Planning (joint appointment)

Law School Liaisons continued...

LAW SCHOOL LIAISONS

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“Equal Protection and Aesthetic Zoning: A possible chink and a preemptive repair” (with Lou Tassinary et al.) in the 42 *Urban Lawyer* 375 (2010) • “Meeting Their Fair Share: A Proposal for the Creation of Regional Land Banks to Meet the Affordable Housing Needs in the Rural Areas of Texas” (with Shannon Van Zandt & Nicole Adair), 19 *J. Affordable Housing and Community Development Law* 147 (2010) • “The Impact of Historic Facade Easements on Condominium Value,” *The Appraisal Journal* (with K.W. Geideman) (Fall, 2009), at 329 • “Wal-Mart in the Garden District- Does the Arbitrary and Capricious Standard of Review Lessen the Right of Citizens to Participate” (with Kevin Gifford), 18 *J. Affordable Housing and Community Development Law* 260 (2009) • “Small Town Housing Needs: Resource Inefficiencies and Urban Bias in the United States” (with Shannon VanZandt, Cecilia Guisti, and June Martin), *J. of the Community Development Society* (June 2009), at 75

Christine A. Klein
Chesterfield Smith Professor
“Environmental Patriotism,” in

BEYOND ENVIRONMENTAL LAW: POLICY PROPOSALS FOR A BETTER ENVIRONMENTAL FUTURE (Alyson C. Flournoy and David M. Driesen, eds.) (Cambridge University Press 2010) • “A Scientific Assessment of Alternatives for Reducing Water Management Effects on Threatened and Endangered Fishes in California’s Bay Delta” (co-author as member of Committee on Sustainable Water and Environmental Management in the California Bay-Delta), (National Research Council of the National Academy of Sciences, 2010) • NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES (with Federico Cheever & Bret C. Birdsong) (Aspen, 2d ed. 2009) • “The Environmental Deficit: Applying Lessons from the Economic Recession,” 53 *Arizona L. Rev.* 651 (2009) • “Modernizing Water Law: The Example of Florida” (with Mary Jane Angelo & Richard Hamann), 61 *Florida L. Rev.* 403 (2009)

Michael Allan Wolf
Richard E. Nelson Chair in Local Government Law

LAND USE PLANNING AND THE ENVIRONMENT: A CASEBOOK (with Charles M. Haar) (Environmental Law Institute Press, 2010) • “Planning and Law: Shaping the Legal Environment of Land Development and Preservation” (with Charles M. Haar), 40 *Environmental Law Reporter* 10419 (2010) • POWELL ON REAL PROPERTY:

MICHAEL ALLAN WOLF DESK EDITION (LexisNexis Matthew Bender 2009) • “Becoming a Legal Troublemaker,” in LAW TOUCHED OUR HEARTS: A GENERATION REMEMBERS BROWN V. BOARD OF EDUCATION (Mildred Wigfall Robinson & Richard J. Bonnie eds. (Vanderbilt Univ. Press, 2009) • “Charles Warren,” in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW (Roger K. Neman, ed., Yale University Press, 2009)

Thomas T. Ankersen
Legal Skills Professor; Director, Conservation Clinic and Costa Rica Law Program

“Baselines and Benchmarks: The Need for a National Environmental Legacy Act to Address the Shifting Baselines Phenomenon” (with Kevin Regan), in BEYOND ENVIRONMENTAL LAW: POLICY PROPOSALS FOR A BETTER ENVIRONMENTAL FUTURE (Alyson C. Flournoy and David M. Driesen, eds.) (Cambridge University Press 2010).

Joan D. Flocks
Director, Social Policy Division, Center for Governmental Responsibility

“The Role of Employers and Supervisors in Promoting Pesticide Safety Behavior among Florida Farmworkers” (with Brian Mayer and Paul Monaghan), 53 *American Journal of Industrial Medicine* 8: 814-824 (2010) • “Pesticide Policy and Farmworker Health,” 24 *Reviews on Environmental Health* 297 (2009)

Richard Hamman
Associate in Law, Center for Governmental Responsibility

“Water, People and the Future: Water Availability for Agriculture in the United States” (with Sharon B. Megdalet al.), Council for Agricultural Science and Technology, Issue Paper No. 44 (November, 2009).

Jeffrey S. Wade
Director, Environmental Division, Center for Governmental Responsibility

“A Regulação e Uso dos Biocombustíveis nos Estados Unidos (*The Regulation and Use of Biofuels in the United States*),” in BIOCOMBUSTÍVEIS COMO FONTE DE ENERGIA SUSTENTAVEL (*Biofuels as a Source of Sustainable Energy*) (Helene Selvini Ferreira and José Rubens Morato Leite, eds.) (Saraiva S.A Livreiros Editora, São Paulo, April 14, 2010).

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reaches of nondisclosure. While *Stambovsky* was a New York decision, there is no reason why Florida law would differ. You see, dear reader, *Stambovsky* addressed the seller's duty to disclose poltergeists to a residential buyer.

The purchaser was a New York City resident who did not know that the house he wanted in the Village of Nyack had a longstanding reputation for being haunted. The seller had often reported ghosts in national and local press. Accordingly, the seller held peculiar knowledge about the house that went "to the very essence of the bargain between the parties, greatly impairing both the value of the property and its potential for resale." 169 A.D.2d 254, 257.

The majority acknowledged that New York had a strict *caveat emptor* rule. This barred a claim that the listing broker had any duty to disclose the "phantasmal reputation of the premises . . ." Nonetheless, the majority held that equity mandated that the seller be given a right to seek rescission.

The majority was too clever by half, even noting that the presence of poltergeists violated the contract rider's statement that seller delivered the house "vacant." *Id.* at 260. Nonetheless, it recited a compelling analysis:

Where a condition which has been created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity. Any other outcome places upon the buyer not merely the obligation to exercise care in his purchase but rather to be omniscient with respect to any fact which may affect the bargain. No practical purpose is served by imposing such a burden upon a purchaser. To the contrary, it encourages predatory business practice and offends the principle that equity will suffer no wrong to be without a remedy.

Id. at 259.

An article in PROBATE AND PROPERTY addressed this decision and other, similar ones in M. Ben-Ezra and A. Perlin, *Stigma Busters: A Primer on Selling Haunted Houses and Other Stigmatized Property*, PROBATE AND PROPERTY (May/June 2005). The article recommends disclosure of stigmatizing information, citing as a model the seminal Florida decision of *Johnson v. Davis*, 480 So.2d 625, 628 (Fla. 1985) (duty to disclose latent defects in residential transactions). While the authors note that most states hold stigmatized property transactions to common law disclosure duties, they note that some states are enacting legislation protecting sellers and licensees against stigma claims for solely nonphysical, psychological issues. *See, e.g.*, Okla. Stat. 59 § 858-513 (protects against such claims); Ga. Code § 44-1-16(a)(1) (protects against nondisclosure, but requires honest response to questions on-point). The 2003 Florida Legislature amended the 1988 s. 689.25, Fla. Stat., which states expressly that such issues as residence by a person with HIV or a death on-site are not material for purposes of disclosure duties.

II. Nondisclosure in Florida and Other States

A. Caselaw, Including Recent Decisions

As stated above, Florida has a broad disclosure requirement in residential transactions. *Johnson v. Davis*, 480 So.2d 625, 628 (Fla. 1985). Nonetheless, Florida Law maintains a *caveat emptor* standard in commercial transactions. *See, e.g., Futura Realty v. Lone Star Building Center*, 578 So.2d 363 (Fla. 3d DCA 1991) (no affirmative duty to disclose environmental conditions in a commercial sale).

A large body of caselaw and journal articles addresses the duty of disclosure of environmental conditions. Buyer's Claims Against Seller Who Fails to Disclose Environmental Condition of Property, 36 AMJUR PROOF OF FACTS 3d 471, explicates the wide ranging issues regarding everything from "as is" clauses as to environmental conditions to breaches of express and implied warranties. Several recent decisions provide guid-

ance as to duties, environmental disclosure and due diligence.

A recent Florida Fourth District Court of Appeal decision addressed various aspects of a purchaser's rights to sue an environmental consultant. In *McDaniel Reserve Realty Holdings v. B.S.E. Consultants*, 39 So.3d 504 (Fla. 4th DCA 2010), the appellate court addressed various venue and damages issues. It concluded that damages for clean-up costs should be sought where the property is located, while damages for negligence or fraud should be raised where the closing of the purchase occurred. The latter claims address the purchase price, so any injury occurs at closing. 39 So.3d at 510.

Among the more troubling disclosure duty decisions was *Asuamah v. Haley*, 293 Ga. App. 112, 666 S.E.2d 426 (2008), which held a transactional broker had a fiduciary duty to disclose a twenty-page mold report to a residential purchaser. The report "showed extensive water stains and mold throughout the house." Although the agent did not have any express contractual privity with buyer or seller, the Court held that the broker's performance of such ministerial acts as calling the seller's agent with the buyer's offer established a fiduciary relationship. The Georgia Supreme Court further upheld a summary judgment for all seller defendants on the buyer's fraud claim, because they provided the mold report to the buyer's *de facto* agent, i.e., the transactional broker.

Two Wisconsin decisions addressed broker liability in the context of alleged contamination. *Chapman v. Mutual Service Consulting Ins. Co.*, 35 F.Supp.2d 693 (E.D.Wis. 1999), addressed insurance coverage for a broker. A purchaser sued the seller and broker, among others, when allegedly improperly remediated lead paint caused the purchasers' son to suffer lead poisoning. The federal judge held that Wisconsin law did not exclude insurance coverage for the broker's allegedly negligent selection and inspection of the painter and failure to warn the buyers of the lead-based paint. In a companion decision at 35 F.Supp.2d 699, the Court held that the purchasers had a cause of action against the realtor for alleged violations of state statute and rule governing real estate professional

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duties of inspection and disclosure. Additionally, the realtor had a non-delegable duty to the purchasers for the hiring of the painters. The seller had no independent duty to the purchasers where the seller relied on the real estate professional. It should be noted that the Wisconsin Court of Appeals distinguished *Chapman* in *Eddy v. B.S.T.V.*, 696 N.W.2d 265 (Wis. 2005). *Chapman* addressed a policy that did not delineate what constituted “professional services” excluded from coverage. 696 N.W.2d at 269. *Eddy* addressed a policy that excluded “rendering . . . professional services’ as real estate agents.” Thus, the policy did not cover brokers’ alleged liability to home purchasers for failure to discover and disclose mold in a house.

By comparison, a commercial buyer assumed the risk of a sewer defect under a contract whereby the seller warranted the condition of water pipes but sold the parcel “as is” otherwise. Additionally, the buyer waived its contractual inspection rights. *Youndt v. First Natl Bank of Port Allegany*, 868 A.2d 539 (Pa. Super. Ct. 2005).

In *BP Amoco Chem. Co. v. Flint Hills Resources*, 615 F.Supp.2d 765 (N.D. Ill. 2009), the court held summary judgment was not proper where the buyer alleged the seller breached a contractual warranty of compliance with all environmental laws. The question was whether the seller properly certified compliance with a Clean Air Act permit. Nonetheless, the jury ultimately found in favor of Flint Hills on the breach of contract claim and awarded Flint Hills \$41.7 million damages for *inter alia*, breach of warranties concerning environmental requirements. 697 F.Supp.2d 1001 (N.D.Ill. 2010). The massive reported Memorandum Opinion and Order addressed a plethora of issues ranging from measure of damages, to cause of action for breach of contract and fraud, to spoliation of evidence.

A recent New Jersey decision concerned liability for sale of a home that violated a New Jersey state stream encroachment permit. *Denegri v. Fassilis*, 2010 WL 3184481

(N.J.Super. A.D. Aug. 11, 2010), upheld an award for lost value in favor of the buyers. The sellers received a state permit to build in a floodplain, as long as they did not build any structure on, or live on the ground level. The sellers substantially altered the house to include living quarters at ground level without permit. They falsely represented to the purchaser that the ground level was habitable, and had never flooded. The buyers discovered this falsehood, when flooding occurred three months after closing. This was the third flood of the house since 2004. The appellate court held the award of lost benefit of bargain was appropriate.

Conversely, the Appellate Court of Connecticut in *Reid v. Landsberger*, --A.2d --, 123 Conn. App. 260, 2010 WL 3169368 (Conn. App. Aug. 17, 2010), held in favor of innocent sellers who signed a statutory disclosure stating that to the best of their knowledge a parcel had no wetlands, where wetlands existed, and stated, incorrectly, that a deck had all permits, where their subsequent after-the-fact permitting showed that they could have cured. The purchaser sought rescission without granting an opportunity to cure. The appellate court upheld the judgment allowing the sellers to retain \$63,500 as contractual liquidated damages.

On July 19, 2010, the U.S. Northern District Court for Georgia rendered an opinion that intertwined due diligence and the Resource Conservation and Recovery Act, or RCRA. *Premier v. EXL Polymers*, 2010 WL 2838497 (July 19, 2010 N.D.Ga.), featured the former’s lease to EXL’s predecessor of an Atlanta parcel for production of products made from recyclable materials Nycore purchased. The raw materials included carpet selvedge, or trimmings, from Shaw. Premier alleged that the tenants discharged hazardous wastes regulated by RCRA, and parallel Georgia law, before and after a fire burned the site “to the ground” and destroyed much of the selvedge. Shaw argued that Premier’s claim against Shaw should be dismissed in part because Premier failed to conduct ‘appropriate due diligence’ as the site’s owner and landlord. The Court awarded Premier judgment on the pleadings on Shaw’s counterclaim because Shaw showed no injury in fact under RCRA. The

Court noted the argument that Premier failed to exercise due diligence could be raised as a defense to “bear on the equitable relief to which Premier may be entitled.” *Id.* at *5. More to the point, the Court dismissed Shaw, finding that Shaw diverted the selvedge from the waste stream. While the tenants to whom Shaw sold the selvedge might have stored the selvedge speculatively and failed to recycle, Shaw’s diversion and transfer of the carpet selvedge to Nycore for reuse or recycling meant Shaw had properly addressed recovered materials. *Id.* at *9-11.

The U.S. District Court for Hawaii addressed recently a seller’s claim that it was entitled to damages for an allegedly inaccurate environmental report that was prepared for a purchaser. The seller claimed the purchaser paid \$7 million less due to inaccuracies in the report. In *Hawaii Motorsports Investment, Inc. v. Clayton Group Services*, 210 WL 2640106 (D. Hawaii June 29, 2010), granted summary judgment for the consultant on one count, breach of contract. The Court found “no evidence that [seller] is an intended beneficiary of the . . . contract” between the consultant and the contract purchaser. While the seller stated that the consultant’s agreement with the buyer was ratified on behalf of a subsequently created joint venture for whom the seller paid, the Court found that the seller waived any argument by paying for the services on behalf of the subsequent joint venture without objection. On August 27, 2010, the Court granted summary judgment on the remaining claim. 2010 WL 3398553 (D. Hawaii Aug. 27, 2010). The Court found no relationship or foreseeability of harm to support a professional negligence claim. The Court found that no evidence showed the seller ever believed the site was contaminated as the consultant believed. Accordingly, the Court concluded there would be no liability for negligent misrepresentation because there was no reasonable reliance. The Court found further no evidence supporting injurious falsehoods, slander of title or trade liable. Finally, the Court concluded that the sellers’ claims of negligence did not support a claim for tortious interference.

B. Interesting Issue: Energy Con-

sumption As Latent Defect

A recent law review article raised an interesting issue. Should energy consumption constitute a material issue for disclosure purposes? A. M. Guttridge, *Redefining Residential Real Estate Disclosure: Why Energy Consumption Should Be Disclosed Prior to the Sale of Residential Real Property*, 37 RUTGERS L. RECORD 164 (2010). The author cites various jurisdictions' requirements in urging that LEED and other "Green" construction standards support mandatory disclosure of energy consumption. Further support for the argument was the added cost of inefficient energy consumption.

C. Contractual Issues

A Vermont Law School Note contains insightful analysis of contractual provisions for assignment of environmental liability. It features analysis of the "private liability buy-out firm," which bids to contractually assume the site's environmental liability directly, or by surety or by insurance policy. K. Hines, *Examining Contractual Models for Transferring Environmental Liability: How They Work and Where They are Headed*, 11 VT.J.ENVTL.L. 395 (2009).

III. ASTM Standards

ASTM E-1527-05 is the current standard in the due diligence industry for examination of "recognized environmental conditions." The USEPA states that an assessment conducted under this standard meets the agency's "All Appropriate Inquiries" (AAI) Rule. Further, it is the general standard "to define good commercial and customary practice in the United States of America for conducting an environmental site assessment of a parcel of commercial real estate with respect to [CERCLA] and petroleum products." <http://www.astm.org/Standards/E1527.htm>.

The ASTM standard, if followed, creates *prima facie* evidence that a potential purchaser established "Innocent Purchaser" status under virtually all applicable statutory schemes, including the AAI CERCLA standard.

A. Historical Search

The ASTM standard requires historic site and surrounding use review back to the earlier of 1940 or first developed use of the property.

B. "Shelf Life"

One may use a report that is older than one (1) year, but one must update the following within 180 days prior to acquisition:

1. Interviews;
2. Searches for environmental clean-up liens;
3. Review government records;
4. Visual inspection; and
5. Declaration of environmental professional.

C. Environmental Professional

The work must be performed by or under the direction and control, supervision or responsible charge of an "Environmental Professional." Such a person must:

1. Hold a PE or PG license or registration and have the equivalent of three (3) years full-time (equivalent to a full-time year meaning full year, 40 hour work weeks) relevant experience;
2. Hold a license to perform environmental inquiries and have the equivalent of three (3) years full-time relevant experience;
3. Hold a BS in engineering or science and have the equivalent of five (5) years full-time relevant experience; or
4. Have the equivalent of ten (10) years full-time relevant experience.

D. Review Sources

One must review all reasonably available documents that are reasonably likely to contain information that is related to the inquiry.

E. Reporting

General description and scope of review set forth in AAI rule.

IV. AAI Requirements

There is substantial overlap between the current ASTM standard and the USEPA AAI rule, noted above. The USEPA promulgated the AAI rule to allow protection from CERCLA liability for three classes of persons who exercise environmental due diligence: (a) bona fide prospective purchasers; (b) innocent purchasers; and (c) contiguous landowners. The first class includes persons who determine that contamination exists, but proceed to purchase under arrangements with USEPA to minimize liability. The second is a class of persons who

reasonably rely on an environmental assessment to determine there is no recognized environmental condition on a parcel they intend to purchase. The last class is an off-shoot of USEPA policies limiting liability for individual residents residing in CERCLA parcels and persons whose parcels overlie an aquifer affected by an off-site CERCLA discharge, but who do not add to the discharge.

The AAI rule states expressly that ASTM E-1527-05 meets the rule. There are, however, several distinctions. AAI requires:

A. Historical review back to:

1. when the property first contained structures; or
2. when the property was first used for residential, agricultural, commercial, industrial or governmental purposes.

B. Any report over one-year-old is invalid. It may be used, if updated within one year prior to acquisition.

Additionally, the items that ASTM E-1527-05 requires in last 180 days (III.B., above) must be current within last 180 days before acquisition.

C. Same qualifications.

D. Similar review sources.

E. Same reporting requirements.

V. Specific Purchaser Protections

A. Contiguous Owner Status

The Contiguous Property Owner portion of the AAI Rule protects owners of adjacent and "similarly situated" parcels that are nearby. The CERCLA 2002 Brownfields Amendments and implementing AAI rule protect such a landowner whose parcel is affected by a hazardous substance release from a nearby parcel. If no release emanates from the site owned by a contiguous or nearby parcel's owner, that person is not liable for "passive mitigation" from off-site under the AAI rule, subject to the following paragraph.

One point under the AAI Rule, however, may well preclude reliance on the contiguous owner protection. The AAI Rule at 70 Fed. Reg. 66069, 66073, states the purchaser "must have no knowledge or reason to know of contamination at the time of acquisition . . ." The rule states:

Persons who know, or [whol] have reason to know, that the property

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is or could be contaminated at the time of acquisition of a property cannot qualify for the liability protection, but may be entitled to bona fide prospective purchaser status.

Id. at 66074. (e.a.) Such a person might remain eligible for Bona Fide Prospective Purchaser status.

B. Contaminated Aquifer Policy

Additionally, the USEPA's "Final Policy Towards Owners of Property Containing Contaminated Aquifers" is not abrogated by the later AAI rule. The USEPA policy states that only "exceptional circumstances" visit liability for contiguous lands' owners for passive migration through aquifers underlying their parcels. The exceptional circumstances in most cases would require wells on a contiguous land to have exacerbated or spread contamination from off-site for an off-site owner to be liable.

NOTE: The USEPA generally follows its policies. They are not, however, legally binding on the agency.

C. Bona Fide Prospective Purchaser

As stated above, the AAI rule provides that a purchaser who has reason to know of contamination that might affect the property under contract might not qualify for contiguous owner or innocent purchaser status. Nonetheless, it might still qualify as a bona fide prospective purchaser. *Id.*, citing 70 Fed. Reg. 66069, 66073-74. The pre-acquisition elements for this category are as follows:

1. Purchase after January 11, 2002
2. May know of contamination.
3. Must buy the property after all releases of hazardous substances.
4. Provide all appropriate legal notices regarding hazardous substances on-site.
5. Not be potentially responsible or affiliated with one who is responsible for response costs at the property.

A bona fide prospective purchaser who meets and maintains this status has no liability under CERCLA beyond the lesser of unreimbursed response costs of USEPA or increase in fair market value resulting from

any USEPA response action on-site. An outstanding law review article questions whether the agency's right to assert a lien undermines the BFPP protection due to uncertainty of the payment of future, undetermined costs. F. Strickland, *Brownfields Remediated? How the Bona Fide Prospective Purchaser Exemption From CERCLA Liability and the Windfall Lien Inhibit Brownfield Redevelopment*, 38 INDIANA L. REV. 789 (2005).

The standard ordinarily does not require a site-specific agreement with the USEPA. The Agency will, however, provide a "comfort" or "work program" letter to a prospective purchaser if asked. *See* <http://www.epa.gov/compliance/cleanup/revitalization/tools/html>. (USEPA, Enforcement Tools That Address Liability Concerns.) Note, however, that negotiating such an agreement may take many months. USEPA moves at its own pace.

The post-acquisition requirements generally consist of "not making a bad situation worse." **KEY:** S. Rep. No. 107-2, 107th Cong. 1st Sess., March 12, 2001, accompanying s. 350 in creating the Brownfields Act that AAI implements, indicates strongly the bona fide prospective purchaser standard does not require groundwater assessment:

Except under exceptional circumstances . . . , these persons are not expected to conduct groundwater investigations or install remediation systems, or undertake the response actions that would more properly be paid for by the responsible parties who caused the contamination.

Id. (e.a.) While this is legislative history, it is not necessarily binding. It is, however, a strong indicator of what Congress intended.

D. Third Party Defense

Regardless of the availability of AAI status, a buyer of an off-site parcel that suffers passive migration still can assert CERCLA's "third party" defense. *See, New York v. Lashins Arcade*, 91 F.3d 353 (2d Cir. 1992). One must establish that one did not have reason to know of the contamination. 42 U.S.C. §9601(35)(A)(i).

E. State Liability Exemptions

Many substances constitute

both a "hazardous substance" under CERCLA and a "pollutant" that is regulated by Ch. 376, Part II, Fla. Stat., subject potentially to due diligence requirements under s. 376.308(1)(c), Fla. Stat. Nonetheless, efforts to establish a passive migration counterpart to the "contiguous property owner" provisions of federal CERCLA have not been very successful. In fact, subsection (1)(c) holds liable the owner of one of several categories of a "facility" that stores or has stored pollutants. Further, a wholly off-site discharge should protect against state liability under s.s. 376.308(2)(d) and 403.727(5)(d), Fla. Stat. Neither Florida statute has a knowledge limitation similar to 42 U.S.C. §9601(35).

The Florida Department of Environmental Protection (FDEP) might generate what is called a "Winn Dixie Letter." A Winn Dixie Letter acknowledges that a purchaser is "carving out" a known contaminated portion of property in order to minimize a prospective purchaser's environmental exposure. The FDEP states the conditions under which it will not hold the purchaser liable for the carve-out.

VI. Lender Protection

A. CERCLA

The CERCLA Lender Liability Exemption is found at s. 101(20)(A) of CERCLA. It excludes from Superfund liability as a site "owner or operator" any "person who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." Lenders have far more protection from CERCLA as a lender than would a bona fide purchaser, including when and if a lender takes title to protect a security interest. Nonetheless, the determination of what constitutes "participating in management" to render a lender liable is a close question of fact. EPA has said that monitoring or inspecting the property for environmental compliance does not make a lender liable. The closer call is that a lender may conduct or require a site remediation without being liable, but is liable if it exercises decision making at such a level of environmental compliance that the lender "undertakes responsibility for hazardous substance handling or disposal practice."

B. RCRA

The federal lender liability rule implementing the CERCLA exclusion and statutory provisions of the Resource Conservation and Recovery Act (RCRA) provide limited protection to lenders. 42 U.S.C. § 6991b(h) (9)(A) and 40 CFR 280.230(a), codifying 60 Fed. Reg. 46, 692-46,693. RCRA's lender exclusion applies only to USTs. Additionally, there is no lender exclusion from liability for citizen suits if a citizen sues for abatement of an imminent endangerment to health or the environment. *See, generally*, 42 U.S.C. § 6972(a)(1)(B). The lender's most common argument in such cases is generally that the lender did not "contribute" to any contamination.

C. State Exclusions

S. 376.308(3), Fla. Stat., pro-

vides various lenders with defenses to state statutory liability for pollutant discharges. Unfortunately, similarly to RCRA, this statute is limited to petroleum or petroleum products. There is no defense under the hazardous waste provisions of s. 403.727, Fla. Stat., that applies to lenders. So, the lender is left with general common law arguments that you are acting as a lender only, and are not acting as an "owner or operator."

CONCLUSION

The foregoing is only an overview of some of the myriad environmental disclosure issues in real estate transactions. The author recommends that a thorough closing attorney consult any of the many good, freely available resources on the topic. Nonetheless, Florida's reliance on common law standards for most environmental

transactional issues means that the most prudent attorney has little or no absolute guidance or binding template in drafting prophylactic provisions addressing this vexing issue.

Endnote:

¹ I cannot think of any way to cite to my other favorite decision, *City of Winston-Salem v. Tickle*, 53 N.C. App. 516 (1981), which generated the "Tickle rule," holding that "parcels of land separated by an established city street, in use by the public, are separate and independent as a matter of law." There. I feel better.

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