www.eluls.org

THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

Vol. XXXII, No. 3
March 2011

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

Oil Spill Pollution Solutions:
International Liability for the *Deepwater Horizon* Crisis in a Transnational World

by Jessica Urban

On April 20, 2010, British Petroleum's *Deepwater Horizon* mobile offshore drilling rig exploded on the Outer Continental Shelf in the Gulf of Mexico.[1] The ensuing liability issues continue to cause a finger pointing regime on an international scale. Imminently unsatisfying, the shifting issues of international liability hover uneasily over the crisis with concerns, unanswered, were the spill to reach such countries as Mexico, Cuba and the Bahamas.[2] Despite the fact that the United States has asked British Petroleum (BP) to pay for the oil spill, it is subject to liability itself under conflicting general principles of international law. This Article asks whether the U.S. has international liability under current international law for the oil spill, were it to reach such countries as the Bahamas, Cuba and Mexico.

This Article will begin by looking at the facts which led to the crisis and then to the basis for Cuba's, Mexico's and the Bahamas' liability claims. This Article will then uncover causes of action under international law through the lenses of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the International Maritime Organization (IMO), the Convention for the Prevention of Pollution from Ships (MARPOL), the *Prestige* incident, the *Trail Smelter*

See "Oil Spill," page 24

From the Chair

by Joe Richards, Pasco County Attorney's Office

Your Executive Council is hard at work bringing you the programs and articles you expect. Your CLE committee has prepared many engaging seminars to keep you abreast of changes to the law and to fulfill your continuing legal education requirements. Please check our website and listserv messages for updates regarding upcoming programs. Remember, also, that if you can't attend these programs in person, they are available for purchase afterwards. This is a good way to obtain CLE credits on your own schedule. The ELULS Audio Webcast Series is continuing. The next installment is "Ethical Considerations for the Environmental and Land Use Practitioner" on April 17th.

We also have an immediate need for Florida Bar *Journal* articles. If you have a recent brief you've worked on that could be turned into a *Journal* column, please let us know. Alternatively, if you know of a topic that you think should be covered, let us know. We will find someone to write it up.

For anyone interested in joining the Executive Council, I encourage you to become involved with one of our many committees. Please check the website for more details. There are many ways to become involved and I encourage you to do so. You can contact us through the website or Facebook or call me anytime. Thanks.

INSIDE:

The Governors' South Atlantic Alliance: Regional Ocean & Coastal Governance

by Veronica Saavedra and Sidney F. Ansbacher

I. Introduction & Background

In 2009, North Carolina, South Carolina, Georgia, and Florida formed the Governors' South Atlantic Alliance (Alliance) as a voluntary interstate governmental partnership, and held public hearings throughout 2010 to explain the Alliance's authority and goals. The purpose of the Alliance is to provide for regional collaboration and planning of ocean and coastal resources. Otherwise various discordant and balkanized state programs would handle such issues on a state-by-state basis. The Alliance is one of six Regional Ocean Governance (ROG) partnerships recognized by the National Oceanic and Atmospheric Administration (NOAA) and the National Ocean Council for Stewardship of the Ocean, Coasts, and Great Lakes (NOC). Exec. Order No. 13547. NOAA delineated the regions based on coastal ecological zones, and began offering grants for any entities choosing to develop such regional partnerships in 2010. 75 FR 55541-01. The creation of ROGs followed a chain of events beginning with findings and recommendations of a Pew Ocean Commission (Pew) 2003 report and a U.S. Commission on Ocean Policy (USCOP) 2004 report.[1]

One example shows the difficulties of a unified approach. One commentator emphasized that the two reports identified overfished fisheries as a core problem.[2] Josh Engle explained that the best way of analyzing fisheries is as a capital asset, similar to a mine. "A 'sustainable' rate of fishing 'spends' only the interest generated by the asset, while 'overfishing' mines the capital." Accordingly, consumers will also pay more in the long run.[3] While the Alliance seeks to preserve those resources, it must weigh the economic engine aspects of the coastal region.[4] Sports and commercial fishing are huge components of the Southeast's economy.

Following the Pew and USCOP reports' recommendations, President Bush called for the development of new institutions on regional coastal and ocean governance. Exec. Order No. 13340. This Order also established the U.S. Ocean Action Plan and the Ocean Blueprint for the Twenty-First Century. Additionally, President Obama established the Interagency Ocean Policy Task Force in 2009, which published a Final Recommendation in July 2010 to create regional ocean partnerships. 75 FR 48521; 75 FR 45606. Thus, President Obama created NOC authority in July of 2010 for ocean, coastal, and great lakes management at the regional level. Exec. Order No. 13547.

II. Governors' South Atlantic Alliance Action Plan

The four South Atlantic states intend to implement these national goals and policies, while coordinating with applicable federal agencies, local governments, scientists, academia, private industry, and nongovernmental organizations. The Alliance drafted and signed an Action Plan to direct each member state's planning and management role in the coordinated and cooperative efforts.[5] The Action Plan discusses four priority issue areas, including: (1) healthy ecosystems, (2) working waterfronts, (3) clean ocean and coastal waters, and (4) disaster resilient communities. Each of these priorities is individually addressed, and include an overarching goal with objectives and actions for reaching each goal.

a. Healthy Ecosystems

The Healthy Ecosystems (HE) priority sets a goal for coastal and marine environmental sustainability, focusing on ecological and economic stability. This goal includes a concentration on ecosystem based management (EBM), developing and applying sound scientific data, increasing research efforts at the regional level, and cross-border communication of such EBM, scientific data, and educational outreach. The HE priority goal establishes four objectives, each with a list of specific actions to ensure meeting the objective and overarching goal.

The first HE objective is to implement regionally-coordinated EBM by mapping key estuarine and marine habitats, identifying distributions of species of special concern, and developing an integrated interstate database of all such mapping and scientific data. The second HE objective encourages evaluating independent and cumulative impacts on ocean and coastal systems due to development and climate change by assessing resources of greatest risk, as well as developing methods for assessing cumulative impacts of these high-risk areas. The third HE objective calls for "economic, science-based land-use" as well as ocean planning/management through habitat conservation and restoration, ecosystem health and impact evaluation, and multiple use marine spatial planning via joint federal-state efforts. Additionally, the objective calls for EBM using mapping and impact evaluation results in land use planning efforts, and to expand educational outreach. The final objective of the HE priority focuses on managing invasive species through interstate data compilation to identify their distributions, educational outreach to enhance remediation, and researching the risks of these nuisance species.

b. Working Waterfronts

The second priority of the Alliance Action Plan focuses on Working Waterfronts (WW), which include cultural activities, commerce, public access/use, and infrastructure development and maintenance. The WW goal is to manage water access points (including public access and ports) while balancing these needs with other development, historic uses, port expansion, and sustainable resource uses, which are addressed in three objectives.

The first WW objective involves infrastructure expansion that addresses dredging impacts, natural resource protection, and ship/cargo-carried invasives. Actions to meet this objective incorporate long-range planning for multiple uses, promoting existing navigational channels and infrastructure, and forecasting long-range coastal port needs. The second

objective focuses on best management practices (BMPs) to balance multiple uses for viability of a sustainable economy in working waterfronts. Activities include maintaining recreational and commercial waterfronts via public/private partnerships and incentives, predicting future impacts and needs, encouraging land use and waterway planning, expanding technical assistance on WW, and promoting eco-tourism. Additionally, the objective calls for the establishment of a public access inventory from each state, as well as the maintenance of U.S. military waterfront access. The final WW objective and actions encourage emerging industries in energy development for local job placement, adopting model land use and water management policies to incorporate energy development, and ensuring no-net loss of public access.

c. Clean Coastal and Ocean Waters

Clean coastal and ocean waters (CCOW) (yes, sea cow) is the third Alliance Action Plan priority, with the goal of providing managers tools for effective target prevention, enforcement, response, mitigation, and the integration of coastal and ocean observing systems. Four objectives and actions are set out to meet the CCOW goal.

The first objective is to improve point and non-point source pollution management at the watershed level by establishing regional technical work groups, using best available technology for reducing nitrogen pollution, and sharing knowledge to implement BMPs, including smart growth and green infrastructure. The second CCOW objective focuses on research and partnership development to better understand climate change impacts on water quality and quantity, and to develop strategies in light of this phenomenon. Such research would be carried out through partnerships creating sustainability programs and center on regional water quality impacts and map-based tools assessing how and where alterations will likely occur due to climate change. Similarly, the third objective calls for standardizing water quality data collection and reporting through regional monitoring used to identify state and regional monitoring needs. The last objective works to improve marine debris removal programs by increasing interstate communication for identifying owners of derelict or abandoned vessels, setting a baseline density of marine debris, and developing educational programs.

d. Disaster-Resilient Communities

The last Action Plan priority is to ensure disaster-resilient communities (DRC), with a goal of better understanding ocean and weather dynamics in light of episodic and chronic impacts due to climate change and other weather patterns. In reaching this overarching DRC goal, the Action Plan sets forth five objectives.

The first objective focuses on assessing vulnerabilities to hazards and climate change as well as determining economic values of ecosystem services which help to support resilience. The actions include risk assessments, hazard mitigation plans, and case-by-case decision-making regarding ecosystem services. The second objective is to create adaptation and mitigation plans in light of climate change and sea level rise, while taking into account socioeconomic conditions. The third DRC objective is improving redevelopment after a disaster by evaluating current initiatives, developing guidance to improve these initiatives, and looking into short-term economic recovery options for long-term redevelopment. Additionally, the fourth objective calls for reducing development in high-risk areas via the institution of incentive programs and removal of high-risk development subsidies. Vulnerable areas must first be identified, incentives and disincentives must be studied and better understood, and analysis must be completed to determine the legal and economic ramifications of discontinuing subsidies. In addition to high-risk zones, the Action Plan addresses shoreline migration in its last objective. Shoreline migration is addressed by modeling future migration patterns and developing regional standards or BMPs for monitoring such migration, as well as determining necessary adaptations.

III. Alliance Organization, Structure & Actions

In addition to the Action Plan, the Alliance has composed an Executive Group, Steering Group, and Issue Area Technical Teams in collaboration with other supporting partners.[6] The Executive Group is comprised of the member states' governors, and provides guidance to the Steering Group for plan development and implementation. The governors seek to ensure regional connectivity of and coordination among the states, as well as with other regional and national activities. The Steering Group representatives appointed by member states' governors are senior state officials who oversee actions in their representative states. Steering Group members plan and organize the Alliance Action Plan priority programs within their respective states. Issue Area Technical Teams develop and implement the specific plans made by the Steering Group, including the goals, objectives, strategies, and schedules. Each state Steering Group member selects a technical lead representative for the respective state to implement project tasks via the integration of science and policy. Supporting partners are the stakeholders: federal, local, academic, non-governmental organizations, and private sectors. These individuals lay the ground work, providing the people and some funding for research, as well as technical expertise.

The Alliance holds a minimum of one meeting per year to report achievements of each sub-group and the Alliance as a whole, as well as to discuss areas requiring further work or improvement and any emerging issues. Throughout the year, the Technical Teams keep in constant contact as necessary in completing research and implementation assignments.

IV. Alliance Pros and Cons

The organization and priorities of the Alliance Action Plan have set many useful standards and goals for guiding each of the state governments to develop programs consistent with one another's needs, and taking into account a wide array of ecological and socioeconomic concerns. Yet, because this Alliance is fairly new, state implementation is only at the planning phase, and any success of this program cannot be gauged until the states begin such implementation. This Alliance is similar to other ROG partnerships, and the successes and failures of those programs can serve as a tool for how North Carolina, South Carolina, Georgia, and Florida should consider the implementation

continued...

of their own programs for meeting their shared goals expressed in the Alliance Action Plan.

NOAA generated an overview of regional ocean governance in 2009 that explicated some of the problems faced to that date by other ROGs.7 That document set forth issues that the South Atlantic Alliance will likely face:

• Insufficient data for decision making at regional, state and local levels, and lack of coordination among entities collecting data.

• Disproportionate and overall weak investment from the federal government.

Lack of capacity to staff and implement regional governance initiatives.

• Sustained engagement and participation from state and federal leaders.

Competition between states as well as other regional organizations.

• Lack of a unified, compelling story hinders ability to increase support and ultimate success.

Additionally, while intergovernmental cooperation is the goal in this Alliance, and the Southern Atlantic region's governors signed the Action Plan, the document specifies that it is voluntary. Thus, it is not legally binding. Therefore, each state actor is involved in the Alliance on a good faith basis. This has both benefits and drawbacks.

An area of concern regarding ROGs in general is the lack of enforceability to ensure the states are following through with meeting the regional goals and standards. Unlike a legally binding document, such as an interstate compact, there is no recourse for any of the states involved when another state "breaches" the Alliance Action Plan. On the other hand, a non-binding Action Plan allows for greater state autonomy and flexibility upon approval of state programs to implement the plan.

An interstate compact does not provide this flexibility because any amendment a state wishes to make requires consent of all states that are party to the compact. This may cause delays in implementing the regional and state plans, increasing the difficulty of practicing adaptive EBM policies or plans. Additionally, interstate compacts often require a state to create legislation, rather than regulatory policies, which often take a longer amount of time. An Action Plan provides state autonomy for reaching the Alliance's regional goals in any manner the state sees fit, including through state administrative agencies, which may be a faster and more flexible approach. However, the practical limitations are inherent in that flexibility. Each state's executive agency is limited by its own legislative delegation of authority, which may prevent adequate participation and implementation. Further, the Alliance's prefatory status undermines federal preemption claims in implementing the ROG in the face of contrary state legislation. This is particularly true of the various hot button coastal issues.

Because the Alliance is a voluntary partnership, states may not adequately participate or implement the Action Plan, particularly when the states have competing interests or values. However, shared goals and values are more likely to be implemented, creating a starting point for the Alliance. Additionally, incentives may ensure adequate state participation and implementation, such as NOAA's Regional Ocean Partnership Funding Program (ROPFP) which provides incentives for states and other entities to create voluntary regional collaboration and coordination plans. In fact, NOAA's 2010 call for funding proposals specified the intended purpose of the ROPFP to support two categories of ROG activities: (1) implementation of activities meeting ROG/ROP priorities set forth in their action plans, and (2) development of plans and activity management. 75 FR 55541-01. Additionally, one of the factors considered for providing funding is the applicant's prior award performance. The incentive seeks to ensure adequate performance, a failure of which may lead the ROG partnership to not receive funding for subsequent grant applications.

V. Conclusion

The push towards federalism and away from centralized regulation that permeated the 2010 election cycle shows little sign of abating. This is particularly true in the states that comprise the Alliance. Further, massive state budget shortfalls undermine the Alliance from the start. While the goals of the ROG and the Alliance are laudatory, the program's voluntary nature, lack of federal preemptive impact and absence of state legislative implementation, combine to call into question how much the Alliance will accomplish. Nonetheless, any mechanism that supports regional cooperation regarding the coastal resources has multiple benefits.

Endnotes:

[1] Pew Oceans Comm'n, America's Living Oceans: Charting a Course for Sea Change (2003); U.S. Comm'n on Ocean Policy, An Ocean Blueprint for the 21st Century: Final Report for the U.S. Commission on Ocean Policy (2004). Additionally, NOAA cites as a springboard a 2005 scientific consensus statement on marine ecosystem management. McLeod Palumbi and Rosenberg, 2005 Scientific Consensus Statement on Marine Eco-system Management (signed by 221 academic scientists).

[2] J. Engle, "Regional Ocean Governance: The Parts of Multiple-Use Management and the Promise of Agency Diversity." 16 DUKE ENTL L. & POLICY F. 143 (2006).

[3] *Id*. at Fn.3.

[4] *See, e.g.,* July 15, 2009, letter from various sports fisher organizations to the Interagency Ocean Policy Task Force, entitled "National Policy for the Oceans, Our Coasts, and the Great Lakes" (advocating access to coastal fisheries to further multibillion dollar benefits to economy).

[5] Governors' South Atlantic Alliance Action Plan, available at http://www.southatlanticalliance.org/.

[6] *See The Governors' South Atlantic Alliance: Partnership Agreement*, available at http://www.southatlanticalliance.org/agreement.htm.

[7] D. Finch and A. Harrison, Overview of Regional Ocean Governance and NOAA Involvement for Northeast Regional CZM Meetings (Nov. 12, 2009). http://coastalmanagement.noaa.gov/news/archivedmtgdocs/2009neregmtg/finch.pdf

Veronica Saavedra *is an intern at the Jacksonville office of GrayRobinson, P.A., focusing on environmental, natural resource, and land use law. She expects her J.D. in May 2011 with an Environmental Law Certificate from Florida Coastal School of Law, and is the Vice President of the Environmental Law Society. She graduated from the University of Florida with a B.S. in Wildlife Ecology and Conservation, specializing in Ecology.*

The Florida Bar Foundation: A Cause We Can Share

By John A. Noland, President, The Florida Bar Foundation

I hope lawyers in Florida will join me in supporting a common cause: The Florida Bar Foundation.

The Foundation, a 501(c)(3) public charity, is a means through which lawyers can support a commonly held belief that everyone should have access to legal representation – regardless of his or her ability to pay.

The Florida Bar Foundation's mission to provide greater access to justice is accomplished through funding of programs that expand and improve representation and advocacy for the poor in civil legal matters; improve the fair and effective administration of justice; and make public service an integral component of the law school experience.

In 1981, financial support for the Foundation increased significantly when the Florida Supreme Court adopted the nation's first Interest on Trust Accounts (IOTA) program. Over the past 29 years, the Florida IOTA program has distributed more than $350 million to help hundreds of thousands of Florida's poor receive critically needed free civil legal assistance and to improve Florida's justice system. More than 30 percent of the total funding for legal aid organizations in Florida comes from The Florida Bar Foundation.

Domestic violence, predatory lending and foreclosure, and access to public benefits are among the types of cases flooding legal aid offices throughout the state. For the sake of those throughout Florida with nowhere else to turn for legal help but to Legal Aid, your support of The Florida Bar Foundation is vital.

Gifts to the Foundation provide added value to your local legal aid organization because of Foundation initiatives such as salary supplementation and loan repayment programs to help retain legal aid attorneys, a Summer Fellows program that places law students at legal aid organizations for 11 weeks each summer, new technological efficiencies such as a statewide case management system, and training opportunities for legal aid staff attorneys.

The Foundation is unique as a funder in providing leadership, along with its financial support, by working with its grantees to improve Florida's legal services delivery system and identifying and addressing the legal needs of particularly vulnerable client groups. You can learn more about the Foundation at www.floridabarfoundation.org.

I hope you will come to consider The Florida Bar Foundation one of your charities. It's truly an organization in which all of us, as Florida attorneys, can take tremendous pride.

P.O. Box 1553 • Orlando, Fl 32802-1553 • 407-843-0045 • 800-541-2195 • Fax: 407-839-0287 • www.flabarfndn.org

Taking the LEED on Brown to Green with Renewed Energy

New funding formulations, an EPA focus on renewable energy, and a new LEED certification for neighborhood developments are helping to advance brownfields redevelopment projects

by Miles Ballogg, Roger Register, and Marc Mariano

Florida has more than 250 Brownfields sites -- properties on which expansion, redevelopment or reuse may be complicated by the presence or perceived presence of contamination. Slowly, but surely, these properties are being cleaned and redeveloped, contributing to a growing economy and a healthier environment. The credit goes to a combination of EPA programs, state-level incentives, local economic development assistance, society's increased interest in sustainability, and the determination and savvy of private developers and their consultants.

"There is no silver bullet to cleaning up and redeveloping these blighted properties," commented Terry Griffin, PG, Senior Hydrogeologist for Cardno TBE based in Clearwater, and vice chair of the affiliate members for Environmental Land Use Law Section of the Florida Bar Association. "It's really a culmination of a team effort of federal, state, and sometimes even local agency programs; the use of the latest and most creative design and technology; along with private funding; and knowledge of how to puzzle together the public funding pieces to bring a project to reality."

Federal Level Assistance

The U.S. Environmental Protection Agency's (EPA) Brownfields Program has undisputedly provided many benefits to the environment, economic development, and the health and welfare of local residents. For instance, according the EPA's Brownfield Benefits Postcard published January, 2011, brownfields projects have leveraged $17.39 per EPA dollar expended; helped to create tens of thousands of jobs nationwide; reduced stormwater runoff from development by 47 to 62 percent compared to runoff of greenfields scenarios; increased nearby residential property values 2 to 3 percent; and spurred area-wide planning and growth.

To build on these successes, EPA Administrator Lisa P. Jackson identified seven priorities for the EPA, including cleaning up our communities by maximizing the brownfields program to spur environmental cleanup and job creation in disadvantaged communities, as well as building strong state and tribal partnerships to address brownfields properties.

While there is no formal funding mechanism tied to the greening of brownfields, the EPA offers a healthy number of points to brownfields applications that preserve greenspace. More so, there is a plethora of federal, state, and local programs that can be tapped for the greening of brownfields. For a list of national programs that provide technical assistance and funding, visit www.epa.gov. Some programs of note are:

- The Environmentally Responsible Redevelopment and Reuse (ER3) Initiative, which uses enforcement and other Agency-wide incentives to promote sustainable redevelopment of contaminated sites.
- The American Recovery and Reinvestment Act (ARRA) of 2009, which added $100 million to the already appropriated $80 million for EPA's brownfields grant programs.
- The Partnership for Sustainable Communities initiative, a combined effort of the EPA, the U.S. Department of Housing and Urban Development, and the U.S. Department of Transportation to ensure that federal investments, policies, and actions support development in more efficient and sustainable locations. The group selected several pilot projects nationwide to receive technical assistance and to serve as a model for future projects.
- EPA Targeted Site Assessments Funding for Petroleum, Brownfields Corridors, and Renewable Energy Sites.
- The Green Buildings on Brownfields Initiative is designed to promote the use of green building techniques at brownfields properties in conjunction with assessment and cleanup.

Many brownfields projects in Florida have benefited from the U.S. EPA Brownfields program, including up to $400,000 to local governments and $1,000,000 for coalitions annually in EPA Brownfields Assessment Grants. Typically, the next step is obtaining up to $600,000 annually, $200,000 per site, in EPA Brownfields Clean-up Grants. In addition, the EPA Revolving Loan Fund Grants of up to $1 Million for each coalition member; EPA Job Training Grants of up to $200,000 for providing training for residents in the area near the brownfields location and the potential of up to $2,800,000 in funding annually.

The City of Cocoa, with a population of about 20,000, used an EPA Brownfields Assessment Grant when it planned to use the site of the former post office for its new City Hall. With the potential for arsenic and pesticides due to an old railroad that operated on the site, in addition to two dry cleaners, a retail gasoline station, an auto repair facility and a print shop all adjacent to the property, contamination was more than suspect. While the assessment determined that the property was free from pollutants, the site would probably still be abandoned had it not been for the EPA grant that paid for the assessment. The City went on to seek and earn the U.S. Green Building Council's LEED Silver Certification for the new City Hall.

Re-Powering America's Land Program

There is more to come . . . In October 2010, the EPA announced its Re-Powering America's Land Program,

led by EPA Office of Solid Waste and Emergency Response Center for Program Analysis (OSWER CPA). As demand for energy increases and communities become more concerned about the environmental impacts of fossil fuels, renewable energy will play a greater role in meeting future electricity demand. According to the EPA's website, wind, solar and biomass facilities supply 2.3 percent of our nation's electricity, but renewable energy production is expected to increase by more than 70 percent between 2006 and 2030. Identifying and using land located in areas with high quality renewable energy resources will be an essential component of developing more electricity. The program takes a multi-pronged approach by helping to identify potential sites, supporting pilot projects to reuse contaminated properties, estimating greenhouse gas benefits, identifying additional site redevelopment and reuse tools, and conducting outreach activities.

"Contaminated properties such as Brownfields and landfills present a triple win as locations for siting renewable energy facilities," explained Lura Matthews, lead for RE-Powering America's Land at EPA. "They often have critical infrastructure and adequate zoning in place, they provide an economically viable reuse to a property that may have been abandoned for a number of years, and their development protects greenspace and local habitat." You can view the Re-Powering America's Land management plan at www.epa.gov/oswercpa.

The town of St. Marks, Florida, with a population of just 300, could be one of the first communities to benefit from the idea of Re-Powering America's Land Program. For 50 years, St. Marks housed the state's only oil refinery. The St. Marks Refinery closed down in 2001, and the property was abandoned. "The Florida Department of Environmental Protection (DEP) took over the land in 2003 and spent approximately $20 million to remove the processing equipment and clean up the site," reported St. Marks Mayor Phil Cantner. In 2009, the property was donated to the city through the Federal Bankruptcy Court, and several liens on the property have been settled. The city has received two EPA grants to continue assessment of the site. Cantner said, "The city has raised $750,000 thus far for this project, and it also received a congressional grant that was arranged by former Congressman Allen Boyd with management by the Department of Energy." The property is essentially being looked at as three separate sites for development purposes. The part closest to Port Leon Drive is not contaminated and would be ideal for a commercial property. The middle part is where the bulk of the processing equipment was, and tests show that it is pretty clean now, but not to the level for a typical development. This is the type of site that is ideal for a solar farm, as it has power lines all around it with two power companies located nearby. The third parcel that fronts the St. Marks River is a likely candidate for a boat yard, in line with its historical use.

With the help from an EPA grant, the Town of Saint Marks was able to clean up storage tanks that were left when the Saint Marks Refinery was abandoned.

And, more federal help may be on the way. On February 3, President Obama announced the Better Buildings Initiative, a package of proposals including a new tax credit and grant competition among states and cities that aim to make commercial buildings 20% more energy efficient over 10 years. While not a brownfields-specific program, the plan includes a proposed new tax credit for commercial-building energy upgrades, to replace the current tax deduction. Another element of the plan would be a new federal grant competition among states and cities with funds going to localities that adopt building codes, regulations and standards that promote energy efficiency in commercial facilities. The program would be called "Race to Green." In addition, the Small Business Administration is encouraging banks to promote lending for energy-efficiency building upgrade projects.

State of Florida Incentives

The State of Florida offers a number of incentives for brownfields developments. The Brownfields Job Bonus Refund offers $2,000 -$2,500 per new job and up to $10,500 if stacked with Qualified Targeted Industries (QTI) and Enterprise Zone Refunds. The Incumbent Worker Training Program encourages expansion of jobs in brownfields areas. The Quick Response Training (QRT) Program provides job-training resources for new jobs in the brownfields areas, while the Building Materials Sales Tax Refund for Affordable Housing encourages work force/affordable housing in the area.

In addition to the financial incentives, Florida offers liability protection, loan guarantees, and site assessment assistance. The developer / lender liability protection helps to overcome the environmental stigma associated with a brownfields property. The State Loan Guarantee Program for Primary Lender encourages financing on brownfields sites. The Voluntary Clean-up Tax Credit (VCTC) offers 50 -75 percent tax credits on the site assessment and clean-up costs. The Florida Department of Environmental Protection offers assistance with the site assessments and limited source removal costs through a federally funded Targeted Brownfield Assessment program (a.k.a., Site-specific Activities Grant).

Municipal Assistance

On the local level, a number of communities offer technical assistance and are an invaluable resource for providing developers with a list of prospective properties, direction on where to find public and private funding, and initiation of the development process with assessments and some basic clean up of the site.

Terrace Bradford, the owner of Pro-Fit Development, a local developer, found two small abandoned infill sites in downtown Tampa that he felt were ripe for opportunity. Infill sites are relatively small properties that tend to be too small to meet minimum requirements for larger developers. Ed Johnson, urban development manager with the East Tampa Economic & Urban Development Department, said, "We were able to secure the funding for the Phase I

continued...

and II site assessments and used tax increment financing to help with sidewalks and lighting in the area." Bradford commented, "Knowing that the properties did not contain contamination really helped this project move forward." "The city also helped us to arrange financing through the local GROW Federal Credit Union." The Zagora Retail Center opened in December 2009, and the Seminole Heights Professional Center is slated to open this year. Johnson continued, "Our relationship with the EPA and the availability of the brownfields grants are important incentives to drive economic development on the local level."

The Seminole Heights Professional Center, developed on brownfields infill site, will open later this year were, thanks, in part, to EPA assessment grants and assistance from the East Tampa Economic & Urban Development Department.

LEED Certification, Technical Creativity and Funding Formulas

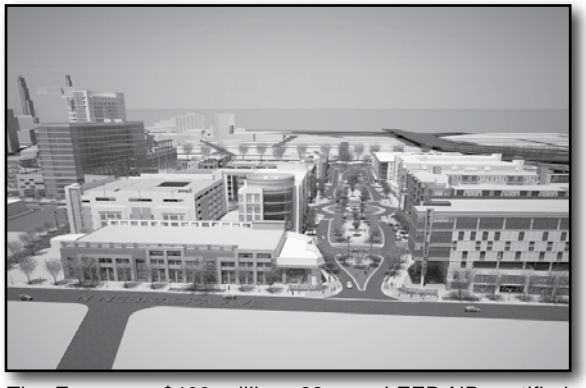
Recognizing that sustainability truly requires a holistic approach, the U.S. Green Building Council, has added new Leadership in Energy and Environmental Design (LEED) certification categories, including the LEED-ND for neighborhood development. This first national certification for neighborhood design encourages smart growth and new urbanist best practices by promoting the location and designs of neighborhoods that reduce vehicle miles traveled and are pedestrian friendly. It also promotes an range of green building and green infrastructure practices, particularly related to more efficient energy and water use.

Banc of America Community Development Corporation formed a joint-venture, Central Park Development Group, LLC, with the Tampa Housing Authority to redevelop Central Park Village, a historically significant, but seriously blighted neighborhood and brownfields site. The result of this joint venture is the Encore project, a unique undertaking to redevelop 28 acres of property located between downtown Tampa and Ybor City as one of the first LEED-ND Certified, mixed-use, transit oriented communities. At full build-out, the $600 million project will provide 1,500 mixed-income residential units, 200 hotel rooms, a 35,000 SF grocery store, 180,000 SF of office space, 85,000 SF of retail space, a middle school, an African-American history museum, and public parks and gathering spaces. The technically savvy design includes various cost-saving and sustainable initiatives, such as a stormwater vault that will allow for the re-use of rainwater for irrigation instead of potable water and a solar panel array on top of the vault that will generate energy to be sold back to the utility company to pay for streetlights within the project. The landscape design includes drought-tolerant, native species and interpretative signage to promote the unique environmental features of the project. Central Park Development Group secured $28 million from the U.S. Department of Housing and Urban Development's Neighborhood Stabilization Program 2 for the infrastructure improvements supporting the construction of the 300 low/moderate income housing units within the Encore project. The developer also received $1 million in funds from Florida's Office of Tourism, Trade and Economic Development to be used towards infrastructure improvements that will ensure appropriate connectivity between the residential and commercial portions of the project.

Sometimes just a little technical ingenuity is required to incorporate sustainability and/or create costs savings that make the project economically viable. For example, for a municipality in southern Florida, Cardno TBE has used solar power to operate a small down-well oil-skimming machine on the site of a former landfill that was geographically isolated. Similarly, a private owner of an office building that previously housed a petroleum storage facilty in Volusia County, Florida, has also used solar technology to operate an electrical submersible "Spill Buster" free product recovery system.

More often than not the real key to making brownfields development work is a team effort in identifying and securing a collection of funding, tax breaks, grants, etc. For instance, more brownfields projects are benefitting from U.S. Department of Transportation (DOT) Transportation Investment Generating Economic Recovery Grants (TIGER II). As with the original TIGER program, funds for the TIGER II program are to be awarded on a competitive basis for transportation projects that will have a significant impact on the nation, a metropolitan area or a region, for which many brownfields projects qualify.

The public-private partnership led by Banc of America Community Development Corporation, Ustler Development and the City of Orlando is planning Creative Village, a $1.2 billion, 68-acre, LEED-ND certified, transit-oriented mixed-use development. Creative Village, to be built on the site of the old Orlando Magic's Amway Arena, will be home to a cluster of creative and educational industries and their employees in a pedestrian friendly environment set around the theme of technology and sustainability.



The Encore, a $400 million, 28-acre LEED-ND certified, transit-oriented, mixed use development in downtown Tampa is redeveloping an antiquated public housing development in a pedestrian friendly manner that is built around the rich musical, African-American history of the area, as well as sustainability.

Construction on Creative Village is expected to begin in late 2011 and take at least 10 years to complete. To fund public infrastructure improvements associated with the redevelopment, the partnership obtained money through the U.S. DOT TIGER II grant program. The project is also being funded through the Neighborhood Stabilization Program 3 and ARRA. The development team continues to work in concert with the City of Orlando to identify and obtain additional funding from various sources, as the initial infrastructure improvements are estimated to total $105 million.

The redevelopment of brownfield properties, with the infusion of green building principals and/or renewable energy projects, could make properties once overlooked by the development community as liabilities into gold mines, turning blighted neighborhoods into healthy and vibrant communities, spurring local economies, cleaning up the environment, and providing space for a much needed energy resource.

Miles Ballogg *is the director of Cardno TBE's Brownfield Redevelopment Program. He is responsible for identifying/obtaining Brownfields grants and incentives, assisting municipalities managing brownfields programs, and linking public and private sector clients to promote Brownfields redevelopment. He can be reached at* miles.ballogg@CardnoTBE.com.

Roger Register *is director and branch manager for Cardno TBE's office in Tallahassee, former president of the Florida Brownfields Association, current co-chair of the FBA Legislative and Policy Committee, and former Brownfields Liaison for the Florida Department of Environmental Protection. Roger is active also on a national level through his work with the National Brownfields Association, NALGEP, and the National Brownfields Coalition to promote and encourage enhancements to the EPA's Brownfields Program. He can be reached at* roger.register@CardnoTBE.com.

Marc Mariano, AICP, PP, *is project manager for Cardno TBE's Site Development Division. His educational and occupational planning background affords an effective and creative perspective throughout the site design process, as well as during the permitting and zoning approval portion of the land development process. He can be reached at* marc.mariano@CardnoTBE.com.

On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of February 7 , 2011. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Kuvin v. City of Coral Gables, Case No. SC10-2352. Petition for review of 3rd DCA decision in *Kuvin v. City of Coral Gables,* affirming trial court's order upholding sections of the City's zoning code that prohibit the parking of trucks in residential areas of the City unless parked in an enclosed garage. The appellate court certified the following question: "May a City ordinance, which prohibits the parking of any truck in a private driveway or in a public parking spot at night, as applied to a personal-use of a light duty truck, be upheld as constitutional?" Status: Notice filed December 2, 2010.

SJRWMD v Koontz, Case No. SC09-713. Petition for review of 5th DCA decision in *SJRWMD v. Koontz*, affirming trial court order that the District had effected a taking of Koontz's property and awarding damages. 15 So.3d 581 Fla. 5th DCA (2009). Status: On February 28, 2011, the court reversed and remanded for further proceesings. 36 F.L.W. D 436a (Fla. 1st DCA, Feb. 28, 2011).

FIRST DCA

Guidry v. DEP, Case No. 1D10-6399. Petition for review of final order determining appellants lack of standing to challenge as unadopted rules two conditions in a beach restoration permit and a position with regard to when erosion control lines must be established. Status: Proceedings stayed until June 1, 2011.

Mid-Continent Casualty Co. v. First Coast Energy, L.L.P and DEP, Case No. 1D10-5740. Appeal from final judgment determining that the term "site check" in insurance policy has the same meaning as the term in EPA's regulations in 40 CFR 280.52 and may provide a basis for a "confirmed release" for which insurance coverage is provided. Status: Notice of appeal filed October 29, 2010.

Honorable Jeff Atwater, et al v. City of Weston, Florida et al. Case No. 1D10-5094. Petition for review of final summary judgment determining that one provision in SB 360 (Chapter 2009-96), the 2009 growth management legislation, constitutes

continued...

ON APPEAL
from page 9

an unfunded mandate, and determining that the entirety of SB 360 "is declared unconstitutional. . . and the Secretary of State is ordered to expunge said law from the official records of the state." Status: Notice of appeal filed September 24, 2010; all briefs have been filed.

Dawn K. Roberts v. Florida Prosecuting Attorneys, et al. Case No. 1D10-4532. Appeal from declaratory judgment declaring that a proviso in the 2010-11 General Appropriations Act providing that "no state agency may expend funds provided for Bar dues," is unconstitutional as violative of III, Section 12, of the Florida Constitution, and ordering the Secretary of State to expunge the challenged proviso from the official records of the state. Status: Oral argument set for February 15, 2011.

Duval Motor Company, et al v. DEP, Case No. 1D10-3940. Petition for review of final order denying eligibility for petroleum contaminated sites to join the Innocent Victim Petroleum Storage System Restoration Program. Status: Affirmed *per curiam* on January 28, 2011.

Schweickert v. DCA and Citrus County, Case No. 1D10-3882. Petition for review of final order determining amendment to Citrus County comprehensive plan to be in compliance. Appellant argues his constitutional right to due process of law was violated by the ALJ's granting of the request for an expedited hearing. Status: All briefs have been filed.

Griffis v. FFWCC, Case No. 1D10-3492. Petition for review of final order by FFWCC permanently revoking Griffis' commercial saltwater fishing license and assessing an administrative penalty against him. Status: Oral argument held January 11, 2011.

Jacqueline Lane vs. International Paper, etc. et al. Case No. 1D10-1893. Petition for review of DEP final order adopting the ALJ's ultimate conclusions that IP provided reasonable assurances that its effluent would not adversely affect the biological community; that granting the permit will be in the public interest; that the discharge would not be unreasonably destructive to the quality of the receiving waters; that the proposed project complies with the DEP's antidegradation policy; and that the consent order establishes reasonable terms and conditions to resolve the enforcement action for past violations and is the order that establishes a schedule for achieving compliance with all permit conditions. Status: Oral argument denied November 16, 2010.

James Hasselback vs. FDEP, etc, et al, Case No. 1D10-1850**.** Petition for review of DEP final order determining that petition challenging intent to issue Coastal Construction Control Line Permit was untimely notwithstanding that the Petitioner did not receive actual notice of the agency action, because Petitioner received constructive notice through the law firm that represented him and because another Cape Haven Townhome owner had implied authority to serve as his agent for receipt of notice. Status: On February 28, 2011, the court reversed and remanded for further proceedings. 36 F.L.W. D436a (Fla. 1st DCA, Feb. 28, 2011).

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

Martin County Conservation, et al v. Martin County, Case No. 1D09-4956. Petition for review of final order determining comprehensive plan amendments to be in compliance. Two appellees moved to dismiss the appeal for lack of standing, and requested attorneys fees. Status: Appeal dismissed *per curiam* on June 21, 2010, because "the appellants' have not demonstrated that their interest or the interest of a substantial number of members are adversely affected by the challenged order, so as to give them standing to appeal." On December 14, 2010, the court entered an order concluding that the appeal was filed in contravention of s. 57.105(1), F.S., and imposing sanctions against appellants and their counsel. Appellants have filed a motion for rehearing and a motion for rehearing *en banc.*

Lowe's Home Centers, Inc. v. DCA, Case No. 1D09-4383. Petition for review of final order of Administration Commission finding that Lowe's amendment to Miami-Dade Comprehensive Plan is not in compliance. Status: Oral argument held on January 18, 2011.

FOURTH DCA

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

Flagler Center Properties, LLP, et al v. FDEP, Case No. 4D09-4979. Petition for review of final order issuing an Environmental Resource Permit and Letter of Consent to Use Sovereignty Submerged Lands authorizing Palm Beach County to undertake a project in the Lake Worth Lagoon known as the South Cove Restoration Project. Status: Affirmed per curiam on December 22, 2010.

FIFTH DCA

General Dynamics Corp., et al. v. Brottem, et al., Case No. 5D09-3719. Appeal from non-final order denying motion for final summary judgment asserting immunity from suit under Florida's Workers' Compensation Act in action brought under Florida's Water Quality Assurance Act for personal injuries or wrongful deaths allegedly caused by occupational exposure to hazardous substances at telephone equipment manufacturing facility. Status: On December 30, 2010, the court reversed, holding that defendants are entitled to Workers' Compensation immunity; conflict certified. 36 F.L.W. D66a (Fla. 5th DCA December 30, 2010).

St. John's Riverkeeper, Inc. v. SJRWMD, Case No. 5D09-1644; *City of Jacksonville v. SJRWMD,* Case No. 5D09-1646. Petition for review of SJRWMD final order granting consumptive use permit to Seminole County for withdrawal of surface water from the St. John's River for public supply and reclaimed water augmentation. Status: On February 15, 2011, the court affirmed the issuance of the consumptive use permit, but reversed the finding that the appellant lacked standing, 36 FLW D377C (Fla. 5th DCA, Feb. 15, 2011).

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee, the Administrative Law Section, the Environmental & Land Use Law Section and the Government Lawyer Section present

State & Federal Government & Administrative Practice (SFGAP) Certification Review Course I: The Sunshine State

• Live
• Live Webcast
• Audio CD
• Video DVD

COURSE CLASSIFICATION: ADVANCED LEVEL

Live and Webcast Presentation: Friday, April 8, 2011
Tallahassee-Leon County Civic Center • 505 West Pensacola Street
Tallahassee, FL 32301 • 850-222-0400

Course No. 1184R

Those who have applied to take the certification exam may find this course a useful tool in preparing for the exam. It is developed and conducted without any involvement or endorsement by the BLSE and/or Certification committees. Those who have developed the program have significant experience in their field and have tried to include topics the exam may cover. Candidates for certification who take this course should not assume that the course material will cover all topics on the examination.

7:30 a.m. – 8:00 a.m. **Late Registration**

8:00 a.m. – 8:10 a.m.
Welcome and Introductions
Francine M. Ffolkes, Florida Dept. of Environmental Protection
Kelly A. Martinson, Hankin, Persson, Davis, McClenathen & Darnell

8:10 a.m – 9:00 a.m.
Administrative Hearings: From Selecting Your Forum to Winning Your Case
David L. Jordan, Department of Community Affairs

9:00 a.m – 9:50 a.m.
Rulemaking Update: How to Keep Your SERC from Getting SBRACed and More!
Reginald L. Bouthillier, Jr., Greenberg Traurig, P.A.

9:50 a.m. – 10:00 a.m. **Break**

10:00 a.m. – 10:50 a.m.
How to Break the Rules Legally: Challenges to Proposed, Existing, and Unadopted Rules
Hon. John G. Van Laningham, Division of Administrative Hearings

10:50 a.m. – 11:40 a.m.
Professional Licensing & Discipline – It's More Than Just a Hand Slap
William M. Furlow III, Grossman, Furlow & Bayo, LLC

11:40 a.m. – 12:30 p.m.
Navigating the Taj Mahal: Administrative Appeals
Francine M. Ffolkes, Florida Dept. of Environmental Protection

12:30 p.m. – 1:30 p.m. **Lunch (on your own)**

1:30 p.m. – 2:20 p.m.
I've Fallen and I Can't Get Up: State Tort Litigation
Stephen M. Fernandez, Shapiro, Goldman, Babboni & Walsh

2:20 p.m. – 3:10 p.m.
Crying Foul: Bid Protests Under the Florida APA
Michael P. Donaldson, Carlton Fields, P.A.

3:10 p.m. – 3:20 p.m. **Break**

3:20 p.m. – 4:10 p.m.
The Doors are Open, Come on In: Public Records and Sunshine Law Update
Seann M. Frazier, Greenberg Traurig, P.A.

4:10 p.m. – 5:00 p.m.
Florida Ethics Overview: The Top 10 Dos and Don'ts for Public Officers and Employees
Virlindia A. Doss, Florida Commission on Ethics

WEBCAST CONNECTION:

Registrants will receive webcast connection instructions two days prior to the scheduled course date via e-mail. If The Florida Bar does not have your e-mail address, contact the Order Entry Department at 850-561-5831, two days prior to the event for the instructions.

CLE COMMITTEE

Candace S. Preston, Wauchula, Chair
Terry L. Hill, Director, Programs Division

PROGRAM STEERING COMMITTEE

Francine M. Ffolkes, Tallahassee — Program Co-Chair
Kelly A. Martinson, Sarasota — Program Co-Chair
Bruce Lamb, Tampa — Program Co-Chair

CLE CREDITS

CLER PROGRAM

(Max. Credit: 9.0 hours)
General: 9.0 hours Ethics: 1.0 hour

CERTIFICATION PROGRAM

(Max. Credit: 9.0 hours)
Appellate Practice: 1.0 hour
City, County & Local Government: 9.0 hours
Civil Trial: 1.0 hour
State & Federal Gov't & Administrative Practice: 9.0 hours

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

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

continued...

TO REGISTER	ON-LINE: www.floridabar.org/CLE	MAIL: Completed form with check	FAX: Completed form to 850/561-5816

REFUND POLICY: A $25 service fee applies to all requests for refunds. Requests must be in writing and postmarked no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid.

Register me for the "State & Federal Government & Administrative Practice (SFGAP) Certification Review Course I: The Sunshine State Seminar

ONE LOCATION: (288) LEON COUNTY CIVIC CENTER, TALLAHASSEE (APRIL 8, 2011)

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

Name _____ Florida Bar # _____

Address _____ Phone: ( ) _____

City/State/Zip _____ E-mail* _____

***E-mail address required to transmit electronic course materials and is only used for this order.** **JMW: Course No. 1184R**

ELECTRONIC MATERIALS: Effective July 1, 2010, every CLE course will feature an electronic course book in lieu of a printed book for all live presentations, live webcasts, webinars, teleseminars, audio CDs and video DVDs. This searchable, downloadable, printable material will be available via e-mail several days in advance of the live course presentation or thereafter for purchased products. We strongly encourage you to purchase the book separately if you prefer your material printed but do not want to print it yourself.

LOCATION (CHECK ONE):

- ❑ **Tallahassee, April 8, 2011**
  (288) Leon County Civic Center
- ❑ **Live Webcast / Virtual Seminar* April 8, 2011**
  (317) Online

***Registrants who participate in the live webcast will receive an email with a web-link and log-in credentials two days prior to the seminar to include access to the course materials. Call The Florida Bar Order Entry Department at (800) 342-8060, ext. 5831 with any questions.**

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

REGISTRATION FEE (CHECK ONE):

	WEBCAST:
❑ Member of the Administrative Law Section; Environmental & Land Use Law Section; Government Lawyer Section: $155	❑ $250
❑ Non-section member: $180	❑ $275
❑ Full-time law college faculty or full-time law student: $90	
❑ Persons attending under the policy of fee waivers: $0	

Members of The Florida Bar who are Supreme Court, Federal, DCA, circuit judges, county judges, magistrates, judges of compensation claims, full-time administrative law judges, and court appointed hearing officers, or full-time legal aid attorneys for programs directly related to their client practice are eligible upon written request and personal use only, complimentary admission to any live CLE Committee sponsored course. Not applicable to webcast. (We reserve the right to verify employment.)

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-5816.)

☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX Exp. Date: __/__ (MO./YR.)

Signature: _____

Name on Card: _____

Billing Zip Code: _____

Card No. _____

COURSE BOOK – AUDIO CD – DVD – ON-LINE – PUBLICATIONS

Private recording of this program is not permitted. **Delivery time is 4 to 6 weeks after 4/8/11. TO ORDER AUDIO CD / DVD OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax. Tax exempt entities must pay the non-section member price.** Those eligible for the above mentioned fee waiver may order a complimentary audio CD in lieu of live attendance upon written request and for personal use only.

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

❑ **COURSE BOOK ONLY (1184M)**	❑ **AUDIO CD (1184C)**	❑ **DVD (1184D)**
Cost $60 plus tax	(includes electronic course material)	(includes electronic course material)
(Certification/CLER credit is not awarded for the purchase of the course book only.)	$155 plus tax (section member)	$250 plus tax (section member)
	$180 plus tax (non-section member)	$275 plus tax (non-section member)
TOTAL $ _____	**TOTAL $ _____**	**TOTAL $ _____**

Related Florida Bar Publications can be found at http://www.lexisnexis.com/flabar/

Florida Case Law Update

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

Municipality's legislative discretion to deny comprehensive plan and zoning amendments is limited, where proposed use is consistent and compatible with the comprehensive plan but current designations are not. *Village of Pinecrest v. GREC Pinecrest, LLC*, 47 So. 3d 948 (Fla. 3d DCA Nov. 17, 2010).

The Village of Pinecrest denied a landowner's application to amend its future land use element (FLUE) and zoning designations to increase the density of its property. The landowner filed suit, alleging the municipality's denial was inconsistent with its comprehensive plan. The trial court agreed, remanding to the municipality for it to issue a development order consistent with the landowner's application.

On appeal, the municipality claimed that: (1) the developer had failed to challenge the denial of the FLUE portion of the application; and (2) the trial court erred by ordering the requested zoning change without ordering an amendment to the FLUE. *Id*. at 950-51. The 3d DCA rejected both these arguments, holding that the landowner's complaint sufficiently challenged the denial of the Comprehensive Plan FLUE amendment by the municipality, and that the trial courts order was "all-encompassing," meaning that the order directed the municipality to "make the necessary amendment to the Comprehensive Plan's FLUE allowing [the landowner's] proposals to be implemented." *Id*. at 951.

The 3d DCA placed great weight on the municipality's admissions that: (1) the landowner's application was consistent with the Comprehensive Plan; (2) the municipality should have approved the application because it was "compatible with, and furthered the objectives, policies, land uses, densities, and intensities in the Comprehensive Plan;" and (3) the property's current FLUE density was "inconsistent with the Comprehensive Plan." *Id*. at 950.

Ambiguous comprehensive plan policies must be interpreted alongside the plan as a whole; the absurdity doctrine should be applied sparingly. *Arbor Properties v. Lake Jackson Prot. Alliance*, 2010 WL 4967715 (Fla. 1st DCA Dec. 8, 2010).

Leon County approved a planned unit development and rezoned a 107-acre parcel for an increased density, mixed-use project. To do so, the county interpreted its comprehensive plan to allow increased development in areas known as "closed basins" in the vicinity of Lake Jackson, even though the plan generally placed restrictions on basins that channeled runoff into Lake Jackson. The Alliance challenged the rezoning, arguing it was inconsistent with a policy in the comprehensive plan that was intended to protect Lake Jackson from stormwater runoff. The trial court agreed with the Alliance, finding that the policy at issue contained no exceptions to development restrictions for closed basins.

The 1st DCA reversed, holding that, as a matter of law, "interpretation of the plan as a whole, and the local government's interpretation of the plan, compels us to uphold the development order and the ordinance." *Id.* at *1, *3. Faced with an ambiguous comprehensive plan policy, the 1st DCA looked to other provisions within the plan, as well as the local government interpretation of the plan—namely, the land development code. *Id.* at *4. From these, the 1st DCA determined that the policy protecting Lake Jackson did not justify restricting development in an area where the development would have no effect on Lake Jackson. *Id.* Finally, the 1st DCA rejected the Alliance's argument that this interpretation produced an absurd result of providing less protection to Lake Jackson. The court held that the absurdity doctrine did not concern the wisdom of policies. Rather, it implied that the doctrine is only to be used in the rare circumstance where an interpretation is obviously different from what was intended when a provision was enacted. *See id.* at *4.

Appeal of an order by the Department of Community Affairs that approved county amendments to the comprehensive growth management plan resulted in sanctions for the various appellant interest groups. *Martin County Conservation Alliance v. Martin County*, 2010 WL 5072588 (Fla. 1st DCA Dec. 14, 2010).

The Alliance and others challenged two ordinances amending the Martin County Comprehensive Plan. After first finding that the Alliance had associational standing under Chapter 163, Florida Statutes, as adversely affected persons, the Administrative Law Judge (ALJ) found that the Alliance had not shown the amendments were not in compliance. The Alliance appealed and this case followed. The 1st DCA dismissed the appeal for lack of standing, holding the appeal was frivolous and lacked a basis in material facts. Further, the 1st DCA issued an order to show cause "why sanctions

continued....

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

Joseph D. Richards, New Port Richey . . . . . Chair
Martha M. Collins, Tampa . . . . . Chair-elect
Erin L. Deady, West Palm Beach . . . . . Secretary
Nicole C. Kibert, Tampa . . . . . Treasurer
Jeffrey A. Collier, West Palm Beach. . . . . Co-Editor
Anthony J. Cotter, Orlando. . . . . Co-Editor
Colleen Bellia, Tallahassee . . . . . Production Artist
Jackie Werndli, Tallahassee . . . . . Section Administrator

from page 13

should not be imposed … for the filing of an appeal for *which [appellate] standing clearly is not present*." *Id.* at *1 (emphasis in original).

The court found that sanctions must be awarded for two reasons. First, because the court awarded attorney's fees and costs to intervenors based on the appeal's frivolity, "by logical necessity," the court concluded that sanctions must be imposed. Under section 120.105, Florida Statutes, the standard is a lack of a basis in material facts, which is less than a frivolity standard. Second, the court held that the "appeal is nothing more than an attempt to retry facts determined adversely to Appellants." *Id.* The appeal lacked "a basis in material fact or application of then-existing law to material facts" and was an "attempt to argue facts not established. *Id.* at 4, 6. The 1st DCA noted the Alliance's two other administrative appeals before the 4th DCA, both of which were dismissed for lack of standing, and explained that the Alliance "would have been well advised to learn from their experience …." *Id.* at 2.

General comprehensive plan policy requiring County to guide future development away from areas with environmental limitations did not prohibit the County from allowing appropriate development in environmentally sensitive areas, when more specific policies controlled. *Katherine's Bay, LLC v. Fagan*, 2010 WL 5072509 (Fla. 1st DCA Dec. 14, 2010).

Citrus County approved a request to change the future land use element (FLUE) designation of a property from Low Intensity Coastal and Lakes to Recreational Vehicle Park/Campground. A neighboring landowner brought suit, alleging the change was inconsistent with the comprehensive plan. An ALJ found that the ordinance was invalid because it rendered the comprehensive plan internally inconsistent on two grounds: (1) the FLUE required compatibility of uses; and (2) the County must "guide future development to areas with minimal environmental limitation." *Id*. at *1. The Administration Commission agreed with nearly all of the ALJ's findings and conclusions. *Id.* at *6.

On appeal, the 1st DCA disagreed, holding that the ordinance was valid. Initially, the 1st DCA concluded there was a lack of competent, substantial evidence to support the ALJ's conclusion that the RV park was incompatible with neighboring properties. The court noted that, alone, the lay testimony of the neighbors speculating about possible noise and light pollution and declining property values was insufficient to show that the RV park would be incompatible. *Id*. at *10.

Second, the 1st DCA explained that "[r]ules of statutory construction are applicable to the interpretation of comprehensive plans." The court then held that a general policy requiring future growth to be steered toward less environmentally sensitive areas must be read in conjunction with other, more specific policies. In fact, at least two other policies demonstrated that "development of new RV parks in Coastal Areas was specifically anticipated." *Id*. at *9. The court concluded that, considering the comprehensive plan as a whole, environmental limitations were "not a basis to prohibit development." *Id*. Because the "development will be required to meet standards for development and obtain necessary permits from appropriate regulatory agencies," the court held that there was no competent, substantial evidence that the existence of environmental limitations "were so severe as to require a prohibition on the development of an RV park." *Id.*

Property appraiser must assume in annual review of prior agricultural classifications that land is still being used for bona fide agricultural purposes and must limit the inquiry to what has changed. If there are no material changes, agricultural classification cannot be denied, even if appraiser believes current use is no longer bona fide. *Tilton v. Gardner*, 2010 WL 5128092 (Fla. 5th DCA Dec. 17, 2010).

Plaintiff received his agricultural classification in 2004. In 2006, after reviewing plaintiff's land use, the property appraiser denied his agricultural classification. The landowner appealed to the Value Adjustment Board (VAB), which affirmed the property appraiser's findings, and this suit followed. The trial court affirmed the decision of the VAB, and the 5th DCA affirmed the decision below.

The 5th DCA found that the trial court correctly applied section 193.461(3)(e), Florida Statutes, finding that the landowner should be granted an automatic extension of his land use classification unless certain changes had occurred. If the agricultural use has materially changed from the time when agricultural classification was granted, the appraiser may consider the "bona fide" factors from section 193.461(3)(b), Florida Statutes, to determine whether or not the agricultural use has been abandoned or discontinued. *Id.* at *4. The 5th DCA accepted the competent substantial evidence below which showed an absence of sufficient natural regeneration and therefore that the agricultural use had been abandoned or discontinued. The court also considered the property owner's attempts to sell the property important evidence of an intent to abandon agricultural classification. *See id.* at *5-6.

Employers may assert workers' compensation as a defense to action asserted under the Water Quality Assurance Act (WQAA). *Gen. Dynamics Corp. v. Brottem*, 2010 WL 5391519 (Fla. 5th DCA Dec. 30, 2010).

Former employees brought personal injury or wrongful death claims against their former employer under the WQAA, which provides a strict liability cause of action against property owners for damages caused by surface or ground water contamination. The WQAA states the that only four defenses are available: an act of war, an act of government, an act of God, and an act or omission of a third party, "other than an employee or agent of the defendant." § 376.308(2), Fla. Stat. (2008). *Id.* at *1. On the other hand, the Florida Workers' Compensation Act also provides that it is the exclusive remedy for employee injuries, where it is effective, and here it is. To resolve the conflict and give both statutes as full an effect as possible, the 5th DCA held that the employer could assert workers' compensation as a defense. The court compared the WQAA to other statutes, including CERCLA, to show that WQAA's defenses were not intended to bar defenses intended as a shield against having to litigate the case in the first instance, such as workers' compensation immunity. *Id.* at *3. Further, the 5th DCA certified conflict with a 1st DCA case. *Id.* at *4.

Department of Community Affairs

by Richard E. Shine, Assistant General Counsel and Jason Holley, Extern

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

The Department appealed a Polk County Development Order issued to Safari Wild for a project located in the Green Swamp Area of Critical State Concern. Safari Wild sought approval to operate a game farm with up to 750 Asian and African grazing in multi-species herds to be viewed by the public for an entrance fee. The Department's petition maintained that the Safari Wild project was not a recreational low intensity use, rather a commercial land use prohibited by the Polk County Comprehensive Plan and Land Development Regulations. The Administrative Law Judge's July 30, 2010, Recommended Order found that the Safari Wild Project and activities authorized by the Development Order constituted "development" as defined in Section 380.04, Florida Statutes; that the project is inconsistent with the Polk County Comprehensive Plan and Land Development Regulations; and recommends that the Florida Land and Water Adjudicatory Commission quash the Polk County Development Order and deny permission to Safari Wild to develop the project. The Commission's Final Order, adopting the ALJ's findings of facts and conclusions of law, quashed the Development Order stating that it "cannot identify any changes to the Safari Wild project that would make it eligible for approval." The Commission also stated that all existing structures and agricultural uses may remain if in full compliance with the County's Comprehensive Plan and Land Development Regulations, excluding commercial operations dependent on the general public coming on the land.

Martin County Conservation Alliance, Inc., Donna Melzer, Eliza Ackerly, Groves Holdings, LLC, Groves 12, LLC, and Groves 14 v. Martin County and Department of Community Affairs, DOAH Case No. 10-0913GM

The Department issued a Notice of Intent finding all but one of the amendments in compliance and the Department filed a petition for formal administrative hearing with DOAH. Subsequently, several parties intervened in the proceeding and the County adopted an ordinance repealing the amendment which was the subject of the Department's not in compliance finding. Subsequent to the repeal of the amendment, the Department requested a voluntary dismissal and the intervenors were realigned as the Petitioners. The ALJ issued a Recommended Order finding two of the challenged policies in the Future Land Use Element not in compliance. In his Conclusions of Law, the ALJ stated that "after a comprehensive plan is determined to be in compliance, any non-substantive amendments to the plan should also be determined to be in compliance." The ALJ found one of the FLUE's policies to be not in compliance as he found that it was not based on the best available data and analysis regarding the effect of provisions of the comprehensive plan to reduce a landowner's ability to attain the theoretical maximum density allowed by the land use designation. In the Final Order issued January 3, 2011, the Department found that one of the policies the ALJ found not "in compliance" was not "new" (it was simply relocated within the comprehensive plan) and, therefore, not subject to a compliance challenge; reached a Conclusion of Law contrary to that of the ALJ with regards to the other contested policy stating, "[t]o compel the County to somehow account for completely undeterminable density discounts is not consistent with controlling precedent;" and determined that the Plan Amendments were "in compliance."

DCA and 1000 Friends of Florida v. Palm Beach County and Florida Crystals Corporation, Okeelanta Corporation, New Hope Sugar Company and S.D. Sugar Corporation, DOAH Case No. 09-6006GM

The Department issued a Notice of Intent finding an amendment, which changed the land use on 318.17 acres of Everglades Agricultural Area to allow underlying industrial uses for the purpose of developing an Inland Logistics Center, not "in compliance." The Department found that the changes to the Future Land Use Map failed to adequately assess the impact of the development on the region's natural resources and that the new Conservation Elements were vague, unpredictable, and failed to adequately ensure protection of natural resources. All parties entered into a settlement agreement where the inconsistent provisions of the amendment were rescinded and an opportunity to submit a Plan Amendment to relocate the Inland Logistics Center was provided. The Department's Final Order found the remaining provision of the amendment relating to the definition of Inland Logistics Center, and the change in the land use designation of the alternate project site from Low Density Residential to Industrial "in compliance" and dismissed the proceeding.

Palm Beach County Environmental Coalition, Panagiotti Tsolkas, Carol Strick, Suki Dejong, Alfred Lark, Christian Minaya, Alexadra Larson, and Rosa Durando v. DCA and City of Palm Beach Gardens and Palm Beach County and David Minkin Florida Realty Trust, Richard Thall, Robert Thall, Peter L. Briger, Paul H. Briger and the Lester Family Investments, DOAH Case No. 10-5608GM

The Department of Community Affairs issued a Notice of Intent to find a City of Palm Beach Gardens comprehensive plan amendment "in compliance." Palm Beach County Environmental Coalition (PBCEC) and individual petitioners challenged the Department's determination. In response to City and County Motions to Dismiss, on grounds that Petitioners lacked standing, the ALJ ordered Petitioners to either show cause why the petition should not be dismissed or file an amended petition showing standing. The ALJ's Recommended Order stated that the individual petitioners failed to show they were "affected persons" with standing to challenge the amendment and that, as an unincorporated association, PBCEC lacked

continued....

the legal capacity to sue in its own name. The Department's Final Order dismissed the proceeding based on Petitioners' failure to demonstrate standing.

Tierra Verde Community Association, Inc., Maura J. Kiefer, and Michael Mauro v. City of St. Petersburg, Florida, DOAH Case No. 09-3408GM

The City of St. Petersburg adopted a Future Land Use Map amendment to assign future land use designations to land annexed from Pinellas County into the City in 2008. While the designation for the land (Commercial General) was the same as it was prior to annexation under the County, the City's Commercial General designation did not contain the same overlay restrictions, and as a result, would allow residential and more intense commercial development. Petitioners challenged the amendment and the ALI's June 30, 2010, Recommended Order found that the City did not react appropriately to the best available existing data regarding the vulnerability of its citizens to hurricanes and the potential adverse effects of the amendment on hurricane clearance times and shelter capacity. Further, the ALJ found the amendment internally inconsistent with four elements of the comprehensive plan and recommended that the Administration Commission enter a final order finding that the amendment not "in compliance." The Commission issued a Final Order which determined the amendment was not "in compliance" and directed the City to rescind. The City rescinded the amendment on December 17, 2010.

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

Manatee County adopted amendment 09-1 to its comprehensive plan changing the land use designation on a parcel of property owned by Intervenor, Patron Holdings, LLC, from Industrial Light to Public Semi-Public-1. The new land use designation allows, among other things, the use of the property as an alternative fuel electrical generating facility consistent with the biomass plant proposed by Intervenor, Florida Biomass Energy, LLC. U.S. Funding Group, LLC owns property in the immediate vicinity of the subject property and filed a Petition challenging the Department's Notice of Intent finding the County's amendment in compliance and alleged an internal inconsistency with the comprehensive plan; failure to include programmed improvements for U.S. Highway 41; a lack of site suitability for the biomass facility due to soil conditions and elevation; and a lack of compatibility with surrounding uses. The ALJ found that the data and analysis adequately supported the amendment, and that the County reacted to that data in an appropriate manner. The ALJ's Recommended Order found Petitioners failed to establish that the amendment was not in compliance. Petitioners subsequently filed a Notice of Voluntary Dismissal with Prejudice causing the controversy to be rendered moot. The Department issued a Final Order dismissing the proceeding and finding the amendment in compliance.

DEP Update

Young v. Hanson & DEP: (DOAH Case No. 09-4908)

The Department issued a coastal construction control line (CCCL) permit to the applicants to construct a single-family residence and associated structures on Anna Maria Island. On August 19, 2009, the Petitioners filed a petition to contest the Department's decision to issue the CCCL permit. The Department referred the petition to DOAH to conduct an evidentiary hearing. In November 2009, the CCCL permit was transferred to Hanson who became the sole permittee.

The Final Order adopted the Recommended Order and granted the CCCL permit to Hanson. In the Recommended Order the ALJ determined that Hanson provided reasonable assurance that all CCCL regulatory criteria were met. The ALJ determined that the expected impacts to the beach and dune system in this area were small; that Hanson minimized these potential impacts and provided mitigation so that no significant adverse impact would result; and that Hanson would further minimize potential impacts to the beach-dune system by adding 129 cubic yards of sand to the project site and planting native, salt-tolerant vegetation. The ALJ further found that Hanson provided reasonable assurance that the impacts associated with his proposed project were offset by existing and proposed mitigation actions.

The ALJ found that the Department's determination of the 30-year erosion projection, using procedures set forth in Rule 62B-33.024, was reasonable, thus Hanson's proposed major structure was landward of the 30-year erosion projection in this area. The ALJ also found that the natural dune on the project site is not a frontal dune. Therefore, he rejected the Petitioners' contention that the proposed project is not a sufficient distance landward of the beach and frontal dune to permit natural shoreline fluctuations and protect beach and dune system stability. The ALJ found that existing structures in the immediate area have established a reasonably continuous and uniform construction line and these structures have not been unduly affected by erosion. Thus, the proposed project conforms to this existing line of construction and would not advance the line seaward.

The Petitioners contended that the cumulative effects of this proposed project and the adjacent Brown project would cause a significant adverse impact to the natural dune that crosses these properties. However, the ALJ found that the more persuasive evidence showed that the portion of the dune on the Brown site remained stable and is even growing; and taken together, the effects of the proposed project and the Brown project would not significantly reduce the protective value of the dune.

Acquisition of Rayonier Parcel:

On January 12th, the Department closed on the purchase of a 400-acre parcel with a price of $1.165 million. The parcel is located within the Heather Island/Ocklawaha River Florida Forever Project, ranked 13 on the acquisition list. The newly acquired parcel will become an addition to Silver River State Park and provide additional recreational opportunities to the public.

Ross v. Tarpon Springs and DEP: (DOAH Case No. 10-3351)

On March 26, 2010, the Department gave notice of its intent to issue an industrial wastewater facility permit to the City of Tarpon Springs to discharge demineralization concentrate that would be produced by a new Reverse Osmosis water treatment plant. The proposed permit authorizes the City to discharge industrial wastewater through an outfall into a canal which is already being used for the discharge of cooling water from Progress Energy Florida, Inc.'s Anclote Power Generation Facility. After being discharged into the canal, the wastewater would become diluted and flow northward, out of the canal and into the open waters of the Gulf of Mexico. The prevailing currents in the area would most often force the wastewater south toward Pinellas County and the mouth of the Anclote River.

The Petitioner filed a challenge to the permit, which the Department referred to DOAH to conduct an evidentiary hearing. The ALJ conducted a two-day hearing and subsequently issued his Recommended Order (RO) on December 16, 2010. The Final Order adopts the ALJ's recommendations that the Petitioner lacks standing, and that the industrial wastewater facility permit should be granted. The ALJ found that the Petitioner is a resident of Tarpon Springs. In his petition for hearing, Petitioner alleged that he is a recreational fisherman and a "consumer of fish taken from the area" where the proposed wastewater discharge would occur. However, the ALJ found that the Petitioner did not present any evidence at the final hearing to prove these allegations, *i.e.* to show that his substantial interests would be affected by the proposed discharge.

The Final Order adopts the ALJ's findings and conclusions that the City provided reasonable assurances: 1) that the proposed discharge would meet all rule requirements for the use of mixing zones; 2) that the proposed discharge will meet all the antidegradation permitting requirements, including the specific requirements applicable to discharges of demineralization concentrate; 3) that the proposed discharge will meet all the requirements for the use of mixing zones; and 4) that within the mixing zones, the proposed discharge will meet the minimum water quality criteria, including toxicity.

On Appeal:

Trump Plaza and Flagler Center v. Palm Beach County and DEP:

Oral argument was heard by the Fourth District Court of Appeal on December 14, 2010. The Department's Final Order was upheld by the Fourth District Court of Appeal by a PCA opinion issued on December 22, 2010.

continued....

Duval Motor Company & York Marketing Associates v. DEP:

Oral argument was held on January 20th at the First District Court of Appeal. The Department's Final Order was upheld by the First District Court of Appeal by a PCA opinion issued on January 28, 2011.

The Conservation Alliance of St. Lucie County v. DEP:

Allied New Technology, Inc., is appealing a Leon County Circuit Court order that determined that a document submitted by Allied to the Department is a public record and not confidential business information and therefore should be released to the Conservation Alliance of St. Lucie County. The First DCA granted Allied stay through the appeal and established an expedited briefing schedule: Allied's initial brief due February 4th; answer brief due February 14th; reply brief due February 19th.

Law School Liaisons

Center for Earth Jurisprudence Update

by Jane Goddard

Center for Earth Jurisprudence Hosts Water Justice Conference

Maude Barlow, National Chairperson of the Council of Canadians, gave the keynote address at the Second Annual Future Generations Conference, "Water Justice for All," hosted by the Center for Earth Jurisprudence on February 4 at the Barry University School of Law. An international environmental leader, author, and former Senior Advisor on Water to the 63rd President of the United Nations General Assembly, Ms. Barlow described recent international efforts recognizing the importance of water and connecting environmental preservation, environmental justice, and social justice. "By 2030, there will be 40% more demand for water than water supply," she said. Ms. Barlow stressed the importance of present-day action to meet current and future global water challenges.

Jennifer Greene of The Water Research Institute of Blue Hill, Maine, began the conference with a presentation featuring live and videotaped demonstrations encouraging a new consciousness of water based on the qualities of water itself. Law students from Barry's Environmental Law, Jurisprudence, and Justice certificate program described Ms. Greene's presentation as "awesome" and "mind-blowing," as she demonstrated the dynamic flow and movement of "good" water compared with water containing pollution.

The program also featured David Tomasko, Ph.D., of PBS&J, evaluating numeric nutrient criteria in a scientific context; David Childs, Esq., of Hopping Green & Sams, discussing the interaction between water, politics, and Florida's economy; and Kariena Veaudry, RLA, of the Florida Native Plant Society, addressing the role of native plants and critical areas of conservation in promoting biodiversity and reducing extinction rates.

The Future Generations conference represents an ongoing effort by the Center for Earth Jurisprudence to provide education and probe significant areas of the essential task of this generation: reconciling current human needs and the needs of future generations of all species.

Center for Earth Jurisprudence and St. Thomas University Partner to Create LL.M. in Environmental Sustainability, Offer Short Course

The Center for Earth Jurisprudence and St. Thomas University Law School introduce a one-year, 24-credit LL.M. in Environmental Sustainability, with the goal of creating a new generation of legal experts to assist in a worldwide transition toward genuine sustainability. The program provides expertise in the laws affecting the natural world and is designed to equip lawyers with the legal tools and practical experience needed in today's changing job market. Applications are now being accepted. Additional information is available at http://www.stu.edu/Academics/Programs/LLMinEnvironmentalSustainability/tabid/2924/Default.aspx.

In addition, a one-week short course in "Environmental Sustainable Development: Laws and Institutions" will be offered March 7 - 11, 2011. Classes are scheduled Monday through Friday from 6:00 - 8:30 p.m. and will be led by John Dernbach, professor of law at Widener University and author and lecturer in environmental law and climate change. Professor Dernbach's professional experience includes several roles at the Pennsylvania Department of Environmental Protection, including policy director, and co-authorship of an amicus brief to the U.S. Supreme Court on behalf of climate scientists in the landmark climate change case *Massachusetts v. Environmental Protection Agency.* He also leads "Sustaining America," a project that assesses sustainable development efforts in the U.S. and recommends action, and is the editor of *Stumbling Toward Sustainability* (2002) and *Agenda for a Sustainable America* (2009). Recently, Professor Dernbach was named one of three distinguished law professors at Widener University. CLE credit has been applied for; space is limited. To register for this short course, e-mail environmentLLM@stu.edu or call (305) 623-2389.

Jane Goddard; (321) 206-5788; jgoddard@mail.barry.edu

Law School Liaisons continued....

Spring 2011 Activities at The Florida State University College of Law and Other Developments

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

The Environmental Law program at The Florida State University College of Law has a full schedule of activities and initiatives on tap for the spring 2011 semester, including the following:

Spring 2011 Symposium: "Law and Sustainability: The Energy-Land Use Nexus:" The goal of this major one-day symposium, scheduled for February 25, is to bring legal scholars together to consider the nexus between energy and land use, looking both at energy consumption based on our land use patterns, and land consumption for energy generation. Presenters include **Terrell Airline**, Bay County Attorney, **Prof. William Buzbee** of Emory University School of Law, **Prof. Steven Ferrey** of Suffolk Law School, **Prof. Robert Glicksman** of George Washington University Law School, **Mike Halpin**, Director, DEP's Power Plant Siting Office, **Angela Morrison** of Hopping Green & Sams, **Prof. John Nolon** of Pace University Law School, **Prof. Jim Rossi** of The Florida State University College of Law, and **Prof. Patricia Salkin** of Albany Law School. The day will also include a presentation by **Sharon Buccino**, Director, Land and Wildlife Program, Natural Resources Defense Council. As part of the Sustainable Energy Research Project, the event is a joint effort of the Law School's Environmental and Land Use Law Program and The Florida State University's Institute for Energy Systems, Economics, and Sustainability (IESES).

Spring 2011 Distinguished Lecturer: Our spring 2011 *Distinguished Lecture*, scheduled for Wednesday, March 16, at 3:15 p.m., will feature **Prof. Jody Freeman**, of Harvard Law School**.**

Additional Faculty Visitors. The College of Law is hosting two distinguished Environmental Law professors during the spring semester for faculty workshops and as guest lecturers for our Environmental Certificate Seminar: **Prof. Lesley McAllister**, University of San Diego School of Law, and Professor **Michael Wara**, Stanford Law School.

This year's Environmental Moot Court Team, consisting of **Seth Welner, Justin Miller**, and **Jesse Unruh**, and coached by **Tony Cleveland**, **Segundo Fernandez**, and **Preston McLane**, is preparing for the National Environmental Law Moot Court Competition at Pace Law School in 2011.

We are delighted to share the accomplishments of our alumni with readers of this *Newsletter*. In this issue we feature **Matthew Z. Leopold, '04**. Mr. Leopold is a Trial Attorney with the U.S. Department of Justice, Environment and Natural Resources Division, Law and Policy Section. He is representing the U.S. in the civil enforcement action against BP and Transocean and other defendants in connection with the April 20, 2010 Deepwater Horizon Oil Spill in the Gulf of Mexico. Mr. Leopold joined the Environment Division in 2007 and has worked on environmental enforcement, natural resources, and eminent domain cases. He also handles numerous environmental policy issues that affect the Division's cases, with a focus on oil and gas and oceans policy. Most recently, Mr. Leopold contributed to the Interagency Oceans Policy Task Force recommendations that were adopted by Executive Order in July 2010, and he remains actively engaged in legal matters affecting the National Oceans Council. Prior to joining the Justice Department, Mr. Leopold worked in the State of Florida's Washington, DC office where he represented the policy interests of the Governor, the Florida Department of Environmental Protection, and Florida's five Water Management Districts to federal agencies and on Capitol Hill. This work largely focused on the federal-state partnership to restore the Everglades and legislative negotiations that led to the enactment of the 2006 Gulf of Mexico Energy Security Act, which created a federal moratorium on offshore oil and gas leases in environmentally-sensitive and militarily-significant areas adjacent to Florida.

We hope you'll join us for one or more of our programs. For more information about our programs, please consult our web site at: www.law.fsu.edu, or please feel free to contact Prof. David Markell, at dmarkell@law.fsu.edu. Our environmental brochure, available online at: http://www.law.fsu.edu/academic_programs/environmental/ documents/environmental_brochure_08.pdf, also contains considerable information about the Environmental Law Program at the Florida State University College of Law**.**

UF Law Update

by Alyson Flournoy, ELULP Program Director & Heather Judd, UF Law ELUL Certificate and J.D. Candidate

This spring the UF Levin College of Law is giving focus to the hot topics of climate change and rising sea level and what that means for Florida and its people. Through its annual Speaker Series, two major conferences, and new fellowship programs, UF Law and its ELUL program have a packed schedule of opportunities for lawyers, students, and the public to become informed on these issues and involved in discussions.

The Speaker Series

Each spring, a selection of nationally-known scholars is invited to the University of Florida Levin College of Law campus to present their research to students and faculty. The seminars are part of the Capstone Colloquium for ELULP certificate students, designed to enrich students' knowledge of environmental and land use law. For 2011, the series focused on the

Law School Liaisons continued....

theme "Climate Change and Energy" and was sponsored by Hopping Green and Sams P.A. of Tallahassee (Gold Sponsor) and Springfield Law, P.A., of Gainesville (Silver Sponsor).

Kicking off the series was Victor B. Flatt, the Tom F. & Elizabeth Taft Distinguished Professor in Environmental Law and the Director, Center for Law, Environment, Adaptation, and Resources at the University of North Carolina School of Law. Prof. Flatt's topic was "The Gulf Oil Spill and NEPA Dysfunction" which highlighted the role NEPA can and should play in helping to prevent future oil spills. On Feb. 3, Joel A. Mintz, Professor of Law at Nova Southeastern, who is visiting UF Law this semester, presented "Institutional Issues in the Enforcement of Future U.S. Climate Change Legislation," providing an intriguing glimpse into how different enforcement tools could be used effectively under different possible legislative responses to climate change. William Rodgers, Stimson Bullitt Professor of Law at the University of Washington School of Law, author of the renowned treatise on environmental law and widely recognized as one of the founding fathers of environmental law, spoke on Feb. 10th. He gave students an inspiring picture of the challenges and importance of environmental law practice and then presented some examples of the challenges, focusing on the problem of ocean acidification and its impacts on coral reefs, plankton, and shellfish.

The remaining schedule as this newsletter goes to press moves from the scholarly to the corporate realm, with Walmart's Vice President for Environmental, Health and Safety Compliance, UF Law alum Phyllis Harris, who will speak on "The Corporate Response to Climate Change" on Feb. 17th. "Climate Exceptionalism" is the topic scheduled for Mar. 3rd, presented by John Copeland Nagle, the John N. Matthews Professor of Law at the University of Notre Dame Law School. Finally the series is scheduled to close with **Hari Osofsky,** Associate Professor of Law, University of Minnesota Law School, presenting a talk on "Climate Change Governance."

Public Interest Environmental Conference

At press time, the agenda for the 17th Annual PIEC was in final form and scheduled for Feb. 24-26. "It's Not Easy Being Green: Our Energy Future" is designed to provide a three day focus on Florida's dire need to address new sources of energy to sustain current and support future energy demands. Both non-renewable and renewable sources, as well as distribution concerns, effects on economic development, environmental protection concerns, and issues of social justice are subjects for plenary speakers and panel discussions. The panels are focused on individual energy sources such as solar, wind, and biofuels, and issues such as the transportation/energy/land use interface. Special panels this year will address last summer's Gulf Oil Spill and the licensing of new nuclear power plants in Florida. Scheduled speakers include representatives from government agencies, public interest groups, industry, and internationally known scholars. The Friday banquet keynote address will be given by Princeton University Professor and author Robert Socolow, whose recent scholarship includes work on high carbon emitters, carbon capture and storage, and biofuels.
Other speakers and panel participants of distinction include: Buddy MacKay, former Governor of Florida and U.S. Representative; John Hankinson, Executive Director of the Obama Administration's Gulf Coast Ecosystem Restoration Task Force; KC Hallet, PhD, from the Strategic Energy & Analysis Center, National Renewable Energy Laboratory; John Byrne, PhD, Distinguished Professor of Energy and Climate Policy and Director, Center for Energy and Climate Policy, University of Delaware; CD Hobbs, Senior Fellow, Public Utility Research Center, UF Warrington School of Business; Tim Center of the Collins Center for Public Policy; Pierce Jones, Director of the Program for Resource Efficient Communities at the University of Florida; and Anna Prizzia, Director of the UF Office of Sustainability.

10th Annual Richard E. Nelson Symposium

This year the Nelson Symposium presented, "Going Coastal: 21st Century Challenges to Our Fragile Coast" on Feb. 11, 2011. Featuring presentations by nationally known scholars, leading practitioners, and two UF Law students , the Nelson was a full day of lectures and panel discussions. The morning discussion was entitled "Drilling: Addressing and Preventing Disasters" and featured Sarah Chasis, Senior Attorney, Natural Resources Defense Counsel, Cynthia Drew, Associate Professor of Law University of Miami School of Law, and Alida C. Hainkel of Jones Walker, New Orleans. Ms. Hainkel provided a fascinating account of the legal challenges to the moratorium on drilling; Sara Chasis offered a longer term picture of NGOs involvement in oil drilling and the challenges of that work, and Professor Drew gave an overview of some issues related to natural resource damage assessment and protecting ecosystems and ecosystem services under that regime.

Peter Byrne, Professor of Law and the Director of the Environmental Law and Policy Institute at Georgetown Law, and William H. Rogers Jr., Stimson Bullet Professor of Law University of Washington School of Law, gave the second presentation: "Global Warming and its Newest Challenges: Adaptation and Acidification." Professor Byrne analyzed how recent takings and other case law, and state and federal legislation account for or fail to account for the challenges of adaptation to a changing climate. Professor Rogers provided the audience a glimpse into the science and policy implications of the ongoing process of ocean acidification, a relatively undisputed phenomenon that results from basic chemical carbon reactions. His presentation highlighted how this process lacks the uncertainty and predictive complexity that characterizes many of the possible impacts of climate change, and the extremely significant consequences of acidification for our oceans.

The final panel, "Judicial Takings: From Idea to Reality?" featured Scott D. Makar, Florida Solicitor General, Barton H. "Buzz" Thompson, Jr., the Robert E. Paradise Professor in Natural Resources, Stanford Law School, and Michael Allan Wolf, the Richard E. Nelson Chair in Local Government at the University of Florida Levin College of Law, and explored the emergence of the idea of judicial takings in the Save Our Beaches case. The two student pre-

Law School Liaisons continued....

senters were UF Law J.D. students Celia Thacker, on beach renourishment and Tony Bajoczky, Jr., discussing drilling moratoria.

ELULP Fellowships

To encourage new research and scholarship and to attract the most qualified students, UF's ELULP has created new fellowships for J.D. and L.L.M. students. J.D. students demonstrating commitment to environmental and land use issues, academic achievement, and leadership submitted applications in January for the two new summer fellowships, both of which support students in summer placements. The first is the Conservation Law J.D. Summer Fellowship which provides a $2,500 grant to one or more 2L or 3L students. The second is the ELUL Minority Fellowship, which is a grant of $2,000 to one student who is either a member of a minority group or has demonstrated an interest in the study of the effects of environmental and land use law and policy on minority groups or communities.

Interested in applying for an ELUL LL.M. at UF? Then consider applying for either of two fellowships available for LL.M's beginning in Fall 2011. The Florida Climate Institute LL.M. Fellowship provides an opportunity to work with faculty on a special climate change focused project. The project will emphasize sea level rise and coastal ecosystem change, including exploring appropriate policy responses. Extensive research is required, along with presentation and possible publication opportunities. This fellowship includes a grant of $18,000. The Conservation Law Fellowship provides a grant of $5,000. Students applying for this grant should show a demonstrated commitment and achievement in Environmental and Land Use Law. Recipients of this fellowship will serve in the Conservation Clinic as "senior associates," supervisors, and mentors to J.D. students participating in the clinic. Both of these LL.M. fellowships have an application deadline of April 30, 2011. For more information please visit www.law.ufl.edu/elulp/llm/fellowships.

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Environmental and Land Use Law Section present

Environmental and Land Use Law Audio Webcast Series

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Dates: October 14, 2010; December 9, 2010, February 17, 2011; April 14, 2011; May 26, 2011
12:00 noon – 1:00 p.m. EST

Course No. 1128R

The Florida Bar Environmental and Land Use Law Section is pleased to announce this 2010-2011 audio webcast series. Over the course of the next eight months, we will provide an easy and affordable manner to earn CLE credits (including ethics credit), listen to presentations on environmental and land use hot topics by some of the top lawyers in the state, all from the comfort of your home or office. There is a discount for ordering the entire series.

October 14, 2010

Ethics – A Scholastic Perspective for the Environmental and Land Use Practitioner
Audio Webcast (12:00 noon – 1:00 p.m.)
Sister Patricia A. Siemen, Center for Earth Jurisprudence
Professor Robin Kundis Craig, FSU College of Law

December 9, 2010

Ethical Considerations When Practicing Before Local Governments
Audio Webcast (12:00 noon – 1:00 p.m.)
Clifford A. Schulman, Weiss Serota Helfman & Pastoriza P.L. et al
Robert C. Apgar, Law Office of Robert C. Apgar

February 17, 2011

Mental Health and Substance Abuse Ethical Issues for Environmental and Land Use Practitioners
Audio Webcast (12:00 noon – 1:00 p.m.)
Scott Rogers, Institute of Mindfulness Studies
Michael J. Cohen, Florida Lawyers Assistance

April 14, 2011

Ethical Considerations for the Environmental and Land Use Practitioner – An Interactive Experience
Audio Webcast (12:00 noon – 1:00 p.m.)
Pamella A. Seay, Florida Gulf Coast University

May 26, 2011

Annual Legislative Wrap-Up
Audio Webcast (12:00 noon – 1:00 p.m.)
Janet E. Bowman, Nature Conservancy
Gary K. Hunter, Jr., Hopping Green & Sams

All programs begin at 12:00 noon Eastern Time.

AUDIO WEBCAST

As an audio webcast attendee, you will listen to the program over the Internet. Registrants will receive audio webcast connection instructions 2 days prior to the scheduled course date via e-mail. If you do not have an e-mail address, contact the Order Entry Department at 850-561-5831, 2 days prior to the event for the instructions.

CLE CREDITS

CLER PROGRAM

(For the Series)
(Max. Credit: 6.0 hours)

General: 6.0 hours
Ethics: 3.5 hours (does not include 5/26/11 program)
Substance Abuse: .5 hours (does not include 5/26/11 program)
Mental Illness Awareness: .5 hours (does not include 5/26/11 program)

CERTIFICATION PROGRAM

(For the Series)
(Max. Credit: 6.0 hours)

City, County & Local Government: 6.0 hours
Real Estate Law: 6.0 hours
State & Federal Gov't & Administrative Practice: 6.0 hours

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

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

TO REGISTER | **ON-LINE:** www.floridabar.org/CLE | **MAIL:** Completed form with check | **FAX:** Completed form to 850/561-5816

REFUND POLICY: Requests for refund or credit toward the purchase of the audio CD for this program **must be in writing and post-marked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $25 service fee applies to refund requests.

TO REGISTER OR ORDER AUDIO CD BY MAIL, SEND THIS FORM TO: The Florida Bar, Order Entry Department, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831.

Name _____ Florida Bar # _____

Address _____ Phone: ( ) _____

City/State/Zip _____ E-mail* _____

E-mail address required to transmit electronic course materials and is only used for this order. **JMW: Course No. 1128R**

ELECTRONIC COURSE MATERIAL NOTICE: Effective July 1, 2010, every CLE course will feature an electronic course book in lieu of a printed book for all live presentations, live webcasts, webinars, teleseminars, audio CDs and video DVDs. This searchable, downloadable, printable material will be available via e-mail several days in advance of the live course presentation or thereafter for products purchased. We strongly encourage you to purchase the book separately if you prefer your material printed but do not want to print it yourself.

REGISTRATION FEE (CHECK ALL THAT APPLY):

Ethics – A Scholastic Perspective for the Environmental and Land Use Practitioner – October 14, 2010 (1129R)

- ❑ Member of Environmental & Land Use Law Section: $40
- ❑ Non-section member: $65

Ethical Considerations When Practicing Before Local Governments – December 9, 2010 (1130R)

- ❑ Member of Environmental & Land Use Law Section: $40
- ❑ Non-section member: $65

Mental Health and Substance Abuse Ethical Issues for Environmental and Land Use Practitioners – February 17, 2011 (1131R)

- ❑ Member of Environmental & Land Use Law Section: $40
- ❑ Non-section member: $65

Ethical Considerations for the Environmental and Land Use Practitioner – An Interactive Experience – April 14, 2011 (1132R)

- ❑ Member of Environmental & Land Use Law Section: $40
- ❑ Non-section member: $65

Legislative Update – May 26, 2011 (1133R)

- ❑ Member of Environmental & Land Use Law Section: $40
- ❑ Non-section member: $65

Reduced Rate: Entire Audio Webinar Series (1128R)

- ❑ Member of Environmental & Land Use Law Section: $150
- ❑ Non-section member: $175

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-5816.)

  ☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX Exp. Date: ____/____ (MO./YR.)

Signature: _____

Name on Card: _____

Billing Zip Code: _____

Card No. _____

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

AUDIO CD

Private recording of this program is not permitted. **Delivery time for the entire series is 4 to 6 weeks after 5/26/11. TO ORDER AUDIO CD,** fill out the order form above, including a street address for delivery. **Please add sales tax. Tax exempt entities must pay the non-section member price.**

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

❑ **AUDIO CD** (includes course material in electronic format)
$150 plus tax (section member)
$175 plus tax (non-section member)

COURSE NO. 1128R **TOTAL $ _____**

Arbitration, the *Corfu Channel* case, the Oil Pollution Act of 1990, the American Bureau of Shipping, the Marshall Islands, the Civil Liability Convention, and the Minerals Management Service (MMS). Despite the fact that the U.S. is asking BP to pay for the oil spill, this article concludes that the U.S. is open to liability under general principles of international law.

Deepwater Horizon Has International Ramifications

The facts of the incident have a distorting effect on international liability. The *Deepwater Horizon* (*Deepwater*) was built in South Korea.[3] It was operated by a Swiss company under contract to a British oil firm. The responsibility for the safety inspections of the rig, the equipment, protocols and crew preparedness rested with the U.S. government and the Republic of the Marshall Islands (RMI). The RMI outsourced many of its responsibilities to private companies, some of which are U.S. companies.[4]

Causation has been attributed to a cascade of factors, including the failure of the blowout preventer,[5] the lack of an acoustic switch and cement set-up failures. BP officials have speculated that a pressure surge known in the oil industry as a "blowout" may have triggered the explosion.[6] When the rig sank, the riser, which is the 5,000-foot-long pipe that connects the wellhead to the rig, became detached and began leaking oil.[7] With the use of remote operating vehicles on April 24, 2010, BP attempted to engage a blowout preventer, which is part of the housing on the sea floor, which failed. The blowout preventer was not equipped with a remote control shut-off device called an acoustic switch.[8] An acoustic switch allows the remote control triggering of a blowout preventer and is intended as a last resort safeguard device. Two oil producing countries, Norway and Brazil, require acoustic switches.[9] Additionally, the U.S. Coast Guard speculates that a bubble of gas which surged to the Gulf surface ignited and caused the *Deepwater* to catch on fire.[10]

U.S. Coast Guard investigators discovered a leak in the wellhead itself.[11]

U.S. Attorney General Eric Holder announced that the Justice Department has opened a criminal investigation focusing on BP.[12] The Coast Guard has also been investigating the emergency procedures protocol of BP.[13] And finally, shareholders have sued the board of BP for failing to monitor safety and exposing the company to potentially enormous liability related to the *Deepwater* spill disaster.[14] With all these suits in mind, the liability on the international scale remains intertwined and yet contingent on the findings of national suits.

The Bahamas Has a Basis For International Claims

In the Bahamas, government officials emphasize that preparation measures have already been mobilized.[15] The Bahamas is receiving assistance from the IMO.[16] Daily monitoring exercises for the presence of oil on the beaches in the Cay Sal Banks will begin once oil is confirmed in the Florida Keys area or the north coast of Cuba, according to the Incident Action Plan for the spill.[17] Next, booming will begin in Bimini once oil is reported in the Keys or Cay Sal Banks, and then the Grand Bahama once oil is reported in Bimini. The areas which are most threatened by oiling events over the next year include near shore sea grass, hard-bar and reef environments that are critical to the fisheries production for the entire Bahamas chain of islands.[18]

The pre-impact report establishes the environmental conditions of Cay Sal Banks, which is one of the areas most likely to experience oiling.[19] The report includes seabird assessments, marine surveys, ocean samples, marine tissue samples and surface sediment samples before any petroleum contamination. This provides valuable evidence in any future claims the Bahamas government may make against BP or the U.S.[20] According to Commander Patrick McNeil, head of the National Oil Spill Contingency Team, "It is an American problem. They have a responsibility to address the problem as best as they can to ensure it doesn't affect other sovereign states. We are expecting them to do all they can to ensure it doesn't reach the Bahamas."[21] Other countries, such as Mexico, echo this sentiment of American responsibility for the spill.

Cuba Has A Major Impact on the Gulf's Ecosystem

Cuba, unlike Mexico and the Bahamas, is not a member of the Civil Liability Convention, discussed further below.[22] Thus, it would not be able to receive funding from the IMO for preparation measures, as the Bahamas has done.[23] This does not obviate alternative routes to a finding of liability, such as international nuisance actions, flag state negligence and classification company negligence suits, as discussed further in this Article below.

The protection of Cuba's coasts is vital to U.S. interests on two levels. This first is that the sea currents carry fish larvae from Cuban waters into the U.S. waters, making the security of Cuba's coastal ecosystems crucial to the health of the U.S. fish populations.[24] Secondly, Cuban waters play a key role in the Gulf's ecosystem. For this reason, in 2007, a tri-national collaboration was formed among the three countries bordering the Gulf of Mexico, namely Cuba, Mexico and the United States, to elevate collaboration in marine research and conservation to a new level.[25] The sharing of information is the central focus in this collaboration. Since the scope of the BP disaster became evident, the collaboration has mobilized in order to provide Cuban researchers with the best information feasible in order to plan for potential impacts and deal with them should they occur.[26]

Though the U.S. embargo of Cuba has made collaboration difficult, a historic meeting co-organized and led by the Washington, D.C. based Center for International Policy and the Harte Research Institute for the Gulf of Mexico Studies at Texas A&M University at Corpus Christi, comprised of a group of 15 Cubans and 15 Americans, met in Cancun, Mexico to develop a plan for taking joint marine research and conservation activities between the U.S. and Cuba to a new level.[27] After a two-day meeting, a framework plan of action was established with priorities placed on strengthening of marine protected areas.[28] The proceedings of the meeting are currently being drafted.[29] Cuba has yet to file claims against BP or to receive assistance from international organizations, but current collaboration efforts toward the protection of the environment vital to all parties involved indicate that U.S. assistance

will not be withheld in the event the spill reaches Cuba, despite the current embargo.

Mexico Sues British Petroleum

In June of 2010, Mexican Environment Minister Juan Elvira Quesada said that Mexico plans to sue BP for response-related expenses and wildlife damage in Mexican territory.[30] By September 15, 2010, three suits had been filed in the U.S. District Court, in the Western District of Texas by the Mexican States of Veracruz, Tamaulipas and Quintana Roo.[31] Mexican Petroleum (PEMEX), the ministries of the navy, environment and agriculture are incurring expenses related to the response to the spill. "The lawsuit will not be against the government of United States, it'll be against the company British Petroleum," Elvira said. Though the oil has not yet reached these state's extensive gulf shorelines, they are claiming damages for costs incurred for the oil spill preparation measures such as scientific sampling, stockpiling supplies, mock clean-up activities and other protective measures.[32] According to oceanographers at the Universidad Nacional Autonoma de Mexico, a plume of oil lingering at 1100 feet is expected to hit Mexican fishing waters and shores by the end of 2010 to early 2011, depending on hurricanes and cold fronts.[33] Daniel Serna, attorney for the States, asserts that the 20 billion dollar BP fund excludes foreign claimants and thus, the States have no choice but to sue.[34] Mexico has already incurred 35 million dollars in expenses. Once oil reaches Mexican coastlines, the damages will include natural resource losses, cleanup costs, cancellations for local resorts, punitive damages and, for the state of Quintana Roo, harm to the state's drinking water supply, as it is drawn in part from the ocean water.[35]

Surprisingly, the suits promulgated by the Mexican states do not include liability under UNCLOS for nuisance and negligence, against the flag state for improper licensing, classification and inspection procedures, under MARPOL principles for a lack of an emergency response plan or a failure to adhere to the Mobile Offshore Drilling Unit (MODU) construction code for safety inspections. Mexico has ratified the Civil Liability Convention (CLC) and may make a claim against BP under strict liability for compensation from the CLC Fund.[36] However, the CLC limits recovery to CLC recourses exclusively, and thus, as such, would limit the states' ability to pursue alternative suits, which may be the rationale for not suing under the CLC.

Furthermore, these suits against BP and not the U.S. may be due to the irony in the international arena as to this disquiet, as PEMEX is answerable for the largest offshore oil spill debacle in history, when the Ixtoc I well blew out in 1979 in the Bay of Campeche, 600 miles south of Texas.[37] It leaked at a rate of more than 420,000 to 1.2 million gallons a day for around 10 months.[38] Oil from that spill reached Texas beaches, causing an estimated $4 million loss in tourism revenue, according to an Interior Department Study.[39] Several U.S. lawsuits were filed against PEMEX.[40] U.S. businesses sued Mexico for more than $300 million in damages, but Mexico claimed sovereign immunity and refused to pay.[41] Thus, even in the presence of international liability, Mexico may refrain from suing the U.S. on principles of comity, while pursuing compensation from BP individually, notwithstanding the presence of international compensation funds administered by the IMO.

UNCLOS III Sets the Standard for International Law

The 1982 United Nations Convention on the Law of the Sea was intended to be a comprehensive restatement of all the aspects of maritime law.[42] Though the United States is not a signatory to the convention, it has adopted most of the convention's principles as widely accepted international law.[43] The convention specifies that pollution can no longer be regarded as an implicit freedom of the seas and gives states the right to protect their coastline from pollution.[44] Under Article 235(1), a state which fails to fulfill its obligations to protect and preserve the marine environment is liable in accordance with international law.[45] Article 221 gives States the right to protect their coastline from pollution.[46] Article 211 of UNCLOS requires states, acting through the competent international organization, such as the IMO, to establish international rules and standards governing vessel-source pollution.[47] These international rules established by UNCLOS III are delineated primarily through the IMO.[48] The IMO was established in Geneva in 1948.[49] The IMO adopts international standards and then gives the job to each individual government to adopt them. It is the central hub for the international law created by the conventions, such as MARPOL, the MODU requirements, and the CLC, as discussed further below.[50]

MARPOL Provides A Framework For International Pollution Law

The 1973 International Convention for the Prevention of Pollution From Ships operates under the IMO.[51] The U.S., Mexico, Cuba and the Bahamas are parties to the agreement.[52] Regulation 26 of Annex 1 requires all oil tankers of 150 tons gross tonnage and above, and every other vessel of 400 tons gross tonnage and above, to have on board an oil pollution emergency plan, as approved by the vessel's flag state administration.[53] The purpose of the plan is to assist shipboard personnel in dealing with an unexpected discharge of oil and, in particular, to set in motion the necessary actions to stop or minimize such discharge and to mitigate its effects. The contents of any plan must address, first, the procedure to be followed by the master or other persons having charge of the vessel to report an oil pollution incident. Secondly, they must create a list of authorities or persons to be contacted in the event of an oil pollution incident. Next, they must have a detailed description of the action to be taken immediately by the shipboard personnel to reduce or control the discharge of the oil and finally, address the procedures and point of contact on board for co-coordinating shipboard activities with national and local authorities in combating the pollution.[54]

Cuba, the Bahamas or Mexico may have a claim against the U.S. if the emergency plans were insufficient or at worst, nonexistent. In testimony before the House Transportation Committee on May 19, 2010, the former Director of the MMS said that BP did not complete an oil spill response plan (OSRP).[55] Yet, BP developed its *Regional* Oil Spill Response Plan for the Gulf of Mexico on December 1, 2000.[56] Whether or not the regional OSRP is sufficient to replace the OSRP will depend on further investigations, such as a causal

continued...

relation between the lack of an OSRP and failures to activate the blowout switch.

A second area of liability is with the IMO's *Code for the Construction and Equipment of Mobile Offshore Drilling Units,* which applies to the *Deepwater*, and affords the least amount of standards for its design, construction and equipment.[57] A briefing paper that the House Transportation and Infrastructure staffers prepared for a May 19, 2010, hearing highlighted inadequacies at MMS that may have contributed to slipshod safety enforcement of these rules.[58] BP was allowed to self-certify itself as secure and MMS was censured for being "in bed" with the oil industry.[59]

Accident reports from MMS show that it knew that, "the (blowout) devices have failed or otherwise played a role in at least 14 accidents . . . since 2005."[60] MMS skipped at least 25% of the monthly inspections which were supposed to ensure that the conditions and practices were good enough to limit the risk of disasters from occurring.[61] Ironically, the *Deepwater* was called an "industry model for safety" in 2009.[62] Thus, the U.S. and BP may both have international liability for failing to enforce IMO standards and in the failure to maintain an adequate emergency plan under international law. In sum, with the implementation of MARPOL and UNCLOS III, there are additional legal avenues for foreign coastal states to impose liability for failures to comply with international norms.

The Republic Marshall Islands MODU Standards Were Overlooked

UNCLOS requires each flag state to, "… exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."[63] The *Deepwater* was registered in the Republic of the Marshall Islands (hereinafter RMI) and was subject to that country's national legislation.[64] Litigation against the RMI and not the U.S. may be presented if the RMI had the main responsibility for safety inspections on the *Deepwater*.

A flag state exercises control over ships flying its flag through its national requirements for a ship's construction, equipment, seaworthiness, manning, labor conditions and crew training.[65] These standards need to match to the appropriate international conventions.[66] In this instance, the Office of the Maritime Administrator of the RMI published the Mobile Offshore Drilling Unit Standards (*RMI Standards*), which contained the RMI's rules for the construction, equipment, arrangement, and operation of MODUs at the time of the *Deepwater* incident.[67] The *RMI Standards* are based upon the *1989 IMO Code.*[68] There are three standards under the code for which the RMI may be held accountable.

The first is that the RMI licensed the *Deepwater* in a way that allowed the rig operator, Transocean Ltd., to place an oil drilling expert ahead of a licensed sea captain in making decisions on the day of the explosion.[69] It is likely that the dual command structure created confusion that delayed an effective response to the crisis. RMI counters this position, asserting that it fulfilled all requirements of the law and met the highest industry standards, including those of the Coast Guard.[70] The Coast Guard issued a letter dated August 9, 2002, that recognizes the *RMI Standards* as sufficient to provide a level of safety equivalent to the international standards and U.S. requirements for operating on the U.S. outer Continental Shelf.[71] Because of this letter, it would be hard to impose liability upon the RMI for merely following standards.

Secondly, the *RMI Standards* requires that all MODUs registered in the RMI must maintain good class standing by undergoing a survey by a classification society that is recognized by the RMI.[72] A recognized classification society is authorized by the RMI to perform its inspections and to issue the relevant certificates. The American Bureau of Shipping, (hereinafter ABS), a classification society, is recognized by the RMI.[73] ABS surveyed the *Deepwater* on behalf of the RMI.[74] ABS last surveyed the *Deepwater* in 2006. It was not due for another full survey until 2011.[75] The fact that RMI had complied with the RMI Standards for surveying could absolve it from international liability. This is supported by the case *In re: Oil Spill by Amoco Cadiz,* 699 F.2d 909, 21 (7th Cir. 1983), when on March 16, 1979, the court upheld jurisdiction by French citizens based on negligent operation against an American company despite the Liberian company which was the owner of the wrecked vessel.[76] The court found that the real owner, for liability purposes, was the American parent organization due to the absence of any significant links between the vessel and the flag state.[77] If it is found that there is an absence of any significant links between the RMI and BP, liability may lie with BP, the U.S., or ABS, rather than the RMI. This is discussed further below, under the *Espana* case.

Thirdly, RMI may be held accountable for failure to perform inspections of the blowout preventers.[78] Captain Thomas Heinan, the deputy commissioner of maritime affairs with the RMI, testified before the joint MMS and U.S. Coast Guard panel examining this accident that the RMI as the flag state did not inspect the drilling equipment and systems on the *Deepwater*.[79] He reportedly indicated that such inspections are "left up to the MMS."[80] He further testified that the blowout preventer is tested once it is installed on the ocean floor rather than on land.[81] Captain Hung Nguyen, a Coast Guard officer co-chairing the investigating panel, stated that this testimony indicated that the blowout preventer is "designed to industry standard, manufactured by the industry, and installed by the industry with no government witnessing or oversight of construction or installation," to which Mr. Saucier indicated was a correct summary.[82] As such, it would be difficult to enforce a standard for which there is no government oversight.

Thus, overall, the act of placing an oil drilling expert over a sea captain fell within applicable international standards, the survey classification duty may be passed on to ABS and the lack of inspections could be passed on to the MMS. As such, the RMI may likely escape liability on the international scene, especially given the financial capacity of the RMI in light of the U.S., MMS and ABS. If the RMI eludes legal repercussions, the regime of flag states needs to be re-evaluated, as the *Deepwater* incident is precisely the type of event such protocols were designed to prevent.

The frustration with international

liability in the arena of oil spill pollution is that each party is pointing fingers at another party. With liability coming from so many arenas which overlap, there may be a proliferation of lawsuits on one hand or in the extreme an inability to place any solid liability on the other. All this leads to the question of whether the government is doing an adequate job in oversight of critical safety equipment used on offshore drilling rigs.

Corfu Channel Creates a State Duty to Prevent Damage to Other States

According to the International Court of Justice (ICJ), each State is under an obligation to not knowingly allow its territory to be used for acts contrary to the right of other States.[83] This was brought to light when, on October 22, 1946, two British cruisers and two destroyers undergoing innocent passage went through a strait that was recognized by international law, the North Corfu Strait.[84] The channel they were following, which was in Albanian waters, was regarded as safe because it had been swept in 1944 and check-swept in 1945. One of the destroyers, the *Saumarez*, when off Saranda, struck a mine and was gravely damaged.[85] The other destroyer, the *Volage*, was sent to her assistance and, while towing her, struck another mine and was also seriously damaged. Forty-five British officers and sailors lost their lives, and forty-two others were wounded. Because of the particular geography of the region, the mine-laying operations must have been noticed by Albania's coast guards. Because of this, the ICJ found that it had a duty to notify shipping agents and especially to warn the ships proceeding through the Strait on October 22nd of the danger to which they were exposed.[86] This principle of international law could be applied to the U.S. via the *Trail Smelter Arbitration* and UNCLOS to impose international liability upon the U.S. for failures in the Gulf.

The *Trail Smelter Arbitration* Created an International Nuisance Standard

The *Trail Smelter Arbitration* became a landmark decision in international environmental law.[87] In that case, an arbitral panel held Canada strictly liable for property damage in the U.S. caused by the tortuous acts of its citizens by the smelter's release of sulfur dioxide from its tall smokestacks.[88] The tribunal held that, "Under the principles of international law no state has the right to use its territory in such a manner as to cause injury . . . to another . . . when the injury is of serious consequence."[89] In combining the bodies of international law under the UNCLOS III where a state must exercise the freedoms of the high seas with reasonable regard to the interests of other states and taking the principles articulated in the *Corfu Channel* case together and broadening the principle in the *Trail Smelter* case by comparison, there is a general rule of customary international law that states must not permit their nationals to discharge into the sea matter that could cause harm to the nationals of other states.[90] Taking this concept to the case at bay would certainly give foreign countries a cause of action against not only BP, but to the U.S. as well, for transfrontier pollution.

The *Prestige* Permitted Suit Against the United States for Negligence

In another oil spill incident, the *Prestige,* a Bahamian-flagged oil tanker, sank off the coast of Spain.[91] The Kingdom of Spain sued the ship's classification society, defendants American Bureau of Shipping, under various negligence claims pertaining to the defendants' duties in classifying and certifying the tanker.[92] The $750 million lawsuit, based in New York Federal Court, is premised on the fact that ABS surveyed the Prestige just six months before it sank.[93] Spain claims the company acted negligently in not carrying out its responsibilities for inspection of the vessel that it had failed to detect corrosion, permanent deformation, defective materials and fatigue in the vessel and had been thus negligent in granting classification. ABS counterclaims, alleging that the Spanish Government is responsible for the accident for refusing to let the distressed vessel take refuge in its ports so it could make the necessary repairs.[94]

The Court of Appeal held that the 1992 CLC cannot divest a U.S. Federal Court of subject matter jurisdiction.[95] However, in sending the case to the District Court, the Court of Appeals stated that the District Court may still exercise its discretion to decline jurisdiction based on *forum non conveniens* or principles of international comity.[96] The Court of Appeal decision made the point that ABS' willingness to fully submit to jurisdiction in Spain was a relevant factor in any decision to decline jurisdiction.[97] If the District Court decided to retain jurisdiction, then the Court of Appeals has instructed it to conduct a conflict of laws analysis to determine which law should govern this case.[98] The case has currently been remanded for further proceedings.

In the case with BP, Mexico, the Bahamas and Cuba may also have a cause of action against the *Deepwater*'s classification society. Interestingly enough, in this case, the classification society for the *Deepwater* is also the ABS.[99] Foreign countries may sue ABS for negligence in not carrying out its responsibilities of inspection, failing to detect corrosion, deformation, and defective materials and being negligent in its granting classification.[100] The court may decline to exercise jurisdiction based on *forum non conveniens* or principles of international comity. The decision to retain jurisdiction may also be dependent on ABS' willingness to submit to jurisdiction in Mexico, Cuba and the Bahamas. Based on the precedent the *Espana* case gives, coupled with the inevitable international scrutiny that such litigation will fall under, such suit will likely withstand dismissal or claims of sovereignty. The possibility of such litigation is dependent on finding incidents of negligence on ABS's part in either classifying the *Deepwater* or in failing to properly inspect the rig. Under the principles of the *Espana* case, such suit is likely to prevail in the U.S. for foreign claimants.

The United States May Have Liability Due to the Minerals Management Service Actions

The MMS, a branch of the Department of the Interior, is responsible for overseeing natural resource leases on the Outer Continental Shelf, including regulating production facilities that pertain to exploration, the drilling of wells and the succeeding production of resources.[101] MMS requires operators to submit proof that they have functioning shear rams.[102] At the Coast Guard Investigation of the *Deepwater* incident, MMS Regional

continued...

Supervisor Michael Saucier stated that BP had not submitted the proof that the blowout preventer had a functioning ram.[103] He testified that MMS allows for self-certification by the industry regarding the safety and effectiveness of the blowout preventers.[104] MMS skipped at least 25% of the monthly inspections which were supposed to ensure that practices were good enough to limit the risk of disasters from occurring.[105] This may indicate that MMS failed to use appropriate management efforts in regulating the industry's manufacturing and installation processes for blowout preventers, providing a solid basis for international liability for the effects of the oil pollution in the Gulf.

Thus, as this Article pointed to the inspection issues with the RMI, the RMI has attempted to pass liability for blowout converter inspections to the MMS and the industry producers. Then, the MMS allows for self-certification, which effectively passes the liability onto BP. It is this type of finger pointing that virtually paralyzes international liability determinations.

The Civil Liability Convention Provides Alternative International Relief

The 1969 CLC and 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage provide compensation for persons who suffer damage caused by oil pollution from ships under strict liability, with limits at $115 million for ships over 140,000 gross tonnages.[106] However, unlike the U.S.'s Oil Pollution Act, the environmental damage compensation is limited to costs which are incurred for reasonable measures to reinstate the contaminated environment. It does allow for expenses sustained for preventive measures to be recovered even when no spill of oil occurs.[107] This provision would allow funds to be channeled to the Bahamas currently, as they have already adopted preventative measures in anticipation of the damages. The United States, however, never ratified the CLC, as the limits were viewed as not providing adequate financial resources of potential claimants.[108] Instead, the United States and many other nations adopted a patchwork quilt of laws on the subject, such as the OPA, as discussed below.

Under the 1992 Protocol, a ship owner cannot limit liability if it is proven that the pollution damage resulted from the ship owner's personal act or omission.[109] Thus, if it is found that BP acted recklessly with respect to the blowout valve or lack of an acoustic switch, BP would not be able to limit its liability under the CLC. The CLC also provides that no other claim under the Convention can be made against "the servants or agents of the owner."[110] Thus, foreign claims against BP under the CLC would be limited to BP, and not its servants or agents, such as ABS and the RMI and would be exclusive of U.S. oil spill compensation plans.

The OPA Is the United States' Alternative to International Oil Spill Liability Provisions

The Oil Pollution Act of 1990, (OPA), was a direct response to the 1989 Exxon Valdez spill for the purpose of federally coordinating cleanup of oil.[111] The OPA establishes an inclusive scheme for the prevention, removal, liability, compensation, and penalties for oil pollution with liability amounts up to $75 million for all third-party damages for subsistence use of natural resources, profits resulting from property and natural resource damages.[112] Prior to the OPA, general maritime law principles would have barred Gulf Coast hotel owners from bringing claims against BP for lost revenues unless they had actually owned beachfront property that was physically drenched with oil.[113] Now, hotel owners all over the Gulf region can bring such claims based purely on cancellations and other lost revenue.[114] Under OPA, all offshore facilities are liable for all removal costs plus a total of $75 million for all third-party damages arising from an oil spill, such as personal property, subsistence use of natural resources, profits resulting from property or natural resource damages.[115] Such liability caps do not apply if a spill was "proximately caused by" a responsible party's "gross negligence or willful misconduct" or by the "violation of an applicable Federal safety, construction, or operating regulation."[116]

For vessels, the owner or operator is the responsible party and, for offshore facilities, such as the *Deepwater*, a responsible party is defined as "the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act … for the area in which the facility is located (if the holder is a different person than the lessee or permittee)."[117] Each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for removal costs and damages that result from such incident. Section 1017(b) of the OPA grants federal courts the power to review an agency's decision regarding a claim against the United States. Section 1017(b) provides:

> The United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the discharge or injury or damages occurred, or in which the defendant resides.

OPA § 1017(b), 33 U.S.C. § 2717(b).

Because a suit for reimbursement from the OPA Fund is in essence a suit against the United States, sovereign immunity would serve to bar the suit absent the government waiving its sovereign immunity.[118] Express waiver is most often accomplished by Congress providing within a statute that a governmental entity may "sue and be sued."[119] One of the only cases to have addressed whether the OPA confers jurisdiction for suit against the United States under the Act is *International Marine Carriers v. Oil Spill Liability Trust Fund*, 903 F. Supp. 1097 (S.D. Tex. 1994). There, the district court held that section 1017(b) of OPA entrusted original jurisdiction to district courts, but did not waive immunity to permit judicial review.[120]

The damage claims cover damage to natural resources, including the reasonable cost for assessing the damage, damage to real or personal

property, loss of the subsistence use of natural resources, loss of revenues to the government, loss of profit or the impairment of earning capacity, and damages for the net costs of providing increased or additional public services during or after removal activities.[121] In order to make a claim for damages for loss of subsistence use of natural resources, the ownership or management of such resources is irrelevant.[122] All that is required by a claimant is proof of their reliance on the natural resources for subsistence and a causative link between the discharge and the damage to the natural resources.[123] Natural resource damage claims could thus be substantial, especially considering the effects that Cuba's ecosystem plays on the Gulf as a whole. Notwithstanding BP's promise to pay legitimate claims, foreign countries have redress through the OPA as well, though it is exclusive of the CLC.[124]

The United States Asks British Petroleum to Pay

The international regulation of oil pollution is one area in which the United States has not ardently contributed to with the consequence that the U.S. is not party to most of the major multi-lateral treaties on the subject.[125] The rationale for this tepid approach include the lower levels of liability allowed under the international conventions and the possibility of preemption of state liability laws.[126] There seems little prospect for any change in this attitude, since ratifying the conventions would entail reopening some of the domestic legislation, particularly the OPA, which is dubious now or in the near future.[127]

The White House said it considers BP financially responsible for all costs associated with response to the leak, including efforts to stop it at its source, to reduce the spread of oil and to protect and clean the shorelines, as well as long-term recovery costs, including compensating all individuals and communities affected.[128] President Obama said the same thing during a tour of the Gulf area, stating, "Let me be clear: BP is responsible for this leak; BP will be paying the bill."[129]

Kenneth Baer, spokesman for the Office of Management and Budget, also noted that if BP were found to have acted negligently in the spill or to have violated federal laws, the damages cap under the Oil Pollution Act would be lifted.[130] Currently, the U.S. Congress is still developing new ideas for dealing with the spill, which may have an impact for foreign countries.[131] The U.S. is considering an escrow demand, with the idea that BP will turn its assets over to a fund administered by an "independent" trustee who would decide what are legitimate damage claims from Gulf residents and businesses.[132] In the event that the spill affects foreign countries, they too, may be able to have access to this escrow fund, though as of yet, nothing as far as foreign nations has been firmly decided. Senate Democrats have advised BP to start its payments to the fund at $20 billion.[133] The White House has no legal authority to demand this, but it is counting on principles of comity to coerce BP to go along.[134]

The U.S. and BP's relative positions also take into consideration that BP is also subject to substantial penalties under the Clean Water Act (also known as the Federal Water Pollution Control Act).[135] BP can be assessed with either a $37,500 per-day or $1,100 per-barrel civil penalty for oil spills, even without a showing of wrongdoing on its part. Even by the most conservative estimates, BP's per-barrel exposure is already around $1 billion.[136] These penalties would ordinarily be sought by the Environment and Natural Resources Division of the U.S. Department of Justice, and any money collected would go into the Oil Spill Liability Trust Fund, as described above.[137] Furthermore, the Justice Department has been looking into the possibility of criminal violations.[138] With these two possibilities in mind, BP would probably much rather pay cleanup costs and civil damages than Justice Department penalties. Proceeding with criminal sanctions would undoubtedly affect BP's stocks in a way that may prove untenable. The prospect of imposing these gives the government enormous bargaining leverage over BP and may explain why BP is paying costs over and above the required environmental cleanup costs under the CLC.

Summary

The scene for international liability with the *Deepwater* is an exercise in culpability diversion. In the same vein, BP is still striving to retain a relatively narrowly flawed image in the world's eyes and as such, is paying claims beyond their duty. There is no international law binding them to such exercises, only the unwritten law of the stockholder's trust and their own business acumen.

Mexico has already filed negligence suits in U.S. federal court against BP and not the U.S., owing to political history, the exclusivity under the CLC, or both. Notwithstanding this, Cuba and the Bahamas may chose to pursue claims against the U.S, the Marshall Islands, the ABS and MMS for negligent inspection procedures, depending on the U.S's waiver of sovereignty. Prior cases have shown an opening for liability in suit against such classification companies as the ABS notwithstanding co-existing CLC claims. Under MARPOL, foreign countries may pursue claims for the lack of an OSRP and MODU code violations, subject to a U.S. sovereignty waiver, as shown by previous oil spill cases. Currently, the U.S. may be unlikely to waive such sovereignty but may choose to work with Cuba in the interest of preserving its fish populations. Since the Bahamas are already receiving assistance from the IMO, the CLC's exclusivity clause would bar claims in conjunction with the OPA, but the door is open for the Bahamas with suits against the ABS and the flag state under negligence theories. The OPA provides specifically for foreign claimants, with wider recovery requirements than those of the CLC. The RMI may be held liable as the flag state, yet financial recovery may not be feasible. And finally, the UNCLOS III in its provisions of general international law, coupled with the *Trail Smelter* and *Corfu Channel* decisions, provide a new framework through which foreign claimants may sue another State for injury under the general international duty not to harm another state.

In all likelihood, the Bahamas will receive compensation from the IMO, and Cuba will likely seek reimbursement directly from BP. The U.S. is likely to claim immunity and deter further claims, instead directing claimants to the OPA. Any recovery against the RMI will likely not be as profitable as against other defendants, leading foreign plaintiffs to pursue other courses. Nevertheless, if we are ever to see a change in the

continued...

oil pollution scheme, suit should be brought under every theory available and brought against every responsible party for the foregoing reasons, regardless of recovery probabilities, in order that disasters of this magnitude should be deterred in the future. Companies, nations and international organizations must stand fast to the protocols they have set up. Those standards were established with such catastrophes as the *Deepwater* spill precisely in view. For this reason, they must be adhered to with deepened assurance to keep international oil spill liability from looking like a vertical presentation of a horizontal idea, leading to such disastrous international circumstances as the *Deepwater* crisis.

Endnotes:

[1] Class Action Compl. at 2, Pattie Seafood Co. v. Transocean, Ltd., No. 3:10 cv 00137 (D. Fla. filed April 30, 2010).
[2] Brent Dean, *Government Forms Contingency Plan for Gulf Oil Spill*, Freeport News, May 5, 2010 at A2.
[3] Tom Hamburger and Kim Gieger, *The Marshall Islands, Not the U.S. Had the Main Responsibility for Safety Inspections on the Deepwater Horizon,* The Trib. Wash. Bureau, June 14, 2010.
[4] *Id.*
[5] A blowout preventer is a large, specialized valve assembly used as a fail-safe device to monitor, control and seal oil and gas wells.
[6] Class Action Compl. at 2, Pattie Seafood Co. v. Transocean, Ltd., No. 3:10 cv 00137 (D. Fla. filed April 30, 2010).
[7] *Id.*
[8] Compl. at 3, Lockridge v. PB, No. 1:10 cv 00233 (D. Ala. filed May 5, 2010).
[9] *Id.*
[10] *Hearing on "Deepwater Horizon: Oil Spill Prevention and Response Measures and Natural Resource Impacts,"* U.S. H.R. Comm. on Transp. and Infrastructure, May 17, 2010, 111th Cong. 2 (2010)[hereinafter *Hearing*].
[11] Class Action Compl. at 2, Pattie Seafood Co. v. Transocean, Ltd., No. 3:10 cv 00137 (D. Fla. filed April 30, 2010).
[12] Matt Rocheleau, *BP Takes Oil Spill Heat, But What About Other Companies*, Christian Science Monitor, June 9, 2010.
[13] *Id.*
[14] Tom Halls, *Shareholders Sue BP for Spill Liability*, Reuters, May 24, 2010.
[15] Mark Trumbell, *Oil Spill: Gulf of Mexico Holds Big Liabilities for BP*, Christian Science Monitor, April 30, 2010.
[16] *Id.*
[17] Erica Wells, *Bracing for Oil Spill Impact:*, The Nassau Guardian, June 9, 2010. At A1.
[18] Mark Trumbell, Supra, note 14.
[19] Lindsay Thompson, *Oil Spill Contingency Committee Says No Signs of Contamination in Bahamian Waters*, The Eleutheran, June 19, 2010.
[20] Trumbell, supra, note 14.
[21] Noelle Nicolls, Bahamian Government Set to Sue BP as the Gulf Coast Oil Spills Fears in Bahamas, The Tribune, in The Caribbean Blog International, May 19, 2010.
[22] International Maritime Organization Website, http://www.imo.org, (last visited June 23, 2010).
[23] Trumbell, *supra*, note 14.
[24] Nelson Acosta, *Cuba Says Preparing for BP Oil Spill*, The Reuters Foundation, June 15, 2010.
[25] OnePlanetOneOcean website, http://1planet1ocean.org/cuba-at-risk-from-the-bp-deepwater-horizon-oil-spill/, (last visited June 23, 2010).
[26] *Id.*
[27] J. W. Tunnell, *The Gulf of Mexico, Past Present and Future: A United States, Mexico and Cuba Collaboration,* 222-229 in K. Withers and M. Nipper, Environmental Analysis of the Gulf of Mexico (Harte Research Institute for Gulf of Mexico Studies, Special Publication Series No. 1, Texas A&M University- Corpus Christi, Corpus Christi, Texas, USA(2008).
[28] *Id.*
[29] OnePlanetOneOcean website, http://1planet1ocean.org/cuba-at-risk-from-the-bp-deepwater-horizon-oil-spill/, (last visited June 23, 2010).
[30] Carlos Rodriguez, *BP Oil Spill to Prompt Global Standards for Offshore*, Businessweek, June 11, 2010.
[31] Margaret Fisk and Brubaker Calkins, *BP Sued By Mexican States Over Oil Spill Damage*, Businessweek, Sept. 16, 2010 at A1.
[32] *Id.*
[33] Serna and Associates, PLLC, homepages, http://www.serna-associates.com/news/bp-press-release/,(last visited October 30, 2010).
[34] *Id.*
[35] *Id.*
[36] International Maritime Organization Website, http://www.imo.org, (last visited June 23, 2010).
[37] Rachel Slajda, *In 1979, Less Complicated Oil Leak Took 10 Months to Stop*, The Muckracker, May 31, 2010.
[38] Jorge Vargas, *The Gulf of Mexico: A Binational Lake Shared by the United States and Mexico*, 9 Transnat`l Law 459, 479 (1996) (discussing Ixtoc I).
[39] *Economic Impact of Oil Spills on the Texas Coast*, FY 1980, Report Title: Ixtoc I Oil Spill Economic Impact Study, Volume I, Volume II: Executive Summary, and Volume III: Input-Output Model for Economic Analysis, Instructional Manual Contract Numbers: BLM: CT0-65; MMS: 14-12-0001-29143.
[40] Slajda, *supra*, note 33, at B2.
[41] Carlos Rodriguez, *BP Oil Spill to Prompt Global Standards for Offshore*, Bloomberg, June 11, 2010.
[42] United Nations Convention of the Law of the Sea, Montego Bay, 10 December 1982, In force 16 November, 1994. 128 ratifications. 21 *ILM* 1245 (1982).[hereinafter, UNCLOS]
[43] National Security Directive 49, The White House, October 12, 1990, #20527, Memorandum for the Vice President, Freedom of Navigation Program. (1990).
[44] UNCLOS, *supra* note 38, at Art. 221.
[45] *Id.*
[46] *Id.*
[47] *Id* at Art 211.
[48] International Maritime Organization Website, http://www.imo.org, (last visited June 23, 2010).
[49] R.R. Churchill, A.V. Lower, The Law of the Sea 23 (Juris Publishing 1999)(1983).
[50] *Id.*
[51] International Convention for the Prevention of Pollution from Ships, 1973, I.M.C.O. Doc. MP/CONF/WP.21/Add.4 (1973), *reprinted in* 12 I.L.M. 1319 (1973), *as modified by* Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, *opened for signature* June 1, 1978, I.M.C.O. Doc. TSPP/CONF/11 (1973), *reprinted in* 17 I.L.M. 546(1978).
[52] *Id.*
[53] International Maritime Organization Website, http://www.imo.org, (last visited June 23, 2010)(MARPOL, Annex 1).
[54] Hearings, *supra*, note 9, at 6.
[55] S. Elizabeth Burnbaum, Dir. Minerals Mgmt. Serv., Dep't of the Interior, Statement before the House Comm. on Transp. and Infrastructure, U.S. House of Representatives (May 19, 2010).
[56] BP, *Regional Oil Response Plan*, (2005) The plan is having been revised on June 30, 2009 and its next review date is listed at June 30, 2011.
[57] IMO, *Code for the Construction and Equipment of Offshore Drilling Units*, as amended, consolidated edition 2001, p. 1.
[58] *Hearing, supra* note 9, at 3.
[59] *Id.*
[60] Jeff Donn and Seth Borenstein, *AP Investigation: Blowout Preventers Known to Fail*, Wash. Post, May 8, 2010, at A1.
[61] Justin Prichart, *AP Impact: Federal Inspections on Rig Not as Claimed*, Associated Press, May 16, 2010.
[62] *Id.*
[63] United Nations Convention of the Law of the Sea, Montego Bay, 10 December 1982, In force 16 November, 1994. 128 ratifications. 21 *ILM* 1245 (1982). Article 94.
[64] Tom Hamburger and Kim Kieger, *The Marshall Islands, Not the U.S. Had the Main Responsibility for Safety Inspections on the Deepwater Horizon*, The Tribune Wash. Bureau, June 14, 2010.
[65] Convention of the Law of the Sea, *supra*, note 59, at Art. 94.
[66] *Id.*
[67] International Association of Classification Societies (IACS) Requirements Concerning Mobile Offshore Drilling Units, at 1.
[68] Republic of the Marshall Islands, Mobile Offshore Drilling Unit Standards (MI-293), rev. 8/02, at 17.
[69] Hamburger, *supra*, note 60, at A1.
[70] *Memorandum of Agreement Between the Minerals Management Service, U.S. Department of the Interior and the U.S. Coast Guard, U.S. Department of Homeland Security: Oil Discharge Planning, Preparedness, and Response* (May 23, 2007), at 4-5.
[71] Hamburger, *supra*, note 60.
[72] IMO, Code for the Construction and Equipment of Mobile Offshore Drilling Units, as amended, consolidated edition 2001, second edition, at iii.
[73] U.S. Coast Guard's Maritime Information Exchange, *Port State Information Exchange: Deepwater Horizon* (May 17, 2010), http://psix.uscg.mil/PSIX/PSIXDetails.aspx?VesselID=33177.
[74] *Hearing on "Deepwater Horizon: Oil Spill Prevention and Response Measures and Natural Resource Impacts*," U.S. H.R. Comm. on

Transp. and Infrastructure, May 17, 2010, 111th Cong. 2 (2010)[hereinafter *Hearing*].
[75] *Id.*
[76] In Re: Oil Spill by Amoco Cadiz, 699 F.2d 909, 21 (7th Cir. 1983).
[77] *Id.*
[78] Jeff Donn and Seth Borenstein, *AP Investigation: Blowout Preventers Known to Fail*, The Wash. Post, May 8, 2010.
[79] Brett Clanton, *Regulators Point to Limits in Rig Inspection Process*, Houston Chronicle (May 12, 2010).
[80] Jennifer Levitz, *BP Didn't Provide Failsafe Requirements*, Wall Street Journal (May 12, 2010).
[81] *Id.*
[82] Hearing, *supra*, note 70, at 9.
[83] Murrat Metin Hakki, *Borders and Boundaries in International Law: Cross Border Water Conflicts in Mesopotamia: An Analysis According to International Law*, 13 Willamette J. Int'l L. & Dispute Res. 245, 259 (2005).
[84] R.R. Churchill, A.V.Lower, The Law of the Sea 23 (Juris Publishing 1999)(1983).
[85] Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, at 28 (Dec.15), *available at* http://www.unhcr.org/refworld/docid/402398c84.html (last visited August 14, 2010).
[86] *Id.*
[87] Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1070 (9th Cir. 2006).
[88] Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1938-1941)(Greensfield, Hostie & Warren, Arbs.), reprinted in 35 Am. J. Int'l. L. 684 (1981).
[89] *Id* at 1965.
[90] Auston L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law and the Search for Solutions*, 85 B.U.L. REV 363, 371 (2005).
[91] Iciar Patricia Garcia, *"Nunca Mais" How Current European Environmental Liability and Compensation Regimes are Addressing the Prestige Oil Spill of 2002*, 25 U. Pa. J. Int'l. Econ. L. 1395, 1396 (2004).
[92] Reino de Espana v. Am. Bureau of Shipping, No. 3573, 2005 U.S. Dist. LEXIS 15685, at *1-2 (S.D.N.Y. Aug. 1, 2005) (where the U.S. waived its sovereignty to allow for suit from foreign claimants against a U.S. classification society).
[93] *Id.*
[94] *Id.* at 2272.
[95] Garcia, *supra*, note 106, at 1399.
[96] Iciar Patricia Garcia, *"Nunca Mais" How Current European Environmental Liability and Compensation Regimes are Addressing the Prestige Oil Spill of 2002*, 25 U. Pa. J. Int'l. Econ. L. 1395, 1396 (2004).
[97] Eric Jaworski, *Developments in Vessel Based Pollution; Prestige Oil Catastrophe Threatens Western European Coastline, Spurs Europe to Take Action Against Aging and Unsafe Tankers*, 2002 Colo. J. Int'l. Evntl. L. & Pol'y 101, 104 (2002).
[98] *Id.* at 102.
[99] Tom Hamburger and Kim Kieger, *The Marshall Islands, Not the U.S. Had the Main Responsibility for Safety Inspections on the Deepwater Horizon*, The Trib. Wash. Bureau, June 14, 2010.
[100] Carmen Casada, *Vessels on the High Seas: Using a Model State Flag Compliance Agreement to Control Marine Pollution*, 35 CAL.W.Int'l.L.J. 203, 210 (2005).
[101] 43 U.S.C. §1331 (LexisNexis 2010).
[102] Donn and Borenstein, *supra* at 25.
[103] *Id.*
[104] Justin Pritchard, *AP Impact: Federal Inspection on Rig Not as Claimed*, Assoc. Press (May 16, 2010) at A1.
[105] *Id.*
[106] International Convention on Civil Liability for Oil Pollution Damage, Bah.-Cuba-Mex., art. V, Nov. 26, 1969, 9 I.L.M. 45 (1969), International Maritime Organization, *Liability and Compensation, available at* http://www.imo.org/ (Last visited June 26, 2010) [hereinafter CLC].
[107] International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Bah.-Cuba-Mex., art. IX, Dec. 18, 1971, 11 I.L.M. 284, *amended by* 1992 IMO Protocol to Amend The International Convention on Civil Liability for Oil Pollution Damage (1969) [hereinafter FUND].
[108] CLC, *supra* note 115.
[109] Mans Jacobsson, *The International Liability and Compensation Regime for Oil Pollution from Ships- International Solutions for Global Problems*,32 Tul. Mar. L.J. 1, 6 (2007).
[110] *Id.*
[111] Matthew Harrington, *Necessary and Proper, But Still Unconstitutional: The Oil Pollution Act's Delegation of Admiralty Power to the States*, 48 Case. W. Res. L. Rev. 1, 4 (1997).
[112] 33 U.S.C. §2704 (West 2010).
[113] Harrington, *supra*, note 55, at 2.
[114] Roger Parloff, *BP Is Not Alone in Gulf Exposure*, Fortune (June 11, 2010) at A1.
[115] 33 U.S.C. §2704.
[116] *Id*. at §2702.
[117] *Id.* at §2701.
[118] Anne Kornblut and Juliet Eilperin, *Obama Assails Oil Company Chiefs for Hill Testimony*, The Wash. Post (May 14, 2010).
[119] *Id.*
[120] International Marine Carriers v. Oil Spill Liability Trust Fund, 903 F. Supp. 1097 (S.D. Tex. 1994) as cited in Plantation Pipeline, Co. v. Oil Spill Liab. Trust Fund, 1998 U.S. Dist. LEXIS 23671, 6-9 (D. Ga. 1998).
[121] 33 U.S.C. §2712.
[122] 33 U.S.C. § 2704(c)(1).
[123] *Id.*
[124] *Id.*
[125] Ambrose Ekpu, *Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria*, 24 Denv. J. Int'l. L. & Pol'y 55, 74 (1995).
[126] *Id.* at 84.
[127] *Id*. at 93.
[128] Anne Kornblut and Julie Eilperin, *Obama Assails Oil Company Chiefs for Hill Testimony.* The Wash. Post (May 14, 2010).
[129] Erica Werner, Obama Vows to Make BP Pay, AP Foreign,(May 4, 2010).
[130] Joseph Picard, Congress Needs New Liability Limits for Oil Spill, Intn'l Bus. Journal, June 7, 2010.
[131] Peter J. Henning, Looking for Liability in BP's Oil Spill, N. Y. Times (June 25, 2010).
[132] *Id.*
[133] Lisa Lerer, Congress Prepares Bill to Remove BP Liability Limit, Bloomberg Bus. Week (June 3, 2010).
[134] Picard, *supra*, 130.
[135] Clean Water Act, 33 U.S.C.§1321(j)(1)(C) 1991.
[136] *Id.*
[137] Sharona Hoffman, Criminal Sanctions in Accidental Oil Spill Cases: Punishment Without a Crime, 71 NEB. L. REV. 1033, 1039 (1992).
[138] Richard Epstein, *BP's Endless Nightmare in the Gulf*, Forbes.com Online Column, June 7, 2010.

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