



Update on the Legal and Planning Issues of Climate Change Facing Florida

by Erin L. Deady

Without tracing a complete history back to approximately 2006, the State of Florida has had a relationship with climate change, sea level rise (“SLR”), and greenhouse gas (“GHG”) management longer than most might think. For this overview, the focus is on recent advancements in state law and local strategies utilized across the state. Local governments continue to be on the frontlines of navigating these concepts. One thing is clear, the law surrounding climate change, flooding, and adapting to changing future environmental conditions are principles that are not going away, but evolving and growing in scope and depth, quite literally.

I. Climate Change Law in the State of Florida and Local Government Action

Florida was an early adopter of climate change policy when then-Governor Jeb Bush signed into law the Renewable Energy Technologies and Energy Efficiency Act in 2006.¹ A major component of the Act was an advisory board for state energy policies. In its 2007 report, the Florida Public Service Commission detailed steps and a schedule for the development of a state climate action plan.²

The report recommended setting targets to reduce GHGs, developing an inventory of GHGs, and putting the state in a position to lead by example through education and unification of Florida’s energy governance. State-level activity on climate change continued throughout the Crist administration. One bill created a cap and trade program for utilities, set up a renewable portfolio standard for energy, and addressed automobile

efficiency and emissions.³ Another piece of legislation addressed issues such as green building, efficient land use patterns, energy conservation, GHG emissions in planning, and prompted the Florida Building Commission to make recommendations on energy efficiency, among other provisions.⁴

Within the current state administration, agencies are still working on climate change related issues. This administration has focused more on technical assistance to local governments and emergency management planning, with additional support activities. The Florida Fish and Wildlife Conservation Commission is conducting a significant amount of data collection and monitoring of changing conditions impacting Florida species’ and their habitats.⁵ The Florida Department of Health has continued work on the relationship between health and climate change, one example being the Building Resilience Against Climate Effects (“BRACE”) initiative, which includes partnerships with institutions such as Florida State University. The Florida Department of Economic Opportunity (“DEO”), through both its own statutory mission and funding from the federal government, has been doing extensive work on SLR, including pilot planning efforts in several communities.⁶ Additionally, the DEO has sought to provide technical assistance for local governments (through review and comment) on compliance with legislation passed in 2015 related to addressing “peril of flood” issues in Comprehensive Plans. The DEO has also created numerous

guides and compilations of resources for local governments that want to start addressing SLR in their policy framework.⁷ Most recently, the Florida Department of Environmental Protection has formed the Florida Resilient Coastlines initiative, awarding an initial wave of grant funding to local governments for coastal adaptation and resiliency planning. In addition, the Department will continue its Coastal Partnership Initiative grant program, which funds some resiliency projects implemented by local governments.⁸

a. Another Drop in the Bucket: Coastal Resiliency Planning

Many local governments are incorporating climate adaptation strategies into their Comprehensive Plans. One main strategy is establishing “Adaptation Action Areas”- an option for local governments to address SLR adaption as part of their Coastal

See “Climate Change” page 12

INSIDE:

From the 17-18 Chair	2
On Appeal.....	3
June 2018 ELULS Case Law Update.....	4
So You Want To Be An Expert Witness?..	7
The Benefits of Teaching Environmental Law and Policy to Engineers and Science Majors	9
Working to Protect the Nation’s Waters: Stetson’s Institute for Biodiversity Law and Policy Files Amicus Curiae Brief in Opposition to Suspension of Clean Water Rule	10

From the 17-18 Chair

by Janet E. Bowman, Immediate Past Chair

The Section Annual meeting and ELULS 2018 Update Seminar was held June 14th and 15th as part of the Florida Bar Convention at the Hilton Orlando Bonnet Creek. Events included the ELULS Executive Council meeting and Joint Reception with the Administrative Section on June 14th and the ELULS Update and Annual Luncheon on June 15th. At the Annual Luncheon, new officers for the upcoming year were installed including David Bass as Chair. The Annual Update program included participation by several administrative law judges and a member of the Florida House, administrative law, procedure and ethics, an environmental legislative panel and the popular General Counsel panel discussion of hot topics from the water management districts, and state agencies.

During this Spring, members of the Executive Council engaged with other sections and bar leadership in monitoring the development of language by the Constitutional Revision Commission that restricts the ability of former cabinet and executive agency heads, and local government officials to lobby certain entities on issues of policy, appropriations, or procurement for 6 years following public service. Through the expression of concerns by interested section members and others, language was read into the record of the Constitution Revision Commission distinguishing between “lobbying” and representing

clients in administrative and quasi-judicial proceedings. While the ELULS ultimately did not adopt a formal legislative position, the Executive Council believed it important to monitor the trajectory of this amendment. I would like to particularly thank our Board of Governor’s representative, Larry Sellers, for his guidance and advice in navigating the Florida Bar’s process for Section engagement in adopting legislative positions.

Thanks everyone for your participation in the ELULS this year!



CURRENT CHAIR DAVID BASS DISCUSSING HIS EXCITEMENT FOR THE UPCOMING YEAR



IMMEDIATE PAST CHAIR JANET BOWMAN PRESENTING THE STEPHENS/ REGISTER AWARD TO EXECUTIVE COUNCIL MEMBER JOAN MATTHEWS

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

David J. Bass, Orlando	Chair
Jonathan Harrison Maurer, Tallahassee	Chair-elect
Rachael Santana, West Palm Beach	Secretary
Susan Roeder Martin, West Palm Beach.	Treasurer
Janet E. Bowman, Tallahassee	Immediate Past Chair
Jacob T. Cremer, Tampa	Editor
Nikki T. Williams, Orlando	Co-Editor
Clay Shaw, Tallahassee	Production Artist
Cheri Wright, 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.

ON APPEAL

by Larry Sellers, Holland & Knight

Note: Status of cases is as of June 1, 2018. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Lieupo v. Simon's Trucking, Inc., Case No. SC18-657. Petition for review of decision by the First District Court of Appeal in which the court certified the following question as one of great public importance: "Does the private cause of action contained in s. 376.313(3), Florida Statutes, permit recovery for personal injury?" *Simon's Trucking, Inc., v. Lieupo*, Case No. 1D17-2065 (Fla. 1st DCA, April 18, 2018). Status: Notice filed April 30, 2018.

The Richman Group of Florida, Inc. v. Pinellas County, Case No. SC18-456. Petition for review of decision by the Second District Court of Appeal reversing final judgment awarding the Richman Group of Florida, Inc., over \$16.5 million in damages under 42 U.S.C. § 1983, based on the trial court's conclusion that Pinellas County violated Richman's substantive due process and equal protection rights by denying Richman's proposed amendment to the county's land use plan. 42 Fla. L. Weekly D2526a (Fla. 2nd DCA 2017). Status: Notice filed March 20, 2018.

Pacetta, LLC v. The Town of Ponce Inlet, Case No. SC17-1897. Petition for review of Fifth District Court of Appeal decision reversing trial court judgment that the town is liable for taking as a result of the enactment of a planned mixed use redevelopment of waterfront property, including by referendum. 42 Fla. L. Weekly D1367b. Status: Petition for review denied on January 23, 2018; application for extension of time to file a petition with U.S. Supreme Court granted to June 21, 2018.

FIRST DISTRICT COURT OF APPEAL

Paul Still v. SJRWMD, Case No. 1D17-1938; *Paul Still v. SRWMD*, Case No. 1D17-1940; *Ichetucknee Alliance, Inc., v. SJRWMD*, Case No. 1D17-2273; and *Ichetucknee Alliance, Inc. v. SRWMD* Case No. 1D17-2275. Four appeals from final orders dismissing separate petitions filed by appellants to challenge the St. John's River Water Management District's orders approving the regional water supply plan. Status: Each final order was affirmed *per curiam* on April 23, 2018.

THIRD DISTRICT COURT OF APPEAL

Cruz v City of Miami, Case No. 3D17-2708. Appeal from trial court order granting the city's motion for summary judgment, concluding that a consistency challenge is limited to whether the challenged development order authorizes a use, density or intensity of development in conflict with the applicable comprehensive plan. In so ruling, the trial court applied the 2d DCA's holding in *Heine v Lee County*, 221 So. 3d 1254 (Fla. 2d DCA 2017). Status: Notice of appeal filed December 13, 2017.

Florida Retail Federation, Inc., et al. v. The City of Coral Gables, Case No. 3D17-562. Appeal from final summary judgment upholding the City of Coral Gables ordinance prohibiting the sale or use of certain polystyrene containers, based upon trial court's determination that three state laws preempting the ordinance are unconstitutional. Status: Oral argument held on December 13, 2017.

FOURTH DISTRICT COURT OF APPEAL

Everglades Law Center Inc. v. SFWMD, Case No. 4D18-1220. Appeal from Order Denying Writ of

Mandamus Against Plaintiff South Florida Water Management District and Entering Final Judgment on Defendant Everglades Law Center's Counterclaim. The Everglades Law Center sought to require disclosure of the transcripts of a "shade" meeting held by the South Florida Water Management District Governing Board involving discussions regarding mediation between the district and its Governing Board in attorney-client sessions. The order concludes that the transcripts of such discussions constitutes communications at a mediation proceeding within the meaning of Section 44.102(3), Florida Statutes, and therefore is exempt from disclosure under the public records law. Status: Notice of appeal filed April 20, 2018.

Maggy Hurchalla v Lake Point Phase I LLC, Case No. 4D18-763. Petition for expedited writs of prohibition, mandamus and certiorari related to trial court rulings during and after a trial. The jury found Ms. Hurchalla liable for \$4.4 million in damages on a claim of tortious interference with a contract for a public project, due to her public comments in opposition to the project. Status: Petition for writ of prohibition dismissed on May 11, 2018; to the extent the petition seeks certiorari relief, it is denied; to the extent the petition seeks mandamus, the writ is dismissed without prejudice to file a separate petition for writ of mandamus; motion for rehearing filed May 24, 2018.

City of West Palm Beach v. SFWMD, et al., Case No. 4D17-1412. Appeal from final order granting environmental resource permit for extension of State Road 7 in Palm Beach County Status: Oral argument set for June 19, 2018.



LEGAL *fuel*
The Practice Resource Center
of The Florida Bar

We know you're great, but now we need the rest of the world to know it, too.

Visit
LEGALfuel.com
to find out how.

June 2018 ELULS Case Law Update

by Gary K. Hunter, Jr., Hopping Green & Sams, P.A.

***Pinellas Cty v. Richman Grp. Of Fla.* No. 2D16-3279 (Fla. 2d DCA November 29, 2017).**

The Court held that Pinellas County did not deny Richman's substantive due process and equal protection rights by denying a proposed amendment because the denial was rationally based and was related to a legitimate fiscal concern. Richman proposed a change to the comprehensive plan to rezone Industrial Limited (IL) land to Residential Medium. The Court held that the preservation of IL designated land for target employers was a rational basis for denying Richman's proposal.

Richman sought to amend Pinellas County's Future Land Use Plan ("FLUP") for the IL designated property to Residential Medium to develop the land. Pursuant to the County's Special Act, only a local government with jurisdiction over the subject property may submit a proposal to amend the FLUP to the planning council. The Council then reviews the amendment and makes a recommendation. If the Council recommends approval, it forwards the proposal to the Board of County Commissioners (the "BCC") for a hearing and vote in the BCC's capacity as the County Planning Authority (CPA). If the CPA denies the proposal, the substantially affected person can seek a hearing with an Administrative Law Judge (the "ALJ"), which is limited to a review of the facts. The ALJ's recommendation is then forwarded to the CPA for a final decision. The Special Act does not mandate that a proposed amendment that is consistent must be granted.

Richman's proposal was forwarded to the CPA with a recommendation to approve the amendment. At the hearing, hundreds of local residents opposed the amendment with specific concerns related to impact on property values and lost industrial space. The BCC, acting as the CPA, denied the amendment, citing Resolution 06-3 which articulated the need to "reserve industrial parcels for target employers." Richman then obtained a hearing before an ALJ to determine whether the amendment

was consistent with the criteria in the rules governing amendments to Pinellas County's FLUP. The ALJ found that Resolution 06-3 was not a relevant source of criteria to the amendment because it had not been repeated, paraphrased, or adopted in the Countywide Rules. The ALJ ultimately recommended that the amendment be approved, but this finding was not binding on the CPA. The ALJ's order came before the CPA's final hearing where the CPA again denied the amendment.

Richman then filed a § 1983 claim in Circuit Court, alleging violations of its equal protection and substantive due process claims. Richman claimed that its equal protection rights were violated because the CPA treated Richman differently from similarly situated applicants by denying the proposed amendment without any rational basis for the CPA's action or any rational relationship between the denial and government interest. Richman claimed its substantive due process rights were violated by the arbitrary and capricious denial without any rational basis for the decision. Richman prevailed at the trial court stage and was awarded \$16.5 million dollars. Pinellas County appealed.

The Second District Court of Appeal (the "Second DCA") limited its review to whether the CPA's denial of the amendment was arbitrary and capricious. Substantive due process claims are evaluated under the rational basis test that states that a legislative act will not be considered arbitrary and capricious if, in the zoning context, it has a rational relationship to a legitimate public welfare concern. If the legislative decision is fairly debatable, then there is no denial of substantive due process. The fairly debatable standard requires approving a planning action if reasonable persons could differ as to its propriety. The Court found that reasonable persons could differ as to the propriety of the CPA's decision and found that the trial court erred in holding that the CPA's denial of the amended was not fairly debatable. The CPA was required to make the final legislative decision, limited only by the ALJ's

findings of fact. The trial court ruled that the CPA's decision violated the Special Act's limitations by ignoring the ALJ's findings, but the Second DCA found this to be error, holding instead that the ALJ's findings only limited the CPA's decision as to the findings of fact, not matters of law like rational basis. The ALJ did not find that the CPA lacked a rational basis or that the preservation of IL land was not a rational basis for the CPA's decision. The trial court also erred in holding that the ALJ's determination that the CPA's decision was not fairly debatable based on the finding that the IL designation was inconsistent with the criteria in the rules. The ALJ did not find that all of the potential IL designation uses would be inconsistent with the surrounding uses and did find that certain target employers could use the property despite the surrounding limitations. The CPA could conclude that the amendment was inconsistent with the rules, but the CPA was not barred from considering the property's use for target employers.

The Second DCA also opined that the trial court erred in its application of *Island, Inc. v. City of Bradenton Beach*, 884 So. 2d (Fla. 2d DCA 2004). The *Island* court held that if a property was classified by an improperly designated use, reasonable persons could not differ in concluding that the proposers of the amendment were not entitled to the amendment. *Island* was improperly applied here because the current IL designation was not imposed erroneously or that the property was being used in a way inconsistent with its current designation.

***Ocean Concrete, Inc. v. Indian River Cty., Bd. of Cty. Comm'rs* No. 4D16-3210 (Fla. 4d DCA March 14, 2018).**

This case addresses application of the Bert Harris Act (the "Harris Act"). The Fourth District Court of Appeal (the "Fourth DCA") reversed the trial court's decision that Ocean Concrete failed to prove entitlement to relief under the Harris Act. Ocean Concrete wanted to develop a concrete

continued...

CASE LAW UPDATE

from previous page

batch plant on land zoned Industrial Light (IL). Concrete batch plants were permitted under the IL designation. During the course of the permitting process, public opposition to the proposed concrete plant became widespread. The Board of County Commissioners (the “BCC”) voted to change the zoning code to restrict industrial uses, like the concrete plant, to General Industrial (IG) districts and also voted to not grandfather in applications previous to the change. Ocean Concrete made an administrative appeal and its application was reinstated. Ocean Concrete’s site plan application ultimately failed because the Community Planning Director did not find that Ocean Concrete had a vested right to development under the old code. Ocean Concrete then added the Harris Act claim and the trial court found that Ocean Concrete did not prove that the County had violated the Harris Act.

The Fourth DCA concluded that the trial court erred in its determination that the plant was not a non-speculative use and that the plant was not financially viable. The term “non-speculative” refers to the use of the land itself, not the financial viability of the project, and applies when a party argues for using land for a purpose not provided for by the designation. The use here was expressly provided for by the IL designation, so it could not be non-speculative because it was reasonably foreseeable. The trial court’s finding that the plant was incompatible was flawed because an area that is zoned for a particular use (IL) is *per se* compatible with the surrounding land uses.

The trial court also erred in finding that Ocean Concrete did not have a reasonable, investment-backed expectation for the existing use of property. A reasonable, investment-backed expectation depends on the physical and regulatory aspects of the property, and neither renders Ocean Concrete’s expectation unreasonable. The trial court relied on federal takings cases rather than Florida case law was misplaced because the Harris Act proclaims itself as “separate and distinct” from the federal law of takings. Under Florida law, nothing about the physical or regulatory aspects of the

property rendered Ocean Concrete’s expectation unreasonable. The court reversed and remanded for a trial to assess damages under the Harris Act.

***Fish v. Daws*, 2018 Fla. App. LEXIS 4867.**

The Daws own and reside on an inholding in the Blackwater Wildlife Management Area that is managed by the Florida Wildlife Commission (the “FWC”). The FWC regulates hunting licenses and the number of days available to hunt with deer dogs per year (44 days). The Daws suffered a series of trespasses on their property related to the deer dog hunting in the WMA. The Daws filed complaints to the FWC and the FWC took various ameliorative measures. The Daws claimed that the trespasses rose to the level of inverse condemnation because they were deprived of the right to exclude others from their property and because the trespasses were a nuisance. The trial court agreed, and issued an injunction requiring the FWC to abate the nuisance of trespass. The FWC appealed and the injunction was automatically stayed; but, the trial court vacated the stay to protect the Daws’s rights.

The First District Court of Appeal (the “First DCA”) reversed the decision, dissolved the injunction and remanded for summary judgment for the FWC. On de novo review, the court considered whether sovereign immunity bars an inverse condemnation claim when the plaintiff fails with a constitutional claim. The Daws’ takings claim failed because they failed to allege either type of taking: a permanent occupation or a deprivation of all economic use of the land. The court determined that the sporadic trespasses during only 44 days of the year did not constitute a permanent taking. The court also determined that there was no deprivation of economic use of the land.

The FWC has a sovereign immunity defense based on the separation of powers doctrine to the Daws’s nuisance claim. Fla. Stat. § 768.28(1) provides a broad waiver of immunity to the government, and even where the government may owe a duty of care, the separation of powers doctrine can support sovereign immunity for certain discretionary or planning level governmental functions. The court found that the FWC owed no duty to the Daws to stop third parties from

trespassing or committing criminal acts. The court further held that even if the FWC did have a duty, sovereign immunity would nonetheless bar the Daws’ claim because the FWC’s functions here were purely discretionary and inherent in the actions of the government.

The DCA went on to conclude that the injunction violates the separation of powers doctrine and is too broad. The judiciary violates the separation of powers if it directs an administrative agency to perform its duties in a way that is not feasible. The injunction functionally stops the issuance of hunting licenses, which means that FWC’s licensing is the nuisance stopped by the injunction. Thus, the injunction stops the FWC from performing its duties in a feasible way. The FWC was entitled to summary judgment because FWC was protected from the Daws’ claims by sovereign immunity.

In a dissent, Judge Lewis disagrees and argues the trial court’s holding was proper on every point and concludes that sovereign immunity does not apply to the Daws’ claims. The trial court viewed the Daws’ claim as a request that the “flood” of trespassers on their property be considered a nuisance and a taking. The trial court found that sovereign immunity does not apply to the FWC here. Lewis points out that the majority’s ruling will bar the Daws from pursuing an inverse condemnation claim on a basis not expressly ruled upon by the trial court and not argued by the parties on appeal. Lewis also approves of the trial court’s use of *Crowley Museum & Nature Center, Inc. v. Southwest Florida Water Management District*, 993 So. 2d 605 (Fla. 2d DCA 2008) for the proposition that immunity does not bar inverse condemnation claims. Lewis also concludes that FWC does owe a duty of care and that its actions are not discretionary in nature, and that the injunction was proper.

***Town of Ponce Inlet v. Pacetta, LLC*, 226 So. 3d 303, 2017 Fla. App. LEXIS 8842**

This is the third filing related to this dispute. Pacetta has been attempting to develop 16 acres of contiguous land in Ponce Inlet since 2003. Ponce Inlet has a 2003 comprehensive plan and a 2004 Riverfront Overlay District (the “Overlay”). The previous litigation

continued...

CASE LAW UPDATE

from previous page

pertained to whether Pacetta could develop the land under Ponce Inlet’s current comprehensive plan. During this time, public opposition to the development mounted and a new town council was elected with councilors adverse to Pacetta’s plan. The town also adopted two year moratorium on new development. The town then adopted a new comp plan that effectively barred Pacetta’s planned development. *Pacetta I* held that the 16 acres constituted one parcel of land.

In the instant suit, Pacetta filed a complaint seeking damages for inverse condemnation, a denial of substantive due process and equal protection, a denial of procedural due process, and a Harris Act claim. The issue before the trial court was whether Pacetta had established a vested right to construct and operate the planned development submitted

to Ponce Inlet. The 2003 and 2004 comprehensive plan and Overlay absolutely prohibited Pacetta’s proposal. But the court had to determine whether, despite the comprehensive plan amendments and the Overlay, Pacetta had a right based on equitable estoppel to construct the development. The trial court ruled for Pacetta on all counts. In *Pacetta II*, the DCA reversed the Harris Act order holding Ponce Inlet liable, finding that Pacetta did not rely in good faith on assurances by town officials because they lacked the authority to unilaterally amend the comp plan via representations to Pacetta.

Pacetta sought to recover the value of the property that was, allegedly, *de facto* taken by the government without a formal exercise of power. In this kind of taking, the property owner is deprived of the economic benefit or productive use of the property. The DCA, applying the doctrine of judicial estoppel, concluded that trial court erred in determining that

Pacetta’s inverse condemnation claim should not be applied as a single parcel analysis since in *Pacetta I* the landowner had successfully argued the land was a single parcel. The DCA then concluded that under a “Lucas” analysis, there was no total taking of Pacetta’s property because it was not completely deprived of economic benefit. The DCA then remanded the case to the lower court to apply the “Penn Central” partial takings analysis to the properties as a whole. In so doing, the jury award of damages for Pacetta were set aside.

Finally, the DCA directed the trial court to enter a summary judgement for the Town on both the State and Federal procedural and substantive due process claims. Pacetta asserts that it made an “England” reservation on the federal claims. This issue is likely to be addressed in a subsequent federal proceeding since the DCA maintains that Pacetta did pursue both issues in state court.



Take advantage of your exclusive member benefits.



Save up to **15%** extra on our most popular magazines!

	Cover Price	Your Price
People.....	\$269.46	\$61.00
Time.....	\$259.48	\$29.95
The New Yorker.....	\$375.53	\$99.99
Sports Illustrated.....	\$249.50	\$39.00
Consumer Reports.....	\$90.87	\$30.00
Vanity Fair.....	\$59.88	\$24.00
Southern Living.....	\$64.87	\$19.95
Money.....	\$59.88	\$14.95
Conde Nast Traveler.....	\$54.89	\$12.00
Vogue.....	\$47.88	\$19.99

Over 40 more magazines to choose from on offers.buymags.com/flabar

Order up to \$60, get an extra 5% off.
 Order \$60-\$100, get an extra 10% off.
 Order over \$100, get an extra 15% off!



Visit offers.buymags.com/flabar to shop our sale!



THE FLORIDA BAR
 Magazine Program

So You Want To Be An Expert Witness? ---

Marc J. Rogoff, Ph.D.

I have worked for over 38 years in the solid waste management industry and have provided my opinions on solid waste topics in more than 350 consulting engagements, 150 publications, and 8 textbooks. Some consider me an expert on this subject. But, like many environmental professionals, my knowledge base of the legal profession and civil trial procedure has been quite limited—fashioned on what I picked up in watching re-runs of Perry Mason, inhaling the series of John Grisham novels, watching trials played out before the American public, and what I was taught in my high school civics lessons. So, my recent experience being engaged for the first-time as an expert witness has been an educational experience and I have learned that much of what I thought I knew about how expert testimony works in a legal proceeding is quite different. I have prepared this article to provide other experts who may be in the same situation with some information and lessons learned in the hope that it is helpful as they wade into the expert testimony waters. If you are already an accomplished expert witness, this article may not be for you. But, if you are new to the expert witness arena, this article is for you.

When I received a telephone call from an attorney inquiring whether I might be interested in serving as an expert on a major lawsuit involving his client, I was intrigued. His client was aware of my long career and reputation in the solid waste management industry and I liked the idea of being considered and serving as an expert in such an important case. But, at the same time, I was somewhat concerned about the prospect of being cross-examined and picked apart on the stand during trial like I have seen happen to witness so many times in popular media.

To make an informed decision about whether to accept this expert engagement, I interviewed my firm's legal counsel, talked to friends who had served as experts, and researched whether my firm had any potential conflicts of interest in my taking on this assignment. After confirming

that there were no conflicts and receiving the advice from my support team, I decided to take the plunge and accept the expert engagement. As a first step, I sought information targeted at someone like me to provide a general overview of what I could expect to transpire and what my role would be during the upcoming civil proceeding. Unfortunately, I found that there is little, if anything, written for the non-lawyer on expert witnesses. The following sets forth the lessons learned, or if you will a basic summary of the civil process and the role of the expert in such cases.

What Is An Expert Witness or Consultant?

In general, experts are those persons who have special training, skill, education, or expertise beyond the experience of ordinary members of the public. Lawyers involved in environmental litigation use experts in a variety of ways. For example, the expert or consultant may serve solely to evaluate the case and help determine whether the claim has merit. Experts may conduct onsite or laboratory testing to prove or disprove a point or to help build or defend the case. In other cases, the expert may serve solely as an expert witness at the trial. The major takeaway here is that experts are used in a variety of ways and that a new expert should understand what type of expert they are being asked to be.

Discovery

American jurisprudence provides a formalized process for collecting relevant data and information during a legal proceeding. This process, typically described as "discovery", is designed to provide the defendant and plaintiff with the same information so that they are working from the same factual basis. As an expert, there will be a formal process for how you get your information. You need to understand that process. In general, you need to keep track of all the information you review and provide reference to all documents used as a basis for your opinions. Any documents that you generate during your engagement may need to be provided to the other side (subject to certain expert

disclosure restrictions). *Federal Rule of Civil Procedure 26* covers discovery and expert discovery – Cornell has a good excerpt here https://www.law.cornell.edu/rules/frcp/rule_26

Pleadings and Motions

Pleadings and motions are written by the lawyers. Experts may be asked to provide consulting and/or support to certain aspects of these that may be included as attachments. Often, it is helpful for the expert to review these pleading as they provide good background information—in some cases that has been stipulated by both sides. The plaintiff has the burden of proof in the lawsuit. Typically, the opposing party, the defendant denies. Again, the expert can be helpful in developing the formal complaint or crafting the answers.

Expert Reports

Experts are generally used in litigation to help the judge or jury's understanding of the facts of the case. In this way, they can first help to establish and interpret the pertinent facts of the case by sifting through the often-voluminous amount of paper obtained during discovery. Calculations, articles, and memos used to develop the expert report as well as the report itself, must be made available to the opposing side. There are certain requirements on what must be included in expert reports – this can vary by jurisdiction. In general, the expert must include all opinions and the basis for the opinions, including necessary references.

Depositions

The "deposition" is a direct way to gather evidence for trial from anyone with any relevant knowledge of the case, including the experts hired by either party. Witnesses are sworn to tell the truth by a court reporter and a transcript is prepared. Questioning is designed to probe the expert's biases, potential weaknesses, and to accelerate the expert's learning curve on facts surrounding the case or the industry in general.

Table 1 contains some useful tips for experts. Be prepared. Prepare for a long day-rest and eat. Remember to

continued...

EXPERT WITNESS

from previous page

Speak clearly and verbally (no hand signals). Make sure you understand the question and then only answer the question. Pause after each question is asked to allow counsel on your side to object if needed. Spell out complicated words and define acronyms for the reporter. Avoid verbal tics (ums, uhs, likes)—instead pause

The Trial

At trial, the expert witness will be used in direct examination to lay out the facts of the case and the story in terms a lay person can understand. The role of the expert is to unravel the mysteries of the case in terms of their special expertise. Know the trial exhibits that your counsel plans to use to guide your testimony. Be ready for clarifying questions from the judge and address them respectfully and directly.

Settlement

Prior to and during the trial there

is always a possibility that the parties can negotiate an amicable settlement. In this case, they would jointly inform the presiding judge that the case has been settled. Therefore, from an expert's perspective, all papers used in preparation of the case must be preserved until the case is settled.

A Personal Side

The case for which I served as an expert witness involved claims of tens of millions of dollars. Both parties had invested millions of dollars in researching their complaint and defense as the case weaved its way through the Federal district court system. Experts on both sides provided focus for the case and eventually provided a mechanism by which both sides evaluated the merits of their case and preparation prior to trial. This eventually translated into a decision to settle the case before opening statements were made to the jury. Having never served as an expert witness before this case, I was a little anxious about testifying in court. And

yes, I was happy when the case was settled! However, the training and advice given to me by the defendant's counsel during my engagement gave me invaluable insight and experience for future situations. I expect that my expert report was helpful in narrowing the gulf between the two sides and supporting the progress toward a settlement, resolving the dispute and freeing up valuable court time.

Best of luck to all of you new expert witnesses. I hope my sharing of this experience and information helps you successfully navigate the process.

Marc J. Rogoff, Ph.D. is a Senior Consultant with Geosyntec Consultants. He can be reached at 813 810-5547 or mrogoff@geosyntec.com

References

Luber, Steven and Elizabeth Bales, *Expert Testimony: A Guide for Expert Witnesses and the Lawyers Who Examine Them*, Lexis Nexis: National Institute for Trial Advocacy, 2014.

Rogoff, Marc J., *So We Want to Be An Expert Witness*, Environmental Practice 2(1) March 2000.

Table 1 – Tips for Testifying

1.	Tell the truth and nothing but the truth. Careers and cases have ended when untruths are given in depositions or at trial.
2.	Think before you answer. Take time to consider your answer. This will at least allow your attorney enough time to object to the question or line of questioning.
3.	Answer the question asked. Even if you think the question is not relevant, don't follow-up with the question you think the examiner should have asked.
4.	Don't volunteer information. Quite literally answer the question asked and then stop. It is not your role to educate the examiner. Once you have answered, remain quiet. The examiner will use the pregnant pause and stare at you to get you to further elaborate on your testimony.
5.	Don't answer a question that you don't understand. If you don't understand the question, tell the examiner that you don't understand the question. Ask him/her to rephrase—it's not your job to ask the questions!
6.	Don't guess. Be as specific as you can, but never guess. If you can't recall, tell the examiner, that you can't remember.

The Benefits of Teaching Environmental Law and Policy to Engineers and Science Majors

By John K. Powell, J.D., P.E.

The relationship between lawyers and technical consultants is a complex and important one. It takes a diverse team of experts to successfully navigate agency rules and overcome the many obstacles that engineering and construction projects are typically confronted with. In addition to expertise in the law, the most successful environmental lawyers will possess a basic understanding of the underlying scientific and technical issues of their case or project. Similarly, attorneys and their clients prefer hiring technical experts with a comparable understanding of the legal system and the regulatory processes before them.

The FAMU-FSU College of Engineering is taking the unique and innovative step of offering engineering students the opportunity to study environmental law as part of their course curriculum. Since 2013, a three-credit Introduction to Environmental Law and Policy course specifically tailored to undergraduate and graduate level engineering students has been available.

While the curriculum is governed by the requirements of the Accreditation Board of Engineering and Technology, and therefore limited on the amount of elective courses that can be offered towards a student's degree, the course has nevertheless been worked into the regular rotation as the benefits are undeniable. The course, offered again this spring, continues to be well-received by participating students. Dr. Lisa Spainhour, Professor and Interim Chair of the Department of Civil and Environmental Engineering at the FAMU-FSU College of Engineering, observed that "as much as engineers may prefer to gravitate towards design calculations and data, the reality is that legal issues permeate all aspects of our society, including science, engineering and construction."

Today's professionals must possess a fundamental understanding

of environmental law and policy in order to identify and avoid potential legal pitfalls, and be prepared to effectively work with administrative agencies to satisfy regulatory requirements. Engineers with a basic knowledge of environmental law are better positioned to serve their clients and fulfill project objectives on-time and under budget.

This Introduction to Environmental Law and Policy course provides an overview of the U.S. legal system and the major federal environmental laws that practicing engineers frequently deal with, such as the Clean Water Act, Clean Air Act, National Environmental Policy Act, Resource, Conservation and Recovery Act, and the Endangered Species Act. For many new engineers, the need to obtain environmental permits is often one of the first unanticipated challenges they face. Understanding the legal foundation of those regulatory requirements is beneficial to overall project success.

The course also addresses developing and sometimes controversial issues such as climate change, environmental justice, and hydraulic fracturing, and is intended to further develop students' critical thinking skills. "The course helps students recognize the complex and interdependent relationship between science, engineering and the law in furthering both environmental and natural resources protection and while supporting efficient development," said Spainhour.

For a broader perspective, the course instructor is both a Registered Florida Professional Engineer and a Florida Bar licensed Attorney. At the conclusion of the course, students are able to identify the major environmental laws, their primary purpose and function, and the administrative agencies implementing them; and recognize the potential impact on proposed engineering and construction-related projects. The course is also designed

to enhance their ability to perform effectively on interdisciplinary and multidisciplinary teams. Unlike traditional law classes, learning is accomplished not only through textbook study and an analysis of relevant case law, but also supplemented with site visits to local environmental projects, guest speakers, in-class exercises, and a review of current events in the media related to environmental law and policy. Recognizing the global nature of environmental issues, international law is an important component of the course, comparing and contrasting environmental requirements with difficult trade considerations. The role of alternative dispute resolution is also explored with students participating in mock mediations that simulate real-life environmental disputes.

This new course serves as a model for other colleges across the country to follow to better prepare their engineering students for careers outside the classroom. Based on its success, and recognizing the many benefits, the course is now offered to students in other disciplines as well such as environmental science, planning, and public policy.

For some students, the class confirms an already existing interest in the study and practice of law and policy. For other students, it is inspiring potential new career paths with multiple possibilities including politics and public service. At a minimum, this innovative new course is developing well-rounded professionals better prepared to serve their clients and the community.

John K. Powell is an Adjunct Instructor at the FAMU-FSU College of Engineering, and the Director of the City of Tallahassee's Environmental Regulatory Services and Facilities Management Department.

Working to Protect the Nation’s Waters: Stetson’s Institute for Biodiversity Law and Policy Files Amicus Curiae Brief in Opposition to Suspension of Clean Water Rule

The Institute for Biodiversity Law and Policy (“Biodiversity Institute”) at Stetson University College of Law continues to work to protect the Nation’s aquatic resources. Professor Royal Gardner (Director of Stetson Law’s Biodiversity Institute) and Erin Okuno (Foreman Biodiversity Fellow at Stetson Law) recently co-authored an amicus curiae brief in opposition to the suspension of the 2015 Clean Water Rule, which defined the geographic coverage of the Clean Water Act. They co-authored the brief with a team of attorneys, including Dr. Steph Tai (Associate Professor of Law at University of

Wisconsin Law School), Kathleen Gardner (an attorney in New York), and Christopher Greer (Park Jensen Bennett LLP). On May 7, 2018, the team filed the amicus brief in the U.S. District Court for the Southern District of New York on behalf of the Society of Wetland Scientists, a leading professional association of wetland and aquatic scientists around the world.

Promulgated by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers in June 2015, the Clean Water Rule defined the term “waters of the United States” (“WOTUS”), which describes

those waters that the Clean Water Act protects and the limits of the agencies’ geographic jurisdiction under the Act. As noted in the amicus brief, the Clean Water Rule was designed to “identify[] as jurisdictional those waters—including streams and wetlands—that support the objective of the Clean Water Act ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’”

Since 2017, the agencies have been engaged in a multi-step rulemaking process to consider whether to rescind the Clean Water Rule and

continued...



PROFESSOR GARDNER AND STUDENTS ON A SWAMP WALK AT BIG CYPRESS NATIONAL PRESERVE

PROTECT THE NATION'S WATERS

from previous page

replace or revise the definition of WOTUS. The agencies have not completed that rulemaking process, but on February 6, 2018, the agencies published a final rule (the "Suspension Rule") that added an "applicability date" to the Clean Water Rule, effectively suspending the Clean Water Rule for two years. Several states and organizations quickly filed suit against the agencies to challenge the Suspension Rule.

New York, nine other states, and the District of Columbia filed suit in the U.S. District Court for the Southern District of New York. On May 1, 2018, they filed a motion for summary judgment in the case, arguing that the agencies' suspension of the Clean Water Rule was invalid. Professor Gardner, Erin Okuno, and their team filed the amicus brief on behalf of the Society of Wetland Scientists in support of the states' motion for summary judgment. The amicus brief asserts that the Suspension Rule is arbitrary and capricious because the agencies refused to consider the scientific basis of the Clean Water Rule.

As the brief explains, the Clean Water Rule was based on the best available science, including a report titled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence," which analyzed over 1,200 peer-reviewed publications. The report, often referred to as the "Connectivity Report," summarized the scientific understanding of how streams and wetlands contribute to the chemical,

physical, and biological integrity of downstream waters. The Connectivity Report is a key component of the scientific basis for the Clean Water Rule. The amicus brief maintains that when the agencies suspended the Clean Water Rule, the agencies' refused to consider the scientific basis of the Clean Water Rule, which renders the Suspension Rule invalid.

Professor Gardner explains that "every aspect of the Clean Water Act's implementation requires the use of science. When the agencies disregard science, their judgments deserve no deference." The amicus brief is available online at <http://stetso.nu/qpl0m>. [Note: The views expressed in the brief do not represent the views of Stetson University College of Law or any other institution identified in the brief. Affiliations of counsel are provided in the brief for identification purposes only.]

The Institute for Biodiversity Law and Policy coordinates Stetson Law's environmental programs and initiatives and serves as an interdisciplinary focal point for educational, research, and service activities related to local, national, and international biodiversity issues. The Biodiversity Institute hosts international speakers and conferences, and it coordinates externships, courses, and seminars on a variety of topics, including wetland law and policy, environmental law, natural resources, and international environmental law. For more information about Stetson Law's Biodiversity Institute or how to support its programs, please visit <http://www.stetson.edu/law/international/biodiversity> or contact Erin Okuno at okuno@law.stetson.edu.



Listen to on-demand educational interviews and stay on top of what's happening with The Florida Bar.

LISTEN FOR FREE:
www.floridabar.org/PRI



Download The Legal Talk Network Apps:



LEGAL TALK NETWORK
www.legaltalknetwork.com

Management Element. Adaptation Action Areas can be areas for which the land elevations are below, at, or near mean higher high water, areas with a hydrologic connection to coastal waters, or areas which are designated as evacuation zones for storm surge, and other areas impacted by stormwater and flood control issues.⁹ This local mechanism is reinforced by the definition codified in the Florida Community Planning Act, for “Adaptation Action Area,” which is “a designation in the coastal management element of a local government’s comprehensive plan which identifies one or more areas that experience coastal flooding due to extreme high tides and storm surge, and that are vulnerable to the related impacts of rising sea levels for the purposes of prioritizing funding for infrastructure needs and adaptation planning.”¹⁰ The definition leaves discretion to the local government on which types of areas can fit the designation.

Several local governments have already identified Adaptation Action Areas in application to specific stormwater projects, inlet management, and natural resource protections. In practice, this strategy can designate local infrastructure needing special consideration when planning for the life of government investments such as roads, bridges, facilities, and stormwater infrastructures. Policies for planning within the Adaptation Action Area include: utilization of best available data and resources; regional collaboration; and vulnerability assessments to identify “at risk” public infrastructure, investments, and assets that could be impacted by rising sea levels. The City of Ft. Lauderdale is one example of a local government that has designated infrastructure-related Adaptation Action Areas.¹¹

In 2015, the Florida Legislature passed “An Act Relating to the Peril of Flood,”¹² which includes many topic areas such as flooding, data gathering, pre-disaster planning, and post-disaster mitigation planning. However, the most important changes are new requirements for Coastal Management Elements in Comprehensive Plans. Local jurisdictions must now, within their Comprehensive Plans,

include “(a) redevelopment component that outlines the principles that must be used to eliminate inappropriate and unsafe development in the coastal areas when opportunities arise.”¹³ While the redevelopment component itself is not new, what is required to be addressed in the component has been supplemented with the following:

1. Creating development and redevelopment principles, strategies, and engineering solutions that reduce the flood risk in coastal areas which results from high-tide events, storm surge, flash floods, stormwater runoff, and the impacts related to sea-level rise;
2. Encouraging the use of best practices development and redevelopment principles, strategies, and engineering solutions that will result in the removal of coastal real property from flood zone designations established by the Federal Emergency Management Agency;
3. Identifying site development techniques and best practices that may reduce losses due to flooding and claims made under state issued flood insurance policies issued;
4. Being consistent with, or more stringent than, the flood-resistant construction requirements in the Florida Building Code and applicable flood plain management regulations set forth in 44 C.F.R. part 60;
5. Requiring that any construction activities seaward of the coastal construction control lines established pursuant to Section 161.053, F.S., be consistent with Chapter 161, F.S.; and
6. Encouraging local governments to participate in the National Flood Insurance Program Community Rating System administered by the Federal Emergency Management Agency to achieve flood insurance premium discounts for their residents.

Section 163.3178(2)(f)1, F.S., now identifies SLR as an issue that must be addressed in the “redevelopment principles, strategies, and engineering solutions” in order for local jurisdictions to comply.¹⁴ Local governments actually required to have Coastal Management Elements in their Comprehensive Plans enjoy broad discretion as to how they comply with this new mandate.

Currently, there is no deadline for compliance. Recognizing that Section 163.3191(1), F.S., still requires local governments to evaluate their plans at least once every seven (7) years to determine if amendments are necessary to reflect relevant changes in state law, and that jurisdictions also have the authority (pursuant to Section 163.3191(2), F.S.) to make a determination that amendments are necessary sooner than the seven-year requirement, these new requirements could be met in traditional review cycles or sooner.

Incorporating these requirements into the Coastal Management Element of a Comprehensive Plan is but one of the many strategies for climate mitigation policy development. Some jurisdictions have developed a separate Comprehensive Plan element to provide for future conditions planning. Others have increased the amount of new policies throughout existing elements to address climate change and SLR or use a combination of both strategies.¹⁵ Utilizing the optional element approach to address these issues within a Comprehensive Plan probably affords a local government the widest latitude to address their issues at the most individual level through direct policies and commitments to further develop data to support future policy or both.

One example of an approach is the City of Sarasota’s Comprehensive Plan which details a wide range of climate change and SLR planning strategies in the Environmental Protection and Coastal Island Element. This section promotes the reduction of GHG emissions community wide and in city operations as well as requires SLR and storm surge data to be considered in the planning for future infrastructure. If proposed development is within a vulnerable area, resiliency strategies must be incorporated into the design.¹⁶

In short, many local governments are beginning to use their Comprehensive Plans to effectuate policy in the climate change, energy, and sustainability areas. State-wide planning trends have various common undercurrents, which include future planning based on solid data and SLR projections, infrastructure vulnerability analyses, limiting expenditures in coastal areas susceptible to storm damage, and reducing GHGs. These

continued...

CLIMATE CHANGE

from previous page

strategies can be incorporated when updating Comprehensive Plans by including goals, objectives, and policies to increase resiliency. The importance of considering state policy and regulatory structure as a floor, not a ceiling, when dealing with climate change and SLR issues is a shift that is already occurring at the local level in many jurisdictions across Florida.

b. Rising Tensions: Permitting and Regulation

Other areas ripe for consideration of future conditions that will evolve due to SLR include the “Coastal Construction Control Line” (“CCCL”) permitting program¹⁷ and the Environmental Resource Permit (ERP) program.¹⁸ Both programs regulate the construction of structures either directly along the coast or activities that alter the flow of surface waters. In order to preserve our coastal systems, the CCCL permitting program regulates structures and activities altering coastal dunes systems or causing beach erosion.¹⁹ The ERP program sets requirements for activities impacting surface waters, such as construction creating stormwater, dredging, and the filling of wetlands.²⁰ Currently, neither program explicitly requires an analysis of “future conditions,” meaning the life of newly built structures or the efficiency of systems may have a higher risk of compromise. While a project may have undergone a regulatory review process, the level of service contemplated for that structure or system may not be able to be maintained in the face of these changing weather and environmental conditions.

c. Drainage, Road Infrastructure, and Levels of Service

Maintaining roads and drainage in the face of rainfall and tidal flooding has long presented difficulties due to vast areas across the state having low topography. Many roads already suffer from a lack of adequate drainage capacity. Coastal roads are also largely impacted by hazards such as erosion. As rainfall and tidal conditions change over time, these issues will be exacerbated.

While not directly addressing “sea level rise” or “climate change,” *Jordan v. St. Johns County* is instructive about what local governments face regarding roads—and other infrastructure.²¹ Property owners sued St. Johns County for a “taking” of private property because the Atlantic Ocean was impacting the only road access to their homes and the County had been unable to keep the road in the equivalent condition as other County roads. After the property owners lost at the trial court level, the Appellate Court ruled, “[t]he County must provide a reasonable level of maintenance that affords meaningful access, unless or until the County formally abandons the road.”²² In many areas where the road used to exist, a new wet sand beach inlet has washed it away. Estimates of the cost to repair the road (at that time) were over \$13 million up front and \$5.7–8.5 million every 3–5 years for a one road project. Government inaction was specifically raised as a cause for potential takings for the first time in any Florida court proceeding. However, the court did not opine that a taking had occurred with the facts in the case.

continued...



LEGALfuel
The Practice Resource Center
of The Florida Bar

**LegalFuel connects
Florida Bar members with
strategic tools designed
to help you fuel your law
practice with increased
efficiencies & profitability.**

Visit
LEGALfuel.com
to learn more.

**manage your practice.
fuel your business.**

CLIMATE CHANGE

from previous page

Ultimately the case settled including, among other elements, an agreement on the levels of service for the road in the future, recognizing the future environmental constraints impacting the quality of the road. During the case, the County passed an Ordinance relating to levels of service for “environmentally-challenging” locations.²³ During 2016’s Hurricane Matthew, the road and properties at issue in the *St. Johns County* case were heavily damaged.

In Monroe County, a Pilot Study completed in January 2017 analyzed the impacts of tidal flooding in two (2) neighborhoods severely impacted by King Tides in October 2015 and October 2016. The effort developed numerous road elevation/stormwater options based on specific flooding scenarios. At the conclusion of the effort, the County adopted a Resolution, including a design standard accounting for SLR and a maximum threshold of seven (7) days of annual flooding for the useful life of the project.²⁴ The final report also included a draft Ordinance building upon the *St. John’s County* environmentally-challenging locations concept, adding a design standard and local conditions analysis for feasibility.²⁵ The County has recently issued a procurement to begin design of the pilot projects in each of the two neighborhoods that were ultimately developed. As of this writing, the County is also nearing the issuance of another procurement for a more comprehensive countywide analysis to develop a phased approach for addressing road elevation projects based on their level of vulnerability in the future.

The final case study is Broward County’s development of the “Future Conditions Map Series.” This series of maps is a comprehensive approach to future conditions planning related to stormwater management. The maps consider future groundwater levels SLR projections, future precipitation projections, and County drainage capacity. Currently, the County has required any permitting activities altering the flow of surface water to consider the new groundwater surface map titled, “Plate WM 2.1 – Future Conditions.”²⁶ This map has been incorporated into the Broward County

Code of Ordinances. The County is in the process of developing a second map, titled “Future Conditions Broward County 100-year Flood Elevation Map.” This map will represent predicted changes in surface flood elevations and impacts on drainage caused by a 100-year flood event. The purpose is to identify coastal and western areas across the County that will lose storage capacity or have reduced ability to drain to coastal areas. The data allows for better design of stormwater management systems that should ultimately increase the useful life of those projects because they account for future conditions.²⁷

With regard to services, Florida courts distinguish between “upgrading” and “maintenance” of infrastructure. The Florida Supreme Court has held that “the decision to upgrade” infrastructure is considered a “planning-level function, to which absolute immunity applies.”²⁸ In contrast, this same Court has held that failing to “maintain” infrastructure is an “operational” activity that exposes the government to potential liability.²⁹ When the government provides this type of infrastructure, it “thereby assume[s] the duty to maintain and operate the system so it [will] properly drain off expected excess water and prevent flooding.”³⁰ Liability is a fact-specific inquiry considering the design, function, and history of project operations for that infrastructure. In the face of changing future conditions, like unprecedented rainfall volumes and tidal inundation, these principles are likely to be applied in the context of SLR and climate change. Liability may be raised especially when previously constructed projects can no longer function as designed due to no fault of the local government operationally. The challenge is determining what “maintenance” or “operations” are feasible considering future changing conditions. This issue is also exacerbated by political pressures which influence capital project planning that squarely peg the legal nuances between maintaining (operating) infrastructure against deciding to upgrade it. Local governments may be forced to consider new level of service standards for future maintenance and design.

The case law and these case studies highlight new realities that local governments need to consider for infrastructure construction, improvement,

or maintenance. These realities include: 1) the obligations to even provide (or not) infrastructure service; 2) a duty to maintain; 3) a duty to manage expectations by establishing levels of service accounting for future conditions in a transparent and clear manner; and 4) the value of notice of what will be possible in the face of changing environmental conditions. These concepts will need to be considered by local government while approving future developments, and planning capital projects and investments.

d. Seawall Design Criteria

Some local governments have adopted policies requiring increases in minimum seawall heights within their jurisdictions in an attempt to fortify their SLR defense. The City of Miami Beach recently amended its Public Works Manual to require the raising of seawall heights in certain situations. As amended, the manual now requires new public seawalls be constructed to a minimum elevation of 5.7 feet NAVD (from 3.2 feet previously).³¹ Existing seawalls that are not being repaired or replaced are permitted to remain so long as they meet the minimum 4.0 feet NAVD with the structural design to accommodate extension to 5.7 feet NAVD in the future. This new height takes into account SLR projections, design storm events, and coincides with the typical lifespan of a seawall.³²

The City of Fort Lauderdale has also passed several ordinances which respond to SLR. Issues addressed by these ordinances include the relationship of dock height in seawall calculations, maximum and minimum heights for seawalls, and ensuring public and private seawalls are consistent so tidal protection systems remain effective. The group of policies also addresses maintenance of seawalls in good repair and a citation system for violation enforcement.³³ Still, other local governments have commenced discussions, which include potentially raising seawall heights to combat SLR. For example, the Town of Hillsboro Beach workshopped the issue on February 16, 2017 and seems to be heading toward enacting a similar seawall ordinance.³⁴

II. Regional Collaboration

Regional collaboration has taken
continued...

CLIMATE CHANGE

from previous page

many forms, such as the Southeast Florida Regional Climate Change Compact (including Palm Beach, Broward, Miami Dade and Monroe Counties), the One Bay Resilient Communities in the Tampa Bay Region, and new regional efforts in East Central Florida (Brevard and Volusia Counties). These initiatives provide collaboration, resource exchange, outreach, and data sharing. In particular, these initiatives have helped achieve consensus on future estimates of SLR for consistent decision-making across jurisdictional boundaries and chosen regional planning efforts.³⁵ Florida's Regional Councils also have examples of climate projects such as the Northeast Florida Regional Council's discussions with the business community through its Public/Private Regional Resiliency ("P2R2") Committee³⁶ and the South Florida Regional Planning Council's pilot and grant funded initiatives.³⁷

The Southeast Florida Regional Climate Compact ("Compact") was formed in 2010 as a mechanism for coordinating climate change mitigation, adaptation techniques, and policy development collaboration across the four participating counties. The Compact has successfully developed the *Unified Sea Level Rise Projection (2015)*, which serves as a consistent baseline for projected SLR throughout the Southeast region. This regional standard is critical for understanding vulnerability and developing risk informed adaptation strategies.³⁸ As Southeast Florida continues to grow and adapt to future conditions, the Compact will be a regional vehicle guiding development by local governments in the region.

The One Bay Resilient Communities working group ("One Bay") is a regional partnership of private and public organizations promoting a regional effort to increase sustainability and resiliency throughout the Tampa Bay region (Pinellas, Hillsborough, Manatee, and Pasco counties). The partnership includes: Southwest Florida Management District, Tampa Bay Regional Planning Council, Tampa Bay Estuary Program, Tampa Bay Regional Transportation Authority, Tampa Bay Partnership Regional, and

the Urban Land Institute Tampa Bay District Council. In August 2015, One Bay published their *Recommended Projection Sea Level Rise in the Tampa Bay Region*.³⁹ This report provides guidance using regional tide gauges and the SLR projections offered by the National Oceanic and Atmospheric Administration ("NOAA"), for low, intermediate low, intermediate high, and high estimates.⁴⁰

In East Central Florida, regional collaboration regarding resiliency and climate change preparedness has largely been driven by the East Central Florida Regional Planning Council, the Brevard County Extension, and other academic and private sector partners. In late 2017, the East Central Florida Regional Planning Council ("ECFRPC") received a grant from the Florida Department of Environmental Protection to develop a Regional Resiliency Action Plan. The purpose of the planning effort is to stimulate collaboration between Volusia and Brevard Counties in regards to climate preparedness and SLR planning. The Regional Resiliency Action Plan is still in its development phase, but will acknowledge regional vulnerabilities and set the tone for future planning in East Central Florida.⁴¹

Similarly, the North East Florida Regional Council (Nassau, Baker, Duval, Clay, St. Johns, Putnam, and Flagler Counties) has a work group known as P2R2 committee, which is developing a regional strategy for increasing resiliency to SLR and climate change. So far, P2R2 has completed a regional vulnerability assessment and action plan. Next, they are working on adoptable strategies to be implemented throughout the various jurisdictions in the region.

In conclusion, regional collaboration to address SLR and climate change is critical for developing uniform standards, obtaining state and federal funding assistance, and exchanging best practice information. There has been much success in Florida at the regional level and it is growing with the benefit of providing assistance to local governments that comprise the area to further or jumpstart their own initiatives.

III. Wading Through Uncertainty: Emerging Legal Theories

While some have stated that the "law of climate change" is not a large

portion of our national jurisprudence, reoccurring climate change issues are a blend of old legal theory with new novel issues. For example, property owners have traditionally been responsible for maintaining floodwaters at the individual parcel level. However, managing floodwaters takes on new meaning when localities are now faced with yearly 500-year or 1000-year events. To date, apportioning liability to those responsible for actual climate change has been a theory (usually nuisance) advanced for years with little success due to the challenge of identifying definitive cause and effects. But new theories are evolving. A short summary follows for some of those theories and how they might signal where the law of climate change is heading.

a. Agency takings. In 2005, following hurricane Katrina, the residents of St. Barnard Parish, Louisiana filed suit against the United States Army Corps of Engineers ("Corps") for a "take" under the Fifth Amendment, due to extensive flood damage experienced in the St. Bernard Parish and Lower Ninth Ward. Six landowners were successful in seeking to recover lost property values of \$3.16 million plus interest. The complaint alleged that the Corps was liable for failure to maintain or modify the Mississippi River Gulf Outlet Canal (commonly referred to as the "MRGO"), and as a result of their inaction they should be culpable under a takings theory. In May of 2016, a federal judge found the Corps liable.⁴² The decision has since been appealed and reversed by the U.S. Court of Appeals for the Federal Circuit Court.⁴³ The reversal holds that the Corps cannot be liable under a takings theory due to inaction or the failure to modify or maintain the MRGO, and that if the Corps is at all culpable, liability perhaps could be found in tort.

However, there is case law to support a Fifth Amendment taking due to government-induced *temporary* flooding, caused by a government constructed and operated dam, which increased stormwater

continued...

damage to a plaintiff's personal property.⁴⁴ Thus, a future Fifth Amendment claim against the Corps or a local government premised on government action causing or increasing mere temporary damage to personal property may gain traction; think, tidal flooding from seasonal King Tides.⁴⁵

Finally, in *St. Bernard Parish*, the United States Court of Appeals for the Federal Circuit, held on appeal that the plaintiffs' tort claim could not be successful because the lower court applied an incorrect causation analysis and the record lacked evidence to establish the construction or operation of the MRGO caused the plaintiff's injury. The lower court should of considered a comparison of the flood damage that occurred to what would have occurred had there been no government action at all (i.e. as if the MRGO had never been built).⁴⁶ The correct causation analysis for flood cases considers, "the impact of the entirety of government actions that address the relevant risk."⁴⁷ Here, the full range of government activities was not considered, such as those undertaken to protect the region against hurricane damage apart from the MRGO (i.e. a subsequent levee project that mitigated the impact of MRGO and may have placed the residents in a better position than if there was no government interference at all).⁴⁸ Thus, future flood causes would benefit from approaching causation by considering the totality of government action related to a relevant risk and not by just pinpointing isolated government actions.

b. Factoring Adaptation Benefits into Takings Analysis.

In *Borough of Harvey Cedars v. Karan*, a New Jersey case involving a 3-story beach front home (and the owner's value) was pitted against the Borough's planned 22' bar-

rier dune protection project.⁴⁹ It was noted that without the project at issue, the property owners (the Karans) had a 56% chance of storm damage (over 30 years), but with the project, it had a 200 year "protective life;" thus, the project itself was going to provide anticipated benefit to the homeowners. The Karans sought to exclude testimony on the benefits of the project. In the lower tribunal, the jury awarded \$375k in just compensation (upheld at appellate level). Ultimately, the New Jersey Supreme Court remanded the case, finding that a property's fair market value should be used to calculate just compensation in a partial-takings case and the benefits of the dune project should be considered. Ultimately, the Karan's received a \$1 settlement at the conclusion of the case.

c. Public Trust Doctrine. In *Juliana v. United States*, a lawsuit brought by 21 young people in the United States District Court of Oregon, charges the federal government with violation of the United States Constitution's Public Trust Doctrine in an attempt to compel action on climate mitigation. In plaintiff's claim the federal government has violated their constitutional rights by contributing to the accumulation of GHGs in the atmosphere. The case has survived a motion to dismiss and a motion to strike.⁵⁰ The case has been scheduled for oral argument regarding defendant's motion for judgement on the pleadings on July 18, 2018.⁵¹

The Florida Constitution, like the United States Constitution, includes a Public Trust Doctrine. The Doctrine provides that the State holds navigable rivers, lakes, and tidelands in the public trust, which creates a legal duty on behalf of the State to preserve and control such resources for public use. These provisions have recently given rise to *Reynolds v. Florida*, where eight young Floridians from throughout the State, allege that the State of Florida,

the Florida Governor, other State officials, and agencies have violated their fundamental right to a stable climate system as protected by the Florida Constitution and Florida law.⁵² The complaint alleges that the State defendants contribute to a fossil fuel dependent economy, which has caused harm to the natural resources of the State. The plaintiffs seek declaratory relief as well as orders requiring the defendants to prepare a state-wide GHG inventory, a comprehensive remediation plan, and benchmark targets for phasing out fossil fuel dependence in order to decrease the atmospheric GHG emission in the state.

d. Accountability for Local Government Damage Caused by SLR.

In *San Mateo County, Marin County and the City of Imperial Beach v. Chevron*,⁵³ California counties and cities relies upon public nuisance, strict liability for failure to warn and design defect, private nuisance, negligence, and trespass theories to hold the fossil fuel industry responsible for its contribution to climate change. The case raises issues related to when and what the industry knew about its impact on climate change, the "disclosure" and "behavioral" activities of the industry with regard to climate science, and how these activities have worked to exacerbate damage to local governments. Plaintiffs brought the action to address the burden caused by the fossil fuel industry resulting from climate-related impacts in terms of damages and their need to adapt. The Complaint also raises allegations that represent the fossil fuel industry "engaged in a long-term course of conduct to misrepresent, omit, and conceal the dangers of Defendants' fossil fuel products." Plaintiff local governments have sought compensatory and punitive damages to address their respective climate impacts.

e. Failure to Disclose Flood

continued...

Risk. *Ali v. JP Morgan Chase Bank*, heard by the Southern District of Texas, involves a plaintiff whom purchased a home from Chase Bank in 2011 and received mortgage financing advise, home insurance advise, flood insurance advise and other counseling from Chase.⁵⁴ The Plaintiff alleges that in the course of purchasing the home, Chase negligently gave wrong and unlawful advice and counsel on the need for flood insurance. Ali relied on Chase's wrong and unlawful advice and counsel to his foreseeable injury. The action is for common law claims of negligence, negligent misrepresentation, and includes a plea of strict liability in tort for Chase's conduct. Chase advised the plaintiff that the home at issue was not in a flood zone, and relying on that advice, the plaintiff removed his coverage for flood insurance.

In 2017, Hurricane Harvey flooded the home and caused over \$200,000 in damages. By advising plaintiff that the home was "not in a flood zone," Chase was engaging in the unlawful practice of insurance by an unlicensed person, for which it is strictly liable in tort. The case raises two key issues, but it is too early in its procedural activities to shed light on either: 1) what does "within a flood zone" really mean when it comes to evaluating risk? and 2) is the routine practice of relying on location of a property "within a flood zone" a data point that we should be making mortgage risk determinations upon? Given the tie between risk, National Flood Insurance Program reform, incorporation of future risk into flood insurance premiums, and "the biggie" affordability of flood insurance in areas at risk from climate change, this case could highlight the confluence of these issues as we struggle to protect local tax bases and the affordability of housing in a sea of change.

IV. Conclusion

Local governments are the entities advancing responses to climate change and SLR because they control local land use decisions and predominantly, infrastructure planning. Deciding where people live in the face of flood risks (due to topography, major storm events, or SLR) has been a longstanding challenge in Florida. The state has a long, somewhat unpredictable history in that area due to the desire to balance economic development with property rights. But, the tide is changing.

There are numerous examples throughout the State of local governments tackling the issues with managing for future conditions resulting from climate change and SLR. St. Augustine has unique challenges with historical preservation and long term infrastructure management, Monroe County is facing significant road adaptation to keep their community connected, the Tampa Bay region is facing significant real estate and economic impacts due to its flat sloping marine and terrestrial geography, several locations are facing adaptation needs for military installations, the lower east and west coasts both are tackling hundreds of miles of shoreline planning, managing species, and habitat issues (sometimes with protected species implications), which is a daunting task considering those ecosystems are shifting.

Managing local development according to identified future risks is a far more effective strategy than purposefully downplaying them at this point. Resiliency planning only makes good economic sense within our land use and environmental decision making. Without a recognition that we are in a new phase of planning and development in Florida, we are doomed to repeat the mistakes of the past. The down side of promoting such considerations is minimal, but the upside reduces risk, cost, and disruption – which is something that should cross party lines, and be driven by common sense instead of politics.

Erin L. Deady is the President of Erin L. Deady, P.A. in Delray Beach Florida. She received her law degree from Nova Southeastern University and practices primarily in the fields of local government, climate change, sustainability, energy, and land use.

Danielle Schwabe is an Associate Attorney at Erin L. Deady, P.A. She received her law degree from St. Thomas University of Law and has experience with local government law, environmental sustainability, and land use. Thomas Ruppert is a Coastal Policy Specialist at Florida SeaGrant and was a contributor to portions of this article.

Endnotes

1 Fla. Admin. Code Ann. R. 62-16.300 (2006).

2 FLORIDA PUBLIC SERVICE COMMISSION, 2007 REPORT TO THE LEGISLATURE, [HTTPS://WWW.FLORIDAPSC.COM/FILES/PDF/PUBLICATIONS/GENERAL/ANNUALREPORTS/2007.PDF](https://www.floridapsc.com/files/pdf/publications/general/annualreports/2007.pdf) (LAST VISITED JUNE 1, 2018).

3 See Ch. 2008-227, Laws of Fla.

4 See Ch. 2008-991, Laws of Fla.

5 See *Climate Change*, FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION, [HTTP://MYFWC.COM/CONSERVATION/SPECIAL-INITIATIVES/CLIMATE-CHANGE/](http://myfwc.com/conservation/special-initiatives/climate-change/) (LAST VISITED JUNE 1, 2018).

6 See *Adaptation Planning*, FLA. DEPT. OF ECON. OPP'TY, [HTTP://WWW.FLORIDAJOBS.ORG/COMMUNITY-PLANNING-AND-DEVELOPMENT/PROGRAMS/COMMUNITY-PLANNING-TABLE-OF-CONTENTS/ADAPTATION-PLANNING](http://www.floridajobs.org/community-planning-and-development/programs/community-planning-table-of-contents/adaptation-planning) (LAST VISITED JUNE 1, 2018).

7 See *id.*

8 See *Costal Partnership Initiative Grant Program*, FLA. DEPT. OF ENVTL. PROT, [HTTPS://FLORIDADEP.GOV/FCO/FCMP/CONTENT/GRANTS](https://floridadep.gov/fco/fcmp/content/grants) (LAST VISITED JUNE 1, 2018).

9 See FLA. STAT. § 163.3177(6)(g)10 (2017).

10 See FLA. STAT. § 163.3164(1) (2017).

11 See *City of Ft. Lauderdale Comprehensive Plan, Coastal Management Element*, CITY OF FT. LAUDERDALE (2015), [HTTPS://WWW.FORTLAUDERDALE.GOV/HOME/SHOWDOCUMENT?ID=882](https://www.fortlauderdale.gov/home/showdocument?id=882).

12 See Ch. 2015-69, Laws of Fla.

13 See FLA. STAT. § 163.3178(2)(f) (2017).

14 Ch. 2015-69, § 1, codified at FLA. STAT. § 163.3178(2)(f), (2016).

15 See, e.g., *Monroe County Year 2030 Comprehensive Plan, Energy and Climate Element*, MONROE COUNTY (2016), [HTTP://WWW.MONROECOUNTY-FL.GOV/DOCUMENTCENTER/HOME/VIEW/4606](http://www.monroecounty-fl.gov/documentcenter/home/view/4606); *Broward County Comprehensive Plan, Climate Change Element*, BROWARD COUNTY (2015), [HTTP://WWW.BROWARD.ORG/PLANNING/FORMSPUBLICATIONS/DOCUMENTS/CLIMATE-CHANGE-ELEMENT.PDF](http://www.broward.org/planning/formspublications/documents/climate-change-element.pdf).

16 See *City of Sarasota Comprehensive Plan, Environmental Protection and Coastal Islands Plan*, CITY OF SARASOTA (2017), [HTTPS://WWW.SARASOTAFL.GOV/HOME/SHOWDOCUMENT?ID=2432](https://www.sarasotafl.gov/home/showdocument?id=2432).

17 See FLA. STAT. §§ 161.011.242 (2017).

18 State permitting is also conducted in conjunction with U.S. Army Corps of Engineers permitting. See *Submitting an ERP*, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, DIVISION OF WATER RESOURCE MANAGEMENT (2017), [HTTPS://FLORIDADEP.GOV/WATER/SUBMERGED-LANDS-ENVIRONMENTAL-RESOURCES-COORDINATION/CONTENT/SUBMITTING-ERP](https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/submitting-erp).

19 See FLA. STAT. §§ 161.011.242 (2017).

20 See *Submitting an ERP*, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, DIVISION OF WATER RESOURCE MANAGEMENT (2017), [HTTPS://FLORIDADEP.GOV/WATER/SUBMERGED-LANDS-ENVIRONMENTAL-RESOURCES-COORDINATION/CONTENT/SUBMITTING-ERP](https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/submitting-erp).

21 See *Jordan v. St. Johns Cty.*, 63 So. 3d *continued...*

CLIMATE CHANGE

from previous page

835 (Fla. 5th DCA 2011); *St. Johns Cty. v. Jordan*, 77 So. 3d 647 (Fla. 2011). (The case settled in 2013.)

22 *Id.*

23 *See* ST. JOHNS COUNTY, FLA., ORDINANCE No. 2012-35 (DEC. 11, 2012).

24 *See* MONROE COUNTY, FLA., RESOLUTION No. 028-2017.

25 *See* Monroe County, Fla., *Monroe County Pilot Roads Project: The Sands and Twin Lakes Communities* <https://www.flseagrant.org/wp-content/uploads/Deady-SLR-Workshop-ELD-Roads-111517.pdf> (last visited Jan. 2017).

26 *See* Broward County Environmental Engineering & Licensing, *Groundwater Maps*, <http://www.broward.org/Environment/Engineering/Pages/GroundwaterMaps.aspx>, (last visited May 30, 2018).

27 *See* Broward Groundwater Elevation Maps: Predicted Changes and Planned Updates, BROWARD COUNTY

http://www.broward.org/NaturalResources/ClimateChange/Documents/Climate_Toolbox/Sea_Level_Rise/FutureGW_withaddedtext.pdf (last visited June 25, 2017).

28 *See* *Dep't of Transp. v. Konney*, 587 So. 2d 1292, 1296 (Fla. 1991) (holding that a government decision to upgrade an intersection was a planning level decision the government had immunity from).

29 *See* *Dep't of Transp. v. Neilson*, 419 So. 2d 1071, 1073 (Fla. 1982) (affirming the *Commercial Carrier* holding that "the failure to properly maintain existing traffic control devices and existing roads may also be the basis of suit against a government entity").

30 *See* *SW. FLA. WATER MGMT. DIST. v. NANZ*, 642 So. 2d 1084, 1086 (FLA. 1994) ("HAVING ASSUMED CONTROL OF THIS DRAINAGE SYSTEM AND UNDERTAKEN TO OPERATE AND MAINTAIN SAID DRAINAGE SYSTEM, [D]EFENDANTS, AND EACH OF THEM, HAD A DUTY AND OBLIGATION TO PRUDENTLY OPERATE, CONTROL, MAINTAIN, AND MANAGE SAID SYSTEM SO THAT IT WOULD WORK PROPERLY AND DRAIN OFF EXCESS WATERS SO AS NOT TO CAUSE FLOODING IN THE AREA. DEFENDANTS OWED SAID DUTIES AND OBLIGATIONS TO YOUR [P]LAINTIFFS, RESIDENTS AND/OR OWNERS OF HOMES AND REAL PROPERTY SERVICED BY THE DRAINAGE SYSTEM.")

31 *See*, CITY OF MIAMI BEACH, FLA., ORDINANCE No. 2016-4009 (MAY 11 2016),

<http://www.mbrisingabove.com/wp-content/uploads/2017/11/2016-4009-Ordinance.pdf> (Seawall elevation and design standards recommended for private sea walls, design of new/renovated walls, and new public sea walls).

32 *See* AECOM, A RESEARCH PAPER REVIEWING ISSUES AND UNINTENDED CONSEQUENCES RELATED TO RAISING MINIMUM BUILDING FINISH FLOOR ELEVATIONS (2015).

33 *See*, e.g., CITY OF FT. LAUDERDALE, FLA., ORDINANCE No. C-10-44 (DEC. 10, 2010), [HTTPS://LIBRARY.MUNICODE.COM/FL/FORT LAUDERDALE/ORDINANCES/UNIFIED LAND DEVELOPMENT CODE?NODEID=559847](https://library.municode.com/fl/fort_lauderdale/ordinances/unified_land_development_code?nodeid=559847) (MAXIMUM HEIGHT STANDARDS INCLUDING DOCK HEIGHT IN THE CALCULATION OF ALLOWABLE SEAWALL HEIGHT WHICH RESULTED IN A LOWER ELEVATION FOR THE SEAWALL); CITY OF FT. LAUDERDALE, FLA. ORDINANCE No. C-16-13 (JUNE 21, 2016), [HTTPS://LIBRARY.MUNICODE.COM/FL/FORT LAUDERDALE/ORDINANCES/UNIFIED LAND DEVELOPMENT CODE?NODEID=778718](https://library.municode.com/fl/fort_lauderdale/ordinances/unified_land_development_code?nodeid=778718) (MAXIMUM AND MINIMUM SEAWALL ELEVATION, ALLOWING DOCK

HEIGHTS TO EXCEED SEAWALL BY NO MORE THAN 10 INCHES); CITY OF FT. LAUDERDALE, FLA., ORDINANCE No. C-16-27 (DEC. 6, 2016), [HTTPS://LIBRARY.MUNICODE.COM/FL/FORT LAUDERDALE/ORDINANCES/UNIFIED LAND DEVELOPMENT CODE?NODEID=803182](https://library.municode.com/fl/fort_lauderdale/ordinances/unified_land_development_code?nodeid=803182) (FURTHER RAISES MINIMUM SEAWALL HEIGHT TO FORMER MAXIMUM HEIGHT 3.9' AND ATTEMPTS TO ENSURE THAT PUBLIC/PRIVATE SEAWALLS REMAIN EFFECTIVE. NEW SEAWALL HEIGHT REQUIRED FOR NEW SEAWALLS AND THOSE UNDERGOING SUBSTANTIAL REPAIRS. REQUIRES MAINTENANCE IN GOOD REPAIR, CREATING A SYSTEM OF CITATION FOR OWNERS NOT MAINTAINING THEIR SEAWALLS AND PROVIDING FOR A 60 DAY CURE PERIOD).

34 *See* Town of Hillsboro Beach, Fla., *Town Commission Workshop Minutes* (Feb. 16, 2017), http://www.townofhillsborobeach.com/public-documents2/doc_view/675-2-16-2017-commission-workshop.

35 *See*, e.g., *Unified Sea Level Rise Projection Southeast Florida*, SOUTHEAST FLORIDA REGIONAL CLIMATE CHANGE COMPACT (OCT. 2015) [HTTP://WWW.SOUTHEASTFLORIDA CLIMATE COMPACT.ORG/WP-CONTENT/UPLOADS/2015/10/2015-COMPACT-UNIFIED-SEA-LEVEL-RISE-PROJECTION.PDF](http://www.southeastfloridaclimatecompact.org/wp-content/uploads/2015/10/2015-Compact-UNIFIED-SEA-LEVEL-RISE-PROJECTION.PDF); *RECOMMENDED PROJECTION OF SEA LEVEL RISE IN THE TAMPA BAY REGION*, TAMPA BAY CLIMATE SCIENCE ADVISORY PANEL (AUG. 2015) [HTTP://WWW.TBRPC.ORG/COUNCIL MEMBERS/COUNCILAGENDAS/2015/101215/8C.PDF](http://www.tbrpc.org/council_members/councilagendas/2015/101215/8C.PDF).

36 *See* *Good for Business*, PUBLIC/PRIVATE REGIONAL RESILIENCY, [HTTP://WWW.RCINEF.ORG/P2R2.HTML](http://www.rcinef.org/P2R2.HTML) (LAST VISITED MAY 30, 2018).

37 *See* *Improving the Planning Process to Protect Infrastructure From Emerging Coastal Flood Hazards*, SOUTHEAST FLORIDA REGIONAL PLANNING COUNCIL [HTTP://SEREGIONALCOUNCIL.ORG/PORTFOLIO-ITEM/INFRASTRUCTURE-RESILIENCE/](http://sefrcouncil.org/portfolio-item/infrastructure-resilience/) (LAST VISITED MAY 30, 2018).

38 *See* *Unified Sea Level Rise Projection Southeast Florida*, SOUTHEAST FLORIDA REGIONAL CLIMATE CHANGE COMPACT, (OCT. 2015) [HTTP://WWW.SOUTHEASTFLORIDA CLIMATE COMPACT.ORG/](http://www.southeastfloridaclimatecompact.org/)

[WP-CONTENT/UPLOADS/2015/10/2015-COMPACT-UNIFIED-SEA-LEVEL-RISE-PROJECTION.PDF](http://www.southeastfloridaclimatecompact.org/wp-content/uploads/2015/10/2015-Compact-UNIFIED-SEA-LEVEL-RISE-PROJECTION.PDF).

39 *See* *Recommended Projection of Sea Level Rise in the Tampa Region*, TAMPA BAY CLIMATE SCIENCE ADVISORY PANEL, (AUG. 2015) [HTTP://WWW.TBRPC.ORG/COUNCIL MEMBERS/COUNCILAGENDAS/2015/101215/8C.PDF](http://www.tbrpc.org/council_members/councilagendas/2015/101215/8C.PDF).

40 *See* *Id.*

41 *See* *East Central Florida RPC's Approach to Regional Resiliency*, FLORIDA REGIONAL COUNCIL ASSOCIATION (2018) [HTTP://WWW.FLREGIONALCOUNCILS.ORG/EAST-CENTRAL-FLORIDA-RPCS-APPROACH-REGIONAL-RESILIENCY/](http://www.flregionalcouncils.org/east-central-florida-rpcs-approach-regional-resiliency/).

42 *St. Bernard Parish Gov't v. United States*, 126 Fed. Cl. 707 (2016).

43 *See* *St. Bernard Parish Gov't v. United States*, 887 F.3d 1354 (Fed. Cir. 2018).

44 *See* *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 133 S. Ct. 511 (2012).

45 *See* *Id.*; *Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003)

46 *Id.*

47 *See* *St. Bernard Parish Government v. United States*, 887 F.3d 1354 (Fed. Cir. 2018).

48 *Id.* at 9-10.

49 *See* *Harvey Cedars v. Karan*, No. A-4555-10T3 (N.J. Super. Ct. App. Div. March 26, 2012).

50 *See* *Juliana v. United States*, 217 F. Supp. 3d 1224, 1276 (D. Or. Apr. 12, 2018).

51 *See* *Juliana v. United States*, SABIN LAW CENTER FOR CLIMATE CHANGE (JUN. 4, 2018),

<http://climatecasechart.com/case/juliana-v-united-states/>.

52 *See* *Reynolds v. Florida*, SABIN LAW CENTER FOR CLIMATE CHANGE (APR. 16, 2018),

<http://climatecasechart.com/case/reynolds-v-florida/>.

53 *San Mateo v. Chevron Corp.*, No. 3:17-cv-04929 (N.D. Cal. Apr. 9, 2018).

54 *Ali v. JP Morgan Chase Bank*, No. 4:17-cv-02858 (S.D. Tex. Sept. 23, 2017).



Join the ELULS e-mail mailing list and stay up to date on the latest section news and events...



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

NAME: _____

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: _____

CHECK ALL COMMITTEES OF INTEREST TO YOU:

- | | |
|--|--|
| <input type="checkbox"/> AFFILIATE MEMBERSHIP | <input type="checkbox"/> YOUNG LAWYERS |
| <input type="checkbox"/> CLE | <input type="checkbox"/> LAND USE |
| <input type="checkbox"/> ELUL TREATISE | <input type="checkbox"/> POLLUTION ASSESSMENT, REMEDIATION |
| <input type="checkbox"/> FELLOWSHIPS | <input type="checkbox"/> NATURAL RESOURCES |
| <input type="checkbox"/> LAW SCHOOL LIAISON | <input type="checkbox"/> ENERGY |
| <input type="checkbox"/> FL BAR JOURNAL COLUMN | <input type="checkbox"/> MEMBERSHIP |
| <input type="checkbox"/> SECTION REPORTER | <input type="checkbox"/> PUBLIC INTEREST |

<u>MEMBERSHIP OPTIONS / DUES</u>		
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: _____