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Climate Change and the Clean Air Act: Reluctant Dance Partners?

by Joseph A. Brown, Hopping Green & Sams, P.A.

Over the last decade, the Clean Air Act (CAA) has emerged at the center of the battle to address climate change in the United States. Most recently, the Obama Administration's effort to use the CAA to regulate greenhouse gases (GHGs), especially carbon dioxide (CO_2), has culminated in a suite of proposals that seek to achieve a 30 percent reduction in electric-utility CO_2 emissions from 2005 levels, with the potential to completely reshape the industry in the process. This is the latest and most significant development in what the U.S. Supreme Court has described as the "[s]ingle largest expansion in the scope of the Clean Air Act in its history."[1] The CAA, however, was not crafted to address climate change or CO_2 emissions, and its structure and design is not tailored to that purpose.[2] So, how did we get here? And, what is the potential reach and impact of CAA-based authority to regulate GHGs as the U.S. Supreme Court begins to weigh in?

Climate Change and the Clean Air Act: A Prelude

When the CAA was passed in 1970, little attention was given to the then nascent study of climate change and its potential impacts.[3] The federal government's attention to climate change increased later in the 1970's, with federal and international attention on climate change continuing to grow in the late 1980's through the 1990's.[4] This included the formation of the United Nations' Intergovernmental Panel on Climate Change and the publication of its first comprehensive report on climate change in 1990; convention of the United Nations' "Earth Summit" in 1992 resulting in the first President Bush signing the United Nations Framework Convention on Climate Change; and the adoption of the Kyoto Protocol in 1997, which the United States Senate

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From the Chair

by Kelly Samek

This year's ELULS Annual Update was a bittersweet event indeed. On one hand, it was fun to be back at Amelia Island, where I and many other current members spent their first and maybe many other past Annual Updates. On the other, it was in fact the last of such outings. Since the economic downturn several years ago, the Section has struggled to maintain its financial health even with historical levels. Undoubtedly there are many reasons for this, but even as the country's overall economic situation has recovered, we have to confront the reality that our practices have changed for the long haul, if not forever. More and more, lawyers are relying on delivery of CLE programming through convenient and cost-effective options such as The Florida Bar's OnDemand catalog. Many organizations remain operating with tightened budgets and heightened scrutiny on travel in the age of long-distance meeting technologies. For a smaller Section with a significant membership base in the government and not-for-profit sectors, we cannot sustain programs that are as costly as those of the past.

And so, we adapt.

In the future, we will distribute the great programming that's the

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CHAIR'S MESSAGE
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signature of the Annual Update over two shorter events. Please consider joining us at one of our live programs in the next year as we begin this transition. In January, we will be offering a one-day program discussing the top issues in environmental and land use law. This is shaping up to be a solid program featuring sessions ranging from the medical marijuana business's land use implications to the future of rail in the state to the latest in water law. In coming years, we anticipate expanding this into a two-day event, with one day focusing on environmental law topics and the other oriented toward land use law issues. For other core features of the Annual Update CLE, including the administrative law and legislative updates, we are planning to continue with a program to be offered in conjunction with The Florida Bar Annual Convention in June.

If you happen to need CLE without the travel, check out the audio webcast series, which will begin later this fall. You can invest in the whole series or in single sessions holding the greatest relevance for your practice. Don't see the topic you are interested in covered in this year's CLE offerings? Visit The Florida Bar's website to peruse our previously recorded programs, many of which are now offered as downloadable podcasts.

If it's the social aspects of the Annual Update you'll miss the most, you should check out an Affiliate Mixer. These evening networking events, held in major cities around the state, are made possible by the Section's Affiliate membership in conjunction with sponsoring law firms. Subscribe and stay tuned to the ELULS Listserv to get the details on when and where as they are made available. Whether it is education or networking you seek, I hope to see you soon at one of ELULS's upcoming events.

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

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DEP Update

by Krystle Hoenstine, Assistant General Counsel

Rulemaking Update:

Operator Training and Delivery Prohibition rulemaking for UST/LUST grant Chapter 62-761 (Underground Storage Tanks Systems):

The Department adopted new operator training requirements and delivery prohibition procedures in response to the Energy Policy Act of 2005 and the associated EPA requirement that states have such rules in order to continue receiving certain EPA grant funds. The new rules require owners or operators of underground storage tanks (UST) regulated by the Department designate certain individuals receive at least one of three types of operator training and certification, and that at least one certified operator is present at the facility during hours of operation. Such training is designed to ensure the proper maintenance of the UST, appropriate response to potential releases of pollutants from the UST, and understanding of the regulatory and financial assurance requirements for USTs. The Department also added new procedures to prohibit delivery of regulated substances to a UST facility that is not in compliance with certain Department rules. Such prohibition would only be effective after the Department has notified the facility owner or operator of the failure, provided the facility with an opportunity to correct the failure, and the failure has not been corrected. The types of rules include a failure to maintain and operate leak detection equipment, maintain and operate the UST in compliance with the performance requirements, respond and abate a discharge of regulated substance, complete closure of an out of service UST, and maintain adequate financial responsibility to respond to a discharge in to the environment. EPA Region IV approved the rules as compliant with their requirements. The operator training and delivery prohibition rules became effective August 7; however, facilities are not required to fully train all of their operators until 365 days from the effective date of the rule.

Chapter 62-160 (Quality Assurance): The Department proposed amendments to Chapter 62-160, F.A.C., to update the Department's field and laboratory Standard Operating Procedures (SOPs) and provide clarification and increased flexibility. The proposed amendments: (1) update various documents incorporated by reference in the chapter, including a number of SOPs, to reflect recent scientific advances and national guidance, (2) revise the groundwater sampling SOP to allow a new technique that more accurately collects volatile contaminants, while reducing costs to the regulated community, (3) simplify retention time requirements for documentation, and authorize electronic documentation in lieu of paper documentation, (4) clarify when laboratory certification is not required or can be waived, (5) clarify requirements for approval of new, modified, and alternative field and lab procedures, and allow greater flexibility to use alternative methodologies to facilitate alignment of sampling/testing procedures with scientific advancements, (6) clarify documentation requirements for research activities, and (7) address miscellaneous, minor revisions in response to public input. The Department received public comments after the deadline for receipt of public comments, expressing concern over the use of formalin as a preservative and requesting that the Department consider less toxic alternative preservatives. The Department added rule language that allows the Department to consider proposed alternatives to sample preservation procedures. The Department held an additional adoption hearing on April 21, to discuss this alternative preservatives amendment and Joint Administrative Procedures Committee amendments. On July 10, the Department filed the certification package for Chapter 62-160. The rule became effective on July 30.

Litigation:

Siting Board Hearing – IN RE: Florida Power & Light, Turkey Point Units 6 & 7 (DOAH): In June of 2009, the Department received a Site Certification Application from Florida Power and Light Company (FPL) for power plant site certification. The application sought certification for: two additional nuclear generating units, each with an approximate electrical output of 1,100 MW; supporting buildings, facilities and equipment; off-site facilities including nuclear administrative building, training building, parking area; transmission lines and system improvements within Miami-Dade County; and other facilities as necessary. The site certification hearing began July 8, 2013, in Miami, and ran for five consecutive weeks, with an additional three weeks thereafter, ultimately concluding on October 3, 2014. The Administrative Law Judge issued a Recommended Order on December 5, 2013, and the parties filed responses to the Recommended Order and exceptions to the responses. On May 13, this matter went before the Governor and Cabinet, sitting as the Siting Board. After a several hour hearing, the Siting Board voted unanimously to adopt the Department's draft Final Order.

Focus v. FDEP and Lockheed Martin (First District Court of Appeal): In 2004 the Department entered into a consent order with Lockheed Martin to assess and remediate a site in Manatee County that involved soil and groundwater contamination from metals and volatile organic chemicals. After years of submitting revised Site Assessment Reports (SAR) and Remedial Action Plans (RAP) by Lockheed Martin, the Department approved the SAR and RAP with both approvals thereafter challenged by FOCUS. After a two week hearing in 2011 on the approvals of the SAR and RAP, the administrative law judge issued a Recommended Order finding that all of the Chapter 62-780 criteria for conducting site assessments had been met, that the temporary point of compliance (TPOC) determined by the Department was consistent with TPOC requirement in Chapter 62-780, and that the RAP also satisfied the requirements of Chapter 62-780. In October of 2011 the Department issued a final order adopting the Recommended Order in its entirety with

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a couple of minor corrections. FOCUS thereafter appealed the final order. On June 17, the First District Court of Appeal affirmed the Department's final order without opinion.

Ahlers et al. v. BOT (Circuit Court, Leon County): Petitioners filed a Petition for Writ of Mandamus alleging that the Board of Trustees of the Internal Improvement Trust Fund had a legal duty to require Georgia-Pacific to obtain a sovereign authorization for the use of mixing zones associated with its discharge to the Lower St. Johns River. Georgia-Pacific had already received a sovereign authorization for the construction of the discharge pipeline. On June 20, the circuit court granted the Board's Motion for Summary Judgment and entered a final judgment dismissing the Petition for Writ of Mandamus with prejudice. The circuit court held: (a) there was no legal duty on the part of the Board to require a sovereign authorization for the use of a mixing zone; (b) the Department is the regulatory agency responsible for establishing mixing zones as part of its water quality standards program; (c) the Petitioners have other legal remedies available; and (d) the Petitioners failed to exhaust available administrative remedies by failing to challenge the recent renewal of Georgia-Pacific's NPDES permit.

Kline Properties, Inc. v. BOT (Circuit Court, Lee County): Kline Properties sued the Board of Trustees of the Internal Improvement Trust Fund to quiet title to certain submerged land lying within Hurricane Bay in Fort Myers. The Board answered the complaint and filed a counterclaim to quiet title. Kline Properties alleges that the disputed land was dry land in 1845 and became submerged as a result of a 1926 hurricane (*i.e.,* through avulsion), and thus, the Board has no ownership interest in this submerged land. The Division of State Lands believed that the historical evidence coupled with the Board's expert witnesses retained in coastal engineering, geology, and surveying, demonstrate that the disputed land is state-owned because it was submerged and "navigable in fact" at statehood. The trial was held on May 13-16. On June 2, the Court entered its Final Judgment, which quieted title to the disputed property in favor of the Board.

DEP v. Rondolino (Circuit Court, Marion County): In February of 2009, the Department filed a complaint against Defendants for dredging and filling within wetlands on their property without Department authorization. The Department sought restoration of the impacted wetlands along with civil penalties and costs. The trial was bifurcated into a liability phase tried by a jury and a relief phase heard by the Court in absence of a jury. The liability phase concluded on November 29, 2012, after the jury entered a verdict in favor of the Department finding that the Defendants filled within wetlands on their property. The bench trial on relief was held during the week of July 14. During the trial on relief, the Court heard argument on issues relating to the extent of wetland impacts and restoration. The Court ruled in favor of the Department, determining the jurisdictional wetland line on the property and ordering Mr. Rondolino to restore, maintain and monitor the impacted wetland. The Court reserved ruling on costs and attorney's fees.

Conservation Alliance of St. Lucie County et al. v. Ft. Pierce Utility Authority & DEP (Fourth District Court of Appeal): Petitioners challenged the Fort Pierce Utilities Authority's application for a minor underground injection control permit modification to allow for the injection of industrial wastewater generated from the operation of the Allied Chemical bleach plant in St. Lucie County. The Department's final order adopted the administrative law judge's recommendation that the petition be dismissed based on a lack of standing and timeliness. The Conservation Alliance attempted to allege standing as an association acting on behalf of the interests of its members; however, it was unable to demonstrate that a substantial number of its members are substantially affected by the issuance of the minor permit modification. Petitioners appealed the final order. On July 17, the Fourth District Court of Appeal affirmed the Department's final order without opinion.

Conservation Alliance of St. Lucie, Inc. et al. v. DEP et al. (Fourth District Court of Appeal): In 2010, the Department entered into a settlement agreement with two companies requiring payment of penalties and remediation of groundwater and soil contamination at a manufacturing facility in St. Lucie County. Petitioners challenged the settlement agreement on the basis that the terms were inadequate to address the contamination. Petitioners claimed standing under Section 403.412(6), F.S., which grants standing to certain Florida corporations to initiate an administrative proceeding to challenge a "permit, license, or authorization that is the subject of the notice of proposed agency action." The Department entered a final order adopting the administrative law judge's recommended order of dismissal based on the conclusion that Petitioners did not have standing under the statute because the settlement agreement did not involve a "permit, license, or authorization" within the meaning of Section 403.412(6), F.S. Petitioners appealed the final order. On August 6, the appellate court affirmed the final order stating that "[t]he statute is clearly premised upon an *application for a permit, license, or authorization* that the complaining party seeks to challenge" and that the Petitioners' challenge to the settlement agreement did not concern such.

September 2014 Florida Case Law Update

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

***Harris Act Restricts the Government's flexibility in Reaching Settlement to the 180 Day Pre-Suit Negotiation Period. Collier Cnty. v. Hussey*, 2014 WL 2900934 (Fla. 2d DCA June 27, 2014)**

This case stems from an amendment to the Collier County Growth Management Plan referred to as the "Rural Fringe Amendment." Lands were either designated "sending lands" or "receiving lands" and "sending lands" were given greater development and use restrictions based on the heightened environmental value and sensitivity. This amendment resulted in approximately 1000 acres of the Property Owners' land being designated as "sending lands" with new restrictions on development and use. The Property Owners brought suit for damages under the Bert Harris Act, and claimed inverse condemnation due to the "sending lands" designation. During subsequent appeals, the parties entered into a settlement agreement. Section 70.001(4)(d)(2), *Florida Statutes*, requires court approval of a Harris Act pre-suit settlement agreement when it would contravene the application of a statute or regulation. The circuit court denied approval of the settlement agreement because it would result in contravening laws and regulations. The County appealed to the Florida Second DCA.

The Second DCA determined that Bert Harris Act pre-suit settlement procedures in section 70.001(4) were not available to the parties at the time they entered into the settlement agreement in question and affirmed the circuit court's order. The Second DCA found that it was unnecessary to reach the merits of the settlement agreement in this case because the settlement agreement was not entered into in a timely fashion as required by the clear and unambiguous language of the Harris Act. Section 70.001(4), *Florida Statutes*, allows parties to enter into settlement agreements that would otherwise contravene a statute with court approval. The Court held, however, the statute only provides for a limited time period (*i.e.*, the 180 day pre-suit notice period) in which parties can enter into a settlement agreement that would contravene another statute or regulation. Thereafter, the parties can only enter into settlement agreements that do not contravene a statute or regulation.

Disagreement regarding whether an ordinance takes effect immediately upon County Commission vote or when a resolution is adopted is a factual dispute and as such it was improper for the circuit court to dismiss the Plaintiff's Harris Act claim as untimely. *P.I.E., LLC v. DeSoto Cnty.*, 133 So. 3d 577 (Fla. 2d DCA 2014)

P.I.E., LLC, acquired fifty acres of undeveloped land in DeSoto County for sand and shell excavation and future development. The County denied P.I.E.'s permit application for excavation at a hearing on February 27, 2007 by verbal vote. The decision was not reduced to writing until March 28, 2007 when the County adopted Resolution 2007-12. P.I.E. filed its pre-suit claim with the County on March 26, 2008. The circuit court dismissed P.I.E.'s complaint as untimely, deciding that the law was "first applied" on the date of the denial hearing (February 27), not the date of the resolution (March 28). This case centered on the interpretation of section 70.001(11), *Florida Statutes*, which requires a claim be presented within "1 year after a law or regulation is first applied by the government entity to the property at issue."

In reversing the circuit court, the Second DCA determined that, based on the limited record available, the lower court erred in dismissing P.I.E.'s complaint as untimely under the Harris Act. The Second DCA noted that P.I.E. filed its pre-suit claim with the County on March 26, 2008. The circuit court concluded the law was "first applied" on the date of the denial hearing (Feb. 27), not the effective date of the resolution (March 28). DeSoto County maintained that the ordinance was effective as of the date of the vote, whereas P.I.E. asserted that the ordinance was not effective until the date of the adopted resolution. Accordingly, the date in which the decision became effective would determine when the ordinance was "first applied" as prescribed by section 70.001(11), *Florida Statutes*. The court found that the disagreement as to the date the ordinance was "first applied" was a factual dispute, and that dismissal was improper. In remanding, the court noted that the DeSoto County may be able to establish that its ordinances take effect immediately upon voting, and that in such case P.I.E.'s claim would be considered untimely.

Secretary of the Florida Land and Water Adjudicatory Commission committed reversible error when the Secretary unilaterally declined Appellant's request for review of a water supply plan. *Putnam Cnty Envtl Council v. St, Johns River Water Mgmt Dist,* 136 So. 3d 766 (1st DCA 2014).

Putnam County Environmental Council (PCEC) asked the Florida Land and Water Adjudicatory Commission (FLWAC) to review the Fourth Addendum to St. Johns River Water Management District 2005 Water Supply Plan. PCEC requested that FLWAC determine that the Fourth Addendum improperly identified the surface water withdrawals from the St. Johns and Ocklawaha Rivers as 'alternative water supplies' under Section 373.109(1), *Florida Statutes*. The Commission Secretary, acting unilaterally, declined review because FLWAC was without jurisdiction pursuant to section 373.114, *Florida Statutes*. The First DCA held that the Secretary erred in making the determination without the full Commission. The DCA further held that this was not harmless error because the plan, setting the new precedent that surface water pulls constituted agency action, raised a policy issue significant enough to invoke the FLWAC's jurisdiction. Because the Secretary's procedural mistake affected the correctness of the action the court found reversible error.

In making its determination the DCA analyzed the scope of FLWAC's jurisdiction, which authorizes

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FLWAC to review any order or rule of a water management district if it finds (i) the activity authorized by the order would substantially affect natural resources of statewide or regional significance, or (ii) if the order raises issues of policy, statutory interpretation, or rule interpretation that would have statewide significance. Neither side argued the first jurisdictional criterion was applicable. The Secretary, in denying the motion, found that even if the order raised issues of significance the Commission could not direct the district to initiate rulemaking regarding a water plan because section 373.709(5) holds water plans to a "no rulemaking" requirement. In disagreeing with the Secretary, the DCA stated: "while districts are not required to undergo formal rulemaking in the approval of a water supply plan, section 373.709(5) does not exempt rulemaking in all aspects of the water supply plans—simply approval . . . . the commission maintains its statutory authority to order rulemaking and the districts maintain their statutory exemption from formal rulemaking in adopting a plan." *Id.* at 769. The DCA held when reading the statutes this way, FLWAC could have provided the remedy the PCEC sought and therefore it was error for the Secretary to decline jurisdiction.

When the legislature statutorily authorizes an agency's recovery of civil penalties but fails to specify an applicable burden of proof, the burden of proof will be a preponderance of the evidence. *S. Fla. Water Mgmt Dist. v. RLI Live Oak, LLC*, 39 Fla. L. Weekly S 345 (Fla. 2014).

RLI Live Oak, LLC, (RLI), land developers who own property in Osceola County, filed suit in the Circuit Court seeking a declaratory judgment that the property it owned did not contain any wetlands and, therefore, was not under the jurisdiction of the South Florida Water Management District (SFWMD). The SFWMD counterclaimed against RLI alleging that RLI participated in unauthorized dredging, construction activity, grading, diking, culvert installation, and filling of wetlands without first obtaining SFWMD approval. After a non-jury trial, the court found for SFWMD on all counts and awarded it $81,900 in civil penalties. The Fifth DCA, relying on *Department of Banking and Finance, Division of Securities & Investor Protection v. Osborn*, 670 So. 2d 932 (Fla. 1996), found that the circuit court applied the improper evidentiary standard regarding the recovery of civil penalties and should have required proof by clear and convincing evidence. The Fifth DCA denied rehearing but did certify the issue as a question of great public importance. The question, restated by the Florida Supreme Court because of over breadth was:

> Where the legislature statutorily authorizes a state governmental agency to recover a "civil penalty" in a "court of competent jurisdiction" but does not specify the agency's burden of proof, is the agency required under, *Department of Banking and Finance, Division of Securities & Investor Protection v. Osborn*, 670 So. 2d 932 (Fla. 1996), to prove the alleged violation by clear and convincing evidence?

The Supreme Court answered the question in the negative explaining that *Osborn* was limited only to administrative authority to impose administrative, as opposed to civil fines. In explaining its ruling in *Osborn* the Court stated: "This Court concluded that satisfaction of the clear and convincing evidence standard was not required in denying an application for registration to sell securities, but it was required in order to assess administrative fines for securities violations under chapter 517." *Id.* at *14. Therefore, the Court held the Fifth DCA improperly extended the holding in *Osborn* to civil penalties and the trial court applied the appropriate evidentiary standard.

City's content based sign restrictions were unconstitutional under first amendment both on face and as applied. *Bee's Auto, Inc. v. Clermont*, 2014 WL 1268591 (M.D. Fla. March 27, 2014).

Bee's Auto filed suit in state court alleging constitutional claims under 42 U.S.C. § 1983 for purported violations of their procedural and substantive due process rights, their First Amendment right to free speech, an inverse condemnation/unlawful takings claim under the Fifth Amendment, and a state law claim for equitable estoppel. The case was removed to federal court. The Middle District granted summary judgment in favor of the city on all counts except for Bee's Auto's claim for declaratory and injunctive relief alleging violations of their First Amendment right to free speech.

The dispute began when Bee's Auto purchased a new parcel of land across the street from its old business. When the City refused to allow Bee's Auto to operate from the new location the owner put up 12 signs on the property with sayings such as: "Intimidation/Harassment - Selective Law Enforcement-False Arrests - False Documents – What's next? At Least They Haven't Taken My Freedom of Speech YET!" and "27 Years in the Automotive Business and the City is Trying to Turn Me Into a Sign Painter." The City issued a Violation Notice to the Plaintiffs stating that the signs were in violation of Code Sections that required that Bee's Auto obtain a permit for the political signs.

Bee's Auto asserted both a facial and as applied constitutional challenge to the City of Clermont's sign code. Bee's Auto alleged that the Code's permitting and exemption provisions made impermissible content-based distinctions between non-commercial signs containing political messages, political signs that advocate for or against voting for a candidate or political issue subject to an upcoming election, and other types of signs such as legal notices, signs promoting the safety and general welfare, and holiday decorations. In order to determine the appropriate level of scrutiny to apply to the City Code, the Court first had to determine whether the sign code was content based. The court found that because the code identified 18 types of signs that were exempt from the permit requirements because of a particular type of content or message they conveyed, the sign code was undeniably a content-based restriction on speech. The district court went on to find that the code failed strict scrutiny because it was not narrowly tailored to serve a compelling governmental interest. The city failed to provide an

explanation of how the content of a sign would serve to make the town more or less esthetically pleasing and further, to prove how such general and abstract aesthetic, safety, business, and traffic interests could be compelling state interests. "Because the City has not shown how the distinctions it has drawn in the treatment of non-commercial signs, political signs, and other types of exempt signs promote its purported interests, the Court concludes that the signage Code is not narrowly tailored to serve a compelling governmental interest." *Id.* at *34.

Statutory easement under section 704.01(2), Florida Statutes, requires only a showing of convenience and necessity and therefore the trial court erred by denying grant of statutory easement on grounds that the easement was not absolutely necessary. *Messer v. Sander*, 2014 WL 3281822 (1st DCA July 9, 2014).

In 1968 Appellant Messer and his deceased brother purchased 45 acres of land straddling the Leon and Jefferson County border. Approximately 20 acres of the land was in Leon County and the remainder was in Jefferson County. In the middle of the land was a swamp and associated wetlands. Included with the purchase of the lands was an easement over Old Tung Grove Road, which provided access to U.S. Highway 90 for the Jefferson County side of the land. The only vehicular access to Highway 90 from the Leon County side of the land was via Still Creek Road, a private road, a portion of which was owned by the Sanders and was the subject of the appeal.

Florida Statute § 704.01(2) requires three elements to obtain a statutory way of necessity (1) the land is outside of a municipality (2) the land is used or desired to be used for residential or agricultural purposes, and (3) the land is shut off or hemmed in by lands, fencing or other persons so that no practicable route or egress or ingress shall be available therefrom to the nearest practicable public or private road. The last two elements were in dispute in this case. The trial court found that because the land was intended for sale it did not meet the second criteria and because the Messer's had not tried to obtain permits to build a road across the lands the easement was not absolutely necessary, and therefore the third element was not present.

In reversing the trial court, the First DCA held that the trial court erred by interpreting the statute to require an easement to be an absolute necessity to be applicable. The DCA ruled that the statute was based not on the absolute necessity of an easement but rather on public policy, convenience, and necessity. Therefore, the court reasoned, the fact that it would cost the Messer's $25,000 simply to obtain the necessary permits to build a road through the center of the property coupled with a less than 10 percent chance of actually obtaining the permits was enough to satisfy the statutory criteria for an easement. The DCA further held that in finding that the Messer's desired to sell their land, the trial court overlooked the evidence that the there was a forest management plan for tree growth in effect on the land requiring that it be used for some agricultural purpose. Finally, the DCA stated that "the statute can still apply when someone's land, fencing or other improvement shuts off a portion of another's land from access to the nearest practicable public or private road, provided the other statutory requirements exist." *Id.* at *10.

City rebutted presumption of separateness with respect to separately owned and platted parcels and the parcels, taken together, retained economic value such that a taking had not occurred when the city refused to approve the intended development project. *Ocean Palm Golf P'ship v. Flagler Beach*, 139 So. 3d 463 (5th DCA 2014).

This dispute involved two separate parcels, a 34 acre parcel operated as a nine-hole golf course, and a second, vacant, 2.94 acre parcel. At the time the suit was brought, the two parcels were owned by separate entities but at various times before the suit both pieces of land made up a single parcel owned by one entity. The 2.94 acre parcel was operated as the driving range for the nine-hole golf course. In 1989 the City entered into a development agreement with the then owner of the single parcel. The agreement created a planned unit development consisting of two separate parcels. It called for the nine-hole golf course to continue to be operated as a golf course and in return the City would allow residential development on the 2.94 acre parcel of land. The Comprehensive Plan designated the parcel as high density residential. The properties were then sold to different owners. After many attempts at approval of a development plan and much public opposition, the developers filed suit alleging an inverse condemnation taking. The evidence presented at trial was clear, if the parcels were treated separately then the refusal of the city to allow development on both parcels left the developer without any economic value; however, if the parcels were viewed together, as a development with a golf course amenity, then there was no taking and the parcels retained some economic value.

The 5th DCA held that the City rebutted the presumption of separateness associated with separately owned and platted parcels. The DCA looked at three separate factors to determine whether the property should be treated as a single parcel: 1) physical contiguity 2) unity of ownership and 3) unity of use. The DCA found that the unity of use factor together with the fact that the two parcels had historically been a single tract of land was enough to rebut the presumption of separateness. Therefore, taking the parcels as one, a taking had not occurred because the land retained some economic value. Finally the DCA held that a partial taking had not occurred because while the second *Penn Central* factor weighed in favor of a partial taking, (the extent to which the regulation has interfered with distinct investment-backed expectations), the first (the economic impact of the regulation on the claimant) and the third (the character of the governmental action) did not weigh in Ocean Palm's favor.

Another New Chapter Begins For Pace

by Erin L. Deady, Herb Thiele & Chad Friedman

I. PACE 101

Property assessed clean energy ("PACE") programs allow a local government to finance energy improvements through a voluntary non-ad valorem assessment attached to a property and repayment through the property owner's annual tax bill. Improvements can include energy efficiency, renewable energy and wind resistance projects pursuant to Florida statute (Section 163.08, F.S.). This financing structure fixes a large hurdle to energy improvement financing by providing all of the funds to the property owner upfront to complete the projects. The features that distinguish the various PACE programs are the method of financing, the improvements that can be financed, whether or not the programs include residential properties, and the inclusion of specific criteria to minimize the risk to property owners and existing mortgage holders.

PACE enjoys great support from local governments because it creates an enhanced market for financing energy and other property improvements with resulting job creation benefits. It also increases local government revenue with increased permit fees to complete the projects. With PACE, property owners save money on their energy bills and increase property values (another tax revenue enhancement). PACE also provides a strategy to reduce community-wide greenhouse gas ("GHG") emissions and other environmental benefits, such as those stemming from water conservation initiatives.

PACE programs started evolving in 2008 in California with great momentum, but in 2010, concerns with residential PACE programs were raised by the Federal Housing and Finance Agency ("FHFA"—a federal agency of the U.S. government), Fannie Mae ("Fannie") and Freddie Mac ("Freddie"). There were several attempts throughout 2011 and 2012 to resolve the concerns with proposed federal legislation, but these legislative proposals failed to pass. Federal litigation against FHFA, Fannie and Freddie continued through early 2013, and a court-mandated federal rulemaking process came and went. So what has been happening with PACE since the rulemaking and litigation has concluded? The answer is: varying degrees of success in implementation, and in Florida, more litigation.

II. THE PACE LAW IN FLORIDA

In 2010, Florida created Section 163.08, F.S., which clarified supplemental authority for local governments to create PACE programs.[1] This authority is supplemental to Florida county and municipal home rule powers granted in the Florida Constitution to levy non-ad valorem assessments. The law also defines a "qualifying improvement" to include energy efficiency, renewable energy or wind resistance projects. The improvements must be affixed to the existing structure on a property. Florida's PACE law also generally:

- Clarifies the process and public purpose aspects of PACE programs;
- Makes a finding that property owners receive a "special benefit" reducing the property's energy consumption;
- Finds a "a compelling state interest" in implementing PACE programs;
- Allows local governments to partner with one another to form a program;
- Clarifies that PACE assessments take priority over all other obligations on a property, including mortgages, meaning they are considered a "senior lien" because they subordinate mortgage obligations;
- Provides explicit authority for separate legal entities (formed through Section 163.01, F.S. interlocal agreements) to levy and collect assessments for PACE programs as a "local government" streamlining the formation and implementation of multi-jurisdictional PACE programs.

The Florida PACE law provides a general framework within which local governments (as defined by the statute) have flexibility in program set up and implementation. The focus of the law is on assuring property owners are current on their property taxes and that they do not have property-based debt that could complicate a PACE transaction.

III. FEDERAL LITIGATION AND RULEMAKING

On September 18, 2009, Fannie directed lenders to treat PACE assessments as any other tax assessments; but later the FHFA, Fannie and Freddie made contrary determinations through "lender letters" focusing on the seniority of PACE liens in relation to a mortgage. On May 5, 2010, Fannie and Freddie issued advice letters to lending institutions stating that PACE assessments acquiring a "priority lien" over existing mortgages pose risk and are key alterations to traditional mortgage lending practice. Additionally, they characterized the PACE assessments as "loans" rather than assessments. These determinations were upheld by the FHFA in July 2010. Throughout the summer and fall of 2010, the FHFA, Fannie and Freddie continued to issue statements raising concerns about PACE programs. As a result, 8 complaints were filed in federal courts in California, Florida and New York.[2] Claims included:

- Violations of the federal Administrative Procedures Act ("APA")
- Unfair Business Practices
- Violations of the National Environmental Policy Act ("NEPA")
- Violations of the Tenth Amendment to the U.S. Constitution (reserving to the states all powers except those limited powers granted to the federal government and ensuring the division of powers between the states and federal government)

The Plaintiffs argued that by statute, Fannie and Freddie have purchased and guaranteed mortgages subject to government assessment liens which already have statutory priority over any underlying mortgage

obligation; now, the defendants cannot pick and choose which assessment liens have priority over mortgage obligations and which do not.

The Plaintiffs sought remedies holding that (1) the assessments are liens, not loans; (2) the assessments do not pose risk, and do not alter traditional lending practices; (3) the assessments constitute liens of equal dignity to county taxes and assessments; and (4) the assessments do not contravene Fannie or Freddie's Uniform Security Instruments prohibiting loans that have senior lien status to a mortgage. Injunctive relief was also sought to prevent adverse actions against any mortgagee participating in a PACE program.

The Defendants argued that pursuant to 12 U.S.C. § 4617, in a conservatorship role over Fannie and Freddie, FHFA acted to preserve safe and sound financial practices dictated by the Housing and Economic Recovery Act ("HERA") of 2008. Additionally, as a conservator, FHFA's actions were not reviewable and it acted within the scope of its authority. They also argued that the Plaintiffs' claims were not in the zone of interests protected by HERA, and that FHFA did not issue any rule or regulation subject to notice and comment under the APA. Ultimately, the Courts found for the Defendants in all cases.[3]

The California court also ruled that the FHFA must complete the notice and comment process concerning PACE and publish a final rule no later than 210 days from the date of entry of the Judgment (October 16, 2012). FHFA began the notice and comment process and on January 26, 2012, the FHFA issued an Advance Notice of Proposed Rulemaking seeking comment (77 Fed. Reg. 3958). The FHFA received 33,000 comments in response to the notice. On June 15, 2012, the FHFA issued a Notice of Proposed Rulemaking and Proposed Rule concerning underwriting standards for Fannie and Freddie related to PACE programs. Due to the final disposition of the cases, the Rule was ultimately withdrawn by FHFA and they suspended the rulemaking process.

IV. PACE DEVELOPMENT POST LITIGATION- THE MARKET HAS MORPHED

After a "post litigation cooling off period" various types of PACE or PACE-like programs began developing again across the U.S. and in Florida. Some have focused on commercial (Texas), some have scaled residential PACE quite successfully (California). Some PACE programs have controlled delivery methods meaning the manner in which the program is administered is either at the state (Connecticut) or local level (most other programs), but by a specific entity rather than an open market of PACE providers. But, the program differences include the type of financing strategy, seniority of the lien and whether or not they include residential.

Two innovations have occurred in the PACE market as the industry has evolved. The first is that multiple financing alternatives are being offered within single PACE programs (or the "open market" financing approach). The other innovation is that multiple PACE programs are now being offered in a single jurisdiction. Both are results of the rapid deployment of PACE in California and one program in particular: Home Energy Renovation Opportunity ("HERO") administered by the company Renovate America. Prior to these market shifts, the CaliforniaFIRST program drove the rise of the "multi-jurisdictional program" which was premised on multiple local governments coming together in some form to access a single program platform.

Additionally, Connecticut has launched a single state-wide platform focused on Commercial PACE "C-PACE", run by the Clean Energy Finance and Investment Authority ("CEFIA") and Connecticut Energy Efficiency Fund. C-PACE offers financing to commercial, industrial or multifamily property owners. The statewide Authority provides a platform for local governments to join and receive delivery of a common PACE program. There are not multiple third party administrators for the program, but a single delivery mechanism. Additionally, the property owner must provide evidence that the mortgage holder(s) on the property consents to the PACE assessment, if applicable.

While there is no clear policy resolution, either legal or otherwise, programs are on the rise again, including residential. Typically, how the program manages the "risk of the unknown" is to disclose to participants that Fannie and Freddie have raised concerns or that it is possible upon resale or refinancing of a property with an outstanding PACE lien, that a property owner may have to pay off that remaining balance before being able to secure financing. The key is the actual disclosure itself. Structured similarly to financial transaction closing on real estate, all costs, financing rates, payment schedules, etc. are disclosed to property owners anyway, and this is another explicit disclosure added to that process. Individual programs may have unique or different underwriting criteria depending on their financial structure, but typically these disclosures are included on residential transactions.

V. FLORIDA PROGRAM STATUS

Notwithstanding the federal issues and litigation discussed above, several local governments in Florida have begun rolling out PACE programs. It should be noted that unlike Connecticut, the State of Florida does not operate a PACE program. All of the PACE programs within Florida are formed by local governments to operate for local governments. Additionally, all PACE programs in Florida are operated by a third-party administrator procured through competitive bid. There are two structural patterns: multi-jurisdictional or single jurisdiction. Leon County and St. Lucie County both operate single jurisdiction programs, but that could evolve in time. Within the multi-jurisdictional programs several common themes exist including:

- All were formed through interlocal agreement pursuant to Section 163.01, F.S., starting with at least two local government participants.
- None of the PACE programs charge fees to join.
- All "indemnify" the participating local governments pursuant to Section 163.01(7)(b), F.S., which states that "separate legal entities" have the common power to "… incur debts, liabilities, or obligations which do not constitute the debts, liabilities, or obligations of any of the parties to the agreement."
- All allow new "partners" to enter into the program through a fairly

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standard process: pass a Resolution, execute an interlocal agreement and/or form a new regional partnership.
- All access one common "platform" for the program operation including a web-based application process, information hotline, contractor registration, etc.[4]

The Florida programs include:

1. One of the multi-jurisdictional programs is the Green Corridor District PACE Program ("Green Corridor") in Miami-Dade County administered by Ygrene. The Town of Cutler Bay along with seven local governments within Miami-Dade County launched the Green Corridor in 2012. The Green Corridor board currently consists of one representative from each local government. All of the "qualifying improvements" defined in Section 163.08, F.S., are eligible for financing under the program. The Green Corridor is a turnkey senior lien priority program that includes both residential and non-residential properties. There is no cost to the local governments to participate in the Green Corridor. Instead, the costs of the program are integrated into administration and financing of the program. Since its inception, the program has financed $2.3 million in qualifying improvements. The majority of these improvements have been on residential property with an average residential project size of $32,000.

2. Miami-Dade County includes another PACE program called the Coastal Corridor. This program was modeled off of the Green Corridor and consists of three municipalities. The Coastal Corridor initiated its program over the last year with the filing of a bond validation. The trial court validated the Coastal Corridor bonds, but as discussed in further detail below this validation has been appealed. The Coastal Corridor is currently reviewing various options for financing qualifying improvements while this appeal is pending.

3. Another program, Florida Green Energy Works, is a statewide multi-jurisdictional structure with broad geographic representation as it fills its seven (7) statewide board seats. Until this point, the program has only focused on commercial properties but through partnerships is launching residential. To date, the Florida Green Energy Works program includes twelve (12) local government jurisdictions across four (4) separate counties. The program uses an open market financing approach for commercial working with multiple lending institutions and financial sources and requires the consent of any existing lenders on the commercial properties. For residential, the program will provide other capital sources. The program is open and currently accepting applications, and is registering contractors and energy reviewers for property owners to use their services.

4. The final multi-jurisdictional program is the Florida PACE Funding Agency, which currently includes Flagler County, Nassau County, the City of Kissimmee, Jefferson County and Gadsden County. The program will underwrite both residential and commercial PACE projects and has partnered with a single capital provider.

5. Following its unsuccessful efforts at overturning the FHFA "Rule," the Leon County Energy Improvement District decided to alter its path for the PACE program, without abandoning its efforts at utilizing PACE for residential single-family homes. The alternative path was to pursue commercial and multi-family PACE (units of quadplexes and greater) by utilizing a third-party provider. The District issued a Request for Proposals ("RFP") and following the submittal of proposals, the District selected Ygrene as its third-party administrator. After successfully negotiating the Third-Party Administrator Agreement and execution of same on September 13, 2013, the District set about establishing its commercial and multi-family PACE program. In order to provide funding for the program, the District, on November 19, 2013, authorized a bond issue of $200,000,000 with so-called "take down bonds" that would be purchased by Ygrene.

6. The non-profit Solar and Energy Loan Fund ("SELF") has now been operational for more than three (3) years and expanded service into five (5) counties in East Central Florida. SELF is an energy finance program that does not utilize the "assessment" approach but is a more traditional loan-based program. Originating out of St. Lucie County, SELF has completed 930 energy assessments and closed 280 home energy retrofit loans totaling $2.4 million. SELF has also recently been approved as a field partner with Kiva.org and has already begun raising loan capital through worldwide peer-to-peer lending a new innovation in this type of energy financing. SELF has also been working closely with St. Lucie County to customize and deploy its new PACE program. SELF recently secured the first $1 million of loan capital for the County's PACE program - which is now set to launch on September 1, 2014.

On other fronts, PACE in Florida is evolving and innovating in its own right both positively and negatively. On a positive note, several local governments are picking up on the trend in California by allowing multiple PACE programs to operate in their jurisdictions. Broward County was the first to commit to this model (deciding to utilize the Ygrene and Florida Green Energy Works programs). This was followed by Martin County and now Escambia County that are both pursuing multiple PACE providers. Florida PACE program providers seem to be amenable to multiple administrators. Many local governments are still "vetting" the programs on some level to assure solid program design and approach through either staff analysis or competitive bid. In utilizing this model, it will be important for coordination to occur to assure some level of uniformity. On a negative note, more litigation is occurring at the state level with programs that are pursuing the bond validation process.

VI. NO GOOD DEED GOES UNPUNISHED

Only in Florida can we come this far where PACE is beginning to scale again in this post-litigation climate, where we now have new legal hurdles. In no other state are PACE programs facing such obstacles deploying the myriad of options that exist for local governments to launch PACE as in Florida. Currently, there are four active cases in litigation regarding three ongoing bond validations for PACE programs. These cases include the *Leon County Energy Improvement District* (a dependent special district of Leon County)[5], the *Clean Energy Coastal Corridor*[6] and the *Florida Development Finance Corporation*[7]. Despite this current activity, three validations have occurred to date: 1) 2010 for St. Lucie County 2) 2011 for the Florida PACE Funding Agency and 3) 2012 for the Green Corridor, but now challenging and appealing these rather routine bond validation proceedings is common.

Either through single jurisdiction programs or multi-jurisdictional programs, bond validations pursuant to Chapter 75, F.S.,[8] are undertaken to use bond proceeds to finance the actual "qualifying improvements" in a PACE program. The PACE assessments are used to secure the bonds in the programs. The scope of bond validation proceedings is a three-pronged test: 1) does the public body have authority to issue the bonds, 2) is the purpose of the bonds legal and 3) does the bond issuance comply with the requirements of law?

As stated, three bond validation proceedings for PACE are being challenged and appealed to the Florida Supreme Court and a fourth appeal has been filed by the Florida Banker's Association (separate case involving one of the three mentioned proceedings). The scope of the appeals has been to challenge the financing agreement or due process/procedural claims regarding the bond validation process itself. None of the appeals have included an attack on the PACE statute, Section 163.08, F.S., (for instance constitutionality), or the underlying programs. Robert Reynolds, a citizen of Leon County filed a notice of appeal in two of the three proceedings (*Leon County Energy Improvement District* and *Florida Development Finance Corporation*) and three citizens in Broward County, Vicki Thomas, Christopher Trapani and Sidney Karabel, filed an appeal in the *Clean Energy Coastal Corridor* proceeding. The Florida Banker's Association has also filed a notice of appeal involving one of the three proceedings (*Florida Development Finance Corporation*), although their basis for appeal is unknown at the time of this writing. Given the common nature of these programs, it begs the question as to why these common proceedings are being challenged in the first place. Appellees are represented by common counsel in three of the four total cases while the three residents of Broward County are represented by separate counsel. The following includes a case status for the three proceedings:

1. **Leon County Energy Improvement District.** The District filed a bond validation proceeding for the $200,000,000 bonds on December 5, 2013. A hearing was held before the Circuit Court on March 10, 2014, and there were no objections by any parties including the State Attorney's Office. However, on the 30th day after the entry of the Final Judgment authorizing and validating said bonds, an individual filed a Notice of Appeal of the bond validation to the Florida Supreme Court on April 9, 2014. The briefs of all parties have now been filed, and the matter is scheduled for oral argument before the Florida Supreme Court on October 8, 2014. The District is hopeful that the Florida Supreme Court will uphold the validation and find that the claims by the individual are without merit. Until the Supreme Court case has been resolved, the program is on hold, other than the qualification and training of contractors and efforts to establish a Ygrene local office in Leon County, Florida.

2. **Clean Energy Coastal Corridor.** Objections were raised at the Circuit Court level to the Complaint opposing the bond validation (March 25, 2014). After a Final Judgment was rendered in this proceeding (May 27, 2014) an appeal was filed (June 26, 2014) to the Florida Supreme Court largely related to due process claims over the inclusion of Broward County in the proceeding and other non-substantive claims woven in as part of the aforementioned three-part test for a bond validation proceeding.

3. **Florida Development Finance Corporation.** After a Final Judgment was rendered in the proceeding, Robert Reynolds filed a Notice of Objections to Plaintiff's Proposed Final Judgment (June 17, 2014) largely related to the form of the Financing Agreement for PACE transactions and the process of entering into the program for local governments. The result was an Amended Final Judgment (rendered July 18, 2014) upholding the proceeding, which was also appealed to the Florida Supreme Court by Robert Reynolds (on or around August 18, 2014, not available on docket). The Florida Banker's Association has also filed a Notice of Appearance (August 15, 2014) and Notice of Appeal of the Amended Final Judgment (August 18, 2014) to the Florida Supreme Court. Their basis for appeal is unknown as of the date of this writing.

The trend of this litigation appears to be (at this time) objections at the Circuit Court level or appeal after Final Judgment is rendered validating the bonds, to a procedural element of the bond validation proceeding itself and not to the constitutionality of the programs or Section 163.08, F.S. Without knowing the basis for appeal by the Florida Banker's Association, it is unclear whether this trend will hold up.

With Florida clearly on the track to create and have multiple options to fit varying local government needs and goals relative to PACE, it is unfortunate that this latest trend creates more cost, obstacles and difficulties for PACE deployment in Florida. The hope is that these proceedings will be quickly finalized upholding a local government's authority to issue bonds for qualifying improvements, or PACE, programs and providing multiple options for launching PACE programs.

***Erin L. Deady**, is President of Erin L. Deady, P.A. Herb W. Thiele is the County Attorney of Leon County. Chad*

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Friedman is a Partner at Weiss Serota Helfman Pastoriza Cole & Boniske. Lewis, Longman & Walker P.A. and Erin L. Deady, P.A. represented Leon County in its action against FHFA, Fannie Mae and Freddie Mac. Erin L. Deady, P.A. also represents the Florida Green Energy Works Program. Weiss Serota Helfman Pastoriza Cole & Boniske is representing the Green Corridor and Coastal Corridor PACE Programs.

Endnotes:

[1] In 2012, the Florida Legislature adopted a small amendment to the Section 163.08, F.S. clarifying that a separate legal entity created under Section 163.01(7), F.S. is considered a local government for purposes of this statute.

[2] Plaintiffs included the Sierra Club; Sonoma County, California; Placer County; the City of Palm Desert, California; the Natural Resource Defense Council, Inc.; the Town of Babylon, New York; and Leon County, Florida (Leon County filed its Complaint on October 8, 2010).

[3] In New York, on October 24th, the Second Circuit Court of Appeals upheld the dismissal of the cases from the Southern and Eastern Districts of New York. After being dismissed at the District Court level, the Florida case was appealed and argued before the Eleventh Circuit Court of Appeals on October 30, 2012. On November 9, 2012, the Eleventh Circuit upheld the dismissal from the Northern District of Florida.

On August 9, 2012, the Northern District Court of California granted the plaintiffs' motion for summary judgment with respect to their notice and comment claim under the APA. But the Court found it unnecessary to rule on the remaining claims under the APA and the NEPA. The Court found that FHFA was acting as a regulator finding and the FHFA's PACE directives amounted to substantive rulemaking. Similar to this rulemaking, the FHFA had utilized the notice and comment process before with respect to its proposed rule restricting the regulated entities from purchasing mortgages on properties encumbered by private transfer fee covenants deemed to undermine the safety and soundness of their investments. In that analogous instance, the FHFA deemed it appropriate to comply with the APA notice and comment requirements, but did not undertake that process for PACE. The Court also found that FHFA's directives on PACE obligations amounted to substantive rulemaking, not an interpretation of rules that would be exempt from the notice and comment requirement. A final judgment was entered in the case on October 16, 2012, dismissing all other claims including Tenth Amendment claims, but finding that FHFA failed to comply with required notice and comment procedures set forth in the APA.

On March 19, 2013, the Ninth Circuit Court of Appeals vacated the District Court's previous order and dismissed it for lack of jurisdiction. The FHFA issued a "directive" preventing Freddie and Fannie from buying mortgages on properties encumbered by liens made under PACE on residential properties. The Ninth Circuit panel held that the FHFA's decision to cease purchasing mortgages on PACE-encumbered properties was a lawful exercise of its statutory authority as conservator of Freddie and Fannie. The panel held that the courts do not have jurisdiction to review actions that the FHFA takes as a conservator, and dismissed the case.

[4] Even though it is not a multi-jurisdictional program, Leon County utilizes the Ygrene PACE platform.

[5] *Leon County Energy Improvement District v. State of Florida*, No. 2013-CA-003396 (Fla. 2nd Cir. Ct. Mar. 13, 2014)
Robert Reynolds v. Leon County Energy Improvement District, No. 2014-APS-000230 (Fla. 1st DCA Apr. 10, 2014)
Robert Reynolds v. Leon County Energy Improvement District, Etc., et al., No. SC14-710 (Fla. filed Apr. 11, 2014)

[6] *Clean Energy Coastal Corridor v. State of Florida*, No. 2013-CA-003457 (Fla. 2nd Cir. Ct. May 27, 2014)
Vicki Thomas et.al v. State of Florida, No. 2014-APS-000416 (Fla. 1st DCA Jul. 1, 2014)
Vicki Thomas et.al v. State of Florida, No. SC14-1282 (Fla. filed Jul. 2, 2014)

[7] *Florida Development Finance Corporation v. State of Florida*, No. 2014-CA-000548 (Fla. 2nd Cir. Ct. Jun. 16, 2014)
Florida Bankers Association v. State of Florida, No. 2014-APS-000526 (Fla. 1st DCA Aug. 15, 2014)
Florida Bankers Association v. State of Florida, No. SC14-1603 (Fla. filed Aug. 18, 2014)
Robert Reynolds v. State of Florida, No. SC14-1618 (Fla. filed Aug. 18, 2014)

[8] Section 75.04, F.S., states: (1) The complaint shall set out the plaintiff's authority for incurring the bonded debt or issuing certificates of debt, the holding of an election and the result when an election is required, the ordinance, resolution, or other proceeding authorizing the issue and its adoption, all other essential proceedings had or taken in connection therewith, the amount of the bonds or certificates to be issued and the interest they are to bear; and, in case of a drainage, conservation, or reclamation district, the authority for the creation of such district, for the issuance of bonds, for the levy and assessment of taxes and all other pertinent matters.

A New Age of Legionnaires' Disease in the United States

by J. David Krause, PhD, MSPH, CIH, Geosyntec Consultants

By all definitions Legionnaires' Disease (LD) is the most lethal building-related illness (BRI) caused by a microorganism. *Legionella,* the bacteria responsible for causing LD, has the ability to impact both the occupants of a building and surrounding neighborhoods, making it especially dangerous. Once thought to be a rare organism, public health officials now accept that *Legionella* is present in over half of the nation's municipal water supplies[1] and has been found in 60–70% of hospital plumbing systems.[2] [3] Amplification of the bacteria in cooling towers is so commonplace that an entire industry of biocide treatment has arisen to control the microbe.

Despite being greatly underreported, cases of Legionnaires' Disease (LD) have been steadily rising since 2000. According to the Centers for Disease Control and Prevention (CDC) reported cases of LD rose from 1,110 in 2000 to 3,522 in 2009, constituting a 217 % (or 3 fold) increase over the course of 10 years. Confidence in these numbers is muted, as the CDC acknowledges that the nation's passive reporting system fails to capture many of the diagnosed and undiagnosed cases, meaning the actual number is likely to be higher. The CDC estimates the actual number of cases to be somewhere between 8,000 and 18,000 annually.[4]

Legionella is the most frequently reported cause of drinking water-related disease outbreaks in the US. Between April 2009 and December 2010 14 of the 15 drinking water-related deaths reported to the CDC from April 2009 through December 2010 were attributed to *Legionella*.[5]

Given that LD is so lethal, apparently widespread, and increasing–why is it so difficult to detect and control?

Public health agencies only consider performing environmental assessments to find the source of LD when an outbreak involving two or more people is detected by the existing surveillance system. When an epidemiologic association is not readily seen by state epidemiologists, then the case is deemed either a sporadic community or healthcare acquired case, and no further investigation is performed. This should not provide much comfort since only 4% of U.S. resident cases were associated with an outbreak during the 2005-2009 reporting period. This means that approximately 96% of cases were determined to be sporadic cases that did not warrant further investigation by public health officials.[6]

Clinical practitioners now rely almost exclusively (97%) upon the urinary antigen assay to diagnose and confirm that a patient's pneumonia is a result of *Legionella pneumophila*, serogroup 1.[7] Without follow-up on culture and isolation of clinical specimens, a match with environmental source isolates cannot be performed. The absence of such a comparison severely handicaps the public health investigation and limits the certainty that the causative source has been identified and mitigated.[8] This approach also excludes detection of pneumonias caused by strains of *Legionella* that are not caused by *Legionella pneumophila*, serogroup 1.

Residual chlorine levels in drinking water supplies are frequently found to be very low or undetectable in outbreaks. The United States Environmental Protection Agency's (US EPA's) ongoing efforts to reduce levels of carcinogenic disinfection by-products, namely total trihalomethanes (TTHMs) may be driving this condition. Because chlorine combines with organic debris in the water to create TTHMs some water suppliers may be driven to reduce chlorine levels in order to meet ever decreasing limits for TTHMs.

In addition to the problem of reduced chlorine disinfectant levels, the infrastructure of potable water lines throughout the country are degrading. Sediment, scale, and biofilm accumulation in water mains and community and building distribution lines forms an ideal habitat for *Legionalla* and other waterborne bacteria and amoeba. These biological communities help to protect the bacteria from regular and shock treatments of chlorine disinfectants by buffering the microorganisms. These biofilm communities also hasten the rate of pipe corrosion, which result in ruptures and the influx of soil and bacteria, often including *Legionella*.

Water temperatures in homes, hospitals, hotels, and other commercial facilities are limited, by most local plumbing codes to 120° F at the sink or shower outlet. Older buildings that do not have tempering valves to mix cold and hot water just before reaching the faucet must set back their water heater temperatures to the 120° F limit. This set point can sometimes inadvertently create an ideal environment for *Legionella* amplification within the hot water storage tanks.

Inconsistency and lack of detailed procedures in the guidance for maintenance of evaporative cooling systems (cooling towers) may be contributing to a false sense of security. A review of 38 current guidelines for evaporative cooling systems by researchers at the University of Texas School of Public Health in Houston, Texas revealed a series of deficiencies, inconsistencies, and lack of specificity. The study suggests that more specific and standardized maintenance guidelines for the control of *Legionella* are needed. These guidelines must be properly implemented to help reduce the risk of LD outbreaks associated with evaporative cooling systems.[9]

Economic Drivers

The green revolution and widespread efforts to reduce energy usage in the US may be necessary for the sustained survival of our society, but are also likely to have some unintended consequences. Efforts to reduce energy consumption often translate into lowering hot water temperatures in home and commercial plumbing systems. All other conditions being equal, lowering hot water temperatures from 140° F to 120° F is likely to increase the probability of *Legionella* colonization and amplification. Aging water heaters tend to have more sediment and scale, which creates a comfortable home for *Legionella* to grow. We have seen well-intended efforts to reduce energy result in *Legionella* amplification.

Efforts to reduce water usage by installing low-flow fixtures can result in stagnation of water, chlorine dissipation, and habitats that are more favorable to *Legionella* amplification. Flushing water through a building's water supply helps to refresh chlorine disinfectant levels and can be protective against bacterial amplification, if the chlorine levels are high enough. Reducing water usage is not a guarantee that *Legionella* will colonize a plumbing system, but before implementing such changes the overall impact on residual chlorine levels and biofilm development should be considered.

The proliferation of electronic eye faucets in bathroom sinks has had an unforeseen impact because they have created a breeding ground for *Legionella* and other waterborne microorganisms. Many of these electronic eye faucets were installed for two purposes. First they were supposed to save water by shutting off automatically, bypassing the discourteous patron who left the sink flowing. Second, they were supposed to reduce the spread of germs by eliminating the need for contact with the faucet handles. Unfortunately, the mechanics of making water flow without touching a faucet handle involves a system of solenoids, mixing devices, and a metal mesh screen to catch debris. The inner workings of such a mechanical wonder create a great habitat for *Legionella* and *Pseudomonas*. Several studies in hospitals have found high levels of bacteria growing in these strainers and mixing valves, resulting in high levels in the water. While no outbreaks of LD have been publicly attributed to these automatic faucets, the data clearly shows bacterial amplification and an increased risk of exposure.[10]

Outbreaks of Disease Continue to Occur

Deaths and illnesses caused by Legionnaires' disease occur every week throughout the US. However, only outbreaks of 2 or more people are reported in the media, although community acquired and travel related disease happens every day. In 2011 (the most recent year that data is available), 4,202 cases of Legionellosis were recorded by the CDC, averaging eleven cases per day and ten deaths per month attributable to a preventable building related disease.

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In 2009 (the most recent year mortality data are available), of the 3,522 reported cases, 104 (approximately 3%) people died. Since greater than 90% of the cases recorded by the CDC are not associated with outbreaks it can be difficult to interpret these data. High mortality rates may occur more often during outbreaks of LD than with sporadic cases.

An outbreak that caused the deaths of several patients at the Veterans Administration (VA) Hospital in Pittsburgh between 2011-2012 was the subject of a Congressional hearing.[9] Testing of water systems since then has revealed that two VA clinics in Alabama were contamination by the bacteria. Deaths associated with Legionnaires disease outbreaks have also been reported in hospitals, fitness centers, retirement communities, and nursing homes in Indiana, Illinois, Ohio, Florida, Michigan, Wisconsin, Pennsylvania, New York, Nevada, and Maryland.

The cost of contracting LD can range from tens to hundreds of thousands of dollars in medical bills, often times including a stay at the intensive care unit with a severe pneumonia. Recovery is difficult and life-long residual effects are often reported. If an individual case or outbreak is associated with a building or facility, the costs for testing, remediation, and post-remediation testing can often exceed $250,000, even in small facilities. Larger, more complex buildings such as hospitals, factories, and resort hotels can require testing and remediation efforts approaching a million dollars. And all of these costs are in addition to lost revenue and legal defense of lawsuits that almost always occur.

Taking a Proactive Approach

By using the basic tenants of Industrial Hygiene regarding anticipation, recognition, evaluation, control and prevention of hazards in the workplace employers and facility operators can potentially implement programs that prevent Legionnaires' disease. Using currently available tools a competent professional can evaluate the potential sources of *Legionella* amplification and exposure to characterize hazards in their facilities and protect both workers and public health.

Until research studies are able to establish reliable and predictive surrogate indicators of *Legionella* amplification, public health officials and industrial hygienists must rely upon culturable samples to assess the presence and extent of *Legionella* amplification in water sources. Source control will most successfully limit the risk of LD. While periodic sampling for *Legionella* is really just a measure of control effectiveness, it cannot be replaced as a validation tool. Monitoring disinfectant levels, water temperature, and pH are necessary components of a proactive monitoring plan. However, these control indicators cannot be relied upon to verify the effectiveness of *Legionella* control.

The frequency of measurements, number of measurement sites, and other optimal parameters needed to accurately and predictably detect *Legionella* amplification has not been empirically determined. At the present time we must rely upon professional judgment and familiarity with each facility and its potential sources to establish site specific monitoring programs.

Because we must rely so heavily upon the professional judgment and expertise of an individual some effort is needed to determine who should be considered a competent professional. Because *Legionella* is a challenging microorganism to control, and the water systems it tends to colonize are complex by their very nature, individuals charged with establishing and implementing a proactive monitoring plan should have a sound foundation of knowledge and specific training on *Legionella*, its ecology, control, and measurement.

Only specially trained and qualified individuals should perform assessments of *Legionella* in building water systems, design remediation protocols, and conduct post-remediation verification. Such individuals include, but would not be limited to, Certified Industrial Hygienists (CIHs) with specialized education, training, and experience specific to *Legionella* and building water systems. Individuals with less training and education can perform much of the sample collection and measurement of water source parameters under the direction of a competent professional.

Teams conducting assessments of amplification sources suspected to have caused either a single case of LD, or an outbreak, should be multi-disciplinary and be comprised of appropriate subject matter experts, including occupational or respiratory physicians and building engineers.

Interpretation of sampling and measurement results should be left to competent professionals with general and specific knowledge of building water systems (both potable and utility), microbiology, sampling methodologies, personal protective equipment and exposure assessment.

Conclusions

Legionnaires' disease is a preventable building related illness that infects thousands of Americans every year, resulting in many unnecessary deaths. The system established by the nation's public health agencies is far from adequate, misses most cases, investigates only a small percentage of them, and by its own metrics is failing. With an estimated 250% rise in incidence rates since 2000 and no signs of abating, a different approach must be considered.

Numerous factors are believed to increase the risk of LD. Combined with the rising number of susceptible people in our communities (i.e., the aging population and immunocompromised individuals), we should anticipate a surge in outbreaks and sporadic cases acquired in healthcare facilities and the community at large. The collision of contributing environmental factors with increasing risks of LD should spur efforts to shift from surveillance and reactionary responses to lethal outbreaks to proactive preventive programs run by competent professionals.

Despite challenges of doing this with the sampling and measurement methods currently available, we should not simply abandon efforts to prevent illness and disease associated with *Legionella*. By moving away from the existing CDC reactionary approach and implementing a proactive approach based upon

core principles of Industrial Hygiene we can begin lowering the cases of Legionnaires' disease and related deaths.

Endnotes:

[1] ES&T 2/22/2014 http://pubs.acs.org/doi/pdf/10.1021/es4055115

[2] Vickers, RM, Yu, VL, Hanna, SS, et al. Determinants of L. pneumophila contamination of water distribution systems: 15 hospitals prospectively study. Infect Control 8:357-363, 1987. http://legionella.org/publications/sources/determinants-of-l-pneumophila-contamination-of-water-distribution-systems/

[3] Stout JE, Muder RR, Mietzner S, Wagener MM, Perri MB, DeRoos K, Goodrich D, Arnold W, Williamson T, Ruark O, Treadway C, Eckstein EC, Marshall D, Rafferty ME, Sarro K, Page J, Jenkins R, Oda G, Shimoda KJ, Zervos MJ, Bittner M, Camhi SL, Panwalker AP, Donskey CJ, Nguyen MH, Holodniy M, Yu VL; Legionella Study Group. Role of environmental surveillance in determining the risk of hospital-acquired legionellosis: a national surveillance study with clinical correlations. Infect Control Hosp Epidemiol. 2007;28:818-24. http://www.legionella.org/Stout%20et%20al-ICHE%20V28-2007.pdf

[4] MMWR 8/19/2011 http://www.cdc.gov/mmwr/pdf/wk/mm6032.pdf

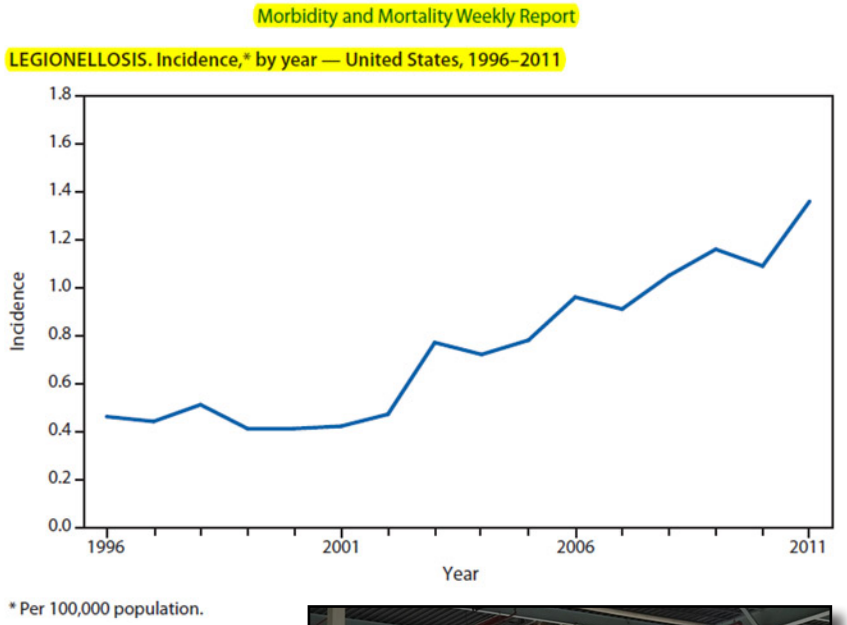
[5] MMWR 9/6/2013 http://www.cdc.gov/mmwr/pdf/wk/mm6235.pdf

[6] Benin, Benson & Besser, Trends in LD 1980-1998: Declining Mortality and New Patterns of Diagnosis. http://cid.oxfordjournals.org/content/35/9/1039.full.pdf+html?sid=7391648d-143a-4739-ad74-f10d8ff8a810

[7] JOEH 3/16/2011 http://oeh.tandfonline.com/doi/full/10.1080/15459624.2011.565409#.UxZ_6diYb3h

[8] Sydnor ER1, Bova G, Gimburg A, Cosgrove SE, Perl TM, Maragakis LL., Electronic-eye faucets: Legionella species contamination in healthcare settings. Infect Control Hosp Epidemiol. 2012 Mar;33(3):235-40

[9] https://veterans.house.gov/hearing/analyzing-va%E2%80%99s-actions-to-prevent-legionnaire%E2%80 %99s-disease-in-pittsburgh



On Appeal

by Larry Sellers

Note: Status of cases is as of August 15, 2014. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

DOT v. Clipper Bay Investments, LLC, Case No. SC 13-775. Petition for review of 1st DCA decision determining that the Marketable Record Title Act's exception for easements in right-of-ways is applicable to land held as a fee estate for the purpose of a right-of-way, so long as competent substantial evidence establishes the land is held for such a purpose. The court reversed the trial court's award of a portion of the land north of the I-10 fence line and remanded with instruction to quiet title to all of the land north of the I-10 fence line in Clipper Bay, except for the portion used by Santa Rosa County. 38 Fla. L. Weekly D271a (Fla. 1st DCA 2013). Status: Oral argument held on April 8, 2014. Supplemental briefs requested and filed.

FIRST DCA

Ahler, et al. v. Scott, et al. Case No. 1D14-3243. Appeal from final judgment denying petition for writ of mandamus seeking to compel defendants to require Georgia-Pacific to obtain authorization for the use of mixing zones associated with its discharge to the lower St. John's River. Status: Notice of appeal Filed July 18, 2014.

Florida Fish and Wildlife Conservation Commission v. Wakulla Fishermen's Association, Inc., et al., Case No. 1D13-5115. Appeal from final judgment enjoining any and all further enforcement of the net ban amendment as set forth in Article X, §16, the Commission's authority to adopt rules to regulate marine life with respect to the use of a "gill net" or an "entangling net" pursuant to Article IV, §9, and Rules 68B-4.002, 68B-4.0081 and 68B-39.0048. Case No. 2011-CA-2195 (2d Cir. final judgment entered October 22, 2013). Status: Reversed on July 7, 2014, 39 Fla. L. Weekly D1407a.

SECOND DCA

Florida Audubon Society v. United States Sugar Corporation, Sugar Farms Co-Op and SFWMD, Case No.: 2D14-2328. Appeal from final order renewing Everglades works of the district permits for the United States Sugar Corporation, Sugar Farms Co-Op and Sugar Cane Growers Cooperative of Florida. Status: Notice of appeal filed May 15, 2014.

THIRD DCA

Miami-Dade County, et al. v. Florida Power & Light Co., et al. Case No.: 3D14-1467. Appeal from final order of the Siting Board certifying two nuclear units at Turkey Point as well as proposed corridors for transmission lines. Status: Notice of Appeal filed June 16, 2014.

Padron v. Ekblom and DEP, Case No. 3D13-2446. Appeal from final order adopting recommended order determining that Ekblom's application to install a boat lift on an existing dock in a man-made body of water is exempt from the need for an ERP. Status: Affirmed on July 23, 2014, 39 Fla. L. Weekly D1546a.

FOURTH DCA

Conservation Alliance of St. Lucie, et al. v. DEP, Case No. 4D13-3504. Appeal from a final order adopting a recommended order of dismissal, which dismissed for lack of standing a challenge to a settlement agreement resolving an enforcement action relating to alleged contamination of soil and groundwater at a bleach-manufacturing and chlorine-repackaging facility. DOAH Case No. 10-3807 (Final Order entered August 21, 2013). Among other things, the order concludes that petitioners were "foreclosed from asserting their interests under subsection 403.412(6), Florida Statutes, in a proceeding where DEP took enforcement action." Status: Affirmed August 6, 2014, 39 Fla. L. Weekly D1650a.

Conservation Alliance of St. Lucie County and Roman v. DEP, Case No. 4D13-2925. Appeal from final order adopting recommended order determining that the petition for hearing was filed untimely and that petitioners failed to demonstrate standing to request a hearing. Status: Affirmed *per curiam* on July 17, 2014.

Law School Liaisons

A Look Ahead to an Exciting Fall Semester at the Florida State University College of Law

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

The College of Law's Environmental Program is delighted that *U.S. News & World Report* again ranked our Environmental Program in the nation's top 20, for the 10th consecutive year. We are looking forward to another productive year beginning this fall.

We are pleased to announce a new **joint degree** program with Florida State University's Department of Earth, Ocean, and Atmospheric Sciences. Through this collaborative initiative, students are able to earn a J.D. and a Master of Science degree in Aquatic Environmental Sciences in just seven semesters, instead of the usual five full years.

In this column we feature recent accomplishments of our distinguished alumni, many of whom are members of the Section. We also provide a summary of the exciting events we have planned for the fall semester.

Alumni News


Jeremy Susac


Jeff Woods


Gigi Rollini


Howard Fox


Nancy Linnan

Timothy P. Atkinson ('93) has been named a Florida Trend's Florida Legal Elite 2013 in the area of Environmental & Land Use. He is a shareholder with Oertel, Fernandez, Bryant & Atkinson, P.A. in Tallahassee.

Jacob T. Cremer ('10), of Smolker, Bartlett, Schlosser, Loeb & Hinds, P.A.'s Tampa office, was elected to the Executive Council of The Florida Bar's Environmental and Land Use Section. He was re-elected to the Board of Governors of Connect Florida, Leadership Florida's young professional program. He also co-authored an amicus brief to the U.S. Supreme Court in support of the property owner in Koontz v. St. Johns River Water Management District, No. 11-1447 (argued Jan. 15, 2013). The American Bar Association Constitutional Law Committee published his article about the same case in its newsletter.

Howard Fox ('09), an attorney with Fowler White Burnett, spoke on"The Current State of Federal and State Environmental Enforcement - with an emphasis on Florida," at the National Association of Environmental Professionals (NAEP) 2014 Annual Conference, April 7 - 10, 2014. He also presented on environmental enforcement in the Environmental Law class at University of Miami Law School.

Justin B. Green ('05), who previously headed the Florida DEP Division of Air's Compliance and Enforcement Section, now leads the Florida Department of Environmental Protection's Siting Coordination Office, which is responsible for licensing power plants in Florida.

Thomas Kay ('05) is serving as the Executive Director of the Alachua Conservation Trust, a non-profit land conservation organization located in Gainesville. The Trust recently received the National Land Trust Excellence Award for its collaborative and innovative efforts in policy and creative funding as well as its broad education and outreach initiatives.

Brian Kenyon ('11) has joined the firm of Holland & Knight in Miami as an associate focusing on land use.

Matthew Z. Leopold ('05) is the General Counsel for the Florida Department of Environmental Protection.

Nancy G. Linnan ('74) was named the 2014 Tallahassee Real Estate Law "Lawyer of the Year." Linnan is a shareholder in Carlton Fields' Tallahassee office.

Anne Longman ('79), a shareholder at Lewis, Longman & Walker, P.A., was recently named Tallahassee Lawyer of the Year for Environmental Law and Environmental Litigation by U.S. News Media Group and Best Lawyers.

Trey Mills ('06) was elected a shareholder at Rogers Towers. He was also elected to the Board of Directors for the North Florida Land Trust.

Andrew Missel ('14) will be clerking for Judge Mark Walker of the Northern District of Florida, beginning in August 2015.

Kaitlin Monaghan ('13) joined Advanced Energy Economy in Washington, D.C. as an associate.

Abby Queale's ('11) article, *Responding to the Response: Reforming the Legal Framework for Dispersant Use in Oil Spill Response Efforts in the Wake of Deepwater Horizon*, 18 Hastings West Northwest J. of Envtl. L. & Pol'y 63 (2012), was cited by the U.S. District Court in In re Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mexico, MDL 2179, 2012 WL 5960192 (E.D. La. Nov. 28, 2012).

Colin Roopnarine ('95) has been named General Counsel of the Florida Office of Financial Regulation.

Gigi Rollini ('03) was appointed Vice Chair of The Florida Bar Appellate Administrative Law Practice Standing Committee and named a "Super Lawyer" in appellate law by Florida Super Lawyers magazine.

Law School Liaisons continued....

LAW SCHOOL LIAISONS
from page 17

Jeremy Susac (L.L.M. '14) recently joined Berger Singerman as a partner and member of its Government Regulatory Team, focused on environmental law and energy-related matters.

Sarah Taitt ('08), an Assistant County Attorney in Osceola County, gave a presentation during the Florida Association of County Attorneys' mid-year CLE that highlighted the growing trend of urban farming in Florida and around the United States.

Chris Tanner ('10) is now an attorney with the Southwest Florida Water Management District.

Liesl Voges ('13) joined the City of Tallahassee as a Senior Planner in Growth Management.

Jeffrey H. Wood (FSU Law '03) has joined the Environmental and Natural Resources Section and Energy Section of Balch & Bingham LLP as a partner in the firm's Washington, D.C. office. Mr. Wood previously served as an attorney for U.S. Sen. Jeff Sessions (R-AL), where he provided advice on environmental, energy, transportation, maritime, agriculture, and forestry issues for more than three years, working closely with members of Congress and federal agency officials. While on Capitol Hill, Mr. Wood also served as the Republican staff director for the Senate Subcommittee on Clean Air & Nuclear Safety in the 113th Congress and the Republican staff director for the Senate Subcommittee on Water & Wildlife in the 112th Congress. Prior to serving on Capitol Hill, Mr. Wood worked as an in-house corporate attorney for almost four years with Ingram Barge Company (IBCO) in Nashville, Tenn., the nation's largest inland waterway transportation corporation. During his tenure at IBCO, Mr. Wood rose to the position of assistant general counsel and managed litigation in federal and state courts across the country, as well as navigated complex regulatory issues and advised the corporation on environmental, transportation, maritime and homeland security issues. Before his corporate and political work, Mr. Wood spent four years as an associate with Balch & Bingham in the firm's Birmingham, AL office. Jeff can be reached at jhwood@balch.com.

Fall 2014 Events


David Adelman


Vinette Godelia


Tom Kay


Vicki Tschinkel


Hari Osofsky

Distinguished Environmental Lecture: The College of Law is honored to host **David Adelman**, Harry Reasoner Regents Chair in Law, the University of Texas at Austin School of Law (October 8, 2014).

Fall Environmental Forum: Florida Renewable Energy: The College of Law's Fall *Environmental Forum* will focus on Florida Renewable Energy. We are still finalizing our list of speakers, but panelists confirmed so far include **Patrick Sheehan**, Director of the Florida Office of Energy, **Michael Sole**, Vice President, State Government Affairs, Florida Power & Light Company, and **Barry Weiss**, a solo practitioner in energy law. Professor **Hannah Wiseman** will moderate the program (November 5, 2014).

Faculty Workshops: **Hari Osofsky**, Professor of Law, 2013-14 Fesler-Lampert Chair in Urban and Regional Affairs, and Director, Joint Degree Program in Law, Science & Technology, University of Minnesota Law School, will visit the College of Law this fall for a faculty workshop.

Environmental Certificate and Environmental LL.M. Enrichment Series:

The Environmental Certificate Program will feature four prominent speakers this fall: **Vinette Godelia**, Partner Hopping Green & Sams; **Tom Kay**, Executive Director, Alachua Conservation Trust; **Vicki Tschinkel**, Vice Chairman, 1000 Friends of Florida; and **Hari Osofsky**, Professor of Law, 2013-14 Fesler-Lampert Chair in Urban and Regional Affairs, and Director, Joint Degree Program in Law, Science & Technology, University of Minnesota Law School.

Environmental Externship Luncheon:

The College of Law's Clinical Externship Program and Environmental Program will host a luncheon on September 9 to enable students to meet with representatives from agencies and public interest organizations and explore externship opportunities for the Spring and Summer semesters.

ALUMNI NEWS WANTED

The College of Law wants to hear from alumni!
Please send accomplishments and updates to **lpickern@law.fsu.edu**.
We look forward to sharing your news.

Upcoming Events

For information about upcoming events, please visit: http://www.law.fsu.edu/academic_programs/environmental/events.html

College of Law Alumni Listserve

The Environmental Law Program at Florida State University shares job opportunities and news about upcoming events with members of its Environmental Alumni listserve. Please e-mail **lpickern@law.fsu.edu** to join the listserve.

Law School Liaisons continued....

UF Law Update

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

Amy Stein Joins ELULP Faculty

Amy Stein has joined the faculty of the Environmental and Land Use Law Program as an Associate Professor of Law. She will be teaching Energy Law and Policy, Climate Change Law, and Torts.

"I am extremely excited to be joining such a top-notch environmental program," she said.

Professor Stein focuses her scholarship on clean energy, environmental, and climate change law and policy. "Energy law has spilled over into so many other fields that everyone should have a basic understanding of the administrative, regulatory, market, and environmental issues facing energy development today. I look forward to working with such bright and engaged UF students to provide them with the foundation necessary to continue to explore both the historical and cutting edge issues relevant to navigating our energy future," she said.

Her recent publications address energy storage, ***Reconsidering Regulatory Uncertainty: A Path Forward for Energy Storage***, 41 FLA. ST. U. L. REV. (forthcoming 2014); the federal government's role in developing renewable energy, ***Renewable Energy Through Agency Action***, 84 U. COLO. L. REV. 651 (forthcoming 2013); the federalism implications of subnational control over siting of electricity generation, ***The Tipping Point of Federalism***, 45 CONN. L. REV. 217 (2012); and the deficiencies of climate change analysis in NEPA documents, ***Climate Change Under NEPA: Avoiding Cursory Consideration of Greenhouse Gases***, 81 U. COLO. L. REV. 473 (2010), all of which can be accessed at http://ssrn.com/author=1216973.

Her most recent work was selected for presentation at Columbia Law School's Sabin Colloquium on Innovative Environmental Law Scholarship, Minnesota Law School's Legal and Policy Pathways for Energy Innovation conference, UT Austin's Electricity conference, Northwestern's Federalism and Energy Conference, and the Electric Power Executive Conference.

Previously, she was an Associate Professor of Law at Tulane Law School, an Adjunct Professor in the Environmental Studies program at the George Washington University, and a Visiting Associate Professor of Legal Research and Writing, Acting Associate Director of the Legal Research and Writing Program, and Co-director of the Scholarly Writing Program at The George Washington University Law School. Prior to her academic appointments, she practiced as an environmental and litigation associate for Latham & Watkins LLP in the firm's Washington, D.C., and Silicon Valley offices. She is a member of the District of Columbia, Illinois, and California state bars. She received her J.D. from the University of Chicago Law School and her bachelor's degree in Environmental Studies from the University of Chicago.

UF Law Professor Cohn Instrumental in "Green" Corporations Law

UF Law Professor Stuart Cohn was a principal in drafting a new law that allows corporations in Florida to form a "benefit corporation" or "social purpose corporation", thus allowing them to contribute in a significant way to greater social causes and look beyond the bottom line. The new law went into effect in Florida on July 1.

Cohn worked with state Senator Jeff Clemens (D-Lake Worth) and Rep. Pat Rooney, Jr., (R-Palm Beach), the legislation's sponsors. Professor Cohn said the idea of benefit corporations arose a few years ago when he was appointed by the Corporations, Securities & Financial Services Committee of the Business Law Section of The Florida Bar to head up a study of this new form of enterprise and to draft legislation. He headed the project and was assisted by UF law student James Glover.

"The idea of a benefit corporation has been around for several years and now over 25 states have adopted some form of legislation allowing it. Those of us who worked on this project believe that Florida's legislation may be the best in the country, as we provide socially-minded entrepreneurs greater choice and freedom than exists in most other states," Cohn said. "Socially-minded entrepreneurs and investors who want to engage in for-profit companies that undertake substantial and significant public interest activities can do so without fear of running up against traditional corporate doctrine regarding maximization of profit. We are likely to see a growth in Florida in public-interest type corporations. Right now, only not-for-profit corporations can engage in such substantial activities, but those corporations are not able to make and distribute profits to investors, which limits their attractiveness to obtaining capital."

Angelo Joins Interdisciplinary Everglades Water Research Team

ELULP Director Mary Jane Angelo is participating on a six-member interdisciplinary University of Florida research team this fall that will conduct a technical review of the options to move water from Lake Okeechobee to the Everglades. The Florida Senate contracted for the research project, which will conclude with a report by the UF team in early 2015.

The research team includes Project Leader Wendy Graham, Director, UF Water Institute; Karl Havens, Director, Florida Sea Grant College Program; Thomas Frazer, Director, UF School of Natural Resources and Environment; K. Ramesh Reddy, Chair, UF/IFAS Department of Soil and Water Science; Peter Frederick, Research Professor, Wildlife Ecology and Conservation; and Angelo.

Law School Liaisons continued....

LAW SCHOOL LIAISONS
from page 19

For decades, planning has been underway to develop solutions to these problems. Currently, the Comprehensive Everglades Restoration Plan is being implemented by the U.S. Army Corps of Engineers, the South Florida Water Management District, and the U.S. Department of Interior.

The UF research team will review relevant reports and documents and interview scientists and engineers at the lead management agencies. They also will gather information from agencies, organizations and individuals with expertise on issues related to reducing regulatory discharges from Lake Okeechobee to the estuaries and to increasing the flow of water from the lake to the Everglades. The Florida Senate authorized an independent review of agency-adopted plans to ensure that the plans are technically sound and to seek innovative and new approaches to moving the water.

The UF research team is charged with developing a final report to the Florida Senate, including an inventory and assessment of current and proposed restoration plans developed by state and federal agencies and stakeholders, as well as any identified by the review team; future uncertainties that could affect restoration plans; and policy and project options for improving water management.

Prior to joining the UF law faculty in 2004, Professor Angelo served as Senior Assistant General Counsel to the St. Johns River Water Management District, Palatka, FL; and was an attorney in U.S. Environmental Protection Agency, Washington, D.C.

2015 Spring Capstone Colloquium Speakers Selected

"Emerging Topics in Land Use and Sustainable Energy" is the theme for the 2015 Spring Environmental Capstone Colloquium, as announced by Christine Klein, Chesterfield Smith Professor and Director of the LL.M. Program in Environmental and Land Use Law.

While the exact dates and presentation titles have not been finalized, the speakers who will participate are:

- Bruce Huber, Associate Professor of Law, Notre Dame Law School
- Ashira Ostrow, Associate Professor of Law, Maurice A. Deane School of Law at Hofstra University
- Uma Outka, Associate Professor of Law, University of Kansas School of Law
- Sara Schindler, Associate Professor of Law, University of Maine School of Law
- Amy Stein, Associate Professor of Law, University of Florida Levin College of Law

The Capstone Colloquium is funded by contributions from Hopping Green & Sams and Jennifer Springfield, P.A. For additional information, please contact Program Assistant Lena Hinson (hinson@law.ufl.edu).

Visiting International Faculty

Professor Roberto Virzo of the University of Sannio in Benevento, Italy, will offer a course on "International Organizations and Law of Sea" this year. He will be co-teaching with Oscar Avalle, Resident Representative, The World Bank, Colombia. Both visiting professors have previously taught at UF law.

The course provides a survey of international law of the sea and focuses on the legal regime established by both customary international law and the United Nations Convention on the Law of the Sea (UNCLOS). It covers the topics of: internal waters; territorial sea; international straits and archipelagos; contiguous zone; exclusive economic zone; continental shelf; high seas and the international seabed area; management and conservation of living resources (including fisheries); protection and preservation of marine environment; and settlement of law of the sea disputes.

Your consideration and feedback are being requested by The Florida Bar Board of Governors, if you wish to provide them. A prior request for input did not generate many comments.

The attached copy of the proposal is in legislative format. Substantive changes appear in the 4th and 5th paragraphs of the comment to the rule. Changes to subdivision (a) of the rule are mainly to conform to the Supreme Court of Florida style guide and were not proposed by FACA or the section. Also attached are letters written by FACA and the section to the Rules Committee as well as Florida Ethics Opinion 09-1 referenced in their letters. A bar News story on the issue is available at the link below:

http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/f6dfc3fb1fa0bf8a85257d3f0042f39f!OpenDocument

Please submit your comments in writing to the Rules Committee by email to eto@flabar.org. Comments must be received by November 7, 2014 so that they can be provided to the Board of Governors for consideration in advance of the board's December 12, 2014 meeting.

The Board of Governors appreciates your input. Thank you for your assistance.

Sincerely,

_____

Elizabeth Clark Tarbert
Ethics Counsel
The Florida Bar
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Thanks to our Annual Update Sponsors, and congratulations to the following award recipients:

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Award Recipients

Dean Frank E. Maloney Writing Contest
1st Place - Lauren Geraci
2nd Place - Loren Vasquez
3rd Place - C. Claire Armagnac

Hopping Scholarship
Elizabeth Turner
Melissa Fedenko

Public Interest Committee Attorney Award
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Kelly Samek & Janet Bowman

Paul Chipok, Nicole Kibert, Sid Ansbacher, Mary Smallwood, Ralph Demeo & Richard Hamann

Kelly Samek & Nicole Kibert

resolved should not be entered into because developing and heavily-polluting nations such as China and India were not subject to it, and which then President Clinton declined to submit to the Senate for ratification.[5]

Although attention on climate change and CO_2 levels increased throughout this period, the United States Congress did not promulgate any laws requiring CO_2 emission reductions. Of particular note, this is true of Congress's substantial amendments to the CAA in 1990, which included three provisions touching on matters related to global climate change but did not authorize regulation.[6] But, in 1998, under the Clinton Administration, EPA issued a memorandum concluding for the first time that the agency believed it had authority under the CAA to regulate CO_2, although it also assured the public that it had no intent to do so.[7]

Then, in 1999, at the end of the Clinton Administration, a collection of public interest groups petitioned EPA to promulgate rules under the CAA regulating GHGs from motor vehicles. The Clinton Administration, however, did not act before President Bush assumed office in 2001. Under the Bush Administration, EPA changed course and issued a new memorandum concluding that contrary to the agency's position under the Clinton Administration, the CAA did not provide authority to regulate GHG emissions to address global climate change, and, even if it did, EPA was justified in exercising its discretion not to.[8] EPA subsequently entered an order reiterating these conclusions and denying the public interest group's rulemaking petition.[9]

In support of its position, EPA argued that the CAA's structure and legislative history demonstrated that it was never intended to apply to the regulation of GHGs. EPA pointed out that the CAA is designed to address local air quality issues, not global issues like atmospheric CO_2 concentrations, which do not vary locally and cannot be meaningfully influenced by isolated local reductions. In addition, EPA noted the CAA's limited references to climate change-related issues and the non-regulatory nature of those references; evidence from the CAA's legislative history that suggested Congress had considered and rejected CO_2 regulation; and instances outside the CAA where Congress addressed climate change but rejected regulation. Finally, EPA relied significantly on the U.S. Supreme Court's intervening decision in *Food and Drug Administration* v. *Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291 (2000), as the basis for the reversal of its prior position under the Clinton Administration. Quoting *Brown & Williamson*, EPA suggested that Congress would not "delegate a decision of such economic and political significance . . . in so cryptic a fashion" and that *Brown & Williamson* cautioned against "using broadly worded statutory authority to regulate in areas raising unusually significant economic and political issues."[10]

Act One: *Massachusetts v. EPA*

EPA's decision to reject the rulemaking petitions was challenged, resulting in the U.S. Supreme Court's seminal decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). *Massachusetts* was initially decided by the D.C. Circuit in favor of EPA. On appeal, however, the U.S. Supreme Court reversed and remanded.

The Court first concluded that the CAA in fact provided EPA the authority to regulate GHG emissions, such as CO_2, from new motor vehicles.[11] Next, given EPA's authority to regulate CO_2, the Court considered whether EPA had the discretion not to regulate CO_2. While agreeing that EPA had some discretion, the Court was unconvinced by EPA's rationale. The Court held that EPA's judgment in responding to the petition for rulemaking must be based on whether GHGs "cause[s], or contribute[s] to, air pollution which may reasonable be anticipated to endanger public health or welfare."[12]

The Court concluded that the list of reasons offered by EPA for not acting did not provided a reasoned justification for not forming a scientific judgment on the issue, and that if the scientific uncertainty was too profound to reach a judgment, EPA must say so clearly. In reaching this holding, the Court explicitly noted it was not addressing whether on remand EPA must make this so-called "endangerment finding" or "whether policy concerns can inform EPA's actions in the event that it makes such a finding."[13] The Court also distinguished EPA's reliance on *Brown & Williamson*, including that it did not believe EPA's regulation of motor vehicles would lead to the sort of "extreme measures" at issue in *Brown & Williamson.*[14] The Bush Administration began work in response to the Court's ruling in *Massachusetts*, but took no formal action before President Obama's election.[15]

Act Two: *Utility Air Regulatory Group v. EPA*

Soon after President Obama came to office in 2009, EPA quickly began to act in response to *Massachusetts*, all while publicly stating that the Administration would prefer Congress to address climate change.[16] That same year, EPA issued its Endangerment Finding under the CAA's motor vehicle provisions concluding that GHGs were reasonably anticipated to endanger public health or welfare.[17] Further, President Obama pledged at the United Nations Climate Change Conference in Copenhagen that by 2025, the United States would reduce its GHG emissions by 30 percent below 2005 levels if all other major economies agreed to limit their emissions as well.[18]

As a result of the Endangerment Finding, and as required by section 202(a)(1) of the CAA's motor vehicle provisions, EPA quickly promulgated its "Tailpipe Rule" setting fuel efficiency standards for cars and light trucks.[19] Next, EPA concluded that regulation of new motor vehicles under the Tailpipe Rule automatically triggered regulation of GHGs from stationary sources under the CAA's Prevention of Significant Deterioration (PSD) and Title V permitting provisions, which led to EPA's "Tailoring Rule."[20] The Tailoring Rule, in a departure from the explicit 100/250 ton per year (tpy) thresholds in the CAA, provided that only sources emitting more than 75,000 or 100,000 tpy of carbon dioxide equivalent – depending on the program and project – would be subject to PSD or Title V regulation for GHGs.[21]

All three rules were subsequently challenged and upheld in a mid-2012 D.C. Circuit Court decision. The U.S.

Supreme Court agreed to hear an appeal, but it limited review to a single question: whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the CAA for stationary sources that emit GHGs. In early 2014, the Court rendered its decision in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (herein after *UARG).*

The Court first concluded that the CAA neither compelled nor allowed EPA to subject stationary sources to the CAA's PSD or Title V permitting programs based solely on their GHG emissions.[22] In reaching this conclusion, the Court held in part that EPA's interpretation was unreasonable because "it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[23] And, quoting *Brown & Williamson* (which the Court previously distinguished in *Massachusetts*), the Court held that

> [w]hen an agency claims to discover in a long-extant statue an unheralded power to regulate "a significant portion of the American economy," we typically greet this announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[24]

The Court noted that EPA itself acknowledged that subjecting sources to PSD for GHG emissions at the CAA's statutory thresholds would capture large residential buildings, hotels, retail establishments, and similar facilities resulting in an "unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land."[25] Further, the Court concluded that EPA's Tailoring Rule, which sought to avoid these impacts, could not save the agency's erroneous interpretation that PSD could apply based on a source's GHG emissions.[26]

The Court next addressed whether sources triggering PSD based on other emissions could still be required to comply with the PSD program's Best Available Control Technology (BACT) requirement for GHGs. While concluding this was a permissible interpretation, the Court acknowledged concerns about EPA's application of BACT to GHGs leading to "unbounded" regulation of energy use at a facility, controlling everything from "light bulbs in the factory cafeteria" to basic industrial processes.[27] As a practical matter, energy efficiency measures dominate the BACT controls that have been approved to date, and no GHG-BACT determination has been made requiring a more traditional end-of-stack type of technology, which for GHGs would consist of carbon capture and storage.[28] The Court responded to these concerns by noting mitigating limitations on BACT and by concluding that applying BACT to GHGs "need not result in such a dramatic expansion of agency authority, as to convince us that EPA's interpretation is unreasonable."[29] But, the Court also "acknowledge[d] the potential for greenhouse-gas BACT to lead to an unreasonable and unanticipated degree of regulation, and [its] decision should not be taken as an endorsement of aspects of EPA's current approach, nor as a free rein for any future regulatory application of BACT in this distinct context."[30]

Act Three: Another Dance Before the U.S. Supreme Court?

While the litigation in *UARG* was proceeding, the Obama Administration was pressing forward with further CAA-based GHG regulation, which culminated in several far-reaching EPA proposals targeting CO_2 emissions from the electric utility industry. These proposals largely flow from the Obama Administration's 2013 Climate Action Plan, which echoed the President's Copenhagen pledge to reduce CO_2 emissions and directed EPA to issue proposals through the CAA's section 111 New Source Performance Standards (NSPS) program to reduce emissions from electric utilities by 30 percent from 2005 levels by 2030.[31] At the core of the CAA's NSPS program are emission standards based on EPA's determination of what constitutes the best system of emission reduction (BSER) that has been "adequately demonstrated" taking into account cost and any nonair-related health, environmental, and energy impacts.[32] In accordance with the Climate Action Plan, EPA issued a suite of proposals in 2014 proposing BSER-based emission standards, including for both new and existing power plants.[33]

EPA's proposal for new power plants addresses natural gas-fired combustion turbines and fossil fuel-fired boilers (i.e., coal-fired boilers).[34] For new natural gas-fired combustion turbines, EPA has proposed standards based on the use of modern, efficient combustion turbines.[35] For new coal-fired boilers, EPA's proposal would require carbon capture and storage, a technology that has never been commercially deployed on a power plant.[36] The potential impact of this proposal for future coal-fired generation is expansive, including potentially barring the construction of any new coal-fired generation because of the cost of carbon capture and storage and uncertainty over its deployment.[37] EPA's proposal also presents an expansive interpretation of its authority to determine what constitutes BSER for a category of sources within the NSPS program. The relationship of BSER for NSPS and BACT for PSD within the structure of the CAA is illustrative on this point.

NSPS emission standards are nationally applicable to all sources within a category and are commonly understood as a providing an emission "floor." BACT determinations, in contrast, are made for each individual source on a fact-specific basis to determine if more stringent emission reductions beyond the floor are appropriate. EPA affirmed this relationship in its oral argument before the U.S. Supreme Court in *UARG*.[38] Yet, in this case, EPA is proposing to establish nationally-applicable NSPS emission standards based on a technology, carbon capture and storage, that has never been determined to be appropriate even under the more stringent fact-specific requirements of BACT.

For existing power plants, EPA's proposal presents a radically different, unprecedented, and even more expansive interpretation of its authority. Rather than propose what emissions reductions were adequately demonstrated as BSER for existing coal-fired boilers and natural gas-fired combustion turbines, EPA has proposed individualized state-wide emission goals based on four "building blocks," including: (1) heat rate

continued....

efficiency improvements at coal-fired boilers; (2) redispatch from coal-fired boilers to natural gas-fire combustion turbines; (3) reduced use of all fossil fuel-fired generation through increased use of low- and zero-carbon sources (e.g., nuclear and renewables); and (4) improved downstream energy efficiency to reduce customer demand on fossil fuel-fired generation.[39]

Under EPA's proposal, states would be required to submit implementation plans that would demonstrate enforceable regulations that, when taken together, would have the effect of reducing emissions sufficient to meet the applicable state-wide emission goal.[40] In EPA's view, this could include traditional "inside-the-fence" restrictions on emissions, such as allowable emissions rates, an allowance system, or equipment specifications, as well as "outside-the-fence" measures, including "any requirement applicable to any affected entity other than an affected source that has the effect of reducing utilization of one or more affected sources, thereby avoiding emissions from such sources, including, for example, renewable energy and demand-side energy efficiency measures requirements."[41]

The potential impacts of EPA's existing-facility proposal on the electric utility industry would be dramatic. Nationwide, EPA projects that by 2025 the proposal would result in the retirement of an additional 50,000 MW of coal-fired generation.[42] For Florida, EPA projects the retirement of an additional 6,358 MW of coal-fired generation, more than 10 percent of the nationwide total. [43] Based on EPA's projections, the coal-fired portion of Florida's generation mix would be reduced from 31.9 percent in 2002 to 1.7 percent in 2025, while natural gas generation will have grown from 25 percent to 85 percent.[44] Needless to say, this would be an extraordinary restructuring of the electric utility industry.

EPA's efforts to stretch the boundaries of its regulatory authority under the of CAA's NSPS provisions and the potential dramatic affects of that regulation on a significant portion of the American economy cannot help but bring to mind the U.S. Supreme Court's treatment of EPA's regulatory efforts in *UARG*. As the Court stated in *UARG*,

> [w]hen an agency claims to discover in a long-extant statue an unheralded power to regulate "a significant portion of the American economy," we typically greet this announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[45]

EPA's proposed NSPS regulations seemingly fit this description; they would effectively regulate the nation's entire generation mix (not just CO_2 emissions from particular types of sources) and would extend beyond any prior interpretation of EPA's NSPS authority to reach issues like demand-side energy efficiency measures. At this point, however, one can only speculate as to how EPA will ultimately structure its regulations in a final action and what myriad of legal issues that are likely to be raised over those future final rules.

Regardless, it seems likely that once EPA finalizes these regulations, ensuing legal challenges over EPA's CAA-based authority to regulate GHGs may reach the U.S. Supreme Court for a third time in a decade. While there are likely to be many future legal battles over the limits of EPA's authority to regulate GHGs under the CAA, the outcome of EPA's current regulatory efforts under the NSPS program could prove to be the climatic third act and set a decisive precedent in determining the scope of future regulation of GHGs under the CAA. Regardless of the ultimate outcome, the implications are significant for everyone, including the broader public, and we should all be watching as this latest episode in EPA's efforts to regulate GHG emissions proceeds.

Endnotes:

1 *Util. Air Regulatory Group v. EPA*, 134 S. Ct 2427, 2436 (2014) (quoting the Clean Air Act Handbook).

2 *See, e.g., Id.* at 2442-43 (discussing difficultly applying the CAA's Prevention of Significant Deterioration program to GHGs).

3 *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 506-7 (2007) (discussing history of the CAA as related to study of climate change).

4 *Id.*

5 *Id.*

6 *See, e.g.,* EPA Memorandum: EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act, Robert E. Fabricant, EPA General Counsel, at 4-5 (Aug. 28, 2003).

7 *See, e.g.,* EPA Memorandum: EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources, Jonathan Z. Cannon., EPA General Counsel (Apr. 10, 1998); Christopher T. Giovinazzo, *Defending Overstatement: The Symbolic Clean Air Act and Carbon Dioxide* 30 Harv. Envtl. L. Rev 99, 134 (2006) (noting statements by EPA General Counsel that "EPA has no plans to use existing authority to regulate CO_2 emissions.").

8 *See* EPA Memorandum: EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act, Robert E. Fabricant, EPA General Counsel (Aug. 28, 2003).

9 68 Fed. Reg. 52922 (Sept. 8, 2003).

10 *See generally, Id.*

11 *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007).

12 *Id.* at 532-533.

13 *Id.* at 534-535.

14 *Id.* at 530-531.

15 *See* Darren Samuelsohn & Robin Bravender, *EPA Releases Bush-Era Endangerment Document*, N.Y. Times, Oct. 13, 2009 (indicating Bush Administration initially investigated executive action on GHGs, but decided the CAA was unworkable for that purpose, and instead sought legislation from Congress), *available at*, http://www.nytimes.com/gwire/2009/10/13/13greenwire-epa-releases-bush-era-endangerment-document-47439.html.

16 John M. Broder, *E.P.A. Clears Way for Greenhouse Gas Rules*, N.Y. Times, Apr. 17, 2009, *available at*, http://www.nytimes.com/2009/04/18/science/earth/18endanger.html?module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A8%22%7D.

17 74 Fed. Reg. 66496 (Dec. 15, 2009).

18 *President to Attend Copenhagen Climate Talks*, The White House, Office of the Press Secretary, (Nov. 25, 2009), available at http://www.whitehouse.gov/the-press-office/president-attend-copenhagen-climate-talks.

19 75 Fed. Reg. 25324 (May 7, 2010).

20 75 Fed. Reg. 31514 (June 3, 2010).

21 *Id.*

22 *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2447 (2014).

23 *Id.* at 2444

24 *Id.* (internal citations omitted).

25 *Id.* at 2436.

26 *Id.*

27 *Id.* at 2447.

28 *Id.* at 2447-2448.

29 *Id.* at 2448.

30 *Id.* at 2449.

31 Executive Office of the President, *The President's Climate Action Plan*, June 2013, *available at,* http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf; Mark Landler & John M. Broder, *Obama Outlines Ambitious Plan to Cut Greenhouse Gases*, N.Y. Times, June 25, 2013, *available at*, http://www.nytimes.com/2013/06/26/us/politics/obama-plan-to-cut-greenhouse-gases.html?pagewanted=all&module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A8%22%7D.

32 42 U.S.C. § 7411(a)(1).

33 79 Fed. Reg. 1429 (Jan. 8, 2014); 79 Fed. Reg.

34830 (June 18, 2014).
[34] *See generally,* 79 Fed. Reg. 1429 (Jan. 8, 2014).
[35] *Id.* at 1430.
[36] *Id.*
[37] Keith Johnson and Tennille Tracy, *EPA Plan to Curb New Coal-Fired Power Plants*, WALL ST. J., Sept. 11, 2013, *available at*, http://online.wsj.com/news/articles/SB10001424127887323864604579069550916021262.
[38] Transcript of Oral Argument in *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2447 (2014), at 48-49 ("That what you are supposed to do under BACT is use Best Available Control Technology to get above the floor, that the NSPS program sets those standards on an every 8-year basis, and the point of BACT is to force best practices to keep raising the bar during those 8-year intervals.") *available at* www.supremecourt.gov/oral_arguments/argument_transcripts/12-1146_nk5h.pdf.
[39] 79 Fed. Reg. 34830, 34856-58 (June 18, 2014).
[40] *Id.* at 34912.
[41] *Id.* at 34956 (defining "emission standard").
[42] EPA, *Parsed File: Option 1 State, 2025*, Docket ID: EPA-HQ-OAR-2013-0602-0221 (2014).
[43] *Id.*
[44] *Compare,* Florida Public Service Commission, *Facts and Figures of the Florida Utility Industry* 2 (2004), *with,* EPA, *Parsed File: Option 1 State, 2025*, Docket ID: EPA-HQ-OAR-2013-0602-0221 (2014).
[45] *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014).