



Lawyers, Consultants and Clients – The Ethics, Legalities, and Implications of Data Reporting

by Kellie Scott & Bill Ware

Each day, environmental lawyers and consultants face the question of what, when, and how to report releases or discovery of contaminants and how to advise clients on these issues. Some of the scenarios are straightforward while others may not be so easy to navigate.

There are a multitude of federal and state environmental regulations that have reporting requirements. For example, in federal law, the Clean Water Act¹ requires reporting of unauthorized discharges in certain waters, the Comprehensive Environmental,

Response, Compensation and Liability Act² requires notification of reportable quantities of hazardous substances, and the Resource Conservation and Recovery Act³ requires the reporting of a leak from a hazardous waste tank. Some of Florida's reporting requirements are found in the rules for Petroleum Storage Tanks Systems⁴ and Contaminated Cleanup Criteria.⁵ Additionally, there may be reporting requirements at the local level. For example, the Miami-Dade County Code has a reporting requirement of its own.⁶ This article is not meant to be an

exhaustive list of all reporting requirements but will incorporate several of the Florida reporting requirements as illustration.

Chapters 62-761 and 62-762, Florida Administrative Code ("F.A.C."), deal with underground and above ground storage tanks and require that contamination must be reported within 24 hours or by close of the next business day.⁷ One aspect that may be confusing is that the discovery of contamination includes the receipt of soil or groundwater analytical results that indicate presence of contaminants

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From the Chair

by Nicole C. Kibert

First, I'm pleased to welcome Cal-brail (pronounced Kuh - Brail) L. Bennett who will assume the position of Program Administrator for the Environmental and Land Use Law Section when Jackie Werndli retires on December 5th. Jackie Werndli is an integral part of the Section and though we will miss her terribly, we wish her fair sailing weather for her many upcoming adventures with her husband, Phil, and enjoyment in visiting her children and two grandchildren.

It's been a busy fall for the Environmental & Land Use Law Section. On October 10, 2013, we had an Executive Council Meeting in Orlando in conjunction with a lovely, well

attended networking reception at Ember Orlando. On November 5th, the Natural Resources Committee sponsored a popular webinar "New State-wide Environmental Resource Permit Rules: The Fundamentals for Lawyers, Engineers, and Consultants." If you missed the program, it is available for playback here: <http://eluls.org/natural-resources-committee/>.

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CHAIR'S MESSAGE

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If you are interested in sponsoring the section, please visit <http://eluls.org/our-sponsors/> for more information. There are some sponsorship opportunities available for our next networking reception in Tampa on January 30, 2014. Please contact Jackie Werndli at jwerndli@fabar.org or Calbrail Bennett at CBennett@flabar.org.

You are welcome to attend meetings of the Executive Council. The remaining 2013-2014 meeting dates for the ELULS Executive Council are listed below:

- January 30, 2014 – Tampa (in conjunction with EL/RPPTL Seminar)
- June 26, 2014 – Gaylord Palms Resort, Orlando (in conjunction with The Florida Bar Annual Convention)

- August 6, 2014 (4:00 p.m.) – Omni Amelia Island Plantation

We have a wonderful schedule of CLE programs – both live and via webinar coming up. Next on the calendar is our joint program with RPPTL that will take place on January 31st. And, of course, please calendar now

for August 7-9, 2014 for the ELULS Annual Update's return to Amelia Island Plantation.

Finally, thanks for your membership in the Section - we hope to see you at a section event soon! If you have any suggestions or questions, please feel free to contact me at nicole.kibert@gmail.com. Thank you!

Open Letter to the Section

It has been both a pleasure and a privilege to serve as your program administrator over the last twenty years. Your support during those years has made my job an enjoyable and rewarding experience. I sincerely thank you all for that working relationship. It's difficult to say goodbye, so fair winds and calm seas - I wish you well in the future.

Jackie Werndli

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

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New Environmental Due Diligence Standard is Here!

by J. Chris Herin, P.G. with Geosyntec Consultants

In early November 2013, ASTM finalized the “*Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*” (Standard Number E1527-13) which is a significant update to the 2005 version. Recent information indicates EPA is now working to modify the All Appropriate Inquiry (AAI) Rule wherein it is anticipated the AAI Rule will be changed to reflect that ASTM Standard Number E1537-13 will replace the 2005 version. Thereafter, Phase I Environmental Site Assessments done according to ASTM Standard Number E1537-13 will be a centerpiece component of demonstrating “all appropriate inquiry” was completed.

According to an ASTM advertisement, changes in this new standard include (and we note, are not limited to):

- Updated “recognized environmental condition” (REC) definition, which is more aligned with All Appropriate Inquiry, but retains some of the additional guidance from prior E1527 versions
- Updated “historical REC” definition, which was redefined to limit application of historical REC to past releases that have been addressed to unrestricted residential use
- Addition of a “controlled REC”, to be used for risk-based closures, where contaminants are allowed to remain under certain conditions
- Clarification that “de minimis condition” is not to be used to describe a controlled REC

- New definition for migrate/migration, to specifically include vapor in the subsurface
- New definition for “release” and “environment,” to align with CERCLA definitions
- New discussion about specific LLP (landowner liability protection) and Brownfield Grantee “User” requirements
- New standardized framework for gathering agency information related to key database listings
- Added language to allow non-significant changes to conclusion statement
- Updated non-binding appendices: Revised Legal Appendix; Revised Report Table of Contents and Format; and Added “Business Environmental Risk” Appendix to provide references and resource guidance for common Business Environmental Risk issues

In our view, some of the more notable changes for Florida (and many other states) are as follows:

- Performance of file reviews for Phase I ESAs. The new standard provides revised guidance regarding when file reviews should be completed. Inclusion of file reviews can significantly impact the cost of completing a Phase I ESA.
- Subsurface vapor migration. Notably, some states (Florida included) do not currently have regulations directly relating to vapor migration or vapor intrusion. However,

consultants will now have to consider the potential for vapor migration when developing Phase I ESA conclusions. This is an interesting challenge when one considers that many contaminated sites have been closed “with conditions” (where contamination has been left in place at a property) and where vapor migration was never considered when the closure order was issued by the agency.

- Historical and Controlled RECs. These two types of RECs present some new challenges for users. For example, a Phase I ESA concluding that a “controlled REC” exists could lead to the need to follow ASTM Standard E2790-11 “*Standard Guide for Identifying and Complying With Continuing Obligations*.” In another example, there likely will be situations where a consultant concludes a “historical REC” exists but does not find that more stringent cleanup requirements exist today in comparison to contaminant levels remaining in the ground. That could be a problem for the consultant and the user of the Phase I ESA!

Assuming EPA updates the AAI Rule according to the indicated schedule (the AAI Rule could be updated by the time this article goes to press); everyone involved with Phase I ESAs in their practice should get up to speed now with E1527-13. Considering that unofficial studies have shown overall poor compliance by the consulting community at fully meeting requirements in the 2005 standard, this underscores that, with the new standard, it is even more important for attorneys and their clients to be fully aware of what is required by E1527-13.



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The Florida Energy Summit Revisited: Three Perspectives

On October 14-15, 2013, the Florida Department of Agriculture and Consumer Services held its third annual Florida Energy Summit. Three attendees of the Energy Summit provide a recounting of the Energy Summit from their unique perspectives. The opinions expressed herein are those of these authors and are not the opinion of the ELULS or its Energy Law Committee. The three authors of this article are Director of the Florida Energy Office, Patrick Sheehan,¹ Douglas S. Roberts,² and George Cavros.³ The Energy Law Committee is grateful for their contribution to this article.

The 2013 FDACS Energy Summit

The Florida Department of Agriculture and Consumer Services (FDACS or department) recently hosted more than 400 attendees at the 2013 Florida Energy Summit in Orlando. This year marks the third time the department has hosted the Summit following the transfer of the state's Energy Office to FDACS during the 2011 legislative session. Prior to the transfer of the Energy Office, FDACS had successfully hosted the annual Farm to Fuel Summit which focused on the development and distribution of renewable energy created from Florida-grown crops, agricultural wastes and residues, and other forms of biomass. Since that time, the department has expanded its focus to all forms of energy production and energy usage, a theme which has been central to the past two Energy Summits as well as to the work the department has undertaken in the area of energy policy.

In 2012, the legislature passed Florida's first energy bill in four years. The bill, which was championed by Commissioner of Agriculture Adam H. Putnam, was multifaceted and designed to expand energy production, increase diversity in the state's energy portfolio, and create jobs in the energy sector. Many of the provisions in the bill, which passed with overwhelming support from the legislature, found their genesis in

presentations delivered at the 2011 Energy Summit. The bill included provisions for: tax credits and refunds for renewable energy technology, the production of renewable energy, a study of Florida's forest resources and energy conservation measures, and others to boot. With input from the industry, the department adopted the rules that govern renewable energy tax credits. Those credits are now available for eligible businesses that (1) utilize any form of renewable energy, (2) demonstrate investment in energy production, and (3) create jobs in Florida.

Another outcome of the 2012 energy bill is the My Florida Home Energy Tool. In conjunction with the University of Florida, the department has developed an interactive, online platform that may help residents of Florida conserve energy and save money. Homeowners can go to www.MyFloridaHomeEnergy.com, then enter their five-digit zip code, and answer questions about the size, shape, and age of their home. The tool uses the information provided by the homeowner, as well as publicly accessible data, to determine potential energy-efficient products, improvements or modifications that may be beneficial.

The passage of the 2012 energy bill was a modest first step forward in bringing Florida's energy policy into the 21st century. The hope was that the legislation would spark conversation and inspire others to propose energy policies that would benefit Florida. In 2013, more energy policies were proposed; one notable example is the Natural Gas Fleet Vehicle Incentives bill. This measure provides \$30 million in rebates over five years to businesses and local governments that purchase new natural gas vehicles or convert their fleet to natural gas vehicles. The Natural Gas Fuel Fleet Vehicle Rebate program creates an incentive to businesses and government to upgrade commercial fleets and will also lower transportation costs for Florida businesses while reducing

the environmental impact of commercial fleets. The savings from the rebate program can be invested in creating more jobs. The program also improves Florida's competitive advantage by creating an additional incentive for businesses to move to the state. The department will begin accepting applications for these rebates beginning in January 2014.

Commissioner of Agriculture Adam H. Putnam opened this year's Energy Summit by recapping the past two successful years and also noting that the state of Florida is in the early stages of an energy revolution with profound implications for our state and our nation. He urged stakeholders to capitalize on the opportunities available in a thoughtful and strategic manner. The Commissioner reiterated his support of a free market, all-of-the-above approach to energy policy and stated that we should help investors, businesses, and consumers capitalize on the potential for development created by smart energy policies. Commissioner Putnam stressed that the role of government is to allow the market to determine what works and what does not. The government should not be in the business of picking winners and losers. To that end, Commissioner Putnam outlined a number of legislative proposals for the upcoming 2014 legislative session.

The proposals are designed to reduce energy costs for businesses and consumers, identify energy infrastructure needs, and support energy innovations. Among the Commissioner's proposals was to cut—by half—the 7 percent state sales tax that Florida commercial businesses pay for electricity over the next three years. He estimated that this tax will save Florida businesses approximately \$250 million every year, which can be used to grow business and create jobs. Noting that strong education breeds innovators, researchers, math and science teachers, the Commissioner further proposed that the revenue from the remaining 3.5 percent sales tax be directed to the Public

Education Capital Outlay (PECO) program that is used for building critical infrastructure in Florida's public schools. The Commissioner also called for a tax holiday week-end on Energy Star appliances and WaterSense products. The purchase of these appliances and products increase a home's energy efficiency, conserve water, and help consumers save money on utility bills.

Additionally, the department's legislative proposals will include a request for a predictive analysis of Florida's natural gas usage. Florida relies on natural gas for about 60 percent of its power generation which makes it the second most dependent state on natural gas for power generation. The Commissioner advocated the need for an analysis and a multi-decade forecast of Florida's natural gas usage. The analysis will evaluate the risks associated with the state's growing reliance on one fuel source and will assess long-range infrastructure needs, above-ground storage and liquefaction, opportunities for natural gas in transportation, and pricing predictions.

In addition to the legislative proposals, Commissioner Putnam announced the department's support of energy innovation with the launch of the state's first Clean Energy Research and Development Match Fund. Many grants offered by the federal government or private organizations call for matching funds as a requirement to qualify for the grant. Although many states historically offered matching funds for this purpose, Florida has not. The Commissioner announced that the department plans to invest up to \$4 million in matching funds to support Florida's innovators and entrepreneurs in energy research and development. This program will not require additional funding. Instead, funds will be redirected from Renewable Energy and Energy-Efficient Technologies grant projects that were not completed or that did not achieve their goals.

This year's Energy Summit focused on the job creation, efficiencies, and business opportunities that come with an ever-changing energy industry. Academics, investors, elected officials, and leaders from all sectors of the energy industry attended the Summit. Michael A. Levi, a nationally

recognized authority on energy and a Senior Fellow for Energy and the Environment at the Council on Foreign Relations, delivered the keynote speech. During his keynote address, Mr. Levi provided a balanced and comprehensive overview of our nation's energy past, present, and future in the context of the politics that surround it.

The Summit featured diverse panel discussions on subjects ranging from Florida's energy workforce development to innovative energy related Florida based manufacturers that are helping governments and businesses save money on lighting, air conditioning, and in cleaning their water supply. Panel discussions also focused on how Florida's changing demographics are affecting energy usage. In turn, those changes in usage and technology spur evolution in Florida's infrastructure for electricity, natural gas supplies, and transportation fuel delivery facilities.

Another panel brought together a utility employee, a businessman, and an academic to talk about their work with young people around the state. Each had successful programs that excited young people about science and engineering and encouraged them to consider fields of study and work in the energy industry. These programs will provide the labor force and innovators for Florida's energy future. To emphasize how important it is to encourage students to study engineering and science, the department once again partnered with the Florida Energy Systems Consortium to highlight the exceptional work of 20 graduate students working in the energy field by displaying their academic posters in the Summit Exhibit Hall.

The Summit also showcased Florida businesses that are revolutionizing the energy industry through their work. St. Petersburg based LumaStream works with cool lighting technologies to help local governments and businesses save money, provide better lighting, and improve safety conditions. Ferrate Treatment Technologies developed a low energy water filtration system that is so effective in removing contaminants that it is being used to clean tidal areas in Louisiana. Danfoss Turbocor manufactures magnetic centrifugal compressors for air-conditioning and

process cooling that, when installed within a large cooling system, help governments and businesses save both energy and money.

Other panels featured stimulating discussions on such topics as the innovative ways companies in Florida are capturing waste heat and the facts and myths associated with hydraulic fracturing and the Keystone Pipeline. The Summit concluded with a panel discussion that focused on the energy and water nexus. Following the past three Florida Energy Summits, the department has received feedback that the Summit provided a valuable service to Florida by providing a forum on energy that is not otherwise available. The Florida Energy Summit brings together participants in the state's energy industry: utilities; state policy makers; local government officials; academics; green builders; environmentalists; and energy related manufacturers and service providers to discuss the current issues and challenges facing Florida's energy industry. The discussions that occur during breaks and luncheons have been as valuable as the information each participant takes away from the panel discussions. Businesses showcasing their products and services at the Summit have benefited from the exposure to clients they might not otherwise have encountered.

Finally, from the department's perspective, these Summits provide staff with an opportunity to hear from all aspects of the energy industry in Florida. From stakeholder priorities to issues that are on the horizon, the knowledge that department staff members have gained from these Summits frequently informs future legislation and policy decisions. The Florida Energy Summit as envisioned by Commissioner Putnam has opened discussions on energy policy to help lay a foundation for Florida's future.

Florida's 2013 Energy Summit – A View into Florida's Energy Past, Present and Future

Florida Agriculture Commissioner Adam Putnam convened the most-recent in a series of Florida Energy Summits on October 14 and 15, 2013. The Summit provided an opportunity to have a conversation on energy policy, energy development, and energy use from a state-wide perspective without the added

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pressure of resolving the contested and controversial issues associated with a specific project or proposal. It afforded a chance to hear about range of issues from the work being done by Gulf Power in the Florida Panhandle and Palm Beach State College to identify, educate, and train the next generation of workers to run our energy supply systems to the work by Florida Atlantic University to develop the next generation of renewable energy that can tap the constant flow of the Florida Current off Florida's southeast Atlantic coast. The Summit highlighted the efforts in Florida to develop and manufacture new energy efficient technologies to operate and light our homes, offices, and manufacturing plants. Reflecting the farm to fuel topic of earlier summits convened by former Agriculture Commissioner Charles Bronson, biomass fuels from Florida crops and residue were discussed as in-state ethanol blending of Florida motor fuels and Florida's university research on biomass conversion technologies were highlighted.

As addressed by Michael Levi, a national expert on our nation's energy history and policy, the Summit provided a reminder of the turmoil our national energy markets and our economy experienced from the oil embargo that occurred in 1979 and the lingering effects of the Great Recession that began in 2008. Significantly, as Commissioner Putnam highlighted in his address, Florida continues on a path to greater reliance on the use of natural gas that, while exciting and leading to lower cost electricity and fewer air emissions, also highlights Florida's return to reliance on a single fuel for much of its electricity generation. While that supply may not be at the risk of foreign interruption, as occurred with imported oil in the 1970s, it places Florida at risk of market swings and possibly of placing too many eggs in that basket. Commissioner Putnam called for an updated analysis and forecast of Florida's increasing reliance on natural gas, which should afford an opportunity to continue that conversation on that key Florida energy issue.

In addition to discussing the need for Florida to assess its increasing reliance on natural gas, Commissioner Putnam called for a number of incentives to stimulate the energy market broadly. Florida's economy is slowly recovering from the Great Recession according to Dr. Rick Harper of the University of West Florida. Florida was one of the first states to enter the recession, and is gradually recovering. However, the state's workforce is changing as manufacturing and "middle skill" jobs decline in the state due in part to emerging use of technology to perform those jobs and the decline in the construction industry.

Natural gas was used to generate about 60 percent of the electricity consumed in Florida last year, and is projected to remain the dominant fuel used in Florida's electrical generating units over the next decade. Nationally, natural gas is on par with coal in the generation of electricity; in Florida, natural gas use is almost twice that of coal. However, Florida has very limited instate natural gas production and no significant storage facilities. The state currently is served by only two major bulk gas pipelines, unlike other large gas-consuming states that have many more pipelines. To address this gas transportation situation in Florida, a major new natural gas pipeline was recently announced by Florida Power & Light Company to supply power plants that were recently converted to use natural gas. As discussed by Michael DeBock of FPL, the gas pipeline will extend from Martin County to the Orlando area where the FPL portion of the pipeline will connect to a new interstate pipeline that will cross into Alabama.

In addition to providing additional gas supply service, the pipeline will allow Florida to tap the new sources of natural gas being supplied by "fracking" of shale formations in the Midwest and other areas of the US. Professor Hannah Wiseman of Florida State University College of Law provided an introduction to issues related to fracking, including the drilling processes that are being used and the environmental issues that surround this technology. While noting the low potential for fracking in Florida, she highlighted the benefits from gas produced by fracking as including lower, less volatile prices

for natural gas, economic growth, and job creation in this new energy sector. In addressing environmental issues, Professor Wiseman pointed out that the significant environmental issues occur on or near the land surface near the drilling sites, related predominantly to recovery, treatment, and reuse of water required in the fracking process. She also noted the community impacts associated with new natural gas drilling projects. She and other speakers pointed out this cheaper, domestic natural gas supply was displacing not only coal-fired generation but was reducing both the market penetration of renewable generating sources such as solar and the expanded use of nuclear power.

This lower cost of electricity along with other perceived market and regulatory barriers to renewable energy sources, particularly to small-scale distributed sources (think "roof top solar systems") led some speakers to advocate for greater incentives for solar and other renewable energy sources. One option is incentivizing greater use of net-metering. Net-metering allows an electric utility customer to sell back to their utility any excess electricity the customer generates with renewable energy, effectively making their electric meter turn backward.

Florida's other sources of renewable energy were also addressed during the two day Summit. Ethanol is mandated by the federal government to be blended with gasoline for use in vehicles. However, much of that blending occurs out of state. Motiva Enterprises, which is affiliated with large petroleum producers and refiners, is looking to Florida as a place to import ethanol from overseas and domestic suppliers and to blend that ethanol with gasoline for use in Florida. Ports in Tampa and Fort Lauderdale were noted as potential areas for this development.

Florida currently imports almost all of the ethanol consumed as fuel in the state. Yet, Florida leads the US in the amount of biomass that could be used to produce energy, including liquid fuels. The state contains over 15 million acres of forest land and 10 million acres of farm land, along with large quantities of forest residue, urban wood waste, and vegetable crop wastes. These resources could help supply in-state

energy needs while creating economic growth and jobs. Dr. Jennifer Curtis, who leads the Florida Energy System Consortium in the state's public university system, highlighted many of the research efforts underway in Florida's universities to tap these and other biomass-based energy sources. These efforts include advanced biofuels technologies using chemical and thermochemical reactions to convert cellulosic biomass into biofuels. Ineos Fuels has recently brought online a cellulosic ethanol plant near Vero Beach to gasify biomass to produce ethanol, while using the excess heat from that production process to generate electricity. Algae is another potential source of biofuels that is being explored in the university lab and in a privately-owned larger-scale ethanol production plant developed by Algneol Biofuels, Inc., near Ft. Myers, Florida.

Florida leads the US in the use of waste-to-energy plants, which combust municipal solid waste to produce electricity, while reducing the amount of material that needs to be landfilled. These plants represent the largest source of renewable energy in Florida, while operating at a high capacity factor. Waste to energy plants have the potential to supply up to 840 megawatts of electrical generating capacity, according to Paul Hauck of CDM Smith. In addition to reducing landfill space, these plants also are recovering various metals from the municipal waste stream and recycling ash to beneficial uses.

Florida's offshore areas are also an emerging opportunity to produce renewable supplies of energy from both winds and ocean current. Florida Atlantic University (FAU) is leading Florida's efforts to evaluate the potential for tapping these sources of energy, which FAU's lead researcher Camille Coley called "blue power." Offshore wind power was described as variable and diffuse and thus requires a backup source of electricity supply during periods of no wind. Florida's offshore wind potential is only now being evaluated in greater depth following an earlier initial assessment of that potential resource. While still more expensive than land-based energy sources, offshore wind was considered to not have significant impacts on commercial fisheries or the marine environment.

Ocean currents or "hydrokinetic marine power" off of Florida's southeast coast holds promise as a source of baseload power, due to its nearly constant flow. This offshore area of Florida has been identified as having the highest potential kinetic energy density in the world. Following a 5-year permitting effort, FAU is undertaking studies to tether the prototype technologies to the ocean floor so that they could rotate, submerged, in the flowing current to generate electricity. FAU is also investigating the impacts to marine resources from deploying these technologies in this area. Development of these offshore resources will raise further issues related to use and impacts to the marine environment from these technologies and from bringing the electricity generated to the shore.

The issue of water and energy also received other attention at the Summit. In his remarks, Commissioner Putnam identified water as critical to energy in Florida. Water is needed to cool power plants; water will be needed to support production of energy crops. Thus, one of Florida's on-going challenges will be ensuring adequate water supplies for this sector of the state's economy.

Water supply has already been a key issue in the development of electrical generating plants. New natural gas units use lower quantities of water than traditional units, due to the use of combustion turbine technologies that do not require water for cooling. For cooling of the steam cycles in Florida's power plants, most plants use lower quality sources of water such as sea water or poor quality groundwater. Many power plants are turning to the use of reclaimed water from domestic wastewater treatment systems as a source of cooling water. Tom Hernandez of Tampa Electric Company described his company's efforts to develop a supply of reclaimed water for use at TECO's Polk County power plant. A 15-mile long pipeline is being installed to supply reclaimed water from the City of Lakeland for use in the power plant, and to replace existing groundwater withdrawals in a region already experiencing excess groundwater use.

A number of other subjects were discussed during the Summit, highlighting manufacturing of energy saving technologies, workforce development,

and improving the reliability of the electric grid, all providing a broader overview of issues related to Florida's "energy industry." Expanded use of energy efficiency measures in the electricity sector was debated, along with discussions of ongoing improvements to Florida's statewide building code to achieve lower energy use in Florida homes and offices. This year's Energy Summit again provided the benefit of learning where we are as a state, and an opportunity to discuss where we are going on key issues related to energy supply, production and use in the Sunshine State.

Clean Energy Can Transition State to Lower Cost, Lower Risk Energy Future

The 2013 Florida Energy Summit continued to highlight the importance of energy policy to the economy of Florida. In his opening remarks, Commissioner Adam Putnam called energy "an important driver in Florida's economy," and that "energy efficiency is an important piece of the puzzle." The Commissioner's legislative proposals included tax relief on the energy industry, including renewable energy development. Several presenters made the compelling case that both energy efficiency and renewable energy, especially solar power, can play a critical role in transitioning Florida to a lower cost, lower risk energy resource portfolio, while diversifying the state's economic base, saving utility customers money, and creating jobs.

Florida by the numbers

Dr. Rick Harper, Director, opened up the summit by highlighting the importance of a diversified state economic base, and the consequences of lacking diversity. Case in point: the Florida economy had been heavily reliant on real estate development prior to the Great Recession of 2007. The real estate development boom created significant job opportunities in the construction sector. Prior to the recession, Florida was outperforming the rest of the country in economic growth. Since then, it has been significantly underperforming the national average in that rate of economic recovery. Florida has lost 53 percent of its construction jobs. Those jobs have been slow to return. By contrast, states with more diversified economic

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bases are recovering more quickly from the recession than Florida.⁴

Much like its economic base, Florida is challenged by a lack of diversity in its energy mix for meeting electricity demand. The state generated well over 60 percent of its electricity from natural gas last year,⁵ and that reliance is likely to increase. The increasing reliance on natural gas is primarily a product of regulatory and economic factors. It was noted that the lack of an open and transparent state utility integrated resource planning (IRP) process, to guide utility resource decisions, could also be exposing customers to unnecessary cost and risk. On the regulatory front, the EPA Mercury and Air Toxics Standard rule requires improved emission control technology to slash harmful emissions from coal plants, primarily mercury. Utilities around the country, including here in Florida, are finding it more economical to retire older coal units rather than comply with the rule.⁶

Moreover, the historic low price of natural gas, due to the domestic hydraulic fracturing boom, makes new coal plant development relatively non-competitive on fuel price to new natural gas plants. Florida's foray into new nuclear plants has been plagued by delays, and hefty cancellations costs on customers.⁷ Therefore, the state's largest utilities are doubling down on natural gas as a resource – planning several new natural gas plants and re-powered plants by 2020.⁸ Yet, natural gas has been a commodity subject to significant price volatility in the past, and prices are expected to increase going forward.⁹

The dual lack of diversification in the state's economic base and electricity resource mix prompts the question: how can the state diversify both its economic base and energy resource mix in a way that effectively acts as a hedge to the state's exposure on natural gas fuel price volatility? The Energy Summit discussion on energy efficiency as resource, reforming Florida's utility resource planning process, realities of solar power, and clean energy jobs, collectively demonstrated that energy efficiency and solar power can play a larger role

in transitioning Florida to a lower cost, lower risk energy resource mix – while creating jobs. The only question that remains: will policymakers embrace them?

Energy Efficiency; the First Fuel

It's often said that the cheapest kilowatt hour is the one that is never used – for good reason. Smarter energy use can meet electricity demand at a fraction of the cost of new power plants.¹⁰ It helps customers slash energy use and save money on electric bills. Yet, this resource in Florida is underutilized relative to other leading states. In Natalie Mim's ranking of the Southeast utilities' performance on capturing energy savings from utility-sponsored efficiency programs, Duke Energy Carolinas led the pack. The Company was capturing 3 times the energy savings from efficiency programs than Florida's biggest power company, FPL.

It is important to note the investor-owned utilities (IOU) are natural monopolies whose rates are regulated by state public service commissions through cost of service ratemaking. Shareholders are entitled to a rate of return on the book value of their capital assets (rate base). The assets include generation (power plants) and transmission assets. Therefore, there is a distinct disincentive for an IOU to embrace energy services, such as energy efficiency, because it can defer or eliminate the need for power plants – on which IOU shareholders earn a rate of return. Therefore, performance incentives are likely necessary to encourage IOUs to pursue meaningful energy saving targets. It should be noted that the Florida Public Service Commission already has the authority to provide performance incentives for certain levels of energy efficiency, but has not acted on it.¹¹ So why can the largest power company in the Carolinas achieve so much more energy savings through efficiency than Florida's largest power company?

The answer lies, in part, that incentives in North Carolina have been realigned to reward utility shareholders for meaningful levels of energy efficiency. There are currently 29 states that have acknowledged the regulatory disincentive for energy efficiency and allow performance incentives for reaching meaningful energy efficiency goals.¹² Additionally, as Mims noted, open and transparent IRPs in

other states, such as in the Carolinas and Georgia, while not ideal models, help place energy efficiency on a “level playing field” with new power plants in meeting demand.

Leveling the playing field

An IRP differs from traditional utility planning in that it requires utilities to use analytical tools that are capable of fairly evaluating and comparing the costs and benefits of both demand-side resources (such as energy efficiency) and supply-side resources (such as power plants), ideally in an open, transparent and rigorous process that allows stakeholder participation.¹³ Florida doesn't utilize the IRP process described above. Instead, Florida's largest utilities use an internal resource planning process that may not fairly value the cost and benefits of all resources and that's closed to stakeholder participation. The lack of an open and robust IRP process may be exposing Florida's electricity customers to unnecessary risk and cost.

For example, during the 2012 North Carolina IRP process, a “high energy efficiency” scenario showed that Duke Energy Carolinas, and its customers, could save \$5 billion by increasing efficiency implementation beyond the “business as usual” scenario.¹⁴ In Florida, there is no process for stakeholders to transparently examine and engage a utility on the cost and benefits of various sensitivities (levels) of utility-sponsored energy efficiency implementation on the overall utility system.

Should the state embrace meaningful levels of energy efficiency as a resource; homegrown companies, like LumaStream, are poised to meet the Florida demand for advanced lighting systems. As noted by Eric Higgs, his company's technology can significantly and cost-effectively reduce commercial and residential energy use for lighting. The St. Petersburg-based company expects to create 1,000 new jobs in 5 years related to the manufacturing and sale of its LED lighting system. LumaStream, and others in the Florida efficiency industry, are propelling the growth of the industry at an annual rate of 16 percent per year – a much faster rate than the state's overall job growth.¹⁵

Unlocking the market for solar power

The US solar industry had its

biggest year in 2012 – solar photovoltaic (PV) grew to a total of 3,300 megawatts (MW) in 2012 alone. In the first quarter of 2013 there was 723 MW of solar PV installed which accounted for 48 percent of all electric generating capacity developed during that time period.¹⁶ It was noted by Dr. Joseph Simmons that there are currently 120,000 solar jobs in the US and growing at 17 percent per year.¹⁷ The cost of solar PV systems has dropped 80 percent in 5 years and is now essentially at grid parity with retail rates in Florida.¹⁸ The state has the second largest electricity market in the US, but was ranked as 17th in the nation in annual solar PV installations in 2012¹⁹ and well below the leaders in total installed capacity.

While large utility-scale solar PV systems will play a role in Florida's solar future, the distributed solar model (customer-sited solar energy systems) arguably offers more benefit to the utility's system and the customer.²⁰ Florida has over 9 million electric utility customers, but has a mere 5,296 customer-sited renewable generation systems – mainly solar PV.²¹ By contrast, New Jersey has almost 24,000 customer-sited installed PV projects; almost five times that of Florida – with half the population and a weaker solar resource.²² What step could the state take to encourage more private investment in solar PV?

Removing tax barriers to customer-sited solar systems, as was mentioned by Commissioner Putnam, is a key to unlocking the solar energy development market in Florida. One such barrier is the tangible personal property tax on leased solar PV systems. The tax is a roadblock to financial viability for third-party leased solar PV systems in Florida. Third-party ownership and leasing of solar PV has become the predominant business model in some of the largest residential markets in the US; comprising greater than 50 percent of new residential PV capacity in California, Arizona and Colorado in 2012 alone, and gaining increasing market share in nearly all states with

significant PV capacity, such as New Jersey.²³ It's estimated that this type of solar ownership structure contributed more than \$938 million to the California economy in 2012.²⁴ The state of Florida could benefit from those levels of private investment.

Conclusion

The Summit discussion evidenced that low cost, low risk resources, such as energy efficiency and solar power, are ready to meet a greater share of the state's energy resource mix and help diversify the state's economy and create new jobs in the clean energy sector. Energy efficiency simply requires policy to allow it to compete on a level playing field with generation options, or in the case of solar PV, removing tax barriers to significant private solar PV investment in Florida.

Endnotes:

¹ Patrick Sheehan was appointed by Florida Commissioner of Agriculture Adam H. Putnam as director of the Office of Energy in 2011. He oversees a staff of 20 policy and grant managers. Prior to working in the Office of Energy, Patrick worked at Alutiiq International Solutions LLC, where he served as the legislative affairs program manager for the International Affairs division of the U.S. National Guard Bureau at the Pentagon. The son of a career United States Air Force officer, Patrick was born at RAF Lakenheath in the United Kingdom in 1971, and has lived and travelled extensively throughout Europe and the United States. He attended high school at Tampa Jesuit and Patch American High School in Stuttgart, Germany. He was further educated at the University of Washington's School of Political Science, in Seattle, and, later the University of Pennsylvania's School of Law, in Philadelphia.

² Douglas S. Roberts is a shareholder with Hopping Green & Sams in Tallahassee. He represents clients on a range of issues related to the siting, permitting, and operation of electrical generating facilities and other large-scale facilities. He has worked on a wide range of electrical generating facilities using a variety of fuels, including nuclear, coal, natural gas, solar and biomass. He graduated from Florida State University's College of Law in 1985. The views expressed here are those of the author.

³ George Cavros is the Florida Energy Policy attorney for Southern Alliance for Clean Energy. He serves as the organization's legal counsel in the state and advocates for clean energy policy solutions. He has worked on a range of state energy policy issues for over a decade. He earned his JD with honors from Nova Southeastern University's Shepard Broad Law

Center. He also enjoys his work as an adjunct professor of Energy Law. The views expressed here are those of the author.

⁴ See Harper, *Florida by the Numbers*, Florida Energy Summit, October 14, 2013.

⁵ Florida Public Service Commission, *Review of the 2013 Ten Year Site Plans*, October 2013, p. 34.

⁶ *Id.* at 30.

⁷ Penn, Tampa Bay Times, *Florida PSC Approves Duke Energy Agreement with Customers on Hook for \$3.2 Billion*, October 17, 2013.

⁸ Florida Public Service Commission, *Review of the 2013 Ten Year Site Plans*, October 2013, p. 38.

⁹ US Energy Information Administration, *Annual Energy Outlook 2013*, April 2013, p. 77.

¹⁰ Lazard Power, Energy & Infrastructure Group, *Lazard's Levelized Cost of Energy Analysis, 7.0*, August 2013.

¹¹ §366.82(9), Fla. Stat.

¹² American Council for an Energy-Efficient Economy, *The State Energy Efficiency Scorecard*, 2012, p. 36.

¹³ See Wilson, et. al, *Best Practices in Electric Utility Integrated Resource Planning*, June 2013.

¹⁴ See Mims, *The First Fuel: Energy Efficiency and Conservation*, Florida Energy Summit, October 15, 2013.

¹⁵ Florida Department of Economic Opportunity, *Green Jobs Survey Report*, Region 21, July 2011.

¹⁶ GTM Research, *US Solar Market Insight, 2012 Year in Review*, at: <http://www.seia.org/research-resources/us-solar-market-insight-2012-year-review>.

¹⁷ See Simmons, *Myths and Realities for Solar Energy 2013*, Florida Energy Summit, October 14, 2013.

¹⁸ *Id.*

¹⁹ GTM Research, *US Solar Market Insight, 2012 Year in Review*, at: <http://www.seia.org/research-resources/us-solar-market-insight-2012-year-review>.

²⁰ See Perez, et. al, *The Value of Distributed Generation to NJ and Pennsylvania*, November 2012. The value of distributed solar energy to the utility include fuel cost savings, the savings of avoided new generation capacity, fuel price and electricity price hedge value, transmission and distribution value by having the energy source closer to demand, and environmental value in terms of zero compliance costs.

²¹ Florida Public Service Commission, *Review of the 2013 Ten Year Site Plans*, October 2013, p. 23.

²² New Jersey's Clean Energy Program, *New Jersey Installation Update*, at: <http://www.njcleanenergy.com/renewable-energy/project-activity-reports/installation-summary-by-technology/solar-installation-projects> (last visited November 4, 2013).

²³ Greentech Media, *US Residential Solar Financing to Reach \$5.7 by 2016*, February 11, 2013.

²⁴ RenewableEnergyWorld.com, *Third-party Solar Surging in California, Nearly a Billion Dollar Business*, February 15, 2013.



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December 2013 Florida Case Law Update

Submitted by Gary K. Hunter, Jr., Thomas R. Philpot, Hopping, Green & Sams, P.A.

A county land development code may not employ an exhaustion of administrative remedies requirement to preclude landowners from seeking a determination of vested rights by declaratory relief in Florida's circuit courts. *Angelo's Aggregate Materials v. Pasco County*, 118 So.3d 971 (Fla. 2d DCA 2013).

Angelo's Aggregate Materials (Angelo's) requested a conditional land use permit to build a new landfill adjacent to a separate landfill it also operated. At the time of Angelo's application, the land proposed for conditional use was designated for the future land use category AG/R with an A-C zoning district on the county's comprehensive plan. The designation only required a conditional use permit in order to construct the landfill proposed by Angelo's. After Angelo's application and subsequent amendments in the Land Development Code (LDC), the county determined that a future land use map amendment to designate the land as "P/SP" would be required in order for Angelo's to construct the landfill. Consequently, the county placed Angelo's application on hold until such an amendment could be considered.

Angelo's sought relief in the circuit court for a declaration of its vested rights in the prior LDC and a declaration that portions of the county's LDC were unconstitutional. The county moved to dismiss Angelo's complaint, arguing that the circuit court lacked subject matter jurisdiction by Angelo's failure to exhaust administrative remedies as required by the LDC. As amended, the county LDC requires that a landowner seek a determination of vested rights before the Board of County Commissioners, whose decision by written order is appealable to the circuit court for a review restricted to only a first tier certiorari proceeding. The circuit court dismissed both counts, holding that the county's exhaustion of remedies requirement was not met by Angelo's and that no cause of action had been asserted in Angelo's claim regarding the constitutionality of the land LDC.

On appeal, the Second District Court of Appeal (Second DCA) held that Angelo's claims were appropriate for declaratory relief in the circuit court as asserted under Florida's Declaratory Judgment Act in chapter 86, *Florida Statutes*. Therefore, the circuit court erred in dismissing the claims as barred by the exhaustion requirements of the county LDC. Where the county's LDC required exhaustion of administrative remedies prior to filing any claim against the county for damages or injunctive relief, the Second DCA construed the provision to not apply to declaratory actions. By resolving the appeal with this construction, the Second DCA preserved harmony of the ordinance with state law and did not find it necessary to address constitutional issues raised by Angelo's other claim. The Second DCA noted, however, that if the LDC provisions attempted to preclude relief by declaratory judgment in the circuit court, the ordinance would operate in conflict with general laws including the Declaratory Judgment Act, thus rendering the ordinances amending the LDC unconstitutional. Chapter 86, *Florida Statutes*, provides that the availability of another remedy does not preclude a declaratory judgment. The case was remanded to the circuit court for further consideration under its power for declaratory judgment.

A city does not deprive a property owner of interests in real property when approving the site use plan for a neighboring parcel, notwithstanding that the property owner has a driveway and drainage agreement with the neighboring parcel owner and is not provided notice or an opportunity to be heard regarding the plan approval. *Manley v. City of Tallahassee*, 2013 WL 4007650 (11th Cir. 2013).

William Manley entered an agreement with a neighboring parcel owner, Rib, Inc., for the joint use of a driveway and storm water drainage system in 1981. In 2008, Rib sold its parcel to a car wash company and submitted a site plan to allow

the company to use the parcel as a car wash. The City of Tallahassee approved a site use plan on the parcel neighboring Manley's property without giving Manley notice or an opportunity to be heard. Manley sued the city, alleging that the city had deprived him of interests in his property without procedural due process. The District Court dismissed Manley's complaint for failure to state a claim upon which relief can be granted.

The 11th Circuit Court of Appeals affirmed the District Court, distinguishing in its holding the property interests derived from zoning laws and the potential property impacts arising from approval of the site use plan. The Court of Appeals emphasized that zoning laws give landowners certain property interests, such as land use restrictions that enable the right to live in a residential area. If an area is rezoned, for example, landowners in the area could face a potential deprivation of their property interests which were secured by the original zoning on the property. A site use plan, on the other hand, does not change the property interests a neighboring parcel owner has in their property, whether those interests are grounded in a private agreement or in state law. In this case, the Court of Appeals emphasized that if Manley's interests are impacted or the driveway and drainage agreement is violated by the use of the neighboring site as approved for a car wash, proper remedies remain available for Manley to seek through a state court.

A county ordinance that attempts to prohibit certain land uses relating to captive wildlife is void as inconsistent with general law when the ordinance operates in direct conflict with the rules of the Florida Fish and Wildlife Conservation Commission, the state's exclusive authority for regulation of the possession and sale of captive wildlife pursuant to the Florida Constitution. *Foley v. Orange County*, 2013 WL 4110414 (M.D. Fla. 2013).

Plaintiffs operated a business owning and breeding toucans from their

continued...

property located in a residential-only zone and on a separate parcel located in a rural-use zone of Orange County. Plaintiffs maintained a permit for the possession of this wildlife through the Florida Fish and Wildlife Conservation Commission (FFWCC). County land use regulations prohibited the operation of a commercial aviary at the residential location altogether and at the second property without a special use permit, which Plaintiffs did not possess. Prompted by a neighbor complaint, the county code enforcement division investigated Plaintiffs' residential property and cited the Plaintiffs for failing to obtain required building permits for certain accessory buildings. Plaintiffs then voluntarily sought an official determination from the county zoning department as to whether the commercial aviary at their residence was authorized. The county determined that its land use ordinances did not permit a commercial aviary as a primary or secondary use, or as an authorized home occupation. Plaintiffs were unsuccessful in appealing the determination twice at the county level and subsequently in state court. Plaintiffs, who were self-represented in this case, eventually set forth a complaint in federal court seeking, among other federal claims, a state-law claim for declaratory judgment that portions of the county's land use ordinances are void on the basis that the ordinances conflict with the exclusive authority vested in the FFWCC by the Florida Constitution. All of the claims were decided by the District Court on cross motions for summary judgment.

In analyzing the state-law claim, the District Court held that the Florida Constitution has granted to the FFWCC all legislative authority regarding the regulation of the possession and sale of captive wildlife. The District Court analyzed the county's use of land use ordinances to prohibit "commercial aviculture, aviaries" and the "breeding, keeping, and raising of exotic animals" on residential properties and determined that the prohibitions conflict with FFWCC rules, which obligate

exotic bird breeders to maintain a commercial enterprise. As the governing law of the state on matters of captive wildlife, the FFWCC rules are tantamount to legislative acts. Thus, the District Court emphasized, any and all laws in conflict with the FFWCC rules are consequently void. Because Plaintiffs were authorized by an FFWCC permit to possess and sell class III birds from their residence, any land use ordinance of the county prohibiting such sale or possession is void. In its opinion, the District Court further analyzed the legal basis and merit of five federal claims rooted in various constitutional theories, all of which were determined on summary judgment in favor of the county and are not relevant for substantial treatment in this report.

Consistency of a development order with a comprehensive plan is determined by what the order permits, not what the current permit holder intends to do under the order. *U.S. Sugar Corp. v. 1,000 Friends of Fla.*, 2013 WL 4017136 (Fla. 4th DCA 2013).

United States Sugar Corporation and Florida Rock industries obtained a development order which permitted mining on U.S. Sugar property located within the Agricultural Production Future Land Use area of Palm Beach County. Following decisions in *Bergeron Sand & Rock Mine Aggregates, Inc.*, 69 So.3d 1123 (Fla. 4th DCA 2011), and *1000 Friends of Fla., Inc. v. Palm Beach Cnty., Rinker Materials of Fla., d/b/a Cemex*, 75 So.3d 1270 (Fla. 4th DCA 2011), Florida Rock gave up its lease. U.S. Sugar, on the other hand, expressed an intention to pursue mining under the development order in a manner consistent with the county's comprehensive plan. Under challenge by the 1000 Friends of Florida, the trial court granted summary judgment and enjoined activities under the development order, holding that an order permitting general commercial mining was inconsistent with the county comprehensive plan. The Fourth District Court of Appeal affirmed and emphasized that the permit holder's intentions under a development order are not determinative of consistency with the comprehensive plan. The proper measure of consistency is determined by comparing what the development order permits. In this

case, the Fourth DCA observed that U.S. Sugar will need to reapply and seek a separate order if the company intends to mine in a manner consistent with the comprehensive plan.

Billboard signs that do not conform to state and federal land use, size, height, and space requirements are not entitled to the additional statutory process afforded to conforming billboards when erection of a highway sound barrier impairs visibility of the billboards. Exclusion of nonconforming billboards from the additional process does not amount to an unconstitutional taking or a violation of the owner's due process or equal protection rights. *CBS Outdoor, Inc. v. Fla. Dep't of Transp.*, 2013 WL 5744443 (Fla. 1st DCA 2013).

The Florida Department of Transportation (FDOT) erected a sound barrier wall on its right of way property along Interstate 95 near Jacksonville, which once constructed, blocked the view of billboard signs owned by CBS Outdoor, Inc. CBS petitioned FDOT for an administrative hearing to pursue the additional process afforded under section 479.25(1), *Florida Statutes*, a provision that establishes which sign owners can receive redress when visibility of a sign is screened or blocked due to the construction of a sound barrier. FDOT denied the petition by CBS Outdoor after determining that CBS Outdoor owned nonconforming signs, or signs that do not conform to state and federal requirements for land use, height, size, and spacing. According to FDOT, the process and remedies available under section 479.25, *Florida Statutes*, applies only to conforming signs permitted by law.

CBS Outdoor appealed, and in addition to review of the agency decision, asserted constitutional arguments that exclusion of their nonconforming signs from the statutory process was a violation of due process, equal protection, and private property rights. Applying a *de novo* review to a matter of statutory construction, the First District Court of Appeal (First DCA) emphasized the relevant statute's plain language and upheld the FDOT's denial of the petition. In its opinion, the First DCA outlined at least three references from the statute that make clear the process

and remedies afforded are applicable to signs that are “lawfully erected,” “conform[ing] to state and federal requirements,” and “lawfully permitted.” Further, FDOT’s asserted basis for exclusion of the nonconforming signs – conditions of federal funding – was determined on appeal to be a rational, non-arbitrary reason sufficient to survive constitutional

scrutiny regarding due process and equal protection. Florida law has not yet recognized the visibility of a sign along the interstate as a property right, and since the sound barrier was constructed on FDOT property and not on the property owned by CBS, the First DCA found the record was insufficient to sustain a claim for an unconstitutional taking. Although

the physical removal of nonconforming signs is subject to compensation under *Florida Statutes*, CBS Outdoor’s claim of visibility impairment did not rise to the threshold of a claim that FDOT had removed the sign. Thus, there was no clear error and no constitutional violation in FDOT’s denial of the petition according to the First DCA.

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THE FLORIDA BAR

On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of November 1, 2013. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

SFWMD v. RLI Live Oak, LLC, Case No. SC12-2336. Petition for review of 5th DCA decision reversing declaratory judgment determining that RLI participated in unauthorized dredging, construction activity, grading, diking, culvert installation and filling of wetlands without first obtaining SFWMD's approval and awarding the District \$81,900 in civil penalties. The appellate court determined that the trial court improperly based its finding on a preponderance of the evidence standard and not on the clear and convincing evidence standard. 37 Fla. L. Weekly D2089a (5th DCA, Aug. 31, 2012). Subsequently, the district court of appeal granted SFWMD's request and certified the following question: "Under the holding of *Department of Banking & Finance v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996), is a state governmental agency which brings a civil action in circuit court required to prove the alleged regulatory violation by clear and convincing evidence before the court may assess monetary penalties." 37 Fla. L. Weekly D2528a (5th DCA, Oct. 26, 2012). Status: On March 7, 2013, the Florida Supreme Court accepted jurisdiction and dispensed with oral argument.

FIRST DCA

Florida Fish and Wildlife Conservation Commission v. Wakulla Fishermen's Association, Inc., et al., Case No. 1D13-5115. Appeal from final judgment enjoining any and all further enforcement of the net ban amendment as set forth in Article X, §16, the Commission's authority to adopt rules to regulate marine life with respect to the use of a "gill net" or an "entangling net" pursuant to Article IV, §9, and Rules 68B-4.002, 68B-4.0081 and 68B-39.0048. Case No. 2011-CA-2195 (2d Cir. final judgment entered October 22, 2013). Status: Notice of appeal filed October 23, 2013.

CRP/HLV Highlands Ranch, LLC v. DEP, Case No. 1D13-3302. Petition to review DEP final order denying appellant's application for an environmental resource/mitigation bank permit and

petition for variance. Status: Voluntarily dismissed on September 24, 2013.

Putnam County Environmental Council v. SJRWMD, Case No. 1D13-2669. Petition for review of FLWAC final order denying the Council's request for review pursuant to s. 373.114, F.S., of the Fourth Addendum to SJRWMD's Water Supply Plan, relating to identification of withdrawals from the St. Johns and Ocklawaha Rivers as alternative water supplies. Status: Notice of appeal filed June 5, 2013.

Zagame v. DACS, Case No. 1D13-2641. Petition for review of FDACS final order rejecting the ALJ's recommended order in part, and concluding that Zagame was entitled to an exemption pursuant to s. 373.406(2), F.S., for the dredging portion of the activities (comprising approximately 1.12 acres), but was not entitled to an exemption for the filling portion of the activities (comprising approximately 1.3 acres). Status: Pursuant to a joint motion for remand, the final order was reversed and the cause remanded to the lower tribunal on September 26, 2013.

Capital City Bank v. DEP and Franklin County, Case No. 1D13-1489. Appeal from two final orders granting dismissal of plaintiff's third amendment verified complaint, by which plaintiff seeks an injunction pursuant to s. 403.412(2), Florida Statutes, for alleged violations of various statutes and rules relating to actions allegedly taken by Franklin County without DEP approval at Alligator Point. Status: Oral argument set for November 21, 2013.

State of Florida v. Basford, Case No. 1D12-4106. Appeal from order of partial taking in claim for inverse condemnation against the State of Florida as a result of the passage of Article X, Section 21, Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy. Status: Affirmed on July 24, 2013. 38 Fla. L. Weekly D1567a; motion for rehearing and rehearing *en banc* denied on August 29, 2013.

FINR, II, Inc. v. CF Industries, Inc. and DEP, Case No. 1D12-3309. Petition for review of final DEP order granting CF's applications for various approvals, including environmental resource permit, conceptual reclamation plan, wetland resource permit

modification and conceptual reclamation plan modification. Status: Affirmed per curiam on July 19, 2013; motion for rehearing and rehearing *en banc* denied August 22, 2013.

THIRD DCA

Padron v. Ekblom and DEP, Case No. 3D13-2446. Appeal from final order adopting recommended order determining that Ekblom's application to install a boat lift on an existing dock in a man-made body of water is exempt from the need for an ERP. Status: Notice of appeal filed September 24, 2013.

FOURTH DCA

Conservation Alliance of St. Lucie, et al. v. DEP, Case No. 4D13-3504. Appeal from a final order adopting a recommended order of dismissal, which dismissed for lack of standing a challenge to a settlement agreement resolving an enforcement action relating to alleged contamination of soil and groundwater at a bleach-manufacturing and chlorine-repackaging facility. DOAH Case No. 10-3807 (Final Order entered August 21, 2013). Among other things, the order concludes that petitioners were "foreclosed from asserting their interests under subsection 403.412(6), Florida Statutes, in a proceeding where DEP took enforcement action." Status: Notice of appeal filed September 19, 2013.

Conservation Alliance of St. Lucie County and Roman v. DEP, Case No. 4D13-2925. Appeal from final order adopting recommended order determining that the petition for hearing was filed untimely and that petitioners failed to demonstrate standing to request a hearing. Status: Notice of appeal filed August 8, 2013.

Archstone Palmetto Park LCC v. Kennedy, et al., Case No. 4D12-4554. Appeal from trial court's order granting final summary judgment determining that the 2012 amendment to section 163.3167(8), Florida Statutes, does not prohibit the referendum process described in the City charter prior to June 1, 2011. Status: Oral argument held on October 1, 2013.

Author's Note: Legislation enacted during the 2013 Regular Session may moot this appeal. See Chapters 2013-115 and 2013-213, *Laws of Florida*.

Law School Liaisons

A December 2013 Update from the Florida State University College of Law

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

The Florida State University College of Law is pleased to provide this update for the Environmental Law & Land Use Section *Newsletter*.

Our next major event will be on **February 28, 2014**. Entitled **Environmental Law Without Congress**, this important conference initiates a cross-disciplinary discussion of the economic, political, psychological and sociological forces that shape attitudes toward environmental law and regulation. It convenes experts in law, policy and the social sciences, with a view toward providing a holistic and comprehensive perspective on environmental law. Featured participants include **Richard J. Lazarus**, Howard and Katherine Aibel Professor of Law, Harvard Law School, **Todd Aagaard**, Associate Professor of Law, Villanova University School of Law, **Dallas Burtraw**, Darius Gaskins Senior Fellow, Resources for the Future, **Daniel A. Farber**, Sho Sato Professor of Law, University of California-Berkeley, School of Law, **William Funk**, Robert E. Jones Professor of Advocacy and Ethics, Lewis & Clark Law School, **Alexandra B. Klass**, Professor of Law, University of Minnesota Law School, **Nathan Richardson**, Resident Scholar, Resources for the Future, **J.B. Ruhl**, David Daniels Allen Distinguished Chair in Law, Vanderbilt Law School, **Theda Skocpol**, Victor S. Thomas Professor of Government and Sociology, Harvard University, **Janet Swim**, Professor of Psychology, The Pennsylvania State University and **Shi-Ling Hsu**, Larson Professor, Florida State University College of Law (*moderator*). We hope you will join us for this conference.

Fall 2013 Events

Environmental Law Distinguished Lecture: The Obama Administration, Climate Change and the Clean Air Act (November 6): **Ann Carlson**, the Shirley Shapiro Professor of Environmental Law and

Faculty Co-Director, Emmett Center on Climate Change and the Environment, UCLA School of Law, gave the Fall 2013 Distinguished Environmental Lecture on the role of the Clean Air Act in addressing climate change challenges.

Environmental Forum: Adaptation Challenges and A Review of Ongoing Initiatives (November 14): The College of Law's Fall 2013 *Environmental Forum* focused on adaptation challenges. Featured panelists included **Heidi Stiller**, Human Dimensions Specialist, National Oceanic and Atmospheric Administration, **Julie A. Dennis**, Community Program Manager, Florida Department of Economic Opportunity, **Janet Bowman** ('87), Director, Legislative Policy & Strategies, Florida Chapter of The Nature Conservancy, and **Will Butler**, Assistant Professor of Environmental Planning, Florida State University Department of Urban and Regional Planning. David Markell, Steven M. Goldstein Professor, moderated the *Forum*.

Environmental Enrichment Series: The Fall 2013 Environmental Enrichment Series for our Environmental Certificate and Environmental LL.M. students included leading academics, policy makers and attorneys. Guest speakers included **Angela Morrison**, Hopping Green & Sams, **Meredith Jagger**, Environmental Epidemiologist, Florida Department of Health and Manager of the Department's Building Resilience Against Climate Effects (BRACE) Program, **Professor Amy Stein**, Tulane University Law

School, **Noah D. Valenstein** ('08), Executive Office of the Governor of Florida, and **Anne Longman** ('79), Lewis, Longman & Walker.

Environmental Externship Luncheon (September 19): The College of Law's Clinical Externship Program and Environmental Faculty hosted a luncheon to enable students to learn about externship opportunities for the spring and summer semesters. Lawyers from several government agencies and non-profit groups participated.

Selected Recent Externship Placements



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SPACHT

Leslie Ann Ames (3L) and Jacquelyn Thomas (3L), Florida Department of Environmental Protection (Tallahassee).

Lauren Brothers (3L), Environmental Protection Agency, Region 2, New York City).

Andrew Missel (3L), Earthjustice (Seattle, WA).

Sarah Spacht (3L), U.S. Attorney's Office (San Diego, CA).

Austin Hensel (3L) and Kaitlin Monaghan (3L), Florida Division of Administrative Hearings (Tallahassee).



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Law School Liaisons continued....

Alumni Accomplishments and Honors

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

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

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

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

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

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

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

Jacob T. Cremer ('10), of Smolker, Bartlett, Schlosser, Loeb & Hinds, P.A.'s Tampa office, was elected to the Executive Council of The Florida Bar's Environmental and Land Use Section. He was also re-elected to the Board of Governors of Connect Florida, Leadership Florida's young professional program.

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

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

We hope you will join us for one or more of our programs. For more information, please consult our web site at: <http://www.law.fsu.edu>, or please feel free to contact Prof. David Markell, at dmarkell@law.fsu.edu.



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QUEALE

UF Law Update

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

20th Public Interest Environmental Conference in February

"Feeding the Future: Shrinking Resources, Growing Population and a Warming Planet" is the theme of the 20th Annual Public Interest Environmental Conference (PIEC), scheduled February 20-22, 2014, at the University of Florida Levin College of Law. The Conference will address the challenges facing agriculture in a modern context. The topics will focus on the intersection of the political, ethical and environmental issues confronting agricultural

production today and in the future.

Conference speakers include Dr. Dickson Despommier, Professor of Public Health in Environmental Sciences, Columbia University, and author of *The Vertical Farm: Feeding the World in the 21st Century*; Sarah Bittleman, Senior Agricultural Counselor, U.S. Environmental Protection Agency; and Jack Payne, Senior Vice-President for Agriculture and Natural Resources, IFAS, University of Florida.

The Conference will include special events and activities, citizen and

attorney skills training opportunities provided by the ELULS Public Interest Committee, and networking venues. Conference co-chairs are Christopher Johns (ufscoot@ufl.edu), J.D. candidate 2015, and Gentry Mander (gmander@ufl.edu), J.D. candidate 2014.

Speaker Series Focuses on Agriculture & Environment

UF law's annual Environmental Speaker Series will parallel the theme of the PIEC, featuring topics on "Agriculture and the

Law School Liaisons continued...

Environment.” Presentations will occur during January and February, 2014. The Gold Sponsors for the speaker series are Alfred J. Malefatto, Shareholder, Lewis, Longman & Walker, P.A., West Palm Beach, FL; and Hopping Green & Sams, P.A., Tallahassee, FL.

Topics and schedule for the series include:

January 9, 2014: *Agricultural Law 101*, Mary Jane Angelo, UF Research Foundation Professor of Law, Alumni Research Scholar, Director, Environmental & Land Use Law Program, University of Florida Levin College of Law.

January 16, 2014: *Hot Topics in Agricultural and Food Litigation*, George A. Kimbrell, Senior Attorney, Center for Food Safety, Washington, D.C.

January 23, 2014: (via videoconference): *The Dating Game and beyond: Expiration Date Laws and Other Policy Levers to Reduce Food Waste*, Emily M. Broad Leib, Director, Food Law and Policy Clinic, Center for Health Law and Policy Innovation, Harvard Law School.

January 30, 2014: *Sustaining the Health of the Land: It all Begins with the Soil*, Frederick L. Kirschenmann, Distinguished Fellow, Leopold Center for Sustainable Agriculture, Iowa State University.

February 6: *Food Labeling, Public Health & the Environment*, Jason J. Czarnecki, Gilbert and Sarah Kerlin Distinguished Professor of Environmental Law, Pace Law School.

February 13, 2014: *The Food Safety Modernization Act and Small and Organic Farmers*, Danielle D. Treadwell, Ph.D., Associate Professor and Vegetable Extension Specialist, Horticultural Sciences, UF Institute of Food and Agricultural Sciences.

All presentations will be held at 3:00 p.m. in Holland Hall 270. Please contact Lena Hinson at 352-273-0777 or elulp@law.ufl.edu for information.

LL.M. Program Welcomes Four
The University of Florida Levin

College of Law's Environmental & Land Use Law LL.M. program welcomed four students into the class of 2014:

Jocelyn Croci received her J.D. degree cum laude from the University of Florida Levin College of Law; an M.S. degree from UF in Animal Sciences; and a B.S. degree in Microbiology from the University of South Florida. Jocelyn, who was selected as the UF Law LL.M. Conservation Associate, will complete her LL.M. project on the relationship among statutorily required cost analyses, funding mechanisms, and stormwater regulations. Jocelyn has served as Assistant General Counsel for the Florida Department of Transportation since 2007.

Chelsea Dalziel received her J.D. degree from the Charlotte School of Law, and her B.A. in Psychology cum laude from the University of Akron. Chelsea's LL.M. project will focus on the development of a model ordinance to guide urban agriculture initiatives.

Jaclyn Lopez, recipient of the Southeast Climate Consortium LL.M. Associate award, received her J.D. degree from the University of Denver College of Law; an M.S. in Planning from the University of Arizona; and her B.A. degree in Interdisciplinary Social Sciences from the University of South Florida. Jacki has served as Staff Attorney with the Center for Biological Diversity (St. Petersburg, Florida) since 2008. Her LL.M. project will investigate whether the Endangered Species Act creates an affirmative duty for federal wildlife managers to assist endangered and threatened species in migrating to suitable habitat in light of sea level rise.

John M. Magee received his J.D. degree from St. Thomas University, and his B.A. degree in Business Law Management cum laude from Stetson University. For his LL.M. project, Mike will develop a website, in cooperation with the National Sea Grant Law Center, to provide private waterfront owners, government and public entities, and waterfront users with information regarding waterfront access and related coastal

issues for the state of Florida.

UF Law Foreign Field Study Opportunities Scheduled

UF law's ELULP will again offer two foreign field study opportunities this academic year in Belize and in Costa Rica. The courses are:

“Sustainable Development: Law, Policy & Practice” is offered during spring break, 2014, in Belize for 2L, 3L, and LL.M. students. The two-credit, eight-day course is hosted by the Belize Foundation for Research and Environmental Education (BFREE). Students will travel through Belize to delve into international and domestic law issues concerning protected areas, indigenous land rights, and intellectual property in biological diversity, water, mining and energy, cultural resources, fisheries and coral reef conservation – all within the context of national pressures for human development. In addition to domestic Belizean law and international development law and policy, students are exposed to the unique legal framework of the commonwealth Caribbean.

Conservation and Sustainable Development: Law, Policy and Professional Practice is an interdisciplinary policy-focused program consisting of three linked courses integrating international and comparative sustainable development law and policy, contemporary issues in tropical conservation and development, and professional skills for practitioners. The 2014 summer program will consist of a foundational course in international sustainable development law and policy; a topical course in water, wetlands and wildlife conservation, and a sustainable development practitioner skills course. All three courses are integrated through practicums based around current issues of conservation and development in Costa Rica and elsewhere, jointly developed by U.S. and Costa Rican faculty. Costa Rican law and graduate students as well as young professionals also will participate. The course will include lectures at the Organization for Tropical Studies headquarters, site visits to international and domestic institutions in San Jose such as the Inter-American Court for Human Rights, and field trips to biological field stations of topical relevance to the course.

Law School Liaisons continued....

Nelson Symposium Slated for February 7

"State and Local Elections: Rights and Wrongs" is the topic for the 13th Annual Richard E. Nelson Symposium, scheduled February 7, 2014. Speakers are:

1. Professor Terry Jones of DePaul University will be speaking on the Voting Rights Act after the Shelby County case in the U.S. Supreme Court;
2. Professor Janai Nelson of St. John's University will be speaking on voter identification laws, felon disenfranchisement, and voter roll purges;
3. Professor Kenneth Stahl of Chapman University will speak on ballot box zoning; and
4. Professor Michael Kang of Emory University will speak on campaign disclosure for ballot measures.

There will be respondents on these topics, including Ilya Shapiro of the Cato Institute, and presentations from UF Levin College of Law students and Michael Allan Wolf, UF Professor of Law and Richard E. Nelson Chair in Local Government Law.

Additional details will be available soon on the UF Levin College of Law website: www.law.ufl.edu.



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Emerging Trends on the Development Front for Environmental, Land Use and Real Estate Practitioners

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Presentation and Webcast: Friday, January 31, 2014
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Course No. 1655R

8:00 a.m. – 8:30 a.m.

Late Registration

8:30 a.m. – 8:45 a.m.

Introduction

Vinette D. Godelia, Hopping Green & Sams, P.A.

8:45 a.m. – 9:30 a.m.

Unraveling the Code: A Primer on Local Government Code Enforcement Processes and Liens

Ernest Mueller, City of Tampa

9:30 a.m. – 11:00 a.m.

Water Supply and Future Land Use: The Central Florida Water Initiative

Eric T. Olsen, Hopping Green & Sams, P.A.

*Mark Hammond, Southwest Florida Water Management
District*

Tom Beck, Florida Department of Environmental Protection

Brian Wheeler, Toho Water Authority

11:00 a.m. – 11:15 a.m.

Break

11:15 a.m. – 12:00 p.m.

Recent Cases & Trends

*Robert Lincoln, Icard, Merrill, Cullis, Timm, Furen &
Ginsburg, P.A.*

12:00 p.m. – 1:00 p.m.

Lunch (on your own)

1:00 p.m. – 1:45 p.m.

Governmental Potpourri

Shaw P. Stiller, City of Tallahassee

1:45 p.m. – 2:45 p.m.

Behind Closed Doors: The Ethics of Communicating with Local Governmental Officials

Amy T. Petrick, Palm Beach County

2:45 p.m. – 3:00 p.m.

Break

3:00 p.m. – 4:00 p.m.

Real Estate Contract Issues: Due Diligence Timeline, Checklist & Required Disclosures

Barry B. Ansbacher, Ansbacher Law

4:00 p.m. – 4:45 p.m.

EPA's Creeping Jurisdiction: Can the CWA Limit Development in Florida?

Winston K. Borkowski, Hopping Green & Sams, P.A.

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above Department standards and is not simply limited to the scenario of an obvious spill or discharge. Under these chapters, reporting responsibilities can fall to the owners or operators of facilities or the owner or operators of the storage tank systems.⁸

Chapter 62-780, F.A.C., which deals with Contaminated Cleanup Criteria, has multiple reporting requirements, dependent upon what type of contaminant is present.⁹ For instance, if the discharge exceeds 25 gallons of petroleum or petroleum products onto a pervious surface or any discharge into surface waters, the discharge must be reported as soon as possible but no later than 24 hours after the occurrence. Whereas, if the discharge contains pollutants or hazardous substances other than petroleum (with the exception of a discharge of drycleaning solvents greater than one quart), it is not subject to reporting.¹⁰ And, depending on what type of discharge it may be, the party responsible for reporting the discharge may differ and could include the discharger or the owner or operator if the discharger is unknown or if the discovery was the result of a previously unreported discharge.¹¹ But, regardless of the complexities of the rule, there are still clear cut directions on what should be reported and who should report it.

The difficulties come into play more often for environmental attorneys and consultants when they have advised a client of reporting requirements and the client, who has a legal obligation to notify the appropriate authority, declines to do so. In this instance, the environmental attorney and consultant must consider how to balance client confidences with potential liabilities and ethical dilemmas that may exist. There may even be extreme situations where the client does not have a legal obligation to report, but the attorney or consultant could bear some responsibility for reporting under professional rules of conduct or state licensure programs.

Some states have included environmental consultants in the group of persons responsible to report contamination in some aspect in the regulatory realm.¹² For example, in New Jersey, if a "licensed remediation

professional" identifies a condition at a contaminated site that in his or her independent professional judgment is an immediate environmental concern, then the licensed site remediation professional is required to notify the New Jersey authority of the condition by calling its hotline. At this point, requirements such as these appear to be limited to only a handful of states.

As mentioned above, in addition to regulatory statutes or rules that set forth requirements of contamination reporting, environmental attorneys and consultants must also adhere to professional rules of conduct and individual licensure programs.

Attorneys in Florida are subject to the Rules Regulating the Florida Bar. Florida Bar Rule 4-1.6(b)(2) provides that "[a] lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent a death or substantial bodily harm to another." Similar to the Florida Bar Rules, the American Bar Association ("ABA") Model Rules of Professional Conduct, Rule 1.6(b)(1) permits disclosure of information to prevent reasonably certain death or substantial bodily harm. The ABA rule goes on to state that "[s]uch harm is reasonably certain to occur if it will be suffered immediately or if there is a present and substantial threat that a person will suffer such harm at a later date." While it may be an extreme scenario, there may be a circumstance where an attorney could gain knowledge of a dangerous substance being discharged into the environment and he or she may be compelled to report the discharge to prevent bodily harm to another.

Similarly, environmental consultants are subject to some of the same limitations. For example, Florida Professional Geologists and Florida Professional Engineers may be subjected to discipline for "willfully failing to file a report or record required by state or federal law."¹³ Reports or records include those that are signed in the capacity of a licensed geologist or engineer. Additionally, American Institute of Professional Geologists, Rule 2.1.3, provides "[i]f a Member becomes aware of a decision or action by an employer, client, or colleague which violates any law or regulation, the Member shall advise against such action, and when such violation appears to materially affect the public health, safety, or welfare, shall

advise the appropriate public officials responsible for the enforcement of such law or regulation." Likewise, the National Society of Professional Engineers Code of Ethics, Section II., Rules of Practice(1.) requires that "[e]ngineers shall hold paramount the safety, health, and welfare of the public. If engineers' judgment is overruled under circumstances that endanger life or property, they shall notify their employer or client and such other authority as may be appropriate." Thus, it would seem that environmental consultants also have the responsibility to report knowledge of contaminants if the report is to prevent bodily harm.

The notification guidelines contained within Federal, State, or local rules, along with the professional rules of conduct and individual licensure programs, illustrate the fine line that environmental lawyers and consultants must walk in order to properly advise clients of their responsibility, prevent bodily harm to third parties, and protect themselves from ethical or even legal dilemmas. Going forward, environmental lawyers and consultants need to continue to advise clients to adhere to the law and reporting requirements that may be required under differing rules. Last, if a contrary client is at hand, lawyers and consultants need to be wary and realize that, in some extreme case, the ethics and implications of reporting may sometimes override confidentiality.

Endnotes:

¹ Clean Water Act, 33 U.S.C § 1251 et seq.

² Comprehensive Environmental, Response, Compensation, and Liability Act, 42 U.S.C. § 9603(a).

³ Resource Conservation and Recovery Act, 40 C.F.R. §§ 264.196, 265.196.

⁴ Chapters 62-761 and 62-762, Florida Administrative Code.

⁵ Chapter 62-780, Florida Administrative Code.

⁶ Miami-Dade County Code, Sec 24-44(2)(j).

⁷ Rule 62-761.450(3), Florida Administrative Code; Rule 62-762-451(3), Florida Administrative Code.

⁸ Rule 62-761.300(1), Florida Administrative Code; Rule 62-762.301(1), Florida Administrative Code.

⁹ Rule 62-780.210, Florida Administrative Code.

¹⁰ *Id.*

¹¹ *Id.*

¹² Connecticut General Statutes, Section 22a-6u(9); New Jersey Site Remediation Reform Act, Section 58:10C-16(j).

¹³ Florida Professional Geology, Chapter 492.113(1)(e), Florida Statutes, and Florida Professional Engineer, Chapter 471.033(1)(e), Florida Statutes.

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