



# THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

Vol. XXIX, No. 1  
December 2007

• Michelle Diffenderfer, Chair • Janet E. Bowman, Co-Editor • Thomas R. Gould, Co-Editor •

## Petroleum Cleanup Program Continues Much Needed Momentum

by Steve Hilfiker, President, Environmental Risk Management, Inc.

- Florida ranks first in the nation for the number of people drinking groundwater
- Florida ranks last among all states in clean up percentage<sup>1</sup>
- Florida has the largest backlog of contaminated sites waiting to be cleaned up<sup>1</sup>
- Florida has one of the most extensive and effective cleanup programs in the nation
- Cleanup progress has been accelerating since 1999

Contamination of groundwater is a public health concern that potentially affects over 15 million Florida citizens. Eighty-seven percent of Florida's population depends on groundwater for their daily drinking water, a source that is threatened by petroleum contamination mostly from historical discharges associated with previously leaking underground storage tank systems. The scope of

the problem should not be underestimated. According to Lynn Stovall, President of AWWA, "secure water supply is a cornerstone of homeland security."<sup>2</sup> Even before the heightened awareness of drinking water importance precipitated by 9/11, President Clinton signed *Presidential Decision Directive 63* in 1998 and thereby identified water as part of America's critical infrastructure.<sup>3</sup>

See "Petroleum Cleanup," page 14

## From the Chair

by Michelle Diffenderfer

I am honored to serve as Chair of the Section this year. We have an outstanding Section full of incredible members that work in some of the most exciting areas of the law. The Environmental and Land Use arena continues to be a growth area for Florida lawyers as the pressures of balancing considerate land use planning with the protection of our precious natural resources continues to create forums for intelligent and informed discussion about our future. The legal issues our Section members work on are usually in the local, state or national press and have or will serve as models for other states. Thank you for being a part of this Section and participating in our pro-

grams and publications to ensure that we reflect the very best of our membership.

At our Annual Update program this August we introduced a number of new Committees. Three of the Committees are practice based in the following areas: Land Use; Water, Wetlands, Wildlife and Beaches; and Hazardous Waste. As part of The Florida Bar's year of Mentoring, we also formed a Young Lawyers Committee to help new lawyers in the Environmental and Land Use fields get involved in our Section and find mentors. We hope these Committees, along with our long standing and very popular Public Interest Representation, Affiliates, and CLE Committees,

will provide a useful forum for our members to get involved with CLE programs, the Newsletter, the Treas-

continued, next page

### INSIDE:

Petroleum Liability Restoration Insurance Program (PLRIP) Sites with Low Funding Caps Should do the Limited Source Removable Initiative (LSRI) During Tank Upgrades.....	3
On Appeal.....	4
Section Financials .....	6
Department of Environmental Protection Update.....	7
Department of Community Affairs Update .....	8
The Affiliate's Corner .....	9
Law School Liaisons	
Barry Environmental Law Society Joins Forces with Student Hurricane Network for Legal Aid to Hurricane Victims .....	10
Nominations Needed to Recognize Environmental Lawyers and Activists .....	11
Brochure – ELU Considerations for a Real Estate Transaction .....	12

**FROM THE CHAIR**

*from page 1*

tise and other Section activities. We are setting up group e-mails for each of the new Committees and you will be included on the group e-mail list once you sign up to be on a Committee. I urge you to join and get involved in at least one of our Committees this year. Please check our website at [www.eluls.org](http://www.eluls.org) for the Chairs of these Committees and further contact information. If you are already involved in our Section, please reach out to others and invite them to one of our programs or Affiliate mixers. Most of our Section leaders got involved because of a personal invitation to come to a program.

Involvement in our Section has untold rewards. My participation started with an invite from a friend to come to the Annual Update in Amelia Island. Over the years that decision to get involved has given me lifelong friends and mentors, amazing learning and networking opportunities and the opportunity to give back to our legal community. In working with lawyers that work on different issues or on different sides I have also been lucky enough to broaden and enhance my experience as a lawyer. I promise you that if you choose to get involved in our Section you will make friends, enjoy yourself, and be a part of a group of people who care deeply about our State's environmental and land use future. Please contact me if you have any thoughts or ideas about how our Section could be better serving you and to find our more about getting involved. ([mdiffenderfer@llw-law.com](mailto:mdiffenderfer@llw-law.com)) (561) 640-0820



**If you've got questions, we've got answers.**

**L · O · M · A · S**

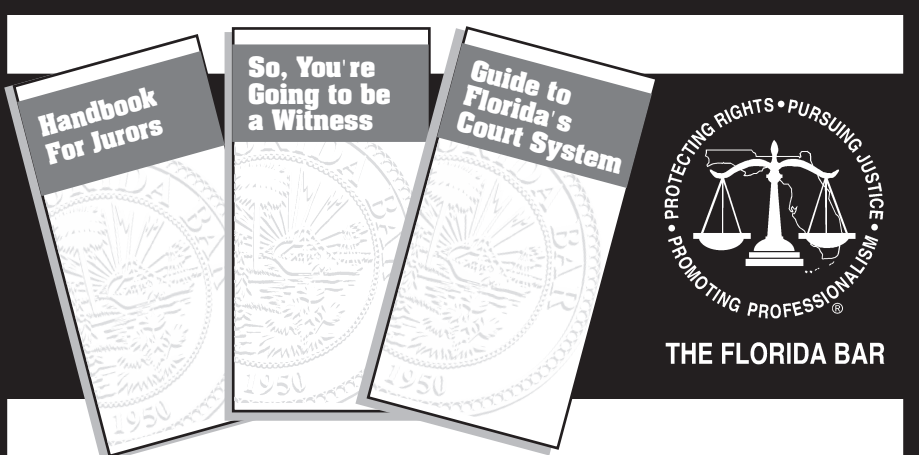
The Law Office Management Assistance Service of The Florida Bar

**CALL Toll-Free 866/730-2020**  
[jrhelms@flabar.org](mailto:jrhelms@flabar.org)

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

- Michelle Diffenderfer, West Palm Beach . . . . . Chair
- Gary K. Hunter, Tallahassee . . . . . Chair-elect
- Paul H. Chipok, Orlando . . . . . Secretary
- Joseph D. Richards, New Port Richey . . . . . Treasurer
- Janet E. Bowman, Tallahassee . . . . . Co-Editor
- Thomas R. Gould, Orlando . . . . . Co-Editor
- Colleen Bellia, Tallahassee . . . . . Production Artist
- Jackie Werndli, Tallahassee . . . . . Section Administrator

Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the Section.



## *Florida Bar Consumer Pamphlets Available*

The Florida Bar has a **series of more than 50 pamphlets available for your law office**, with some translated into Spanish and Creole.\* Topics range from *Divorce in Florida* to *Florida Powers of Attorney* to *Do You Have A Will?* to *Protecting Yourself Against The Unlicensed Practice Of Law*.

Worried about where to put these valuable pamphlets?

Worry no more! The Florida Bar offers professionally styled, clear-styrene, **display racks which hold 300+ pamphlets.**

By placing these pamphlets in your waiting area, you provide accurate, up-to-date information, presented in easy to understand language, that your clients are certain to appreciate.

\*A complete list of titles and charges is available at [www.FloridaBar.org](http://www.FloridaBar.org) in the Public Information section of the Web site, under "Consumer Information."

**Call now: 800/342-8060, ext. 5834**

# Petroleum Liability Restoration Insurance Program (PLRIP) Sites with Low Funding Caps Should do the Limited Source Removable Initiative (LSRI) During Tank Upgrades

by Steve Hilfiker, President, Environmental Risk Management, Inc.

There are many strategies to manage environmental risk at sites required to upgrade their petroleum storage tank system to double wall tanks before 2010. The strategies depend on the site history, prior discharge reports, eligibility, type of clean-up program and status of insurance coverage. Research can be performed to identify the conditions which exist at each site. This article will discuss specific recommendations for sites that meet the following criteria:

- Petroleum Liability Restoration Insurance Program (PRLIP) and Petroleum Cleanup Participation Program (PCPP) eligible sites with funding caps and low scores.

This article applies to sites with the above conditions. Most of these site owners would benefit substantially by following the strategy described below.

Other sites have different historical conditions, such as:

- No prior discharges.
- Eligible sites (other than low-cap sites) with scores below the current funding range.
- Eligible sites with a score in funding range.
- Discharges reported but ineligible for funding.
- Multiple discharges with multiple funding sources.

Strategies to manage environmental risks at these sites are in the longer version of this article, which is available on the [www.ermi.net](http://www.ermi.net) web site.

Prior to upgrade projects, the appropriate level of environmental research is often not conducted by responsible parties, tank contractors or their consultant. Such research is critical to identify the specific background and circumstances at each site. As described below (and in the

extended version of this article), if best management practices are not employed in response to the environmental issues associated with the upgrade, substantial remedial cost may be required by FDEP (sooner or later) from the responsible party.

Much emphasis is placed on the high cost of tank upgrade by site owners, but if the regulatory response to petroleum discharges is not handled in a responsible manner, remedial cost could exceed the upgrade cost. Diligent environmental investigations prior to upgrades can be conducted at a fraction of the cost of the overall project and are recommended as highly valuable professional services. Since each site has different issues, it is very important to confirm that these strategies are the best approach, and available, for the site.

The remainder of this article focuses in on the specific strategy for PLRIP and PCPP sites with low funding caps. Funding caps are a concern to many site owners. Sites that are eligible for the PRLIP with discharges occurring in 1997 or in 1998 have a \$10,000 deductible and a funding cap of \$150,000. PLRIP sites with discharges reported between 1/1/94 and 12/31/96, and all PCPP sites, have \$300,000 caps.

The FDEP Limited Source Removable Initiative (LSRI) provides up to \$50,000 and in some cases up to \$100,000 of state funding to excavate and dispose of contaminated soil during tank upgrade projects. The LSRI Program is well documented and there are several methods to obtain work orders from the FDEP. Further information on details of this program can be found at <http://www.ermi.net/lsri>.

The key strategy for sites meeting these criteria is based on the fact the LSRI funds do not count toward

the funding caps and any unpaid deductibles will not be required. This strategy also applies to sites with \$1,000,000 caps (i.e., PLRIP discharges prior to 1994).

It is common for remedial costs to exceed \$150,000 and many sites exceed \$300,000. Funding caps are often exceeded on sites that had prior assessment or remedial activity prior to funding restrictions that postponed all work at the site. Regulatory closure of significantly impacted properties can be very expensive.

The following is strongly recommended: Any site owner with low funding caps should take advantage of the LSRI program during their tank upgrade. The LSRI program expires on June 30, 2008, and tank contractor schedules are booked for months in advance, so this matter should be considered soon by the applicable clients of the readers of this article. By removing as much contaminated soil as funding will allow one of four positive results should take place.

1. It could complete the entire cleanup and lead to regulatory closure.

2. It could remove enough material that when the FDEP funding for the cleanup becomes available, the site may have cleaned itself up through natural attenuation.

3. If neither of the above happens, it should lead to reduced chemical concentrations, which could prevent intrusive cleanup activity when the FDEP funding for the cleanup becomes available. Monitoring may be all that is needed to clean up the site. This would minimize business disruption during the future work.

4. Finally, remediation may be necessary when the FDEP funding for the cleanup becomes available, but removing these soils will make

*continued...*



## PETROLEUM LIABILITY

from page 3

the cleanup easier, especially around the tank area. This would minimize business disruption and other inconveniences associated with remedial activity.

**Any one of these four outcomes could prevent cost cap over-runs.**

It would minimize the chance of responsible parties paying remedial cost using their own funds. By participating in the LSRI, property owners can substantially benefit and take a major step toward restoring environmental quality of their site. This would benefit owners for any future transactions, minimize the risk of third party liability and generally have a positive impact on property value.

*Steve Hilfiker is President of Environmental Risk Management, Inc., based in Ft Myers. He is also the President of the Florida Environmental Assessors Association, the founding Chairman of the ASTM International Subcommittee on Environmental Forensics, and a member of the FPMA Environmental Committee. Please visit [www.ermi.net](http://www.ermi.net) to download a copy and forward to site owners.*

# On Appeal

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

*Note: Status of cases is as of September 14, 2007. Readers are encouraged to advise the authors of pending appeals that should be included.*

## FLORIDA SUPREME COURT

*Florida Department of Environmental Protection, et al. v. Save Our Beaches, Inc, et al.*, Case No. SC06-1447 and 1449. Petition to review decision of First DCA relating to DEP's final order allowing the renourishment of 6.9 miles of beaches and dunes within the City of Destin and Walton County. 31 Fla. L. Weekly D1173. The First DCA certified as a question of great public importance whether the Beach and Shore Preservation Act (Part I of Chapter 161) has been unconstitutionally applied so as to deprive the members of Stop the Beach Renourishment, Inc., of their riparian rights without just compensation for the property taken, so that the exception provided in Rule 18-21.004(3), Florida Administrative Code, (F.A.C.) exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights, does not apply. Status: Oral argument held on April 19.

*Dennis Potiris and Bart Novak v. Department of Community Affairs, et al.*, Case No. SC07-238. Petition for Review of Fourth DCA decision affirming determination that Potiris, who provided planning services in Wellington but did not own or oper-

ate a business "within the boundaries of the local government whose plan is the subject of the review," lacked standing to challenge the plan amendment. 32 Fla. L. Weekly D172a (4<sup>th</sup> DCA 2007) Status: Petition for review denied July 9, 2007.

*Mid-Chattahoochee River Users v. DEP*, Case No. SC07-520. Petition for review of First DCA decision affirming final order dismissing petition for administrative hearing on the basis of lack of standing. 943 So.2d 989 Status: Petition for review denied on September 4.

*Advisory Opinion to the Attorney General re: Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, Case No. SC06-521. The Attorney General has asked the Court for an advisory opinion as to whether the financial impact statement prepared by the Financial Impact Estimating Conference on the constitutional amendment, proposed by initiative petition and entitled "Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans," is in accordance with section 100.371, Florida Statutes. Status: Remanded July 12 to Financial Impact Estimating Conference for redrafting; petition amendment supplement filed on July 31, 2007 treated as an amended financial impact statement.

*Steven W. Boldt v. Patrick W. Brannon and Kathryn C. Brannon*, Case

No.SC07-563. Appeal from the Second DCA concluding that holders of an easement by implication to access the water did not grant the right to fish or remain on the property for extended periods. The Second DCA interpreted *Cartish v. Soper*, 157 So.2d 150 (Fla. 2d DCA 1963), and considered the nature and extent of riparian rights transferred to lot owners as an easement by implication but not those rights transferred in an express easement. Status: After oral argument was set for September 21 court, after further consideration, concluded on November 1, 2007, that jurisdiction was improvidently granted, the review proceedings were dismissed, and no motion for rehearing was allowed.

*Department of Environmental Protection v. Contractpoint Florida Parks, LLC*, Case No. SC07-1131. Petition for Review of First DCA decision finding that, absent legislative intent to do so, Section 11.066, F.S., did not "overturn twenty-two years of case law subjecting the state to breach of contract actions." Section 11.066, provides that the state or its agencies shall not be required to pay monetary damages except pursuant to an appropriation made by law. The court certified the following question to be one of great public importance: "Does Section 11.066, Fla. Stat., apply where judgments have been entered against the state of one of its agencies in a contract action?" 32 Fla. L.

Weekly D1416b. Status: Petition for Review granted July 9; Reply brief filed on October 8, 2007, and oral argument set for December 5.

#### **FIRST DCA**

*Don and Pamela Ashley v. State of Florida Administration Commission, et al*, Case No. 1D07-95. Appeal from final order determining amendments to Franklin County Comprehensive Plan are not in compliance as defined in § 163.3184 (1)(b), Florida Statutes. The order also required the County to adopt remedial measures regarding capital improvements, affordable housing, coastal high hazard area and planning periods. Status: Notice of appeal filed January 4; all briefs have been filed.

*Brenda D. Dickinson and Vicki A. Woolridge v. Division of Legislative Information etc., et al*, Case No. 1D073827. Appeal from final judgment rejecting legal challenge to lobbyist compensation reporting requirements. Status: Notice of appeal filed July 25.

#### **SECOND DCA**

*Albert Lee, Jr., Personal Representative of the Estate of Albert Lee, Sr. v. CSX Transportation Inc, et al*, Case No. 2D06-1416. Appeal of final summary judgment in favor of defendant CSX Transportation, Inc. which held that plaintiff's wrongful death action was time barred. The court affirmed the trial court's ruling that CERCLA's longer statute of limitations does not preempt the two-year statute of limitations under Florida's Wrongful Death Act. Status: Affirmed June 22. 32 Fla. L. Weekly D1572b.

*Peace River/Manasota Regional Water Supply v. State, Department of Environmental Protection*, Case No. 2D06-3891 and 2D07-3116 (consolidated cases). Appeals from final order granting environmental resource permit to Mosaic for Ona Mine. Status: Notice of appeal filed August 29, 2006; appellee's answer brief filed on October 22, 2007.

*Peninsular Properties Braden River, et al. v. City of Bradenton, Florida*, Case No. 2D06-5302. An appeal of the lower court's dismissal of petition as untimely. The petition for review of the City of Bradenton's denial of petitioners' Mira Isles project was filed after expiration of the jurisdictional thirty-day timeframe for seeking ju-

dicial review of local government action. The trial court determined it was without jurisdiction to rule on the merits and dismissed the petition, rejecting section 70.51(10)(a) "as an unconstitutional infringement on the Supreme Court's rule-making authority." Status: Reversed and remanded. Order denying rehearing en banc on October 5, 2007; acknowledgement of Notice of Discretionary Jurisdiction received by Florida Supreme Court on November 2, 2007.

*Marine Industries Association of Collier County v. Florida Fish & Wildlife Conservation Commission*, Case No. 2D07-1777. Appeal from a final order approving the Fish and Wildlife Commission's permit granted to the City for the placement of waterway markers. The final order rejected much of the Administrative Law Judge's recommended order finding that: 1) the parties had standing to challenge the permit and the necessity of the ordinance underlying the waterway marker permit application and 2) the Fish and Wildlife Commission was obligated to independently determine whether the local ordinance was needed. Status: Notice of Appeal filed April 17; Oral argument set for December 5, 2007.

#### **THIRD DCA**

*Florida Power & Light Company v. Department of Environmental Protection, et al.*, Case No. 3D07-840. Appeal from a final order determining that DEP's proposed CAIR Rule is valid. DOAH Case No. 06-2871RP. Status: Notice of appeal filed March 30. Final order affirmed Per Curiam, on November 7, 2007.

*Jimmy T. Bauknight, et al. v. Monroe County Board of County Commissioners, et al.*, Case No. 3D07-915. Appeal from trial court's order granting County's motion for summary final judgment declaring that appellant property owners failed to exhaust administrative remedies prior to seeking compensation for temporary taking of their properties. This is a result of the County's application of transportation concurrency requirements. Status: Notice of appeal filed April 10. Oral argument held on October 30, 2007.

*CNL Resort Hotel, L.P. v. City of Doral, Florida, et al.*, Case No. 3D07-1528. Petition for review of non-final administrative order dis-

missing or striking challenge to plan amendments based on allegation that the amendments are inconsistent to the extent they impair CNL's property rights. Status: Appeal filed June 18; oral argument held on September 5.

#### **FOURTH DCA**

*1000 Friends of Florida, et al. v. DCA*, Case No. 4D05-2068. Appeal of final order determining that proposed amendments to Palm Beach County comprehensive plan to accommodate the proposed Scripps biomedical campus are in compliance. Status: Response to Court's Order requesting status of Ordinances 2004-34 to 2004-39 and 2004-63 to 2004-64 and whether appeal is moot, filed June 5, 2006; jurisdiction relinquished to the Department of Community Affairs on July 12, 2006 (for 120 days); joint status report filed October 31, 2007; order granting extension of time for relinquishment of jurisdiction rendered November 5, 2007, and recommending case remain with the DCA through January 31, 2008.

#### **FIFTH DCA**

*Alfred J. Trepanier, Successor Trustee, et al. v. County of Volusia, Florida*, Case No. 5D05-3892. Appeal by owners of oceanfront property from a summary judgment for the County. The owners had sued the County for allowing (and directing) the public to park on property they claim they own. Status: Oral argument held November 7, 2006, decision affirmed in part/reversed in part and remanded, September 14, 2007.

**Stacy Watson May**, stacy.watson-may@hklaw.com, received her J.D. from The John Marshall Law School in 1997. She practices in the Jacksonville and Orlando offices of Holland + Knight LLP.

**Lawrence E. Sellers, Jr.**, larry.sellers@hklaw.com, received his J.D. from the University of Florida College of Law in 1979. He practices in the Tallahassee office of Holland + Knight LLP.

**Susan L. Stephens**, susans@hgslaw.com, received her J.D. from the Florida State University College of Law in 1993. She is a shareholder at Hopping Green & Sams in Tallahassee.

## Section Budget/Financial Operations

	<u>2006-2007 Budget</u>	<u>2006-2007 Actual</u>	<u>2007-2008 Budget</u>
<b>REVENUE</b>			
Administrative Fee Adjustment	(9,309)	0	(9,937)
Section Dues	62,300	66,810	66,500
Affiliate Dues	4,000	1,910	4,000
Admin Fee to TFB	(32,750)	(34,378)	(34,850)
Online CLE	0	363	500
CLE Courses	9,000	33,121	20,000
Section Differential	0	8,850	0
Sponsorships	12,000	18,350	12,000
Interest	12,677	23,564	14,841
Miscellaneous	<u>0</u>	<u>100</u>	<u>100</u>
<b>TOTAL REVENUE</b>	<b>57,918</b>	<b>118,690</b>	<b>73,154</b>
<b>EXPENSE</b>			
Credit Card Fees	0	6	0
Staff Travel	2,898	2,055	3,206
Postage	1,300	851	1,350
Printing	2,600	100	2,700
Newsletter	5,600	7,899	6,000
Membership	2,000	110	2,000
Supplies	50	0	50
Photocopying	500	62	520
Officer Travel	3,000	60	3,000
Meeting Travel	8,000	1,064	11,000
CLE Speaker Expense	1,000	0	1,000
Committees	1,000	256	1,000
Council Meetings	3,000	2,253	3,000
Bar Annual Meeting	2,000	2,676	2,200
Section Annual Meeting	18,000	15,167	19,000
Retreat	6,000	1,701	3,000
FSU Law Journal	1,000	0	0
Land Use Law Manual	16,000	13,100	10,000
Pubic Interest Committee	500	213	500
Awards	2,500	1,288	2,500
Scholarships	6,000	0	4,000
Law School Liaison	10,000	9,943	21,000
UF Speaker Program	1,000	4,000	0
Dean Maloney Contest	1,000	1,045	1,000
Access to Justice	3,000	0	2,000
Website	6,000	4,631	4,000
Council of Sections	300	0	300
Misc.	1,000	2	1,000
Operating Reserve	10,811	0	10,835
TFB Support Services	<u>2,866</u>	<u>2,571</u>	<u>3,022</u>
<b>TOTAL EXPENSE</b>	<b>118,925</b>	<b>71,053</b>	<b>119,183</b>
<b>BEGINNING FUND BALANCE</b>	<b>181,104</b>	<b>237,893</b>	<b>212,019</b>
<b>PLUS REVENUE</b>	<b>57,918</b>	<b>118,690</b>	<b>73,154</b>
<b>LESS EXPENSE</b>	<b>(118,925)</b>	<b>(71,053)</b>	<b>(119,183)</b>
<b>OTHER COST CENTER</b>	<b>(12,628)</b>	<b>3,999</b>	<b>(5,540)</b>
<b>ENDING FUND BALANCE</b>	<b>107,469</b>	<b>289,529</b>	<b>160,450</b>

### SECTION REIMBURSEMENT POLICIES:

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



# DEP Update

by Amanda G. Bush, Senior Assistant General Counsel and Kelly Samek, Senior Assistant General Counsel

## ACF Update

On October 16, Georgia's congressional delegation introduced legislation to allow states suffering from droughts to be exempt temporarily from the Endangered Species Act. Specifically, the legislation would amend the ESA to allow a state to be exempt from the Act when either the Secretary of the Army or a Governor declares that drought conditions are threatening the health, safety and welfare of residents in a region served by a river basin managed by the federal government. Georgia also wrote a letter to the President requesting that the rules for operation of the Chattahoochee River be indefinitely suspended in response to the current drought. On October 24, 2007, Governor Crist wrote a letter in opposition, detailing impacts of the drought on the Panhandle, outlining Florida's proactive and longstanding water management programs, and reaffirming Florida's willingness to reach an equitable and collaborative solution, while at the same time making clear Florida's position that "[r]eacting to the concerns of an upstream State to suspend environmental laws unilaterally at the expense of a downstream State's ecology and economy cannot be justified in any circumstance."

On November 1, the three Governors met in Washington, D.C. with Department of the Interior Secretary Kempthorne. The Corps announced that it would reinstate consultation with the USFWS on a proposed emergency drought operations plan. The Governors agreed to evaluate the plan and to meet in Tallahassee on December 12. Meanwhile, oral argument on the DC Circuit appeal is scheduled for November 16.

*Board of Commissioners v. Thibadeau and DEP*, 956 So. 2d 529 (Fla. 4th DCA 2007) The appellate opinion, released May 16, affirmed the Department's final order granting a noticed general permit to Mr. Thibadeau to build a single-family dock in the southern embayment of the Loxahatchee River

and concluded that the Department did not err in its determination of standing for Jupiter Inlet District (as Mr. Thibadeau claimed in his cross appeal). Although the Department offered no conclusion in its Final Order regarding the standing of JID below, the appeal determined that since the agency heard JID's case and opined on it, JID had appellate standing as a party against whom an adverse determination had been made below. The opinion also found that Jupiter Inlet District lacked standing to appeal riparian rights issues when it was not an adjoining landowner.

*DEP v. Byrd*, Case No. 2005-CA-002481

This is a domestic wastewater case in circuit court. Byrd, the owner of the facility, agreed to a temporary injunction. The court found Byrd to be in contempt for failure to comply with the temporary injunction, and ordered the facility to cease operations if Byrd is found in contempt in the future. Thereafter, Byrd only partially implemented some of the corrective actions set forth in the temporary injunction, and the Department moved forward with its second contempt hearing on August 15. Because shutdown of the facility would result in displacement of mobile home park residents served by the facility, the Department requested that Byrd be jailed until full compliance of the temporary injunction could be achieved. A certified operator, an employee of the facility, would be able to implement the necessary corrective actions while Byrd is incarcerated. At hearing on the Department's second motion for contempt, the court found Byrd in direct civil contempt of its prior orders regarding the facility. Byrd was sentenced to 11 months and 29 days in the Leon County jail, but that sentence is withheld as long as Byrd complies with the order of contempt. The order requires Byrd to hire a certified operator, pay the Department \$2,050 in permitting fees within 3 days, submit a complete permit appli-

cation within 15 days and any request for additional information within 7 days of each request, and within 45 days pay the Department \$1,000 in attorney's fees.

*DEP v. Farida Abdullah, Anjuman Ahmed and Sam Chowdhury*, Case No. 2005-CA-004827

In this case involving petroleum storage violations, the Tenth Judicial Circuit Court awarded the Department \$500,000.00 in civil penalties for the defendants' ongoing noncompliance with Florida environmental law. At the August 2007 hearing, the court allowed an upward departure in the penalty amounts awarded since the defendants had a history of non-compliance at their other petroleum storage tank facilities.

## Northwest District ERP Rule

The changes made to Rules 62-4 and 62-341 (general permits) as part of the Phase I rulemaking for NWD ERP were filed with the Department of State on May 30, with an effective date of October 1. The certification package for Rule 62-346 was filed with the Department of State on August 22, with an effective date of October 1. The Department published a Notice of Rule Development for Phase II rules; workshops are scheduled for December.

## ERP Operating Agreements with the WMDs

The Department amended the operating agreements with the water management districts. These agreements identify which agency processes which types of environmental resource permit applications. By law, these agreements must be incorporated by reference into chapter 62-113, F.A.C. The certification package for the rule incorporating the agreements was filed with the Department of State on June 11, with an effective date of July 1.

*Florida Public Interest Research Group, et al v. EPA, et al*, Case No. 4:02cv408-WS (N.D. Fla.)

*continued...*

## DEP UPDATE

from page 5

The plaintiffs filed their notice of appeal on April 16. The parties have settled and the appeal will be dismissed once the settlement is finalized.

*Sierra Club v. EPA*, Case No. 1:05cv00209 (EGS)

Appeal to the Eleventh Circuit by Sierra Club regarding EPA's review of the Department's Group 1 list of impaired waters. An opinion was entered on June 8, affirming Judge Mickle's denial of intervention finding that EPA could adequately represent the Department's interest. Further, the opinion remanded the case back to the district court to determine whether the record adequately supports some of EPA's review determination. Most significantly, the court stated that the phrase "at any time" should not

be taken literally and that Florida is required to take into account the variability that occurs in nature. Of other significance is the finding that the data cut off of 7.5 years was arbitrary. This has been addressed by subsequent amendment to the IWR as adopted in December 2006.

*S-2, 3, and 4 litigation (Friends of the Everglades v. SFWMD)*, Case No. 02-cv-80309 (S.D. Fla.)

On June 15, Judge Altonaga issued an order on remedies and a final judgment in the case. The order reiterates the Judge's earlier legal conclusion that unless authorized by an NPDES permit, the SFWMD's backpumping from the S-2, S-3, and S-4 pump stations violates the Clean Water Act. Altonaga ordered SFWMD (through its Executive Director) to apply for an NPDES permit for these structures. The order also denies plaintiffs' request that the court impose interim remedies until the NPDES permit is

issued. Additionally, the order denies plaintiffs' motion for joinder of DEP Secretary Michael Sole. The case is currently pending before the Eleventh Circuit Court of Appeals. In the interim, the SFWMD has submitted an NPDES application for the three pump stations to the Department.

**Chapter 62-345, F.A.C., Uniform Mitigation Assessment Methods (UMAM)**

In October 2006 the Department published a notice of development of rulemaking and held a rule development workshop regarding amendments to the UMAM rules to provide clarification and guidance on establishing the reference community in Part I, assessing current condition in Part II, and determining lag time. The notice of proposed rulemaking was published on May 25. The Department filed the certification package on August 23 with an effective date of September 12.

## DCA Update

by Kelly Martinson, Assistant General Counsel

*Diane Brown and Panhandle Citizens Coalition, Inc. v. Bay County, et al.*, DOAH Case No. 06-0881GM.

This case involved a challenge to three Bay County Future Land Use Map amendments and various amendments to the West Bay Detailed Specific Area Plan found to be "in compliance" by the Department. The Department's Final Order adopted the findings and conclusions of the Recommended Order, determining the amendments to be "in compliance," in toto. Bay County, St. Joe Company, and Clara Avenue, LLC, moved for attorney's fees against the Petitioners under Section 57.105, F.S., alleging variously that Petitioners' allegations were beyond the scope of the proceeding, were baseless because the challenged amendments did not modify the existing requirements of the comprehensive plan, or were barred by an agreement to settle a prior challenge

to the West Bay Detailed Specific Area Plan. Panhandle Citizens Coalition moved for attorney's fees against St. Joe Company, and then instead Bay County, under Section 786.295, F.S. (the "Citizen Participation in Government Act"). On September 11, 2007, the ALJ held attorney's fees and costs should be awarded to St. Joe Company in connection with Panhandle Citizens Coalition claim under Section 786.295, F.S., because that statute clearly applies only to suits by a governmental entity. Sanctions were also granted against Petitioner Brown and her attorney for three allegations, concerning the effect of development caps and the failure to protect historic or cultural resources, because they knew or should have known these allegations were not supported by the material facts necessary to establish the claim or by application of the then-existing law to those material facts and there

was no good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success. The ALJ has provided the parties with 30 days to reach agreement as to how the amount of attorney's fees should be determined.

*West Beaches Neighborhood Defense Fund, Inc., et al. v. Bay County and DCA*, DOAH Case No. 06-1220GM, First DCA Case no. 1D07-3345.

Petitioners have appealed a Final Order holding that all of the challenged Bay County land development regulations (LDRs) are consistent with the County's Comprehensive Plan. The LDRs at issue cover a wide variety of subjects.

*Gateway Southeast Properties, Inc. and City of Doral v. Town of Medley*,



et al., DOAH Case Nos. 06-0918 and 06-1548, Third DCA Case No. 3D06-1718.

A Motion for Rehearing and Motion for Rehearing En Banc has been denied. This case involved an allegation that Town of Medley LDRs allowing any nonconforming use which serves as a public facility to be enlarged or increased up to 15 percent of the current building and/or land area of such use after approval of the Town Council via resolution were inconsistent with the Town's Comprehensive Plan. The Third District reversed the Summary Final Order granted in favor of the Town of Medley and remanded, directing DOAH to grant Gateway's Motion for Summary Final Order. DOAH issued an Order of Remand doing such on September 4, 2007.

Rural Land Stewardship Area Rule: The Department is considering revising Rule 9J-5, F.A.C., to establish minimum criteria to review requests to authorize the designation of Rural Land Stewardship Areas and to review amendments to local government comprehensive plans that would establish or amend Rural Land Stewardship Areas. Revisions are also being considered for Rule 9J-11, F.A.C., to establish submission and review requirements for requests to authorize the designation of a Rural Land Stewardship Area. The first rule development workshop was held on July 19, 2007 in Lakeland. A second rule development workshop is scheduled for September 24, 2007 in Lakeland. More information can be found on the Department's website at <http://www.dca.state.fl.us/fdcp/dcp/RuralLandStewardship>.

## The Affiliate's Corner

by David Bass and Erin Deady

The ELULS Affiliate Committee had its first meeting at the Environmental and Land Use Law Annual Update this year at Amelia Island on August 25th. David Bass of E-Sciences and Erin Deady of Lewis, Longman & Walker, P.A. were elected Co-Chairs of the Committee and we are still working on choosing a Vice-Chair. At the meeting, we discussed the general direction of the Committee and agreed upon tentative dates for this year's very popular "Affiliate Mixers". The following is a tentative list of dates for the Mixers:

- Tallahassee (Nov. 8th)... Potential sponsors (Arcadis, ERM, Inc., Greenberg)
- Tampa (Jan. 24th)... Potential sponsors (Avid, HSW, Carlton Fields)
- Gainesville (Feb 27th)... Potential sponsors (WAR, Hopping, Green one more consultant)
- Orlando (April 10 or 17th)... Potential sponsors (E Sciences, Mitigation Marketing, Lowndes Drosdick, et al)
- Ft. Lauderdale (May 15th)... Potential sponsors (LLW, two consultants TBD)

This year, we also discussed managing these events through volunteers or if there are several volunteers, through a committee. These people will help work on the planning for these events as well as soliciting opportunities for sponsorship. We have tentative volunteers for the following:

- Gainesville event: Scott Burgard with Water and Air Research
- Tampa event: Abbey Naylor with Avid/ Pedro Fierro with Arcadis

The Affiliate Committee is planning an active year and we will be publishing articles in the Section Reporter. There will be four short articles from the Co-Chairs to let everyone know the latest and greatest activities for the Affiliate Committee. We will have article publishing deadlines in September, December, March and June for the Affiliate Committee members. We currently have papers/authors for Section reporters as follows (but we are always seeking more commitments and more articles):

- ERM in September
- HSA in December
- Golder in March, and
- Geosyntec in June

We are also seeking a commitment from affiliate members to potentially co-author an article for publication in *The Florida Bar Journal*.

If you have any ideas about where the mixers could be, help coordinating the events, interested in writing an article for the Section Reporter or Bar Journal, or interested in sponsoring an event, please contact David Bass at 407-481-9006, or by e-mail at [dbass@esciencesinc.com](mailto:dbass@esciencesinc.com).

We look forward to an exciting year of many events, networking, marketing and development opportunities. Stay tuned for more updates on the Affiliate Committee.

[www.Floridabar.org](http://www.Floridabar.org)

Instant access to...

Links to a wide range of useful information, including:

- Ethics Opinions
- List of Board Certified Lawyers by Specialization Areas
- Online CLE

..... and much, much more!

# Law School Liaisons

## Barry Environmental Law Society Joins Forces with Student Hurricane Network for Legal Aid to Hurricane Victims

In May of 2007, the newly formed Environmental Law Society (ELS) of Barry Law School, sponsored by Barry University's Department of Mission and Ministry and in partnership with the Student Hurricane Network, sent fourteen student volunteers and two professors to New Orleans for a week of pro bono legal services.

It may seem counterintuitive, but the legal aftermath of Hurricane Katrina continues to take its heavy toll on the city of New Orleans, even two years after physical recovery efforts have begun. In a very unfortunate sense, the effects of the most devastating tragedy in recent history continue to destroy, in one way or another, the most vulnerable segments of society—the poor, minorities, those accused of crimes, victims of selective reconstruction, those who continue to struggle with problematic or contentious insurance issues, and victims pursuing damages from government neglect in maintaining the city's supposedly protective levees.

Like the hundreds of volunteers who have helped the Student Hurricane Network in the past, Barry Law School volunteers worked on a wide variety of issues. Some students worked in a private firm leading a class action lawsuit, others worked in different legal aid offices, and some helped in the public defender's office.

Many students dealt with environmental and land use issues. One of the greatest challenges dealt with environmental justice, land use, and zoning. Who is allowed to rebuild? Who can afford to rebuild? For those displaced from their homes, where will they rebuild? These questions are still unanswered for the vast majority of lower-income residents and evacuees. People who have lived in the lower 9th Ward for generations may now face permanent displacement as their home is transformed by a developer's hands. How do we balance the interests of these people with their government? What is best for the common good? There are no easy

answers, and much remains to be done. For example, why should people go through the hardship of rebuilding their lives when newly rebuilt levees cannot withstand another Katrina? Any serious effort by the local, state, and federal government to build defenses from similar storms does not end with thicker or higher concrete walls, but instead must consider environmental factors. Louisiana's natural defenses, the miles of wetlands which have been slowly destroyed, will have to be rebuilt in order to provide adequate protection. The question is whether New Orleans can design a better system, a system that balances the interests of industry while maintaining the natural ecosystems. It should be a system that provides security and prosperity not just for some, but for all of the citizens of the crescent city, so that we never again see people scrambling for their rooftops or waiting to be rescued for days on overpasses.

It did not take long for Barry's students to realize the enormity of this disaster and the Herculean labors that lay ahead for the legal community. Barry volunteers have only taken a first step. Based on the magnitude of the task, Barry ELS President, Mark Hopson, volunteered and was selected by SHN as the regional coordinator for a follow-up visit in 2008. Barry's ELS members are currently planning another pro-bono trip and wish to acknowledge and thank the ELULS for their \$1000 grant in July which will be dedicated to this purpose.

By pooling resources, the many fine law schools of central Florida can make a greater impact on the challenges than any single school could alone. Working together, student volunteers can and will continue to help those with legal needs in New Orleans. Any Florida students interested in volunteering should contact Mark Hopson at [hopsonmc@bucmail.barry.edu](mailto:hopsonmc@bucmail.barry.edu).

**Update your CLE record in record time!**

### CLE CREDIT POSTING

Discover the convenience of online posting at

**[www.floridabar.org](http://www.floridabar.org)**

Click "Member Profile" at top right  
Click "CLE Activity Posting" link  
Login and Post Credits

**REMINDER: FLORIDA BAR CLE ATTENDANCE CREDITS ARE POSTED AUTOMATICALLY**

# Nominations Needed to Recognize Environmental Lawyers and Activists

Know an attorney or active citizen who has made a significant, positive impact on environmental law or policy in Florida? Nominations are needed for deserving citizens and attorneys to be considered for the annual public interest awards to be presented at the 14<sup>th</sup> Annual Public Interest Environmental Conference in Gainesville, FL on the evening of February 29, 2008.

The Public Interest Committee of the Environmental and Land Use Law Section (ELULS) of The Florida Bar recognizes one attorney each year for their service in furtherance of the public interest in the area of

environmental or land use law. Nominees must be admitted to practice in the State of Florida but do not have to be members of ELULS. Factors to be considered in selecting the awardee include the attorney's long-standing commitment to protecting Florida's natural resources, their excellence as an attorney, their mentorship of other attorneys within the field, and their personal character, integrity, and good reputation within the profession.

Additionally, ELULS will bestow an award upon a non-attorney citizen who has furthered the public interest in environmental or land use policy

through some personal contribution.

Nominations must be received by Kelly Samek, PIC Chair, by January 28, 2008, and can be sent by email to [kelly.samek@dep.state.fl.us](mailto:kelly.samek@dep.state.fl.us) or via snail mail to 3900 Commonwealth Blvd., MS 35, Tallahassee, FL 32399. All nominations should include the nominee's full name and contact information, a brief statement on why they should receive the award and the nominator's full name and contact information. The awardees will be selected by the PIC Award Committee and invited to attend the 14<sup>th</sup> Annual Public Interest Environmental Conference.

## *New Bar Web Site Features*

*Florida Bar members may now add:*

- Photo (must be attached as an electronic file)
- Law school and degrees
- Firm name, web site address, number of attorneys
- Martindale-Hubbell rating
- Occupation and practice areas
- Services (offered by your firm) and languages spoken
- Federal courts and state courts



*Go to [www.floridabar.org](http://www.floridabar.org) and click on Member Profile.  
User name and password required.*





THE  
FLORIDA  
BAR  
CLE

The Florida Bar Continuing Legal Education Committee, the  
Environmental & Land Use Law Section and the Real Property,  
Probate & Trust Law Section present

# Environmental and Land Use Considerations for a Real Estate Transaction

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Presentation: January 25, 2008 • Tampa  
Tampa Airport Marriott • 5521 W. Spruce St.

Live Webcast: January 25, 2008

Video Replays (4 locations): February 8, 2008 - March 13, 2008

Live Webcast  
Available

Course No. 0577R

8:00 a.m. – 8:30 a.m.

**Late Registration**

**Morning Session: Case Study Introduction and Environmental Issues**

8:30 a.m. – 8:45 a.m.

**Case Study Introduction**

*Terrell K. Arline, Bay County Attorney's Office*

8:45 a.m. – 9:15 a.m.

**Present the Contract**

*Barry B. Ansbacher, Ansbacher & McKeel, P.A.*

9:15 a.m. – 10:00 a.m.

**Water Permitting**

*Irene M. Kennedy Quincey, Pavese Law Firm*

10:00 a.m. – 10:15 a.m.

**Break**

10:15 a.m. – 11:00 a.m.

**Cute and Costly Animals: ESA and Your Permits**

*Keith W. Rizzardi, South Florida Water Management District*

11:00 a.m. – 11:45 a.m.

**Contamination of the Site**

*Ralph A. DeMeo, Hopping Green & Sams, P.A.*

11:45 a.m. – 12:30 p.m.

**Docks: DEP permitting and Trustees Leases**

*Richard S. Brightman, Hopping Green & Sams, P.A.*

12:30 p.m. – 1:30 p.m.

**Lunch (included in registration fee)**

**Clean-up for Lunch**

*James P. Oliveros, Golder Associates Inc.*

1:30 p.m. – 1:45 p.m.

**Break**

**Afternoon Session: Land Use Issues**

1:45 p.m. – 2:30 p.m.

**Comprehensive Plan**

*David L. Jordan, Greenberg Traurig*

2:30 p.m. – 3:15 p.m.

**Zoning and Development Permits**

*H. Ray Allen, Carlton Fields, P.A.*

*Kenneth A. Tinkler, Carlton Fields, P.A.*

3:15 p.m. – 3:30 p.m.

**Break**

3:30 p.m. – 4:15 p.m.

**Concurrency: Roads, Schools and Water, Oh My!**

*Kelly A. Martinson, Florida Department of Community Affairs*

4:15 p.m. – 5:00 p.m.

**Bert Harris, Takings and Your Project**

*Ronald L. Weaver, Stearns & Weaver*

5:00 p.m. – 5:15 p.m.

**Questions & Answers**

## LIVE WEBCAST

Upon the processing of your registration, you will receive a confirmation letter with instructions. In the instructions, you will be given a web address to access the webcast program. Only those registered for the seminar will receive CLE credit.

## ENVIRONMENTAL & LAND USE LAW SECTION

Michelle Diffenderfer, West Palm Beach — Chair  
Gary K. Hunter, Jr., Tallahassee — Chair-elect  
Martha M. Collins, Tampa — CLE Chair

## REAL PROPERTY, PROBATE & TRUST LAW SECTION

Melissa J. Murphy, Gainesville — Chair  
Sandra F. Diamond, Seminole — Chair-elect  
Jack A. Falk, Jr., Coral Gables — CLE Chair

## PROGRAM CO-CHAIRS

Terrell K. Arline, Panama City  
Carl Eldred, Tallahassee  
Nicole C. Kibert, Tampa

## CLE COMMITTEE

Colleen C. Sachs, Santa Rosa Beach, Chair  
Terry L. Hill, Director, Programs Division

## CLE CREDITS

### CLER PROGRAM

(Max. Credit: 8.5 hours)

General: 8.5 hours

Ethics: 0.0 hours

### CERTIFICATION PROGRAM

(Max. Credit: 8.5 hours)

City, County & Local Government: 8.5 hours

Real Estate Law: 6.5 hours

State & Federal Gov't & Administrative Practice: 8.5 hours


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

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

# HOW TO REGISTER

 **ON-LINE: [www.floridabar.org/CLE](http://www.floridabar.org/CLE)**  
**\*NEW \* SECURE \* FASTER**

 **MAIL:**  
**Completed form w/check**

 **FAX: 850/561-5816**  
 form with credit card information

**REFUND POLICY:** Requests for refund or credit toward the purchase of the CD / DVD or course books of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A \$25 service fee applies to refund requests. Registrants who do not notify The Florida Bar by 5:00 p.m., January 18, 2007 that they will be unable to attend the seminar, will have an additional \$35 retained. Persons attending under the policy of fee waivers will be required to pay \$35.

**Register me for the "Environmental & Land Use Considerations for a Real Estate Transaction" Seminar**

TO REGISTER OR ORDER CD / DVD OR COURSE BOOKS, BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD \$25.00. **On-site registration is by check only.**

Name \_\_\_\_\_ Florida Bar # \_\_\_\_\_

Address \_\_\_\_\_

City/State/Zip \_\_\_\_\_ Phone # \_\_\_\_\_

**JMW: Course No. 0577R**

**LOCATIONS (CHECK ONE):**

- Tampa\*\* - January 25, 2008**  
(049) Tampa Airport Marriott
- Live Online\*\*\* - January 25, 2008**  
(317) Web Cast Seminar
- Ft. Lauderdale\* - February 8, 2008**  
(122) Broward County Bar Association
- Tallahassee\* - February 21, 2008**  
(054) The Florida Bar
- West Palm Beach\* - March 6, 2008**  
(232) Palm Beach County Bar Assn.
- Pensacola\* - March 13, 2008**  
(040) Escambia/Santa Rosa Bar Assn.

\*\*\* Live \*\* Videotaping \*Video Replay

**REGISTRATION FEE (CHECK ONE) LIVE WEBCAST VIDEO REPLAY**

- Member of the Environmental & Land Use Law Section or the Real Property, Probate & Trust Law Section:
 

	\$190	\$250	\$155
--	-------	-------	-------
- Non-section member:
 

	\$215	\$275	\$180
--	-------	-------	-------
- Full-time law college faculty or full-time law student:
 

	\$125	N/A	\$90
--	-------	-----	------
- Persons attending under the policy of fee waivers:
 

	\$35	N/A	\$0
--	------	-----	-----

*Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.)*

**METHOD OF PAYMENT (CHECK ONE):**

- Check enclosed made payable to The Florida Bar
- Credit Card (Advance registration only. Fax to 850/561-5816.)
  - MASTERCARD     VISA    Exp. Date: \_\_\_\_/\_\_\_\_ (MO./YR.)

Signature: \_\_\_\_\_

Name on Card: \_\_\_\_\_

Card No. \_\_\_\_\_



Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

- Enclosed is my separate check in the amount of \$35 to join the Environmental & Land Use Law Section.
- Enclosed is my separate check in the amount of \$50 to join the Real Property, Probate and Trust Law Section.

Membership expires June 30, 2008

**COURSE BOOK — CD / DVD — ON-LINE — PUBLICATIONS**

Private taping of this program is not permitted. **Delivery time is 4 to 6 weeks after 1/25/08. TO ORDER CD / DVD OR COURSE BOOKS**, fill out the order form above, including a street address for delivery. **Please add sales tax to the price of tapes or books. Tax exempt entities must pay the non-section member price.**

*Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida.* If this order is to be purchased by a tax-exempt organization, the course book/tapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

**COURSE BOOK ONLY**

Cost \$35 plus tax  
 (Certification/CLER credit is not awarded for the purchase of the course book only.)

**TOTAL \$ \_\_\_\_\_**

**AUDIO CD**

(includes course book)  
 \$155 plus tax (section member)  
 \$180 plus tax (non-section member)

**TOTAL \$ \_\_\_\_\_**

**DVD**

(includes course book)  
 \$250 plus tax (section member)  
 \$275 plus tax (non-section member)

**TOTAL \$ \_\_\_\_\_**

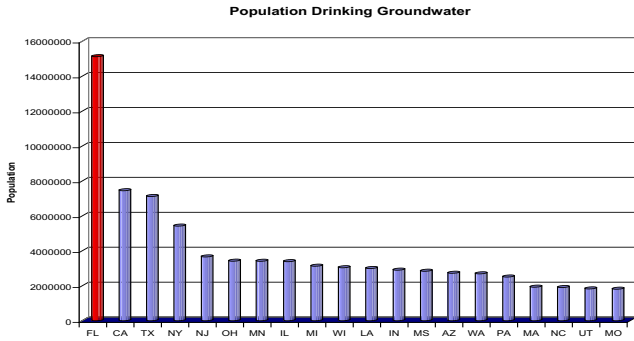
**ON-LINE PROGRAMS!** To view and/or listen to this and other courses on-line, or to download to your computer as a "CLEtoGo," go to [www.legalspan.com/TFB/catalog.asp](http://www.legalspan.com/TFB/catalog.asp)

**Related Florida Bar Publications** can be found at <http://bookstore.lexis.com/bookstore/catalog>. Click on "Jurisdictions," then "Florida" for titles.



# PETROLEUM CLEANUP

from page 1



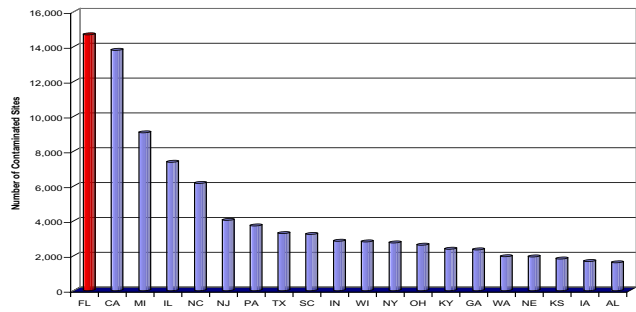
**Figure 1. Florida ranks first in the nation for the number of citizens deriving their drinking water from groundwater.**

While it is incontrovertible that petroleum contamination exists, Floridians are fortunate that the Florida Department of Environmental Protection (FDEP) oversees one of the most effective petroleum cleanup programs in the nation. However, remediation of petroleum contamination and clean groundwater is not cheap. To protect against possible contamination of Floridians' drinking water, continued funding of the FDEP petroleum clean up program through the Inland Protection Trust Fund is critical. This fund is for remediation of petroleum contamination from defunct or insolvent sites, state insurance program sites, and two amnesty programs from the 1980's and mid-1990's. These programs have been closed for at least eight years. Revenue for this fund is generated from taxes paid by the petroleum industry on petroleum products imported into Florida.

### Scope of the problem and the FDEP response

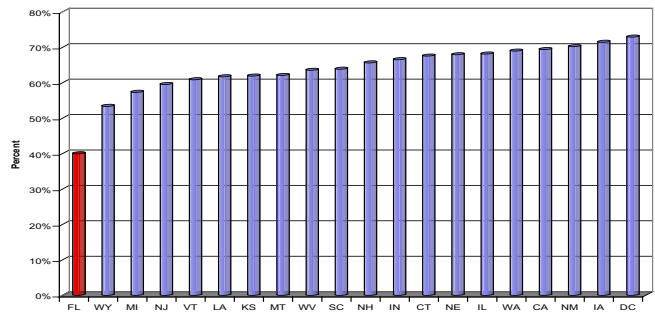
It is a matter of public record that Florida has more documented contaminated petroleum sites to be cleaned up than any other state. Several factors contribute to this dubious distinction. Primary among those factors is that a large number of petroleum site owners applied to the Early Detection Initiative program from 1986 to 1988. This was Florida's first state funded cleanup program. Rather than risk missing out in state funds, claims of contamination were submitted even though evidence supporting the claim was often less than conclusive. Nevertheless, the claims became a part of the universe of contaminated sites. The sheer number of sites to be cleaned up also impacts the reported percentage of sites that have been cleaned up. EPA figures indicate that Florida ranks last in the nation with only 40% of the contaminated sites having been cleaned up.

Cleanup Backlog



**Figure 2. Florida has the greatest backlog of contaminated sites waiting to be cleaned up.**

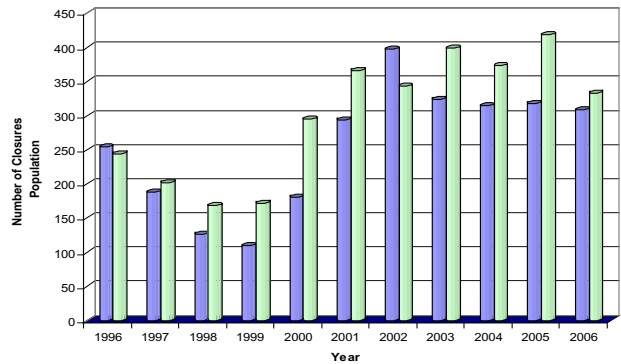
Cleaned Up Contaminated Sites



**Figure 3. Florida ranks last in the nation for the percentage of contaminated sites that have been cleaned up.**

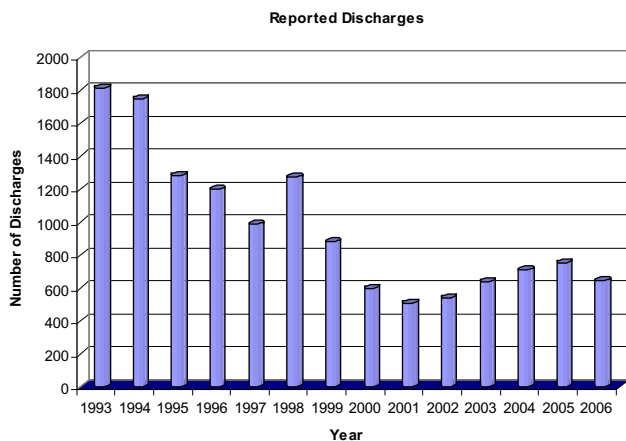
The last place ranking may be a misleading data point. In evaluating this percentage it is important to consider the actual progress made by the FDEP in cleaning up impacted sites. This progress has been especially noteworthy since 1999 as is seen in **Figure 4** and **Figure 5**.

Closures



**Figure 4. An effective state clean up program has resulted in a meaningful number of remediated petroleum sites. Note the progress in the last seven years.**



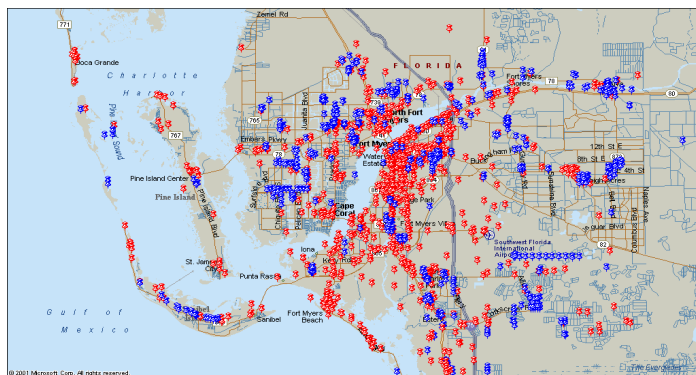


**Figure 5. Progress is also reflected by the decrease in the number of reported discharges.**

**Unique Florida Factors**

In a May 2007 report on MTBE the FDEP offered the following explanation of why petroleum contamination in Florida was especially challenging: “Because of the shallow groundwater conditions and highly permeable soils in the majority of the populated areas of the state, most sites that have had a discharge of petroleum products result in groundwater contamination by the fuel mixture, meaning the sites are contaminated with both MTBE and other petroleum chemicals. In other areas of the country, groundwater may be predominantly deeper in many of the populated areas. As a result, on many sites in those other states the migration of other petroleum chemicals is retarded or attenuated in the unsaturated zone above the groundwater table and the other petroleum chemicals never reach the groundwater in concentrations detectable in monitoring wells.”<sup>4</sup>

Also contributing to the problem is the proximity of contaminated sites to drinking water sources. Almost all of this water is derived from wells, many of which are in close proximity to the historical petroleum discharges. The significance of this spatial relationship can be visualized by mapping wells and USTs on the same map. The following map is for Lee County and uses data supplied by the Florida Department of Health<sup>5</sup> and the FDEP. Similar maps can be generated for other regions.



**Figure 6. The close proximity of drinking water wells and contaminated sites contributes to the urgency of remediating contaminated sites.**

**Conclusion**

There are mountains of data and thousands of reports that document the contamination problem. Without a reasonable level of State funds, the clean up of petroleum contaminated sites will be greatly reduced because many site owners lack personal resources to remediate their sites. Migration of volatile organic compounds and additives such as MTBE would occur and potentially impact drinking water sources that are not currently impacted. If work on contaminated properties is reduced or postponed, significant concerns to one of Florida’s greatest resources would be exacerbated. Funding must continue, or the momentum gained by recent progress in the program will be lost.

**Endnotes:**

- <sup>1</sup> [http://www.epa.gov/swrust1/cat/ca\\_07\\_12.pdf](http://www.epa.gov/swrust1/cat/ca_07_12.pdf)
- <sup>2</sup> <http://www.awwa.org/Advocacy/pressroom/pr/index.cfm?ArticleID=163>
- <sup>3</sup> <http://www.fas.org/irp/offdocs/pdd-63.htm>
- <sup>4</sup> [http://www.dep.state.fl.us/waste/quick\\_topics/publications/pss/pcp/MTBE\\_info/MTBE\\_in\\_Florida\\_51407.pdf](http://www.dep.state.fl.us/waste/quick_topics/publications/pss/pcp/MTBE_info/MTBE_in_Florida_51407.pdf)
- <sup>5</sup> <http://www.doh.state.fl.us/ENVIRONMENT/water/petroleum/saindex.html>

*Steve Hilfiker is President of Environmental Risk Management, Inc., based in Ft Myers. He is also the President of the Florida Environmental Assessors Association, the founding Chairman of the ASTM International Subcommittee on Environmental Forensics, and a member of the FPMA Environmental Committee.*



**JOIN THE FLORIDA BAR’S  
LAWYER REFERRAL SERVICE!**

In 2005, The Florida Bar Lawyer Referral Staff made over 125,000 referrals to people seeking legal assistance. Lawyer Referral Service attorneys collected over \$6.8 million in fees from Lawyer Referral Service clients.

**The Florida Bar Lawyer Referral Service:**

- Provides statewide advertising
- Provides a toll-free telephone number
- Matches attorneys with prospective clients
- Screens clients by geographical area and legal problem
- Allows the attorney to negotiate fees
- Provides a good source for new clients

**CONTACT THE FLORIDA BAR TODAY FOR  
MORE INFORMATION.**

**CONTACT:** The Florida Bar Lawyer Referral Service, 651 E. Jefferson Street, Tallahassee, FL 32399-2300, phone: 850/561-5810 or 800/342-8060, ext. 5810. Or download an application from The Florida Bar’s website at [www.FloridaBar.org](http://www.FloridaBar.org).

---

**The Florida Bar**  
**651 E. Jefferson St.**  
**Tallahassee, FL 32399-2300**

PRSRT-STD  
U.S. POSTAGE  
PAID  
TALLAHASSEE, FL  
Permit No. 43