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THE ENVIRONMENTAL AND LAND USE LAW SECTION

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Implementing A Regional Conservation Framework: A Better Way

David G. Tillis, Marie G. Burns, Janet G. Llewellyn, Thomas O. Estes, and Robert M. Rhodes

The environmental permitting regulatory process for land development activities can be lengthy, expensive, frustrating, and frequently unpleasant for both the regulated applicant and the regulators. It is safe to say that anyone who has gone through the dredge/fill permit process has come away thinking there has to be a better way. This "case story" presents a better way that was crafted for a region of Northwest Florida. It has direct applicability to any region of Florida, especially an area with a sector plan or other large-scale land use planning initiative.

Context

Beginning in 1997, a large property owner in Northwest Florida transformed from primarily a timber landowner with a minor real estate division to a full-fledged community developer, though still with a robust timber operation. As the real estate operations began to grow so did the number of individual dredge/fill permit applications to the Army Corps of Engineers ("Corps") and the Florida Department of Environmental Protection ("DEP"). At that time, the state-permitting authority had not been delegated to the regional water management district and was handled by the Pensacola District office of DEP. It typically took 18-24 months to obtain a permit from submittal to receipt under the joint Corps/DEP review, although the federal regulators dictated the timeline.

The change in the landowner's business focus from silviculture management to real estate development raised concerns from regulators and the environmental community about how the development would proceed in terms of timeframe and location. The regulators and the community feared a "piecemeal" approach to development could result in significant cumulative impacts on the area's resources. Permit reviewers are charged with protecting the long term viability of the region's resources, but are also constantly under the gun to process applications in a timely manner. Similarly, the landowner's new focus on land development presented challenges for its management team to process permit applications efficiently and cost effectively. These factors underscored a reality affecting both public and private regulatory work: although the public and private parties share common goals, public and private parties often must deal with conflicting, short and long term objectives without a clear appreciation of each other's goals and constraints.

Individual Permits – Normal Course of Business

Dredge and fill and stormwater

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From the Chair

Greetings. By this time, you should have read or heard about the Constitutional Revision Commission (CRC). I hope you have paid attention to the information you have been receiving, but if you have not, I urge you to start paying attention now.

The Florida Constitution directs that a CRC be established every twenty years, comprised of thirty-seven members: the Attorney General; fifteen members selected by the Governor; nine members selected by the Speaker of the House of Representatives; nine members selected by the President of the Senate; and three members selected by the Chief Justice of the Supreme Court. The Governor designates the Chair. The CRC is tasked with reviewing the Florida Constitution and filing its proposed (if any) amendments to the Florida Constitution with the Florida Secretary of State to be included on the 2018 general election ballot.

The ELULS listserv forwarded a memo from The Florida Bar Board of

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ON APPEAL

by Larry Sellers, Holland & Knight

Note: Status of cases is as of February 28, 2017. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Florida Power & Light Co. v. Miami-Dade County, et al., Case No.: SC16-2277. Petition for review of Third DCA's decision in *Miami-Dade County, et al. v. Florida Power & Light Co., et al.,* reversing and remanding a final order of the Siting Board certifying two nuclear units at Turkey Point as well as proposed corridors for transmission lines. The court held that the Siting Board had the authority to require that a utility's transmission lines be installed underground. Status: Notice of intent to seek discretionary review filed December 22, 2016; petition for review denied February 24, 2017.

Beach Group Investment, LLC v. DEP, Case No. SC16-2084. Petition for review of the Fourth DCA's decision in *DEP v. Beach Group Investment, LLC*, reversing an order determining that plaintiff Beach Group Investments, LLC, prevailed in its claim for inverse condemnation based on DEP's refusal to issue the requested Coastal Construction Control Line permit. Status: Notice of intent to seek review by Florida Supreme Court filed November 16, 2016.

Charles N. Ganson Jr., as Personal Representative, et al. v. City of Marathon, Florida, Case No. SC16-1888. Petition for review of the Third DCA decision affirming in part and reversing in part an order granting summary judgment in favor of the City and State on Beyers' taking claim. 38 Fla. D. 2286 (Fla. 3rd DCA, November 6, 2013), rehearing en banc denied on September 14, 2016. Status: Notice of intent to seek review by Florida Supreme Court filed October 13, 2016.

Hardee County v FINR II, Inc., Case No. SC 15-1260. Petition for review of the Second DCA's decision in *FINR v. Hardee County*, 40 FLW D1355 (Fla. 2d DCA June 10, 2015), in which the court held that "the Bert Harris Act provides a cause of action to owners of real property that has been inordinately burdened and diminished in value due to governmental action directly taken against an adjacent property," and certified conflict with the First DCA's decision in *City of Jacksonville v. Smith*, 159 So. 3d 888 (Fla. 1st DCA 2015) (question certified). Status: Jurisdiction accepted on August 18, 2015; oral argument held on February 9, 2017. Note: the Florida Supreme Court also has accepted jurisdiction to review the question certified in *City of Jacksonville* (*see* below).

R. Lee Smith, et al. v. City of Jacksonville, Case No. SC 15-534. Petition for review of the First DCA's decision in *City of Jacksonville v. R. Lee Smith, et al.,* in which the majority of an *en banc* court determined that a property owner may not maintain an action pursuant to the Bert Harris Act if that owner has not had a law, regulation, or ordinance applied which restricts or limits the use of the owner's property. 159 So. 3d 888 (Fla. 1st DCA 2015). Status: Jurisdiction accepted on May 22, 2015; suggestion of mootness denied on March 18, 2016; Oral argument held on February 9, 2017. Note: Legislation enacted during the 2015 regular session clarifies that the Bert Harris Act is applicable only to action taken directly on the property owner's land and not to activities that are authorized on adjoining or adjacent properties. *See* Chapter 2015-142, *Laws of Florida.*

FIRST DCA

Lundquist v. Lee County, Case No. 1D17-22. Appeal from a final order by the Administration Commission determining that the amendment to the Lee County comprehensive plan is in compliance, notwithstanding that the ALJ recommended otherwise. Status: Notice of appeal filed January 3, 2017.

Florida Pulp and Paper Association Environmental Affairs, Inc. v. DEP, Case No. 1D16-4610. Appeal from final order dismissing challenge to DEP water quality standards rule as untimely. Status: Notice of appeal filed October 11, 2016. Note: Appeals from this final order also were filed in the Third DCA. See below.

Nipper v. Walton County, Case No. 1D16-512. Appeal from final judgment granting Walton County's (the "County") request for an injunction, enjoining operation of commercial sky-

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ON APPEAL

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diving activity. The appellants originally filed a complaint against Walton County seeking a declaration that the County could not regulate a skydiving business on appellants' farm, asserting among other things that Section 570.96, Florida Statutes (2016), preempts the County from regulating the skydiving business because it constitutes "agritourism" as defined in statute. The County counterclaimed for injunctive relief, which was granted by the court. Status: Reversed on January 17, 2017.

South Palafox Properties, LLC, et al. v. FDEP, Case No. 1D15-2949. Appeal of DEP final order revoking operating permit for construction and demolition debris disposal facility, DOAH Case No. 14-3674 (final order entered May 29, 2015). Among other things, the final order determines that the appropriate burden of proof is preponderance of the evidence, DEP has substantial prosecutorial discretion to revoke (as opposed to suspend) the permit, and that mitigation is irrelevant. Status: Oral argument held on January 19, 2017; affirmed per curiam February 24, 2017.

THIRD DCA

City of Coral Gables v Rich and Silver, Case No. 3D17-206 and -213. Petition for writ of prohibition restraining circuit court from exercising jurisdiction over a consistency challenge to a small scale plan amendment. Status: Petition filed January 27, 2017.

City of Miami v DEP, Case No. 3D16-2129 and *The Seminole Tribe of Florida v. DEP*, Case No. 3D16-2440. Appeals from final order dismissing challenge to DEP water quality standards rule as untimely. Status: Notice of appeal filed September 15, 2016 and October 28, 2016, respectively. Note: Another appeal from this final order also was filed in the First DCA. See above.

FIFTH DCA

McClash, et al., v. SWFWMD, Case No. 5D15-3424. Appeal of Southwest Florida Water Management District ("SWFWMD") final order issuing an environmental resource permit (ERP) to a land trust for its proposed project on Perico Island in Bradenton, over a contrary recommendation by the administrative law judge ("ALJ"). The ALJ recommended that SWFWMD deny the ERP because practicable modifications were not made to avoid wetland impacts and the cumulative adverse effects of the project would cause significant environmental harm. In its final order, SWFWMD concludes that the mitigation proposed by the applicant is sufficient and that reduction and elimination of impacts to wetlands and other surface waters was adequately explored and considered. Status: Notice of appeal filed September 29, 2015. Oral argument set for March 9, 2017.

CHAIR'S MESSAGE

from page 1

Governors in February that outlined a list of potential topics that may be considered by the CRC, all impacting the judicial branch of government. We have already seen bills proposed this legislative session that would undermine the independence of the judiciary (*e.g.*, term limits for judges, a constitutional amendment to allow the legislature to overturn final judicial decisions) and the list of potential CRC topics that further threaten that independence. Those topics, if placed on the ballot as amendments and approved by the voters, would severely weaken the judicial branch of state government, making it a "second-class" branch of government, subordinate to the legislative and executive branches. Fortunately, Senate President Joe Negron appointed Florida Bar President Bill Schifino to the CRC. Bill Schifino has already said that preservation of the independence of the judiciary is a priority for him.

I urge you to keep up with the meetings of the CRC and pay attention to emails from the Board of Governors, ELULS, and any other sections you belong to regarding the CRC. As lawyers, you can and should translate proposed amendments to your friends and family and explain the importance of an independent judiciary as a separate and co-equal branch of government. Please be informed, stay informed, and inform others.

March 2017 Case Law Update

Gary K. Hunter, Jr., Hopping Green & Sams

Proposed rule 62-4.161 exceeds the DEP's delegated rulemaking authority in expanding notice requirements in the event of a release which are not authorized by any enabling statute. *Associated Industries of Florida, Inc. et al., v. Department of Environmental Protection*, No. 16-6889RP (DOAH December 30, 2016).

On September 28, 2016, the Department of Environmental Protection (DEP) published a notice of intent in the Florida Administrative Register proposing the adoption of rule 62-4.161. If this proposed "Public Notice of Pollution" rule was adopted by final order, a person with a "reportable release" of a regulated substance would be required to inform the DEP and local government within 24 hours of the occurrence of the release on the party's property. The releasing party must also inform the general public through a newspaper or television publication within that same 24 hour period. Additionally, if the release migrates onto neighboring property, that property owner must also be notified within 24 hours and this information must be provided to the DEP, local government, and general public. The releasing party must provide additional information to the DEP, local government, and the general public within the next 48 hours post-release. The rule described the specific information required to be included in these notices and penalties for non-compliance. The staff of the Joint Administrative Procedures Committee reviewed the proposed rule and asked the DEP how this proposed rule was not an enlargement or a modification of section 377.371(2), F.S. which only required notice to DEP in the event of a spill or a leak.

Four non-profit corporations and a business association filed a timely petition for hearing to challenge rule 62-4.161. Petitioners held particular interest in the definition of "reportable releases" in the proposed rule, as their businesses involve activities that would likely fall under the definition of "reportable releases" as defined. In October 2016, twenty-seven regulated entities submitted to the DEP a Lower Cost Regulatory Alternative (LCRA) in response to the proposed rule. Florida Electric Power Coordinating Group also submitted an additional LCRA to the DEP. Both LCRAs suggested a shift in the burden to the DEP for providing notice of release to all parties required by the rule, rather than each entity, as it would lessen the cost to the regulated community.

In accordance with section 120.541, F.S. and in response to the submitted LCRAs, the DEP prepared a Statement of Estimated Regulatory Costs ("SERC") in support of the proposed rule and published the notice of availability in November 2016. The SERC estimated an increase in yearly regulatory costs of $182,000 and rejected the LCRA, stating that the releasing party was the more appropriate party to bear the costs imposed by the proposed rule because the releasing party was in a better position to know the details of the substances released as required by the notice report.

Both parties moved for summary final order pursuant to section 120.57(1)(h), F.S., as there was no genuine issue of material fact. The DEP argued that the associations lacked individual standing. Administrative Law Judge Canter disagreed with the DEP's argument that the associations lacked standing to challenge the proposed rule concluding that the rule was "pointing its finger directly at these persons and telling them what they must do and the penalty for non-compliance."

Generally, to establish standing in asserting a challenge to agency action, individuals must prove injury in fact and immediacy of harm, but standing for challenges to rulemaking is less stringent. Judge Canter found that the parties met the three elements of association standing to challenge the proposed rule 62-4.161. For an association to establish standing, the associations must show imminent harm, show a substantial number of the members of the association hold a substantial interest to be affected by the finalization of this rule, and request appropriate relief for the members represented. DEP proposed rule 62-4.161 would immediately harm the associations because the members handled the types of substances regulated by the proposed rule.

The subject matter of the rule fell within the general activities and interests of the associations filing the challenge to the rule, so a substantial interest was established by a substantial number of association members, allowing the associations to "point back and object" to the proposed rule on members' behalf. This rule would directly regulate the associations' field, subjecting a substantial number of associations' members to comply with its requirements. Lastly, Judge Canter also found the associations' request for relief appropriate in seeking to invalidate the proposed rule on grounds that the rule would constitute an invalid exercise of delegated legislative authority in accordance with section 120.56(1)(a), F.S.

Ultimately, Judge Canter agreed the proposed rule should be invalidated under sections 120.52(8)(a),(b),(c) and (f) of the Florida Statutes. In proposing this "Public Notice of Pollution" rule, the DEP materially failed to follow applicable rulemaking procedures, exceeded its granted

continued...

rulemaking authority, expanded and modified its specific rulemaking ability without statutory authority to do so, and imposed regulatory costs onto regulated persons without adopting a lower-cost alternative.

Judge Cantor found that while seven Florida Statutes generally grant the DEP rulemaking authority (sections 377.22(2); 403.061(7),(8),(28); 403.062; 403.855(1); and 403.861(9)), those statutes were inadequate authority for the proposed rule because no enabling statute specifically authorized the DEP to adopt a rule expanding specific notice requirements in the event of a release beyond those already specified by statute. The DEP's interpretation of general notice provisions contained within the statutes would unreasonably expand the notice requirements beyond its own department, which was unauthorized. The DEP argued that sections 403.016(7) and (8), F.S. generally grant sufficient legislative authority, but Judge Cantor held that the general applicability provided by these statutes lacked specific authority required to promulgate the proposed rule.

Thus, the DEP lacked specific rulemaking authority for proposed rule 62-4.161, so the proposed rule was an invalid exercise of delegated authority under sections 120.52(8)(b) and (c), F.S. because it would expand, enlarge, or modify DEP rulemaking ability. The proposed rule was also invalid under section 120.52(8)(a), F.S. because the DEP materially failed to follow rulemaking procedure in rejecting the LCRA findings because the LCRA was rooted in in statutory authority when it proposed only the reporting requirement and associated cost to the regulated community. The DEP also materially failed to follow rulemaking procedures in rejecting the LCRA because it rejected the cost-saving findings on an invalid basis in violation of section 120.52(f), F.S. when it reasoned that the petitioner was better situated to both incur the associated costs because the release was unauthorized and to provide detailed knowledge of the substances released. Accordingly, the proposed rule was also invalid under section 120.52(8)(f), F.S. because the agency failed to adequately consider the lower cost alternative and could have reduced unauthorized regulatory costs if the rule was withdrawn.

In accordance with the findings above, Judge Canter issued a final order invalidating proposed rule 62-4.161 of the Florida Administrative Code as proposed by the DEP due to an improper exercise of delegated legislative authority.

The *Boynton* "development approach" was the proper method used to determine market value of property to be taken in an eminent domain proceeding, which used three factors to determine value: property value as of the date of the taking, an appraisal of what a willing buyer would pay for the property in then-existing condition for the highest and best use of the property, and the best use may be a prospective use. Accordingly, the trial court did not abuse its discretion in allowing conceptual site plans into evidence to establish the highest and best use of a property for valuation purposes. *City of Sunny Isles Beach, etc., v. Cavalry Corp., etc., et al.*, No. 3D15-1420 (Fla. 2d DCA January 25, 2017).

Karen P. Tucker is the owner-trustee of 2.81 acres of undeveloped predominantly submerged land located on a finger canal which contained unobstructed access to the Intercoastal Waterway and a small upland strip of land connecting it to North Bay Road. This property remained undeveloped and no plans were drawn for potential future development. In 2012, The City of Sunny Isles Beach (The City) took .18 acres to build a bridge connecting North Bay Road on the barrier island where The City is located to the mainland, which cut off marine access to the Intercoastal Waterway from the canal.

The City and Tucker argued for differing valuation methods used to determine fair and just compensation for the property taken. Tucker argued that the highest and best use of the property should be used for assessing value to the injury suffered by the taking instituted by The City. Tucker's expert appraiser testified the prospective highest and best use of the property would be a $885,000 private docking facility containing forty-six boat docks to be used by adjoining condominiums or homes. This testimony was rooted in the use of the "discounted cash flow method" or "development approach" to fair-market valuation of property as described in *Boynton v. Canal Authority*, 265 So.2d 722 (Fla. 1st DCA 1972).

The City countered that because the property had never been developed, Tucker had no future development plans, and the number of permits from multiple agencies required to build the proposed facility made such development extremely unlikely and the property had "essentially no economic use potential." Accordingly, The City proffered a fair-market value of $1,000 for the property. The court noted this amount was less than the valuation The City had conducted for tax purposes. However, the Court also stated that tax-assessed value is not conclusive evidence of market value and generally is not admitted in eminent domain proceedings against private landowners such as Tucker. The Court also disagreed with The City's argument that the *Boynton* approach was speculative, analogizing the Boynton "highest and best use" approach to the very approach utilized by tax appraisers in tax assessment purposes.

The Court recognized that Tucker had a constitutional right to receive full compensation for the property taken for a public purpose and she should also receive severance damages to the remaining property for the resulting reduction in value. The Court found Tucker's expert appraiser used the correct *Boynton* method of determining fair-market value for property according to a reasonable highest and best prospective use as a boat docking facility, which met the three factors of the *Boynton* test: the value on the date taken, the amount a willing buyer would pay for the property in "then-existing condition" for the highest and best use on that date, the highest and best use may be prospective and value is not limited to its then-existing use. Accordingly, the Court affirmed the jury award of $885,000.

A stormwater utility usage fee assessed to a homeowners' association, golf course, and hospital on North Stock Island was unreasonable and arbitrary because the landholders maintained their own private stormwater manage-

ment systems and only minimally contributed stormwater to the City of Key West's flood and pollution stormwater control systems. The voluntariness doctrine did not require property owners to seek confirmation from the City that the ordinance meant to compel involuntary payment of the utility fee by threatening exercise of enforcement measures. *City of Key West v. Key West Golf Club Homeowners' Association, Inc., et al.*, No. 3D13-57 (Fla. 3d DCA January 26, 2017).

In the 1960s, the Florida Department of Transportation constructed College Road on North Stock Island, a horseshoe-shaped loop road that intersects with U.S. 1 on both ends and is located west of a waterway that is part of the Gulf of Mexico (Gulf). Property owned by a homeowners' association, golf course, and hospital (together, "Landowners") is located within this loop. When FDOT built College Road, it constructed the road at a higher elevation and with Gulfward slope for stormwater runoff to flow into several storm drains and pipes which released into the Gulf. In 1971, Monroe County contracted with FDOT to maintain College Road. FDOT later constructed seven culverts to restore tidal flow to a landlocked salt marsh created by the College Road construction. In addition to the College Road infrastructure built by FDOT, the Landowners have DEP permits for and maintain private stormwater management systems which include ponds, pumps, swales, and other stormwater-related infrastructure which direct stormwater into the salt marsh and ultimately into the Gulf through the existing College Road culverts built by FDOT.

In 1994, the City contracted for a stormwater study to identify and map flood problems on the island of Key West in accordance with the City's Comprehensive Plan, but this study did not include North Stock Island. In 1995, the City of Key West ("City") orally agreed to maintain the existing College Road stormwater infrastructure in exchange for a share of the State gas tax. Accordingly, the College Road stormwater infrastructure has separate revenue funding. In 2001, the City passed Ordinance §74-363 which established a stormwater utility and stormwater management program, as required by sections 403.0891, 403.0893, *F.S.* (2001). The Court noted the City's method of calculating stormwater fees was legally permissible and based upon a property's impervious surface area. This method is based on statistical estimates and assumes a direct correlation between the number of impervious surfaces and amount of stormwater runoff into the City's system. Because this method is based upon these statistical estimates, irregularities may occur where the fee is not reasonably related to the amount of stormwater runoff. The City attempted to account for this in §74-361 of its Code of Ordinances by creating an exemption for undisturbed property without impervious surfaces and property retaining one-hundred (100) percent of the total volume of runoff within the property. The City also provided a method of fee-reduction by fifteen (15) percent or twenty-five (25) percent for properties meeting the standards of §74-365(f)(1), but the Landowners' property did not qualify.

Subsequently in 2001, the City created a Long Range Stormwater Utility Plan which identified flood zones and capital stormwater projects on the island of Key West. The Long Range Stormwater Plan was used to determine the City's stormwater utility fee, but again failed to identify flood zones and capital improvement projects on North Stock Island. Despite the omission of North Stock Island from the Stormwater Plan, the City began charging the Landowners a monthly stormwater utility fee under the same fee structure as the property owners on the island of Key West. Later in 2006, the City contracted for an additional map and computer simulation of the City's drainage system, but once again omitted North Stock Island. In 2011, the Landowners brought suit, which induced the City to conduct a North Stock Island Stormwater Drainage Assessment and to include the findings that two stormwater improvements could be made into the 2012 Stormwater Master Plan.

The trial court found that the Landowners had paid a combined total of approximately $368,400 in stormwater utility fees to the City since 2003 and found that the stormwater utility fee was arbitrarily and discriminatorily applied to the Landowners due to their non-use or at most minimal use of the City's stormwater services. However, the trial court only awarded the Landowners fees paid post-filing suit because it found the pre-suit payments to have been voluntarily paid by the Land-

owners to the City. This resulted in appeals by both the City for the trial court's decision regarding the arbitrariness of the stormwater utility fee and the Landowners regarding the voluntariness of pre-suit payments.

On appeal, the Court noted that the central issue in this case was whether the City's stormwater utility fee was reasonably based on the Landowners' relative contribution to the stormwater management system. The Court stated that review of this issue was limited to competent substantial evidence and that the trial court's findings were to be afforded a presumption of correctness. Accordingly, this Court would not substitute its own judgment for that of the trial court, even if conflicting competent substantial evidence existed, and the trial court's findings would only be reversed if clearly erroneous.

The Court evaluated the arguments of the City and the Landowners separately for pollution and flood control, as the definitions section of Chapter 403, Florida Statutes includes a definition of "stormwater management system" which references both components and falls under the overall primary purpose of pollution control of the chapter. *See* Section 403.031(16), *F.S.* (2001). The Court noted the salt marsh is "subject to the ebb and flow of the tide" of the Gulf, so it was part of the "waters of the United States" as defined by 40 C.F.R. §203.03(o)(1)(i). Accordingly, both parties properly obtained permits for stormwater discharge of pollutants.

The Court noted the difference in permitting for the private Landowners and the City as evidence supporting the Landowners' argument that the Landowners are not part of the City's system and do not contribute to the City's stormwater discharge. The Landowners' obtained Environmental Resource Permits (ERPs) from the South Florida Water Management District for their private stormwater systems which discharge into the salt marsh and ultimately into the Gulf. Once the water is discharged into the salt marsh in compliance with the ERP, the water has merged into and become part of "waters of the United States."

Likewise, the City obtained a NPDES permit as a point source discharging into waters of the United States for its MS4 stormwater treatment system and components as required by the Clean Water Act. 40 C.F.R. §§122.1, 122.26(b)(8). However, the Court noted that the components of the MS4 system do not include the culverts connecting the salt marsh and Gulf, because those culverts qualify as open conveyances that connect waters of the United States and are excluded from the list of MS4 components by 40 C.F.R. §122.26(b)(9). In accordance with this definition, the Court noted that the culverts and salt marsh are separate from the City's system.

The City also argued that the Landowners receive general benefits from trash guards installed in stormwater inlets along College Road as one of the recommended improvements from the 2011 North Stock Island Stormwater Drainage Assessment. However, the Court did not find this argument compelling because the Landowners' stormwater either stayed on their properties or drained into the salt marsh, so the stormwater did not contribute to the need for the trash guards.

Additionally, the Court evaluated the contribution of the Landowners' stormwater discharge to flood control. The Court noted that the City again argued that the Landowners received a general benefit from the City's flood control systems including inlets, catch basins, and outfalls along College Road. However, the Court noted that while these structures are available to the Landowners' stormwater discharge, the stormwater discharge simply does not flow into them. College Road is a publicly maintained road that affords a general benefit to the public including the Landowners, but the stormwater discharge from that road cannot be imputed to the Landowners because the discharges never enter the structures, so there is no specific contribution by the Landowners to the need for those structures. The Landowners' stormwater discharge enters the salt marsh and Gulf through their private systems, while the College Road stormwater discharge enters the City's structures. The City attempted to argue that the culverts located beneath College Road aid in flood and pollution prevention, but the Court did not find this convincing, as the required maintenance of the

culverts was minimal and the City had orally agreed to maintain them. In response, the Landowners argued that the culverts were essentially being funded twice through the State gas tax and through the exorbitant utility fee assessed by the City for minimal maintenance of the culverts, which were the only portion of public infrastructure that the Landowners' stormwater actually entered.

The Court also distinguished a general benefit from a private benefit and the distinction between assessing a utility fee and a tax. The Court stated that the general benefit received by the Landowners was "insufficient to justify the imposition of the City's stormwater utility fee because the landholders do not specifically contribute to the need for any of the planned or existing pollution control devices…" User fees, such as the City's stormwater utility fees, are to be "charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society." Fee-based services are to be paid by choice with the option to decline the governmental service and associated charge. The Landowners had no option to decline the utility fee and received no private benefit which would warrant the fee.

Ultimately, the Court affirmed the trial court's judgment for the Landowners, agreeing that while the rate of the fee assessed need not correlate exactly with actual use due to the estimated nature in which it is based, the difference between the Landowners' minimal contribution to the stormwater system and the City's $368,400 fee assessed for that use was unreasonably excessive. The Court also held for the Landowners in finding the fee to be involuntary, reversing the trial court's decision on the issue of voluntariness. The Court found the ordinance enacted by the City imposed severe penalties for non-payment by the Landowners and Florida case law has historically indicated that the voluntary payment doctrine did not require the Landowners to seek confirmation from the City that the ordinance constituted a threatened exercise of power which compelled payment.

Section 193.461(5) provides an unambiguous, non-exhaustive list of qualifying activities within the definition of 'agricultural purpose'. Under the plain meaning of sections 823.14 and 193.461, *F.S.*, avicultural bird-breeding activities qualify for an agricultural tax exemption because the birds are a "farm product" and are "useful to humans" and therefore are of an agricultural purpose. *Todd McLendon and Shire McLendon v. Gary Nikolits, as Property Appraiser for Palm Beach County*, No. 4D15-4003 (Fla. 4 DCA January 25, 2017).

Since 2006, the McLendons have conducted avicultural activities on a five-acre parcel of land in Palm Beach County, raising wild birds to be sold as pets. From 2006 to 2012, the Property Appraiser granted an agricultural tax exemption to the McLendon property because the property was used for both aviculture and cattle grazing. In 2012, the Property Appraiser denied the agricultural tax classification for 4.5 acres, issuing the classification for 2.25 acres instead, under section 193.461(1), *F.S.* Pursuant to section 196.461(2), F.S. The McLendons then appealed to the Value Adjustment Board of Palm Beach County ("VAB"). The VAB found for the McLendons and held that the 4.5 acres should receive the agricultural classification as requested.

In 2013, the Property Appraiser denied an agricultural tax classification for the avicultural portion of the McLendon property, stating that his office had mistakenly classified aviculture as an agricultural purpose qualifying for the agricultural tax exemption. Again, the McLendons challenged the Property Appraiser's decision to the VAB. In accordance with section 194.035(1), F.S., the VAB appointed a special magistrate for the purposes of taking and making recommendations to the board. The VAB then reversed the Property Appraiser's 2013 decision declassifying the McLendons' avicultural property. As required by section 194.036(1), F.S., the Property Appraiser then appealed, filing a Complaint to Reinstate Property Assessment in circuit court, and denied the agricultural tax classification for the following year.

The trial court conducted a review *de novo* and concluded that the statute intentionally omitted aviculture as an agricultural purpose because the statute specifically stated "poultry" as a qualifying agricultural purpose. The court also expressed concern that should the McLendons' avicultural activities of raising pets be deemed agricultural, a large influx of landowners would then seek the tax exemption for pet breeding in general. The court employed the canon of strict construction, construing the ambiguity regarding tax exemption entitlement against the McLendons, and found in favor of the Property Appraiser. In entering summary judgment for the Property Appraiser, the trial court revoked the McLendons' 2013 agricultural tax classification. The McLendons then appealed.

On appeal, the Court found that subsection (3) establishes a limitation to only lands used primarily for "bona fide agricultural purposes shall be classified as agricultural." The Court noted that when plain meaning and legislative intent are clear, canons of statutory construction are not to be applied. Accordingly, the Court applied the plain meaning of the language of the phrase "includes, but is not limited to" contained within section 193.461(5), F.S., which lists examples of bona fide agricultural activities which would qualify under subsection (3). The Court found that in using the plain meaning and legislative intent to construe the language of subsection (5), the phrase was unambiguous and did not create an exhaustive list of activities.

Additionally, the Court explained that the lack of ambiguity within section 193.461(5), F.S. is also defined by the legislative intent in the drafting of section 823.14(3)(c), F.S. which uses similarly inclusive language in defining 'Farm Product' as "…[A]ny…animal…useful to humans and includes, but is not limited to, any product derived therefrom." The Court found the McLendons' avicultural activities to be "useful to humans" because the wild birds were raised for pets had entertainment and companionship value, so the birds constituted a 'Farm Product' as defined by section 823.14(3)(c), F.S. which is referenced by section 193.461(5), F.S.

In incorporating the plain meaning and legislative intent of the statutes and declining to invoke canons of statutory interpretation, the Court reversed the trial court's decision and found that the avicultural activities conducted on the McLendon property qualify for an agricultural tax exemption.

Florida State University College of Law March 2017 Update

by David Markell, Steven M. Goldstein Professor and Associate Dean for Research

This column highlights recent accomplishments of our College of Law alumni, students, and faculty. It also features several of the programs the College of Law is hosting this spring semester. We hope Section members will join us for one of more of these programs.

Recent Alumni Accomplishments

Justin Green

Tom Kay

Kelly Samek

Kristen Summers

- **Kelly Baker** is working at the Agency for Healthcare Administration as a liaison for Medicaid policy units.
- **Matt Bordelon** is an attorney with the Department of Navy in the Litigation Office. He previously worked as an Assistant Counsel for the U.S. Department of Defense on Land Use & Environmental Issues.
- **Sarah Meyer Doar** has accepted a position as Civil Deputy Prosecuting Attorney focusing on environmental and land use with the Island County Prosecuting Attorney's office in Island County, Washington.
- **Jessica Fletcher** is now the Director of Operations at The Corporate Climate Alliance in Johns Island, South Carolina.
- **Justin Green** was appointed Director of the Department of Environmental Protection's ("DEP") Division of Water Resource Management in October 2016. The Division regulates, among other things, NPDES facilities, safe drinking water, beach and coastal activities, and Submerged Lands and Environmental Resources Coordination. Before moving on to his new position, Justin was the Director of the DEP's Division of Air Resource Management.
- **Tom Kay** was the Campaign Chairman for the Alachua County Wild Spaces & Public Places ballot initiative last fall. It passed with more than 60% of the vote. This one-half percent local sales tax is expected to generate $16 million annually - $130 million over eight years – beginning January 1, 2017. The funds generated will be used for land conservation acquisitions and improvements at recreational parks in Alachua County and its municipalities. Kay is the Executive Director of Alachua Conservation Trust in Gainesville, Florida.
- **Benjamin Melnick** accepted a position as the Program Administrator of a newly- expanded Water Compliance Assurance Program in the DEP's Division of Water Resource Management. In his new role, he will be working to ensure consistency across the state of Florida in the implementation of state and federal water regulations, as well as confirming Florida compliance with Environmental Protection Agency's data reporting requirements.
- **Kelly Samek** has accepted a new position with the National Sea Grant Office in NOAA's headquarters in Silver Spring, MD. She is also currently working with the National Sea Grant Law Center and the Sea Grant Legal Network.
- **Kristen Summers** is working with the Florida Department of Environmental Protection, Office of Water Policy. In this position, she works with the South Florida Water Management District to ensure that its rule amendments and programs are consistent with the Florida Water Resources Act and that it works towards achieving statewide water management goals and objectives.
- **Danielle Thompson** accepted a new position as a Hearing Officer with the Agency for Health Care Administration in Tallahassee.

Recent Student Achievements

- **John Baker**'s article on Mexican oil and gas reform is being published in the Florida State University Law Review.
- **Mackenzie Medich** has received an award of funding from the Rocky Mountain Mineral Law Foundation to attend the Rocky Mountain Mineral Law Foundation's Special Institute "Oil & Gas Agreements: Surface Law in the 21st Century" in May 2017 in Denver, Colorado.

Recent Faculty Achievements

- **Shi-Ling Hsu** presented his draft article, *Co-operation in Law Faculties,* at the 2017 Midwestern Law and Economics Association meeting in Atlanta in September, and another of his draft articles, *The Case for a Carbon Tax 2.0*, at the Vermont Law School Colloquium for Environmental Scholarship, also in September. He was also invited to a special workshop at Winton Capital Management, a London-based investment advisor, to participate in the establishment of a market for climate change-related events. He has published Capital Transitioning, in the journal Transnational Environmental Law, and Inefficient Inequality, in the Indiana Journal of Law and Social Equality.
- **David Markell** published an article on sea-level rise with a particular focus on Florida, Emerging Legal and Institutional Responses to Sea-Level Rise in Florida and Beyond, 42 Columbia Journal of Environmental Law 1 (2016). In February, Prof. Markell participated in a Workshop on International Investment Law and the Environment organized by Columbia Law School's Center on Sustainable Investment. He participated in January in an invitation-only workshop on environmental compliance and enforcement,

entitled Research on Effective Government: A Workshop on Evaluating Innovative Approaches to Foster Environmental Compliance, in Washington, D.C. The workshop was co-sponsored by Harvard Business School, the University of Virginia, and the University of Maryland. Professor Markell also participated in an invitation-only workshop in November on possible organizational structures for environmental governance, held at George Washington University Law School.

- **Erin Ryan** published an essay, "*Multilevel Environmental Governance in the United States*," in Environmental Science. Her article, Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States, 46 Envtl. L. 277 (2016), was noted on Professor Lawrence Solum's Legal Theory Blog. Prof. Ryan was interviewed in a segment on *Capitol Update* about the Florida-Georgia-Alabama interstate water dispute presently before the U.S. Supreme Court, and quoted by *The Hill* in an article about proposals to defund climate-related earth science research by NASA.
- **Hannah Wiseman** published two books -- Hydraulic Fracturing: A Guide To The Environmental And Real Property Issues (with Keith B. Hall) (American Bar Association) (2017), and Energy Law Concepts & Insights (with Alexandra B. Klass) (Foundation Press) (forthcoming 2017). She also published *The Environmental Risks of Shale Gas Development and Emerging Regulatory Responses: A U.S. Perspective*, *in* Handbook Of Shale Gas Law And Policy (Tina Hunter, editor) (Intersentia) (2016) and Disaggregating Preemption in Energy Law, 40 Harv. Envtl. L. Rev. 294 (2016). Professor Wiseman was quoted in *Tacoma News Tribune* on October 10, 2016; *Reuters Legal* on September 30, 2016; *Energywire* on July 8, 2016; and NPR's *Marketplace* on July 5, 2016.

Spring 2017 Events

Spring 2017 Environmental Forum

On January 18, 2017, the College of Law and the Environmental and Land Use Law Section of the Florida Bar co-sponsored the Spring 2017 *Environmental Forum,* entitled "Springs Protection in Florida." Panelists included **Andrew Bartlett**, Deputy Secretary, Florida Department of Environmental Protection; **Janet Bowman**, Director of Legislative Policy and Strategies, The Nature Conservatory, Florida Chapter; **David Childs**, Partner, Hopping Green & Sams; and **Rebecca O'Hara**, Senior Legislative Advocate, Florida League of Cities. **Jessica Farrell**, FSU '18, introduced the *Forum*, and **David Markell**, Steven M. Goldstein Professor and Associate Dean for Research, served as the moderator. A recording of the *Forum* can be viewed here.

From left to right: Professor David Markell, David Childs, Janet Bowman, Jessica Farrell, Rebecca O'Hara, Andrew Bartlett, and Professor Shi-Ling Hsu

Spring 2017 Environmental Distinguished Lecture

Professor Nicole Stelle Garnett, John P. Murphy Foundation Professor of Law, University of Notre Dame Law School, visited FSU as the Spring 2017 Distinguished Environmental Lecturer. A recording of her lecture titled "Planning for Density: Promises, Perils, and Paradoxes" can be viewed here.

Professor Nicole Stelle Garnett

Environmental Certificate Enrichment Lecture

Robert Scheffel "Scheff" Wright, Shareholder of Gardner, Bist, Bowden, Bush, Dee, LaVia, & Wright, P.A., participated as our Environmental Certificate Enrichment Lecture this spring. His lecture, entitled "Optimizing Energy Policy for Long-Term Economic Welfare" was held on February 15th.

Robert "Scheff" Wright

Municipal Utilities and Cooperatives: Transitioning to a Lower-Carbon Future Conference

Municipally-owned utilities and electric cooperatives provide electricity to millions of United States customers. This conference held on March 24, 2014 explored the challenges and opportunities faced by these entities as they transition to lower-carbon energy sources in response to changing market forces. A full day of panel discussions featured energy law experts and municipal and co-op representatives from around the United States. Florida State University College of Law co-sponsored this conference with the University of North Carolina School of Law.

Environmental, Energy, and Land Use Law Student Colloquium

The FSU College of Law Environmental, Energy and Land Use Law program will hold its annual Spring Colloquium for student papers on Wednesday, April 5 at 3:30 p.m. in Room A221 of the Advocacy Center. This is an opportunity for students to be recognized for their research and writing achievements, for them to give a short presentation of their work, and to get feedback on their hard work.

Information on upcoming events is available at http://law.fsu.edu/academics/jd-program/environmental-energy-land-use-law/environmental-program-events. We hope Section members will join us for one or more of these events.

UF Law Update

Submitted by Mary Jane Angelo, Director, Environmental and Land Use Law Program, and Thomas Ankersen, Director, Conservation Clinic, University of Florida Levin College of Law

UF PUBLIC INTEREST ENVIRONMENT CONFERENCE "EPIC"

UF Law 2L Lucien Johnson thanking keynote speaker Dr. Drew Lanham

With a record 380 registrants, UF Law's 23rd Annual PIEC (Public Interest Environmental Conference) at UF Law was retitled EPIC (Environmental Public Interest Conference). Kudos to 2L's Zach Brown, Lucien Johnson and all the Environmental and Land Use Law Program ("ELULP") students and faculty who work all year long to make the PIEC an annual "must attend" event for Florida's environmental law and policy community. Special thanks to co-sponsor Alachua Conservation Trust for helping shape the conference agenda and for providing the venue for Friday night's banquet.

The Program kicked off with a fascinating talk by Clemson wildlife biologist and social commentator Drew Lanham as he drew unlikely but thought provoking comparisons between the range requirements (and choices) of humans and birds, sprinkled with humorous commentary about the unique challenges of birding while black. A morning plenary session chaired by ELULP Professor Alyson Flournoy focused on the challenges of "Land Conservation in the Anthropocene." Other UF faculty who participated or moderated panels include Ben Fernandez (Amending Conservation Easements: The Conundrum of Change), Danaya Wright (Linear Land Conservation: The Right to Roam), Joe Little (The State of the State) and Tanner Amdur-Clark (Conserving Cultural Lands: Preserving the Past: Protecting the Present).

A wide ranging set of concurrent panels and plenary sessions ran the gamut and included the arcane law of syndicated conservation easements, conservation of traditional African American farmlands, urban gardens and woodlots, and ecologically friendly burial grounds. ELULP Director and Professor, Mary Jane Angelo, led a lively lunchtime roundtable discussion centered around the competing roles of land for development and land for conservation in Florida.

The Conference banquet took place at the lodge of co-sponsor Alachua Conservation Trust ("ACT"), the local conservation community's favorite gathering place, featuring local food and refreshments from Fables & Such and First Magnitude Brewery. Former conference chairs banded together to support this year's conference and the Florida Bar Environmental and Land Use Law Section honored the life of member and environmental advocate, Chris Byrd, now resting in the Prairie Creek Conservation Burial Ground adjacent to the ACT lodge.

The Conference concluded the following day with an inspiring and packed house conversation with former Governor and Senator Bob Graham, who now leads the Florida Conservation Coalition.

Governor and Senator Bob Graham "You Can Fight City Hall –And Win"

UF BIODIVERSITY INSTITUTE AWARDS GRANT TO UF LAW SCHOOL, AMAZON DAMS NETWORK, AND TROPICAL CONSERVATION DEVELOPMENT PROGRAM

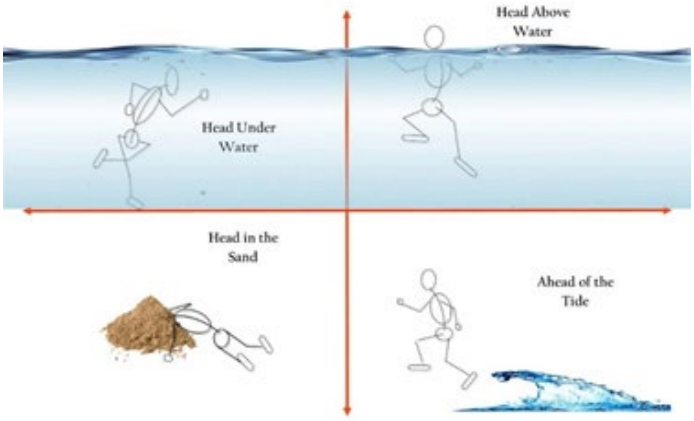
Arara indigenous peoples and fisheries affected by the Belo Monte dam in the Brazilian Amazon. Photo: Simone Athayde.

The newly created UF Biodiversity Institute (UFBI) awarded a Faculty Interdisciplinary Seed Grant to a joint effort by UF faculty, students and Brazilian collaborators of the Amazon Dams Network (Rede Barragens Amazônicas -ADN/RBA), hosted in the Tropical Conservation and Development Program (TCD) in the Center for Latin American Studies, in partnership with the UF Levin College of Law, and the Department of Geography.

The project "*Incorporating traditional ecological knowledge and biocultural diversity into policy-making for infrastructure development across the Amazon*" aims to develop an innovative approach to translate biocultural diversity into development policy and decision-

making, through the creation of a transdisciplinary pilot training program for indigenous "paralegals" – providing indigenous communities with sufficient capacity to participate in large infrastructure planning processes across the Amazon. Conceptually, this term is similar to "para-taxonomist" and "para-ecologist" terms already used to support community-based and citizen science programs for biodiversity assessment and conservation in the region. The framework and tools resulting from this project can serve as a model to inform UFBI strategies and programs for documenting and monitoring human and cultural dimensions of biodiversity, as well as to translate research on biocultural diversity into natural resource management, protection and sustainability.

A CREATIVE COLLISION AT UF LAW: ADAPTING SCENARIO ANALYSIS TO CLIMATE POLICY FRAMEWORKS



UF Law's Environmental and Land Use Law Program ("ELULP") faculty engaged law and graduate faculty and practitioners from across the campus and the country in an interdisciplinary workshop to envision a policy future in the year 2050 under various scenarios of sea level rise and adaptive governance. Under the skillful guidance of scenario analysis guru Juan Carlos Vargas, a principal in the MIT spinoff firm GeoAdaptive, and professional facilitator Heidi Stiller from NOAA, the collaborative approach sought to tease out alternative futures where government acts and where government fails to address the effects of modest and hyper-accelerated sea level rise due to climate change. ELULP faculty Alyson Flournoy, Mary Jane Angelo, Christine Klein Thomas Hawkins and Tom Ankersen helped guide the small group and plenary discussions, while the ELULP's Conservation Clinic Director of Special Projects, Jen Lomberk and ELULP students Alexandra Barshel, Justin Caron, Rainey Booth and Joseph Stuart made sure the workshop's deliberations were captured "on paper." Faculty from resource economics, environmental engineering, geology and architecture joined the ELULP's law colleagues from North Carolina (Sid, Shapiro, Wake Forest) and Louisiana (Rob Verchick, Loyola & Tulane) to contribute their time and expertise, along with policy analysts and researchers from California and Florida, and local officials and policy advocates in the thick of it in Florida. The exercise especially benefited from the creative "speed writing" skills of four (4) professional communicators who constructed narratives of the conditions imagined by the scholars under the four (4) scenario quadrants.

A final brainstorming session yielded an animated discussion of further interdisciplinary collaborations and scholarship, including the potential for bringing the tech tools of virtual reality to bear on imaging policy futures. The workshop was funded by Florida Sea Grant, the ELULP Leonhardt endowment at UF Law and the Florida Climate Institute.


Participants engaging in sea level rise scenario analysis

ENVIRONMENTAL CAPSTONE SERIES

Like the PIEC, this year's Environmental Speaker Series and the associated Environmental Capstone Colloquium are focused on the theme of Conservation. The Speaker Series began with PIEC Opening Keynote, Dr. Drew Lanham's dynamic presentation "Range-Mapping -- Navigating the Future World of Conservation with Inclusion as the Compass". Upcoming speakers in the series include Professor Sandi Zellmer from University of Nebraska College of Law (February 23) speaking on "Le Malheur and Other Misfortunes: The Nature of Private Rights to Federal Resources," Professor Heather Elliott from University of Alabama School of Law (March 16) talking about the challenges of managing abundant resources and giving an update on the ACF Compact litigation. Professor Blake Hudson from Louisiana State University (April 6) will speak about "Harnessing Energy Markets to Conserve Natural Resources: The Case of Southern Forests". Our own Professor Tom Ankersen (March 23) rounds out the line-up, speaking about some of the UF Law Conservation Clinic's recent work. We greatly appreciate the support of our Speaker Series/Capstone sponsors: Hopping Green & Sams and Al Malefatto. For more information on this year's Capstone, please contact Alyson Flournoy at flournoy@law.ufl.edu.

permitting in Northwest Florida for larger land use projects are usually processed as a Joint Individual Permit by the Corps[1] and the DEP[2]. Although a joint application is used, the state and federal programs have separate laws and rules that apply, and a permit must be issued by both the Corps and DEP. These processes provide the regulatory backdrop for this case story.

As required under its governing regulations[3], the Corps must base its decision to issue a permit on policies common for all applications for federal permits. At its heart is the public interest test which mandates that the decision to issue a permit be based on evaluation of probable impacts of the proposed activity including cumulative impacts on a number of factors and resources. The final decision is based on a balance of impacts to conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, flood plain values, land use, water supply and conservation, water quality, property ownership, and in general the needs and welfare of people. Since most applications also involve discharges regulated by the Federal Clean Water Act, projects must also comply with the Environmental Protection Agency's 404(b)(1) guidelines.

The measure and importance of each factor is subjective and difficult to quantify. Competent professionals working on behalf of applicants and regulators frequently disagree resulting in back and forth negotiations and compromises. The regulations and compromises contribute in large part to the length of review. The regulators are primarily concerned with the cumulative impacts to the watershed and the use of mitigation as a means for reducing those impacts to acceptable levels. However, agreement on the nature, amount and location of compensatory mitigation is often protracted, and contributes to the long review timeline.

Early in 2000, as the number of landowner permit applications reached fourteen (14) it became clear that two key issues plagued the regulators-cumulative impacts and mitigation. Small-scale onsite mitigation was often ineffective and hard to enforce over time. Without understanding what buildout would look like, it was difficult for regulators to gauge the long-term effect of a series of individual applications on the function and viability of natural systems. Further complicating the issue, decisions were being made on a project-by-project basis on applications in multiple county and municipal jurisdictions.

Convinced the landowner must have a master plan, the Corps and its federal partners[4] required a master plan before issuing any more permits. The Corps also considered requiring an environmental impact statement (EIS) for the region before any more permits would be processed. In order to assess cumulative impacts and obtain a view of buildout. The landowner insisted that it did not have a master plan and insisted that the prospect of a multi-year "all stop" while an EIS was completed was unacceptable. The Corps and the landowners knew business as usual could not continue but could not yet agree on a path forward.

In Steps the Voice of Reason

Throughout the time leading up to the impasse, the North Florida Permits Branch Chief from the Corps' District office and the landowner's lead regulatory official discussed and lamented the problems confronting all involved. The Corps and the landowners ultimately agreed that instead of the mandatory pre-application meetings required under the joint Corps/DEP individual permitting process, the parties should meet routinely to discuss larger issues and attempt to create a more regional context within which to review applications. The Corps convened the first of a series of meetings that took place over three years. The discussions included the state, all of the federal partners, and the landowner. Each shared the goal to develop a way to move forward that would enable the public and private sides to meet their mandates.

At the first meeting the Branch chief simply stated, "We have to move beyond the issue of a landowner master plan. They either really don't have one like they say or they have one and they aren't going to show it. Either way, we have to move on and think regionally and craft a way forward". At this meeting the landowner's representative explained the owner's business goals, objectives and business operations. This explanation proved valuable for the ensuing discussions. The parties agreed to hold quarterly management level meetings, and formed a technical team consisting of field biologists from each entity. The technical team met and conducted joint field work on a regular basis to establish methodologies, review and validate data collected and to make recommendations to the larger stakeholder group.

Through this process a framework was constructed for a 48,000 acre multi-drainage basin region extending across several political jurisdictions. The framework addressed the key issues that are the most time consuming and contentious in the permitting process[5]. It answered the question about build-out and provided the assurance of viable, connected systems across the region. Future individual project proposals would be evaluated for compliance with the agreed upon framework-which had already worked out all the "hard stuff".

Federal Implementation Vehicle

Not long after the framework began to take shape, focus turned to finding the best implementation mechanism. The challenge was how to incorporate the regional framework into a binding format that could withstand legal and administrative scrutiny to be used as a basis for permit review. The Corps approves projects through the broad categories of either Standard Permit also known as an Individual Permit or a General Permit. Landowner projects were already being reviewed under the Individual Permit provisions, each being evaluated on a case-by-case basis and subjected to the full public interest review, companion federal agency consultation and public notice. Other types of Permits were considered but deemed inappropriate. A Regional General Permit (RGP) was determined to be the most appropriate mechanism.

A RGP would allow similar projects to be evaluated consistent with the framework developed by the group and would provide predictability of the permitting outcome for the landowner. The term "general permit"[6] means a Department of the Army authorization that is issued on a

A BETTER WAY
from previous page

nationwide or regional (District-wide or more limited geographic scope) basis for a category of activities when those activities are substantially similar in nature and cause only minimal individual and cumulative impact. General Permits are a way to reduce the burden of the regulatory program on the public and ensure timely issuance of permits while effectively administering the laws and regulations which establish and govern the program[7]. General Permits may be issued by a Division or District Engineer after compliance with all the other procedures of its regulations.

This is an important provision. The General Permit must undergo the same level of scrutiny as Individual Permits on the Public Interest Test and be subjected to other agency consultation and public notice. The General Permit must demonstrate that the activities are: (i) substantially similar in nature; and (ii) cause only minimal individual and cumulative impact. It is not a free pass nor does it receive a lower level of review. General Permits are reviewed every five years and an assessment of the cumulative impacts of work authorized under the General Permit is performed at that time, if it is in the public interest to do so.

A project wishing to qualify under the General Permit process must demonstrate compliance with the conditions of the General Permit to receive specific authorization to proceed, but as explained later, this is not a separate permit application or approval process. Proposed projects not consistent with the conditions of a General Permit may still receive authorization via a "Standard Permit." The Standard Permit application, however, must be individually evaluated and coordinated with third parties, including the federal and state resource agencies. If a project proposed within the boundaries of the RGP does not fall into the category of activities for which the RGP was issued, it can proceed after undergoing Standard Permit review and issuance.

In this case story, the Corps issued RGP SAJ-86 in 2004 covering 48,000 acres. The Permit authorizes fill-in of non-tidal waters for the construction of residential, commercial, recreational and institutional projects including building foundations, building pads and attendant features (including stormwater management facilities) that are necessary for use and maintenance of the structures. Industrial development and marina construction were not included in the RPG and are required to undergo Individual Permit review. The RPG authorized two mitigation banks for compensating mitigation for the authorized impacts.

Consistent with the RGP regulations, the SAJ-86 provides an Individual Project Approval (IPA) process utilizing a project compliance checklist which must be completed and approved before construction begins and provides for an annual reporting requirement. Allowable uses, impacts, mitigation and other performance criteria are clearly articulated. If an applicant believes its project qualifies, it may demonstrate compliance by completing the required IPA checklists and submittal components. The review agencies must respond to the applicant no later than 60 days. Upon receipt of Individual Project Approval, the project can proceed.

continued...

State Implementation Vehicle

The federal permit was only one part of the regulatory process to which development impacting waters and wetlands in the watershed was subjected. It also required a permit from the DEP. The DEP was an active partner and participant throughout the regional framework formulation process. DEP determined that an Ecosystem Management Agreement (EMA) could be used to codify the regional framework at the state level. At the time, the EMA was a little used statutory tool[8] available to provide flexibility in the form of regulatory authorization as long as a project meets the substantive criteria that normally applies and in addition, provides a Net Ecosystem Benefit beyond what is normally required under DEP's rules. The companion EMA was issued in 2004 and was the first EMA in the state issued for land development. It constituted state dredge/fill and stormwater approval as well as the federally required Water Quality Certification.

In issuing the EMA, DEP determined that the regional framework provided numerous Net Ecosystem Benefits including conservation at a regional landscape scale, an extensive wildlife corridor connecting state-owned lands, a high degree of habitat diversity and stormwater treatment at a higher standard than was the rule at the time.

Lessons Learned and Transportability

RGP SAJ-86 was approved in 2004, withstood a challenge in federal court, and is in effect today having been reauthorized in 2009 and 2014[9]. Subsequently in 2015 RGP-SAJ-105 was issued for an area adjacent to the SAJ-86 area, and a third related RGP (SAJ-114) is pending[10]. All of these permits have or will have upon approval a corresponding EMA as part of the regulatory process to satisfy the state requirements.

The RGP SAJ-86 experience demonstrates that when a group of informed and motivated professionals come together, even if specific objectives differ, much can be accomplished. However, commitment to the process and vigilance is needed to keep the group focused and moving forward. As one participant observed "herding them is like herding cats". A skilled facilitator may be needed to keep each side from retreating to its respective "corner" and digging in its heels. Often there is disagreement for which there must be compromise but civility must always prevail.

It is critical that all regulators and the landowner buy into the process. In this case story, there was consistent and engaged participation which enhanced the relationships and trust building even in the face of disagreements as each representative worked to achieve their respective goals with an appreciation of the other parties' similar objectives.

Despite the intensive use of resources up front, the RGP/EMA process was attractive to the government parties. At the forefront was the possibility of a much better environmental product that exceeded usual permit standards and focused on the watershed instead of small discrete areas within the watershed. In the end, the use of a combined RGP/EMA process resulted in reduced staff time per project when compared to the labor and logistics required for normal permitting scenarios. The RGP/EMA review also produced a more predictable process and outcome.

Although a RGP/EMA can be prepared like the original SAJ-86 without a companion large scale master land use planning effort such as a sector plan[11] , it is more efficient to overlay a RGP on an adopted sector plan or other large scale comprehensive plan amendment. It would save time, effort and money and more effectively connect the land use vision to the long-term environmental resource function. The conservation and environmental considerations required under the sector plan statutory requirements mesh readily with the public interest test components required for Corps permit review. Currently, seven approved Sector Plans are located in the State[12].

A RGP/EMA process can significantly expedite permit review. This fast track provides a striking advantage that enables real estate developers who choose to use the process to bring new product offerings to market more quickly.

As Florida's existing coastal cities build out and we are forced to look farther inland for the creation of new communities, combining large scale land use planning initiatives like sector planning with the conservation framework and permitting process of RGP's provides a powerful tool to assure balanced long- term growth and a healthy economy for Florida. A healthy Florida economy is inexorably linked to a healthy environment.

About the authors:

David G. Tillis is a retired land use planning and entitlement practitioner living and fishing in St Augustine.

Marie G. Burns is retired from the Army Corps of Engineers and is currently working with the EcoLogix Group, an environmental strategy firm.

Janet G. Llewellyn is retired from the Florida Department of Environmental Protection after 32 years and is currently consulting on water resource issues.

Thomas O'Neil Estes is President of Icarus Ecological Services in St. Augustine and Panama City, Florida.

Robert M. Rhodes is a Jacksonville attorney and real estate consultant and a former chair of ELULS.

Endnotes

1 Authorized under The Rivers and Harbors Act and Section 404 of The Clean Water Act as more specifically articulated in 33 CFR Parts 321-324 and Part 330.

2 Chapters 403 and 373 F.S. and rules 62-312 and 62-25 Florida Administrative Code (F.A.C.).

3 33 CFR 321-324.

4 US Fish and Wildlife Service, National Marine Fisheries, and EPA Atlanta.

5 Wetland delineation, assessment of wetland quality, allowable wetland impacts by wetland quality category, location and amount of mitigation, identification of two wetland mitigation banks, identification of upland and wetland resources for conservation, listed species protection, and establishment of a compliance tracking and reporting system.

6 See 33 CFR 325.2(e).

7 The Corps currently has 17 active RGP's in Florida and another under public notice.

8 Section 403.0752, F.S. One notable difference between the federal and state implementation vehicles is that the Corps RGP may be used by any applicant within the area covered by the RGP. However, an EMA is a legal agreement between the DEP and other signatories. This makes an EMA most useful where a single or only a few signatories are part of the agreement. If a non-signatory wishes to use an EMA it requires a signatory to be co-applicant.

9 http://www.saj.usace.army.mil/Missions/Regulatory/Source-Book/

10 http://www.saj.usace.army.mil/Missions/Regulatory/Source-Book/ http://www.saj.usace.army.mil/Missions/Regulatory/Public-Notices/Tag/72501/saj-114/

11 Section 163.3245, F.S. A sector plan now overlays the area covered by RGP SAJ-86.

12 http://www.floridajobs.org/community-planning-and-development/programs/community-planning-table-of-contents/sector-planning-program

MEMBERSHIP APPLICATION
ENVIRONMENTAL AND LAND USE LAW SECTION
WEBSITE: WWW.ELULS.ORG

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EMPLOYER/AGENCY/LAW SCHOOL: _____

ADDRESS: _____

CITY/STATE: _____ ZIP CODE: _____

PHONE: (____) _____ E-MAIL ADDRESS: _____

FLORIDA BAR NO: _____ DATE OF ADMISSION: _____

PROFESSIONAL SPECIALTY(IES)/AREAS OF INTEREST: _____

_____

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CHECK ALL COMMITTEES OF INTEREST TO YOU:

☐ AFFILIATE MEMBERSHIP
☐ CLE
☐ ELUL TREATISE
☐ FELLOWSHIPS
☐ LAW SCHOOL LIAISON
☐ FL BAR JOURNAL COLUMN
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☐ ENERGY
☐ MEMBERSHIP
☐ PUBLIC INTEREST

MEMBERSHIP OPTIONS / DUES

The Florida Bar dues structure does not provide for prorated dues; your Section dues cover the period from July 1 to June 30. Your application and check should be mailed to The Environmental and Land use Law Section, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

I AM... (check one)	MEMBERSHIP OPTION	ANNUAL DUES
	ATTORNEY – Admitted to Florida Bar	$40
	AFFILIATE – Professionals and Faculty	$50
	AFFILIATE – Students	$20

I understand that all privileges accorded to members of the section are accorded affiliates and law students, except that affiliates may not advertise their status in any way, and neither affiliates nor law students may vote, or hold office in the Section or participate in the selection of Executive Council members or officers.

CERTIFICATION: I hereby certify that I have never been denied admission to any bar, or been the subject of any proceeding questioning my moral character, disbarred from any legal bar, convicted of a felony, expelled from any University or Law School, or investigated for fraud, misappropriation or mismanagement of funds.

SIGNATURE: _____ DATE: _____