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THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

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March 2010

• Paul H. Chipok, Chair • Thomas R. Gould, Co-Editor • Jeffrey A. Collier, Co-Editor

Message from the Chair

by Paul H. Chipok

A major topic of discussion at the recent Executive Council meeting concerned how to supply better delivery of Continuing Legal Education (CLE) on topical and important current issues of interest to the Section membership. Restrictions and pressures on travel budgets are a hard fact. So is the long lead time required to organize and implement a full day seminar, half day seminar, or even our current one hour lunch time web based audio seminars.

To the credit of the Executive Council, we have a plan. First, the bad news: annual Section dues will increase by $5 next year to $40. Next, the good news: starting next year Section members will be able to participate in at least four one hour web based audio seminars at no additional cost to the Section members. These seminars will address topics suggested by the substantive committees (Land Use; Pollution Assessment, Remediation, Management and Prevention; and Water, Wetlands, Wildlife and Beaches) as well as the CLE Committee. Topical subjects will be delivered timely with the possibility of the seminar occurring within four weeks of inception. Of course, CLE credits will be available, and, as always, membership input on potential topics and speaker participation is welcome.

The Section's current web based seminar program will also continue. However, there will be a shift in focus of that program series towards ethical considerations (and ethics credits) on relevant substantive land use and environmental subjects. No change to the Section's live CLE programming is anticipated. Rest assured the Annual Update in August remains in place.

To paraphrase Woody Allen: Methods of CLE delivery, I think are like a shark, you know? It has to constantly move forward or it dies. And we don't want a dead shark on our hands.

Summary of Recent Lake Belt Federal Actions

by Susan L. Stephens and Miguel Collazo, III, Hopping Green & Sams, P.A.

Obtaining mining permits in Florida has been challenging for mining companies in recent years, on the local, state and federal front, for both limestone and phosphate mining activities. However, after much concerted effort by the companies and intense scrutiny by courts, public interest groups, and the regulating agencies, we may finally be seeing light at the end of the tunnel. However, the tunnel has been a very long one, filled with many twists and turns. Notably, the much-discussed "Lake Belt" limestone mine permits have finally been (or are being) issued. This article discusses the recent activities with respect to mining in the Lake Belt region of south Florida. Within the past month, there have been several noteworthy federal actions concerning proposed limestone mining activities in that region.

First, on January 11, 2010, in accordance with Section 7 of the Endangered Species Act of 1973, as amended (the "ESA"), 87 Stat. 884; 16 U.S.C. 1531 *et seq*., the U.S. Fish and Wildlife Service (the "Service") transmitted two biological opinions to the U.S. Army Corps of Engineers (the "Corps") evaluating the effects

See "Lake Belt," page 12

INSIDE:

Florida Case Law Update

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

Note: Status of cases is as of February 2, 2010

Development violated Gulf County's comprehensive plan when, despite DEP and Army Corps non-jurisdiction letters, developer filled wetlands without a permit. County found to have wrongfully refused to enforce its Comprehensive Plan and court noted that the subdivision ordinance was also violated when the reconfiguring of boundary lines turned three lots into five. *Fred M. Johnson v. Gulf County*, 2009 WL 4912595 (Fla. 1st DCA Dec. 22, 2009).

On an appeal of a Section 163.3215, Fla. Stat., declaratory judgment action filed in Gulf County Circuit Court, the First DCA reversed the lower Court, finding in favor of a landowner who challenged adjacent development on the grounds that the County violated its Comprehensive Plan in allowing wetlands to be filled and further violated the County ordinances governing minor replats.

The 1st DCA rejected the County assertions that its allowance for a developer's filling of "non-jurisdictional" wetlands was consistent with an earlier settlement agreement regarding this policy of the plan.Instead, the 1st DCA declared that the setback requirement on filling wetlands applied regardless of the "jurisdictional" status of the wetlands and that filling of wetlands was in fact development activity under the County plan. Finally, the court found that the County's subdivision ordinance was also violated when the County allowed the replatting of 3 lots into 3 differently configured lots and again into 5 total lots.

A property owner cannot state a cause of action under the Bert Harris Act (section 70.001, *Florida Statutes*) based on adoption of a generally applicable ordinance, where the city has not applied the ordinance to any particular piece of property. *M & H Profit, Inc. v. City of Panama City*, 2009 WL 4756147 (Fla. 1st DCA Dec. 14, 2009).

M & H Profit, Inc. ("M & H") purchased property subject to a General Commercial ("GC-1") zone, with no height or setback restrictions. Approximately six weeks after M & H purchased the property, the city passed an ordinance, that was subsequently codified in its Land Development Regulation Code, imposing setbacks and restrictions on property zoned GC-1. At the time this ordinance was passed, M & H had not filed a development application with the city.

M & H participated in an informal pre-application conference with the City Planning Manager after the ordinance was passed, and was notified that its application would not meet the new height and setback restrictions. M & H subsequently filed a claim and complaint pursuant to the Bert Harris Act.

The 1st DCA ruled that mere adoption of an ordinance of general applicability does not trigger a claim under the Bert Harris Act. The First DCA ruled that the "plain and unambiguous language of the Bert Harris Act establishes the Act is limited to 'as-applied' challenges, as opposed to facial challenges." Simply put, until a property owner submits an actual development plan, the court is unable to determine whether the government action has "inordinately burdened" property, and thus is unable to determine whether the property owner is entitled to compensation under the Bert Harris Act.

Additionally, M & H's informal discussion with the City Planning Manager did not constitute a specific application of the city ordinances to its particular property, and thus was not asserting an "as-applied" challenge under the Act.

Local Zoning Board ("Board") erroneously issued a Special Use Permit ("SUP") in violation of the provisions of the Putnam County Comprehensive Plan ("the Plan") and the development code.The trial court misapplied the law by failing to apply the development code's rule when a specific use of the land falls within more than one land use category. *Keene v. Zoning Bd. of Adjustment, not yet published* (Fla. 5th DCA Oct. 30, 2009).

Appellant argued that the trial court erred in upholding approval of the appellee's application for a SUP. The appellee's land was zoned as "rural residential." Appellee applied for a SUP to board and stable horses and to open a riding academy. The Zoning Board classified the land as both "commercial: agriculture-related" and as "rural recreational" based on the intended future use of the land and granted a SUP.

Only after appellant brought suit did the Zoning Board realize that the uses approved were not allowed on property zoned as "rural residential" according to the Plan. Consequently, the Zoning Board and appellee argued

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that the land should be considered "resource-based recreational," "limited agricultural," or "activity-based recreational" uses, which were permitted by the Plan on rural residential properties.The trial court ruled in favor of the Zoning Board and found that the uses were "resource-based" or "activity-based recreational."

On appeal, the Fifth DCA reversed, observing that the trial court made no findings of fact to support its decision nor did it make findings that the uses did not fall within the "commercial: agriculture-related" categories. Moreover, the Fifth DCA found that the trial court misapplied the rule set forth in the development code, which required that "where a proposed use could be said to fall within more than one category, the Director shall determine in which category the use most closely fits based on the description of the use category and the examples of uses in the category."

The "commercial: agriculture-related" category explicitly included the stabling and boarding of horses and riding academies as examples of proper uses. Consequently, the trial court "misapplied the law and incorrectly interpreted the pertinent portions of the Plan and the development code by failing to apply the rule that the proposed uses must be placed in the use category into which they most closely fit." The issuance of the SUP was deemed invalid.

Where the State initiates eminent domain proceedings, the taking is not an inverse condemnation; thus, the four year statute of limitations for inverse condemnation proceedings does not apply. Valuation of a parcel in eminent domain proceedings must consider the "condemnation blight," such that lower court properly instructed jury on a valuation date prior to the State threatening condemnation proceedings. The DCA affirmed. *Florida Dep't of Envtl. Prot. v. West*, 21 So. 3d 96 (Fla. 3d DCA 2009).

In 1982 the Department of Environmental Protection, on behalf of the Board of Trustees of the Internal Improvement Fund, ("the State") expressed interest in acquiring a landowner's parcels for habitat conservation. The State, however, did not file eminent domain proceedings until 1995.The parties stipulated to *de jure* taking dates for the parcels in 2004.

The trial court instructed the jury to determine the fair market value of each parcel as of the stipulated taking dates in 2004, "according to the highest and best uses the parcels would have had in 1982." On appeal, the State contended that the trial court's valuation rulings were improper and that the landowners failed to file an inverse condemnation suit within the four year statute of limitations period.

Because the State initiated formal eminent domain proceedings in 1995 and thus the statute of limitations for an inverse condemnation claim did not apply, the appellate court affirmed the trial court's ruling. Moreover, when eminent domain proceedings are filed by the State, compensation for the landowner must await the actual taking of the property and "is based on the value of the property without the effects of the 'the debilitating threat of condemnation.'" This value is commonly referred to as 'condemnation blight' valuation. Consequently, the trial court was correct in applying the 'condemnation blight' principles when it instructed the jury to consider the properties highest and best uses in 1982.

On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of February 4, 2010. Readers are encouraged to advise the author of pending appeals that should be included.

U.S. SUPREME COURT

Stop the Beach Renourishment, Inc. v. DEP, Case No. 08-1151. Petition for review of decision by the Florida Supreme Court concluding that, on its face, the Beach and Shore Preservation Act does not unconstitutionally deprive upland owners of littoral rights without just compensation. 33 Fla. L. Weekly S761a (Fla. 2008). Status: Oral argument held December 2, 2009.

FLORIDA SUPREME COURT

Florida Homebuilders Association, Inc., et al. v. City of Tallahassee, Case No. SC09-1394. Petition for review of 1st DCA decision dismissing an appeal for lack of standing. 34 Fla. L. Weekly D1096b (Fla. 1st DCA 2009). The appeal was from a summary judgment for the City in connection with a challenge to the City's inclusionary housing ordinance. Among other things, the plaintiffs allege that the ordinance constitutes a taking and an illegal tax. Status: Petition denied December 8, 2009.

SJRWMD v. Koontz, Case SC09-713. Petition for review of 5th DCA decision in *SJRWMD v. Koontz*, affirming trial court order that the District had effected a taking of Koontz's property and awarding damages. 34 Fla. L. Weekly 123a (Fla. 5th DCA 2009). Status: Oral argument set for April 5, 2010.

Curd v. Mosaic Fertilizer, LLC, Case No.: SC08-1920. Petition for review of 2nd DCA decision affirming the trial court's dismissal of class-action lawsuit for alleged economic damages after contaminated water was released into Tampa Bay, killing fish and crabs. **33 Fla. L. Weekly D2193a (Fla. 2nd DCA 2008).** Status: Oral argument held May 6, 2009.

Kurt S. Browning v. Florida Hometown Democracy, Case No. SC08-884. Petition for review of DCA opinion finding that a 2007 state law that allows voters to revoke their signatures on petitions collected in the citizens initiative process violates the Florida Constitution by imposing an unnecessary regulation on citizen initiative process. 33 Fla. L. Weekly D1099b (Fla. 1st DCA 2008). Status: Affirmed June 17, 2009; full opinion to follow at a later date.

Miccosukee Tribe v. SFWMD, Case No. SC09-1817. Petition for review of the validation of a bond issue to restore part of the Everglades. Status: Oral argument set for April 7, 2010.

FIRST DCA

Lowe's Home Centers, Inc. v. DCA, Case No. 1D09-4383. Petition for review of final order of Administration Commission finding that amendments to Miami-Dade Comprehensive Plan are not in compliance. Status: Notice of appeal filed August 31, 2009.

SECOND DCA

Lee County v. DEP and Mosaic, Case No. 2D09-913.Petition for review of DEP final order granting permits and approvals for Mosaic's South Fort Meade Hardee County Mine.Status:Oral argument held on February 23, 2010.

John Falkner v. State of Florida Governor & Cabinet, Case No. 2D08-5998. Petition for review of final order of the Siting Board regarding the transmission line corridors for the Bobwhite-Manatee County 230- kV transmission line. Status: Affirmed *per curiam* on December 16, 2009.

FIFTH DCA

St. John's Riverkeeper, Inc. v. SJRWMD, Case No. 5D09-1644; *City of Jacksonville v. SJRWMD*, Case No. 5D09-1646. Petition for review of SJRWMD final order granting consumptive use permit to Seminole County for withdrawal of surface water from the St. John's River for public supply and reclaimed water augmentation. Status: Petition filed May 13, 2009.

A. Duda and Sons v. SJRWMD, Case No. 5D08-1700. Appeal from final order denying Duda's petition to determine invalidity of agency rule and statement generally relating to the so-called agricultural exemption. Status: Remanded, 34 Fla. L. Weekly D1454a (July 17, 2009).

A. Duda and Sons v. SJRWMD, Case No. 5D08-2269. Appeal from SJRWMD final order directing Duda to obtain after-the-fact permit or restore the impacted wetlands. Status: Affirmed in part, reversed in part and remanded for additional proceedings, 34 Fla. L. Weekly D2013a (October 2, 2009); rehearing denied December 1, 2010.

Groveland v. SJRWMD, Case No. 5D09-3765. Petition for review of final order granting the request of conceptive use permit to Niagra Bottling for the use of groundwater to produce bottled water at a facility in Lake County. Status: Notice of voluntary dismissal filed December 9, 2009.

Legal Community Can Assist in Haiti Relief

As Florida's legal community, we have an opportunity to assist the people of Haiti in their recovery and rebuilding efforts. The American Red Cross has set up an account to receive donations from all members of The Florida Bar directed to relief and development efforts in Haiti. Assistance provided by the American Red Cross may include sending relief supplies, mobilizing relief workers and providing financial resources.

The Florida Bar **International Law Section** is leading this effort and is seeking the help and support of every Florida Bar member, section and voluntary bar association.

To donate, please visit: http://american.redcross.org/floridabar-emp

Any donation amount will help make a difference. The International Law Section is encouraging its members to donate the equivalent of one billable hour. Given our numbers, this effort by Florida's legal profession can raise millions of dollars. Together, we have that power!

Department of Community Affairs
November 2009 Summary
by Richard E. Shine, Assistant General Counsel

COMPREHENSIVE PLANNING

Patricia D. Curry, Alexandria Larson, Sharon Waite, and Patrick Wilson v Palm Beach County, Florida, and Department of Community Affairs; DOAH Case No. 09-1204; DCA Final Order No. 09-GM-371

Petitioners challenged the County's adoption of three ordinances changing the Future Land Use Map designation of three separate parcels of land. The first ordinance changed the future land use designation of the 64.48 acre Sluggett property from Rural Residential (1 dwelling unit per 10 acres) to Commercial Low Rural Residential (one dwelling unit per five acres); the second ordinance changed the 30.71 acre Northlake property from Rural Residential 20 to Commercial Low – Rural Residential 5; and the third ordinance changed the 37.85 acre Panattoni property from Low Residential 2 to Commercial High with an underlying 2 units per acre.

The ALJ's Recommended Order found that the Petitioners presented no evidence that the three amendments would harm the sources of public drinking water; that there is a need for the development on both the Sluggett and Northlake properties as they reduce a deficit in neighborhood serving commercial uses and thereby remedy an existing imbalance of land uses caused by urban sprawl; and that the properties are compatible with surrounding uses. The Panattoni amendment requires the property to be developed as a Lifestyle Commercial Center incorporating a mixed use pedestrian form of development. The ALJ found that the Panattoni amendment would not result in strip development and is compatible with surrounding land uses and concluded that the Petitioners failed to prove beyond fair debate that the amendments are inconsistent with any goal, policy or objective of the Palm Beach County Comprehensive Plan or any provision of the Strategic Regional Policy Plan.

DECLARATORY STATEMENT

Renaissance Charter School Inc., DCA Case No. 08-DEC-218; 1D09-2065

Renaissance's Petition for Declaratory Statement sought clarification of the status of the Homestead charter school with respect to "implementing school concurrency requirements," and not "transportation concurrency," citing only to Section 163.3180(13), Florida Statutes which addresses school concurrency. The Department issued a Final Order denying Renaissance's Second Amended Petition for Declaratory Statement because it sought relief that is not authorized by law and is inconsistent with the purpose and use of declaratory statements. The Department found that Renaissance had notice and failed to challenge previous agency action controlling on the issues raised by the Second Amended Petition. Specifically, Renaissance did not challenge the Interlocal Agreement entered into between Miami–Dade County, the School Board, and the City ("Interlocal Consensus Agreement") as provided in Section 163.31777(3), Florida Statutes, and failed to challenge the City's adoption of the Public School Facility Element as provided in Section 163.3184(9), Florida Statutes.

Because there exists another adequate remedy – a challenge to the consistency of the Interlocal Consensus Agreement or the City's Public Schools Facilities Element – Petitioner can not use the declaratory statement process to supplant that remedy. As a result, the Department found that Petitioner's request is not a lawful subject for a declaratory statement and a response would impermissibly amount to a policy statement of general applicability, a statement which is available only by rule or statute.

Petitioner appealed the Department's Final Order to the First District Court of Appeal and after briefing and oral argument the Court affirmed in a Per Curiam Opinion filed January 15, 2010.

PROPOSED RULES

The Department has been engaged in rule development to update Rule 9J-11, Governing the Procedure for the Submittal and Review of Local Government Comprehensive Plans and Amendments; Rule 9J-42, EAR Schedule - to update the schedule for local governments to submit their Comprehensive Plan Evaluation and Appraisal Reports; and Rule 9J-5.006 Needs Analysis - to amend the rule to provide greater detail and explanation relating to the statutory requirements that the future land use element be based on the amount of land required to accommodate anticipated growth and the projected population of the area.

The Department is also engaged in rule development for Rules 9J-5.006; 9J-5.003; 9J-5.010; 9J-5.013; and 9J-5.019 - to implement the new requirements in Ch. 2008-191, L.O.F., (CS/HB 697). Ch. 9J-5, is to be amended to establish minimum criteria to be used in reviewing comprehensive plans to determine whether they comply with the new requirements of Ch. 2008-191, L.O.F., regarding energy efficient land use patterns accounting for existing and future electric power generation and transmission systems, greenhouse gas reduction strategies, strategies to address reduction in greenhouse gas emissions from the transportation sector, factors that affect energy conservation, depicting energy conservation in the future land use map series, energy efficiency in the design and construction of new housing, and the use of renewable energy resources.

DEP Update

by West Gregory

GOOSE BAYOU HOMEOWNER'S ASSOCIATION V. DEP:

Goose Bayou Homeowner's Association (Petitioner) requested a maintenance dredging exemption from wetland resource permitting under Rule 62-312.050(1)(e), Florida Administrative Code. The Petitioner proposed to maintenance dredge two channels in Goose Bayou on the two ends of a U-shaped upland cut canal adjacent to Goose Bayou in Bay County, Florida. On December 4, 2007, the Department determined that the Petitioner's proposal was not exempt from wetland resource permitting requirements and gave notice of intent to deny the Petitioner's request. The Petitioner filed a second amended petition for an administrative hearing that the Department referred to DOAH.

The ALJ recommended the Department deny the Petitioner's maintenance dredging exemption request. He concluded the Petitioner did not prove the channels sought to be maintenance dredged were previously dredged and maintained, or that previous dredging was "pursuant to all necessary state permits." Fla. Admin. Code R. 62-312.050(1)(e). The Final Order adopted the RO in full and denied the maintenance dredging exemption.

JACKSON ET AL. V. DEP:

After Hurricane Dennis made landfall in July 2005, and pursuant to an emergency permit from Walton County, Barbara Ritch Jackson constructed a coastal armoring system in front of her single-family, gulf-front residence. After completion of the construction, Jackson applied with the Department to keep the armoring system as a permanent structure. The Department issued a notice of denying Jackson's after-the-fact permit application. Jackson filed a Petition for Formal Administrative Hearing, and the Department referred the matter to the Division of Administrative Hearings, which conducted a final.

The Administrative Law Judge found that Jackson's project did not meet all of the permitting criteria of section 161.085, Florida Statutes and Florida Administrative Code Rule 62B-33.0051, because the project extended farther seaward than would an alternative type of armoring structure, did not adequately minimize adverse impacts, and would cause a significant adverse impact to the beach-dune system. The Department adopted these findings and denied appellant's permit application.

Jackson appealed the final order of the Department pursuant to section 120.68, Florida Statutes (2008). Jackson argued that the First District Court of Appeal (DCA) should set aside the agency action because certain findings of fact relied upon to support the denial of the permit were not supported by competent, substantial evidence.

The DCA affirmed the Department's Final Order because the appellant did not demonstrate that the findings in the ALJ's Recommended Order were not based on competent, substantial evidence.

AMENDMENT TO CHAPTER 62-709: CRITERIA FOR ORGANICS PROCESSING AND RECYCLING FACILITIES:

The Department adopted amendments to Chapter 62-709, including changing the title to "Criteria for Organics Processing and Recycling Facilities." These amendments focus primarily on creating registrations for composting of yard trash, manure, and food wastes. A copy of the rule can be found at *http://www.dep.state.fl.us/waste/quick_topics/rules/default.htm*.

AMENDMENTS TO 18-24:

The Department completed amendments to the Florida Forever Land Acquisition and Management rule, as required by ss. 259.035(4)(b) and 259.105(19), F.S. The rule certification package was submitted to the Department of State on January 27, 2009. The changes include:

- adding new definitions for "Florida Forever Conservation Needs Assessment," "resource-based recreation," and "tax assessed value";
- deleting references to the "Florida Forever Advisory Council";
- providing new sections on Florida Forever criteria, goals and measures;
- adding requirement that applicants need to definitively describe how applications meet certain criteria; describing an Acquisition and Restoration Council (ARC) ranking process whereby ARC votes projects to the acquisition list and gives recommendations to DEP's Division of State Lands (DSL) on categorization, and after DSL places the projects in the work plan categories, ARC ranks the projects individually in numerical priority order within the categories;
- adding a requirement that ARC gives increased priority to projects that meet certain criteria concerning acquisition partnerships, owner's sell price, discounts, and military buffering;
- describing technical resource data, factors and initial information sources upon which ARC's priority rankings will be based;
- describing other factors important in ARC's evaluation, selection and ranking process, including the threat of development or loss of resources, public support, and owner's willingness to sell;
- adding a description of DSL's land acquisition work plan development process and the method by which ARC's ranked list is transposed into DSL's work plan categories, as well as ARC's right to provide recommendations to DSL and ARC's ability to require DSL to amend the work plan;
- describing how the DSL places projects in each of the work plan categories into priority groups;
- and requiring that at least 3%, but no more than 10%, of Florida Forever funding be spent annually on capital improvement projects that enhance public access.

The effective date of the rules is contingent upon the Legislature. Pursuant to section 259.035(4)(b), F.S., staff is submitting the rules to the Legislature by February 1, 2010 for consideration and "[t]he Legislature may reject, modify, or take no action relative to the proposed rules. If no action is taken the rules shall be implemented."

THE FLORIDA BAR CLE

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

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

Thursday, April 8, 2010

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

8:30 a.m. – 8:35 a.m.
Welcome and Introductions
Francine M. Ffolkes, Florida Dept. of Env. Protection, Tallahassee

8:35 a.m. – 9:30 a.m.
Federal APA Adjudication (Formal and Informal)
Francine M. Ffolkes, Florida Dept. of Env. Protection, Tallahassee

9:30 a.m. – 10:20 a.m.
Federal APA Rulemaking
Robert A. Malinoski, Gunster, Attorneys at Law, Fort Lauderdale

10:20 a.m. – 10:30 a.m. **Break**

10:30 a.m. – 11:20 a.m.
Federal APA: Judicial Review of Agency Action (Part I – Scope of Judicial Review)
Frederick L. Aschauer, Jr., Rose, Sundstrom & Bentley, Tallahassee

11:20 a.m. – 12:30 p.m.
Federal APA: Judicial Review of Agency Action (Part II – Availability of Judicial Review)
Frederick L. Aschauer, Jr., Rose, Sundstrom & Bentley, Tallahassee

12:30 p.m. - 1:30 p.m.
Lunch (On Your Own)

1:30 p.m. – 2:20 p.m.
11th Amendment Immunity
Stephanie A. Daniel, Office of the Attorney General, Tallahassee

2:20 p.m. – 3:10 p.m.
Civil Rights Action Under 42 U.S.C. Section 1983
Stephanie A. Daniel, Office of the Attorney General, Tallahassee

3:10 p.m. – 3:20 p.m. **Break**

3:20 p.m. – 5:00 p.m.
FOIA, FACA, and Federal Government in the Sunshine
Luna E. Phillips, Gunster, Attorneys at Law, Fort Lauderdale
James M. Crowley, Gunster, Attorneys at Law, Fort Lauderdale

Friday, April 9, 2010

8:00 a.m. – 8:10 a.m.
Welcome and Introductions
Francine M. Ffolkes, Florida Dept. of Env. Protection, Tallahassee

8:10 a.m – 9:00 a.m.
Florida APA Adjudication
Honorable John G. Van Laningham, Division of Administrative Hearings, Tallahassee

9:00 a.m – 9:50 a.m.
Florida Ethics
Virlindia A. Doss, Florida Commission on Ethics, Tallahassee

9:50 a.m. – 10:00 a.m. **Break**

10:00 a.m – 10:50 a.m.
Florida APA Rulemaking (including Rule Challenges)
Honorable John G. Van Laningham, Division of Administrative Hearings, Tallahassee

10:50 a.m. – 11:40 a.m.
Other Florida APA Remedies and Principles
Seann M. Frazier, Greenberg Traurig, P.A., Tallahassee

11:40 a.m. – 12:30 p.m.
Judicial Review of Agency Action (Florida Administrative Appeals)
David M. Caldevilla, de la Parte & Gilbert, P.A., Tampa

12:30 p.m. - 1:30 p.m.
Lunch (On Your Own)

1:30 p.m. – 2:20 p.m.
Sovereign Immunity
Barbara C. Wingo, University of Florida, Gainesville

2:20 p.m. – 3:10 p.m.
Government/Tort Litigation
B. Cecilia Bradley, Office of the Attorney General, Tallahassee

3:10 p.m. – 3:20 p.m. **Break**

3:20 p.m. – 4:10 p.m.
Competitive Procurement Under Florida APA
Martha H. Chumbler, Carlton Fields, P.A., Tallahassee

4:10 p.m. – 5:00 p.m.
Public Records Act and Sunshine Law
Patricia R. Gleason, Executive Office of the Governor, Tallahassee

WEBCAST CONNECTION

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

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ONE LOCATION: (053) FSU CONFERENCE CENTER, TALLAHASSEE, FL (THURSDAY, APRIL 8, 2010 & FRIDAY, APRIL 9, 2010)

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  April 8-9, 2010
  (317) Online

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

❑ Check here if you require special attention or services. Please attach a general description of your needs. We will contact you for further coordination.

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RECYCLE

Law School Liaisons

The Center for Earth Jurisprudence, a joint initiative of St. Thomas and Barry Universities Schools of Law

The Center for Earth Jurisprudence (CEJ) works to advance the recognition of nature's intrinsic value in policy and law. Two conferences addressing issues of undeniable relevance to policymakers and lawyers are scheduled for the coming months.

The Center for Earth Jurisprudence hosts **"Who's Next? (And What Will We Leave Them?): Safeguarding the Earth for Future Generations,"** on Friday, March 26, 2010. The program highlights themes of interdependence and sustainability by examining ongoing efforts to reconcile current human needs and the needs of future generations of all species. Speakers draw connections between human health and the health of ecosystems, and propose ways to balance human social and economic needs with the preservation of the Earth's species and wild spaces. Speakers also expand the discussion to include legal approaches to combat global warming and its consequences. The program concentrates on the Central Florida area, relating local efforts to broader issues of state, national and international concern.

Four hours of CLE credit, including ethics credit, have been applied for. The program will be held at the Barry University Dwayne O. Andreas School of Law in Orlando, Florida. Registration is $35 for attorneys. For additional information or to register, contact Jane Goddard at *jgoddard@mail.barry.edu* or 321-206-5788).

Mark your calendars now! On Tuesday, July 13, 2010, **Indian environmental activist and author Dr. Vandana Shiva** is the featured speaker at a conference and dinner hosted by the Center for Earth Jurisprudence. Trained in particle physics, Dr. Vandana Shiva founded Navdanya, a national movement of organic producers, seed-keepers and some 54 community seed banks. Navdanya has trained more than half a million Indian farmers in sustainable agriculture and has helped to create the largest direct marketing, fair trade organic network in India. At the conference, "Ecological Integrity: Reconnecting Communities, Human and Nonhuman," Dr. Vandana Shiva is joined by her sister, Dr. Mira Shiva, a physician and public health activist based in New Delhi and one of the founding members of the People's Health Movement, a worldwide movement to establish health and equitable development through inclusive primary health care and work to redress social factors affecting health. Together, they draw on their considerable experience in positively transforming the lives of their communities' most vulnerable, and they explore practical issues surrounding ecological integrity and the health of living communities, both human and nonhuman. In addition, a panel of South Florida educators and professionals offers its expertise in agro-ecology, environment and community health in our local setting. The conference is followed by a dinner featuring a keynote address by Dr. Vandana Shiva. To reserve a place at the conference, the dinner or both, please send an e-mail to *crauseo-danclair@stu.edu*.

For information regarding the work of the Center for Earth Jurisprudence, including events and publications, please visit *http://earthjuris.org/events/*.

Activities on Tap for the Spring '10 Semester at Florida State University College of Law

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

Florida State Law has a full schedule of activities and initiatives on tap for the spring 2010 semester, including the following:

1) G. Tracy Mehan, III, former Assistant Administrator for Water at the U.S. Environmental Protection Agency, is this spring's *Distinguished Lecturer*. Administrator Mehan will be giving his public lecture, entitled, "A Symphonic Approach to Water Management: The Quest For New Models Of Watershed Governance," on February 10th at 3:30 in Room 102. This lecture is free and open to the public; please contact Jeremy Lightner at *jlightne@law.fsu.edu* if you are interested in attending.

2) The Law School Spring 2010 *Environmental Forum* is scheduled for April 7th at 3:30, in Room 102 at the Law School. Many Section members have participated in our *Forum* Series in the past. The *Forum* will focus on the U.S. Supreme Court case involving Florida's coast, *Stop the Beach Renourishment v. Florida Department of Environmental Protection*. The purpose of the Series is to provide a neutral forum for discussion of timely environmental topics. Members of the public are welcome to attend our *Forum* series, and CLE credit is generally available. Please contact Jeremy Lightner at *jlightne@law.fsu.edu* if you are interested.

3) The Environmental Law Program is bringing in a series of speakers through its Environmental Certificate Seminar and other courses. Professor Robert Abrams from FAMU will discuss the ACF water controversy on Monday, February 8th and Professor Trish McCubbin of Southern Illinois will address the Clean Air

Law School Liaisons continued....

Act and climate change on Monday, March 29th. During his visit, Distinguished Lecturer G. Tracy Mehan, III will engage the students in Professor Ruhl's Environmental Law class.

4) Our current students and recent graduates have been busy and productive on a number of fronts. Howard Fox has accepted a position as Assistant General Counsel in the Civil Enforcement Section of the Florida Department of Environmental Protection.

In addition, several of our students and recent alumni have published articles about environmental or land use law.

• Carolyn Haslam recently published an article entitled *Urban Redevelopment and Contaminated Land: Lessons from Florida's Brownfields Redevelopment Program* in the **Journal for National Association of Environmental Professionals.**

• Andrew Greenlee's article, co-authored with Professor Randy Abate, *Sowing Seeds Uncertain: Ocean Iron Fertilization, Climate Change, and the International Environmental Law Framework*, has been accepted for publication in volume 27 of the **Pace Environmental Law Review** (peer-reviewed journal; special climate change issue) (forthcoming March 2010).

• Bonnie Malloy's article, *On Thin Ice: How a Binding Treaty Regime Can Save the Arctic*, has been accepted for publication in volume 16 of the **West-Northwest Journal of Environmental Law and Policy** (Hastings College of Law) (forthcoming spring 2010).

• Margaret Seward's article, *The Kyoto Protocol's Clean Development Mechanism (CDM) and Energy Efficiency in Buildings (EEB): Why Reform Is Necessary to Promote CDM Projects in the Construction Sector,* won third place ($250 cash award) in the State Bar of California International Law Section's Third Annual Student Writing Competition and is being reviewed for publication in a forthcoming issue of the **California International Law Journal**.

• Travis Thompson's article, *Getting Over the Hump: Establishing a Right to Environmental Protection for Indigenous Peoples in the Inter-American Human Rights System*, has been accepted for publication in volume 19 of Florida State's **Journal of Transnational Law and Policy** (forthcoming spring 2010).

• Katherine Weber's article, *Can You Eat Your Fish and Save it Too? Improving Protection of Pirated Marine Species through International Trade Measures,* has been accepted for publication in volume 25 of Florida State's **Journal of Land Use and Environmental Law** (forthcoming spring 2010).

• Bradley Bodiford's article, *Florida's Unnatural Disaster: Who Will Pay for the Next Hurricane?*, will be published in the April 2010 issue of the University of Florida's **Journal of Law & Public Policy**.

We're delighted by these successes of our students and recent graduates.

Our Environmental Moot Court Team, consisting of Andrew Greenlee, Cooper Lord, and Jesse Unruh, and coached by Tony Cleveland and Segundo Fernandez, is busy preparing for the National Competition at Pace. Our Environmental Law Society has several events planned, including a green social, an environmental career panel, and a visit to an organic farm.

The College of Law maintains list serves on which we post job openings for graduating students and for practicing attorneys. Please let us know if you have job openings and we will be happy to post the relevant information. If you are interested in becoming part of our list serve, please contact Jeremy Lightner at *jlightne@law.fsu.edu* for details.

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

UFLaw Update: Field Course Offerings Expanded, LL.M. Program Developments

by Alyson C. Flournoy, ELULP Program Director

New Field Course Added to Curriculum

The Environmental and Land Use Law Program at UFLaw continues to build on its strength with two opportunities for students to experience the application of environmental and land use law in the field, through field courses being offered this spring. These courses enable students to appreciate first-hand the real world problems that the law seeks to address and to observe the impact of policies already in place. Bringing the students to the field also makes it easier for the students to benefit from a wide array of teachers with relevant experience, knowledge, and expertise and provides for an intensive, immersion educational experience.

Marine and Coastal Law Field Course

The first of the two courses being offered is a new spring break field course on Marine and Coastal Law being offered for the first time by Professors Tom Ankersen and Richard Hamann. This course will be based in Marineland, Florida, and builds on the UF Law Conservation Clinic's representation of the Town of Marineland in various aspects of land use and local government law, contributing to the Town's vision of a "sustainable coastal community,"

a vision explicitly linked to science-based education & coastal tourism. The field course benefits from UF's Whitney Laboratory, a marine research facility at Marineland, and the Marineland attraction, the nation's oldest Oceanarium, and Florida's first tourist attraction, established in 1938. In collaboration with the Atlanta Aquarium, the Marineland Dolphin Conservation Center recently established the Dolphin Conservation Field Station at Marineland.

Drawing on experts from across northeast coastal Florida, the course will provide students a rich variety of guest lectures and field trips as part of an intensive education on coastal and marine policy issues. Scheduled speakers include: John Hankinson, Former Region 4 Administrator, U.S. EPA; Karl Havens, Director, Florida Sea Grant, and Member Florida Oceans & Coastal Council; Dr. Gary Mormino, Frank E. Duckwall Professor of History and Co-Director, Florida Studies Program, University of South Florida and Author, Land of Sunshine, State of Dreams: A Social History of Modern Florida; Mike Shirley, Executive Director, Guana Tolomato Matanzas National Estuarine Research Reserve, Dennis Bayer, Town Attorney, Town of Marineland; Gary Appelson, Policy Director, Caribbean Conservation Corporation, and Member, Florida's Ocean and Coastal Council; David White, J.D., Former Regional Director, the Ocean Conservancy; Bob Swett, Assistant Professor & Director, Boating and Waterway Management Program, Florida Sea Grant ; Ed Regan, Ass't City Manager, City of St. Augustine; and Bill Leery, Former Counsel, Council on Environmental Quality, The White House. This space-limited course was fully subscribed within hours of its announced availability.

South Florida Ecosystems Field Course

The second field course that is slated to be offered in May is a repeat of the highly successful South Florida Ecosystems course that Professor Richard Hamann has co-taught with UF faculty from the Department of Wildlife Ecology, the Center for Wetlands and the Department of Soil and Water Science in the past. This field-based graduate course is designed to approach watershed management from biotic, physical, economic, geologic, legal, political, sociological, and human health perspectives, using adaptive management explicitly as both a focus for critique, and as an evaluative tool. The course is an intensive, full-immersion experience taught almost entirely "on the road" in south Florida, designed to maximize direct experience with habitats, geography, local experts and user groups, and permit first hand viewing of management action and ecological outcomes. The group will have daily lectures by local experts and UF faculty, and daily field experiences (boat trips, swamp walks, interpretive tours etc.). An important emphasis of this course is on multidisciplinary synthesis of the information by groups of students, with a goal of envisioning one or more likely future scenarios for the restoration of south Florida ecosystems.

The students in this course experience most of the large-scale water restoration and water management projects in south Florida, including the Kissimmee River restoration, management of Lake Okeechobee and downstream effects on the Caloosahatchee and St. Lucie estuaries, restoration of Picayune Strand, and the Comprehensive Everglades Restoration Plan. Together these efforts constitute the largest ecological restoration anywhere in the world. Along the way, the class will visit and consider ecological needs and effects in the urbanized east coast, Big Cypress National Preserve, Everglades National Park, the Florida Keys, Kissimmee River and Loxahatchee National Wildlife Refuge. These places will be experienced on foot, via airboat, pontoon boat. Along the way, students will have a chance to hear from civic leaders, legal experts, water managers, biologists, geologists, historians, political scientists, engineers, Native Americans, and restoration planners.

Developments in the Environmental and Land Use Law LL.M. Program

First Spring Entrants Admitted

This January, UF enrolled two spring-entering students in its LL.M. in Environmental and Land Use Law, bringing the total of enrolled LL.M. students to 7. This pilot project with spring entrants is intended to provide prospective students with greater flexibility in entering the LL.M. program. UF will evaluate the pilot project and continue with admitting both fall and spring if the experience is positive.

LL.M. Student Opportunities

UF is currently recruiting students for the fall 2010 entering class. The LL.M. program is designed to be a small and selective full-time program, geared towards students with an interest in studying both law and closely related fields. LL.M. students complete 26 hours of coursework during their one-year program, 6 credits of which are in courses with substantial non-law content. This year's LL.M. students have taken advantage of courses in: real estate, environmental engineering, urban and regional planning, public health, and soil and water science, finding them a valuable adjunct to their law studies. LL.M. students are also serving as Teaching Assistants both for the Environmental Capstone Colloquium and the Marine and Coastal Law field course, providing them a unique experience.

LL.M. Students develop a course of study that includes courses offered through the J.D. curriculum and other UF departments, an LL.M. Research Methods course, and the Environmental Capstone Colloquium, and can include the Conservation Clinic. LL.M. students can also apply to participate in the Costa Rica Summer Study Abroad Program. The deadline for applications for fall 2010 is April 30, 2010. For more information visit our website at: *www.law.ufl.edu/elulp/llm* or contact Lena Hinson at *elulp@law.ufl.edu*.

of proposed limestone mining on the endangered wood stork (Mycteria americana) by several mining companies (see footnote 1, infra) (the "Mining Companies") within the Lake Belt Mining Area (the "LBMA") of Miami-Dade County.

Second, on January 21, 2010, the Eleventh Circuit Court of Appeals rendered its decision in *Sierra Club et al. v. Van Antwerp,* No. 09-10877, D.C. Docket No. 03-23427-CIV-WMH (11th Cir. 2010) (unpublished opinion) ("Sierra Club II"), which held that the Corps' 2002 decision to issue permits to the Mining Companies was arbitrary and capricious in violation of the Administrative Procedure Act (the "APA") because the Corps failed to properly follow the two-step procedure for assessing whether practicable alternatives to the project existed.

Third, and perhaps most notably, on February 1, 2010, the Department of the Army issued a Record of Decision ("ROD") and Statement of Findings on the Lake Belt SEIS, and also issued a project-specific permit to Cemex Construction Material Florida for its FEC Quarry. In the very near future, federal permits will also be issued to other Mining Companies, which will undoubtedly begin mining almost immediately in accordance with the newly-minted permits.

There are both positive and negative implications of these various decisions. While it is reassuring to see authorizations to mine finally issued by the federal agencies, the long path it took for the companies to arrive at this point is one that other mine applicants may be required to tread. The level of detail being demanded by the federal agencies for limestone and phosphate mining applications in Florida is very intense.

I. Summary of January 11, 2010 Biological Opinions

On May 1, 2009, the Corps published, pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 *et seq.*, its final supplemental environmental impact statement ("SEIS") for the Mining Companies' proposed mining activities within the Lake Belt region. *See* the Lake Belt SEIS Web Site, available online at *http://www.LakeBeltSEIS.com* (last accessed February 3, 2010). Specifically, the Lake Belt SEIS evaluated the potential effects of a 50-year full mine-out plan on the Lake Belt Mining Area (the "LBMA") and the adjacent Pennsuco Wetlands. *See id.*

While the Lake Belt SEIS identified nine alternatives, including a no-action alternative, the Corps chose to provide the Service only a single alternative for review – a revised Alternative 8 that was actually a middle ground between two other alternatives that were included within the Lake Belt SEIS. *See Alternative 8 BO*, at 5.

The Corps chose to provide the Service with this single alternative for review for primarily two reasons. First, Alternative 8 encompassed a larger mining footprint than that requested by the Mining Companies for permitting within the LBMA. Because the Corps determined that the Mining Companies were likely to request additional mining in the future, review of a larger mining footprint (as reflected in Alternative 8) made more sense than reviewing the smaller area requested. *Id.* at 5-6. Second, some data focused on Alternative 8 had already been developed. The Corps used modeling data, hydroperiod information, on-site wildlife surveys, and feedback developed pursuant to the draft Lake Belt SEIS, as well as its December 2008 Biological Assessment (the "2008 BA") that focused on Alternative 8, to prepare the wood stork impact analysis section of the Lake Belt SEIS. *Id.*

In its revised analysis, the Corps estimated that Alternative 8 could impact 13,965 acres of wetlands, with mitigation, within the 38,586 acres of wetlands in the Lake Belt. *Id.* at 6. The 13,965 acres of affected wetlands include the acres of wetland impacts authorized in the 10 original permits issued by the Corps in 2002, the proposed 2008 modifications of 8 of the original 10 permits, and the issuance of one new permit for a new mining entity. *Id.*

On January 11, 2010, the Service provided the Corps with the LBMA Alternative 8 Biological Opinion (the "Alternative 8 BO"), which addressed limestone mining during the full 30-year period addressed in the Lake Belt SEIS. *Id.* at 1. The Alternative 8 BO considered the direct effects (the disturbance of approximately 13,965 acres of wetlands, including the physical removal of habitat and its associated loss of biomass; the construction of the Dade-Broward Levee Canal and associated pump station to mitigate the hydrological seepage of wetlands within portions of the LBMA and adjacent public lands; physical reduction in the spatial extent of habitat; the restoration and protection of 6,377 acres of wetlands; changes in geographic distribution; and habitat fragmentation), indirect effects (the effects associated with groundwater seepage from wetlands within and adjacent to the LBMA), interrelated and interdependent actions, and cumulative effects (future actions reasonably certain to occur within an action area) of the proposed action on endangered and threatened species. *Id.* at 100-05. The proposed mitigation also assessed the construction of approximately 847 acres of littoral shelves throughout the various lakes left behind by mining. *Id.* at 101.

On the same date that it provided the Corps with the LBMA Alternative 8 BO, the Service also provided the Corps with a BO assessing the project-related impacts associated with mining a portion of Alternative 8 over a 20-year period known as the Phase I Mining Permits BO (the "Phase I Mining Permits BO"). *See Phase I Mining Permits BO*, at 1. The Phase I Mining Permits BO considered the direct effects of disturbing approximately 7,351 acres of wetlands and the restoration and protection of 4,590 acres of wetlands, as well as indirect effects, interrelated and interdependent actions, and cumulative effects. *Id.* at 98-103. Specifically, the proposed mitigation assessed included exotic species removal to improve wetland function and provide higher quality foraging habitat and increased accessibility to nearby nesting wood storks, as well as the construction of 545 acres of littoral shelves throughout the various lakes left behind by mining. *Id.* at 6, 99.

Both the Alternative 8 BO and the narrower Phase I Mining Permits BO assessed the potential project-related effects on the same listed species: the eastern indigo snake, the Cape Sable seaside sparrow, the Everglade snail kite, and the wood stork. *See Alternative 8 BO*, at 6-9; *Phase I Mining Permits BO*, at 7-8.

First, with respect to the eastern indigo snake, the Corps determined that the mining footprints contained suitable habitat for the eastern indigo snake, but so long as the Mining Companies agreed to abide by standard eastern indigo snake construction con-

ditions, which would be required as part of any future permit, the Corps determined that the project "may affect, but is not likely to adversely affect" the eastern indigo snake. *See Alternative 8 BO*, at 6, 8; *Phase I Mining Permits BO*, at 7. The Corps also determined that because no critical habitat for the eastern indigo snake has been designated, none would be affected. *Id.* The Service concurred with the Corps' determinations regarding the eastern indigo snake. *Id.*

Second, with respect to the Cape Sable seaside sparrow, the Corps determined that the Lake Belt area does not support the kinds of prairie vegetation communities that the sparrow prefers, and that the sparrow had not been found nesting in or immediately adjacent to the proposed mining area. *See Alternative 8 BO*, at 8; *Phase I Mining Permits BO*, at 7. Based upon the Lake Belt Groundwater Flow Model included in the Lake Belt SEIS, baseline hydrological flow conditions would not change even after the proposed mining activities were implemented, meaning that the sparrow's nearest critical habitat (9 miles south southwest of the LBMA) which requires short hydroperiods should not be significantly affected. *Id.* Accordingly, the Corps determined that the project "may affect, but is not likely to adversely affect" the Cape Sable seaside sparrow or its critical habitat. *Id.* The Service concurred with the Corps' determinations. *Id.*

Third, the Service (not the Corps) noted that the Everglade snail kite may occasionally occur in the Lake Belt project area because the habitat conditions that provide the necessary hydrology for growth and development of populations of prey species important to snail kites (primarily the apple snail) were present. *See Alternative 8 BO*, at 8-9; *Phase I Mining Permits BO*, at 8. However, based upon site visits and the types and conditions of wetlands communities on the project site, the Service determined that apple snails within the LBMA exist in densities that are lower than those preferred by snail kites and that dense woody vegetation and melaleuca may make effective foraging difficult. *Id.* Additionally, snail kites had not been documented nesting within the Lake Belt and the proposed hydrologic changes caused by mining activities were not expected to affect hydrologic conditions within current snail kite nesting areas adjacent to the project area. *Id.* Accordingly, the Service determined any impacts to potential snail kite foraging habitat "insignificant and discountable" and therefore unlikely to adversely affect the snail kite. *Id.*

Finally, the Corps determined that the proposed mining activities could adversely affect the wood stork (but not its critical habitat, because none has been designated). *See Alternative 8 BO*, at 8; *Phase I Mining Permits BO*, at 7. Based upon this determination by the Corps, the Service first surveyed the status of the species generally (describing the species, its life history, population, status and distribution, population trends, recovery goals, and nesting locations) and its status within the action area. *See Alternative 8 BO*, at 18-31; *Phase I Mining Permits BO*, at 19-31. The Service noted that "[t]he primary cause of wood stork population decline in the United States is loss of wetland habitats or loss of wetland function resulting in reduced prey availability," and further noted that "[t]he alteration of wetlands and the manipulation of wetland hydroperiods to suit human needs have also reduced the amount of habitat available to wood storks and affected the prey base availability." *See Alternative 8 BO*, at 27; *Phase I Mining Permits BO*, at 28. Next, the Service established an environmental baseline, considering baseline conditions for wetlands, hydrology, prey availability (biomass), and wood stork nesting, among other factors, within the action area and the LBMA. *See Alternative 8 BO*, at 31-66; *Phase I Mining Permits BO*, at 31-65. The Service next analyzed the direct and indirect effects of the project and cumulative effects on the wood stork and wood stork habitat, considering the proposed project's potential impacts on baseline conditions, as well as the proposed mitigation. *See Alternative 8 BO*, at 66-105; *Phase I Mining Permits BO*, at 66-103.

Based upon its analysis of available biomass by hydroperiod, the Service estimated that Alternative 8 could result in nest production loss of 200 wood stork nests (258 nestlings) over the 30-year life of the proposed action. *See Alternative 8 BO*, at 106. Based upon the same considerations, the Service also estimated that issuance of the Phase I Mining Permits could result in nest production loss of 60 wood stork nests (77 nestlings) over the 20-year life of the proposed action. *Phase I Mining Permits BO*, at 103. Both the Alternative 8 BO and the Phase I Mining Permits BO ultimately concluded that the proposed actions considered in each would not jeopardize the survival and recovery of the wood stork, based upon the Service's evaluations of the proposed actions' direct, indirect, and cumulative effects in their action areas, the status of the species, and the mitigation proposed by the Mining Companies. *See Alternative 8 BO*, at 106; *Phase I Mining Permits BO*, at 104.

With respect to mitigation, the Service's key consideration when determining whether the mitigation proposed by the Mining Companies was sufficient was whether the mitigation would ultimately improve habitat foraging value to wood storks, particularly in light of the Service's recognition that reduced prey availability is the primary cause of wood stork decline in the U.S. The Service looked favorably upon the Mining Companies' seepage mitigation proposal because it was projected to result in an equal balance of short and long hydroperiod wetlands pre- and post-mining, which would help to ensure sufficient forage fish production. The mitigation proposal essentially proposed creation of 847 acres of littoral shelves around mine pits reclaimed as lakes (545 acres for Phase I), as well as restoration and preservation of 6,377 acres of unmined wetlands (4,590 acres in Phase I). [*See Alternative 8 BO*, at 101; *Phase I Mining Permits BO*, at 99. A key component of the proposed restoration was removal of melaleuca in the preserved wetlands, because melaleuca makes it difficult for wood storks to effectively forage for food. *Id.* The proposed littoral shelf creation would likewise increase foraging options for wood storks. *Id.* An additional consideration was the fact that these mitigation proposals were to take place adjacent to other larger tracts of preserved lands. *Id.*

Ultimately, the Service issued incidental take permits in conjunction with the BOs, thus authorizing the incidental take of wood storks, wood stork nest production, and wood stork nestlings associated with the conversion of 13,965 acres of wetlands to lakes in the Alternative 8 BO and the incidental take of same associated with the conversion of 7,351 acres of wetlands to lakes in the Phase I Mining Permits BO. The Service determined that there would be no jeopardy to the wood stork as a result of the incidental take because the impacts were sufficiently offset by the proposed mitigation discussed above. *See Alternative 8 BO*, at 106-07; *Phase I Mining Permits BO*, at 104-05.

continued...

II. Summary of *Sierra Club et al. v. Van Antwerp* (Sierra Club II)

In *Sierra Club II*, Sierra Club and other groups challenged the permits issued by the Corps to the Mining Companies in 2002. Sierra Club contended that because the Corps failed to comply with the procedural requirements of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., the Corps' decision to issue the permits to the Mining Companies was arbitrary and capricious and therefore in violation of the APA, 5 U.S.C. § 706. *Id.* at 2-3.

Reviewing the district court's grant of summary judgment against the Mining Companies de novo, the Court explained that it could only set aside agency action under the APA if it determined that the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and noted that this was an "exceedingly deferential" standard. *Id.* at 10-11.

The Court then described the two-step procedure that the Corps had to follow in order to properly assess practicable alternatives under the CWA:

> The guidelines require that the Corps follow a specific two step procedure in applying this [practicable alternative] standard. First, a correct statement of the project's basic purpose is necessary. … Second, after the Corps defines the basic purpose of the project, it must determine whether that basic purpose is "water dependent." … An activity is "water dependent" if it requires access or proximity within a wetland to fulfill its basic purpose.

Id. at 12-13. If an activity is not "water dependent," the Corps has to apply a presumption that a practicable alternative that has less environmental impact on wetlands is available. *Id.* at 13. Moreover, the Corps has to presume that all practicable alternatives that do not involve the discharge into a wetland have less environmental impact. *Id.* Because a correct statement of the basic purpose is necessary in order to determine whether that basic purpose is "water dependent," and therefore whether these presumptions apply, it is a threshold question for the Corps. *Id.* at 14. "If the wrong decision is made, the required procedure will not be followed and the decision will be arbitrary." *Id.*

The Court ultimately determined that the Corps' decision to issue the permits was arbitrary and capricious because the Corps failed to properly follow the two-step procedure for assessing whether practicable alternatives to the project existed. *Id.* at 14-15. In particular, the Corps defined the basic purpose of the project as "the extraction of limestone in general," which the Mining Companies conceded at oral argument was not "water dependent." *Id.* at 15. Importantly, the Court also specifically held that the extraction of limestone in general was not a "water dependent" activity. *Id.* Therefore, the Corps failed to apply the presumption that practicable alternatives to mining were available and did not shift the burden to the Mining Companies to clearly demonstrate that there were no practicable alternatives to mining the Lake Belt. *Id.* Accordingly, the Corps violated its own procedural requirements for assessing the availability of practicable alternatives and the APA. *Id.* at 15-17. This decision (and the Corps' current practices) will make it very difficult to argue that mining activities are "water dependent," and a very detailed alternatives analysis is likely to be required for all mine projects going forward.

III. Record of Decision and Permit to Cemex Construction Materials Florida

On February 1, 2010, the Department of the Army issued a ROD and Statement of Findings on the Lake Belt SEIS, and also issued a project-specific permit to Cemex Construction Material Florida for its FEC Quarry. *See* the Lake Belt SEIS Web Site, available online at *http://www.LakeBeltSEIS.com* (last accessed February 3, 2010). The ROD found that the discharge of fill material into 10,044 acres of Waters of the United States for mining in the Lake Belt area is not contrary to the public interest and is in compliance with the Section 404 of the CWA 404(b)(1) guidelines subject to certain permit conditions. *ROD*, at 190.

The ROD authorized impacts to a total of 10,044 acres, 2,717 acres of which have already been impacted pursuant to the 2002 permits (prior to their being vacated). *Id.* at 18. The remaining 7,327 acres of authorized impacts are new. *Id.* Impacts to these 7,327 acres have been separated into two geographic areas: Section I, consisting of 4,591 acres, and Section II, consisting of 2,736 acres. *Id.* Mining in Section II is conditional and may only proceed upon meeting the following conditions:

- Completion of an effective seepage mitigation/management project ("SM/MP") including required monitoring;
- A Five-Year Interagency Review must be conducted to assure that the SM/MP is proceeding as required, that water quality violations are not occurring, and that the Lake Belt Mitigation Program is current and proceeding according to permit requirements;
- Completion of an updated Biological Opinion specifically focused on mining activities in Section II;
- Submittal of an updated mitigation plan for Section II;
- Recordation of a conservaton easement or transfer of title agreement by permittees and local or state agencies with land within the 1,500-foot Exclusion Area; and,
- The Corps has supplemented the record confirming in writing that the Permittee has met these conditions,

that the Lake Belt region-wide conditions for seepage and wetland mitigation have been met.

Id. at 18-19, 114-15, 188. The Corps determined that this section-by-section approach would be the least environmentally damaging practicable alternative. *Id.* at 114.

The Corps' decision to split mining into two geographic areas was based on asserted seepage concerns and the need to identify wetland mitigation for sequential mining just over a 20-year period. *Id.* at 115. Section I would include wetland fill for mining that could be performed prior to the construction of a seepage management project and would be expected to last approximately 10 years. *Id.* Mining in Section II would not be allowed until the conditions described above have been met and covers an additional 10 years of mining. *Id.* According to the Corps, this approach would allow for a reasonable time frame over which to provide for the public need for affordable, high quality, construction-grade aggregate, and has the added benefit of allowing for natural market forces to provide for the development of alternative sources in the event that the seepage mitigation project is not completed. *Id.*

In addition, the Corps required the enhancement and preservation of a 1,500-foot Exclusion Area, within which no mining may occur, in order to avoid asserted seepage impacts to the Everglades National Park and the transfer of 1,708 acres of miner-owned lands within the Pennsuco wetland area to the Lake Belt Mitigation Committee to offset existing wetland impact mitigation deficits. *Id.* at 30-32, 170-71.

The duration of the Lake Belt mining permits for activities in Sections I and II will be for a maximum period of 20 years, with interagency reviews every five years. Id. at 114-15. The Corps arrived at this permit duration by simply dividing the 7,327 acres of authorized impacts in the ROD by the historic rate of wetland fill from 2002 to 2009 for the Lake Belt (388 acres per year), which equals approximately 19 years. Id. at 21. For Mining Companies with reserves that do not warrant an extended construction window (e.g. in the event a Mining Company only has approximately 22 acres of wetlands left to mine), the permit duration will instead be five years. Id. If all permit conditions are not met and the excavation halts with Section I mining, the construction period will extend no more than ten years. *Id.*

Based upon all of the above, this ROD sets several interesting precedents. First, the ROD appears to establish a precedent for "phased" mining that requires, as a permit condition, demonstration that a proposed mitigation project in an earlier phase will be effective prior to conducting mining in future phases. Second, the ROD could be read to support a permit duration calculation methodology based upon historical per-year rates of mining, rather than the duration requested by the applicant or a set maximum permit duration. The record is not clear whether the applicants objected or consented to the permit duration methodology described above. However, such a methodology is arguably unique to the Lake Belt due to the after-the-fact authorizations involved (mining under the original permits that took place between 2002 and 2009).

IV. Conclusion

The above-described federal actions confirm that federal agencies will continue to vigorously review mining proposals for their potential impacts on wetlands and threatened and endangered species, and will likewise continue to require creative (and often expensive) solutions to address potential environmental concerns. The key for mining companies is to incorporate the lessons learned from past federal actions, as summarized above, into strategies that can be employed in future mining applications.

Endnotes:

[1]The original 2002 permits were successfully challenged in federal district court by various environmental organizations. *See Sierra Club v. Flowers*, 423 F.Supp.2d 1273 (S.D. Fla. 2006); *see also Sierra Club v. Strock*, 495 F.Supp.2d 1188 (S.D. Fla. 2007) (entering an Order supplementing its order in *Flowers* with further relief to the plaintiffs). In compliance with the Court's Order remanding the 2002 permits to the Corps for reconsideration and mandating the Corps to re-initiate consultation with the Service, the Corps re-initiated consultation with the Service on April 26, 2006. The result of this reinitiated consultation is the Lake Belt SEIS, which was published in May of 2009, and reflects NEPA compliance for the Corps' Record of Decision published this month and subsequent permitting.

[2] According to Table 1 of the Alternative 8 and Phase I Mining Permit BOs, the Mining Companies and their associated permits are as follows: White Rock North (SAJ-2000-2284); Sunshine Rock (SAJ-2000-2285) (completed mining activities before 2002 and therefore not reviewed); Sawgrass Rock (SAJ-2000-2286); Tarmac (SAJ-2000-2287); White Rock South (SAJ-2000-2346); Lowell-Dunn (SAJ-2000-2348) (mining never commenced and no renewal or modification of existing permit has been requested); APAC-Southeast (SAJ-2000-2366); Florida Rock (SAJ-2000-2367); Kendall Properties (SAJ-2000-2369); Cemex FEC (SAJ-2000-2373) and Cemex SCL (SAJ-2009-3990) (different mines permitted under the same Corps permit number); and Miami-Dade Aviation (SAJ-2007-535) (new applicant).

[3] In the recently-issued decision *National Wildlife Federation v. Souza*, Case Number 08-14115-CIV-MARTINEZ-LYNCH (Nov. 2009), the Court determined that the Service miscalculated fish prey density in an earlier biological opinion when it used certain data ("Trexler Study" data), which specifically targeted small fish or fish less than 8 cm in length, as representative of all fish regardless of size. *Id.* at 20-21. Use of the data in this way without explanation invalidated various calculations in the biological opinion, including fish biomass and suitable prey size, which in turn invalidated the Service's biological opinion as arbitrary and capricious. *See id.* In both the Alternative 8 BO and the Phase I Mining Permits BO, the Service noted that it "believes the [Trexler Study] data can be used as a surrogate representation of all fish consumed by wood storks, including those larger than 8 cm, which are typically sampled by either electrofishing or block net sampling" and that "[b]ecause data were not available to quantify densities (biomass) of fish larger than 8 cm to a specific hydroperiod and … the wood stork's general preference is for fish measuring 1.5 cm to 9 cm and empirical data on fish densities per unit effort correlated positively with changes in water depth, [the Service believes] the [Trexler Study] throw-trap data represents a reasonable surrogate to predict the changes in total fish density and the corresponding biomass per hydroperiod for our wood stork assessment." *See Alternative 8 BO*, at 52, 55; *Phase I Mining Permits BO*, at 52-53, 56. Therefore, the BOs appear to have taken the ruling in this recent case into consideration.

[4] Seepage mitigation includes the establishment of a 1,500-foot Exclusion Area and the construction of 15- to 18-foot seepage barrier wall along the eastern border of Everglades National Park to reduce seepage of surface water out of the ENP. *ROD*, at 30-31.

[5] In the Phase I Mining Permits BO, the Service noted that the proposed design for the littoral shelves had not yet been finalized, and therefore no potential benefits for wood stork foraging was considered in its analysis. *See Phase I Mining Permits BO*, at 99. Nevertheless, while the specific benefits to wood storks from littoral shelves depend on their design and location, it is clear that the littoral shelves generally are beneficial to foraging. *See Alternative 8 BO*, at 108; *Phase I Mining Permits BO*, at 106 (noting, in condition 2, that the Service requests to be "an integral partner in the review and development of the littoral shelf design and placement for maximum benefit to the wood stork).

[6] A seepage mitigation/management project could include any number of proposals, including the construction of levee and canal systems and physical barriers, intended to reduce or eliminate seepage and its associated hydrological impacts to wetlands. *See, e.g.*, ROD, 28-31.

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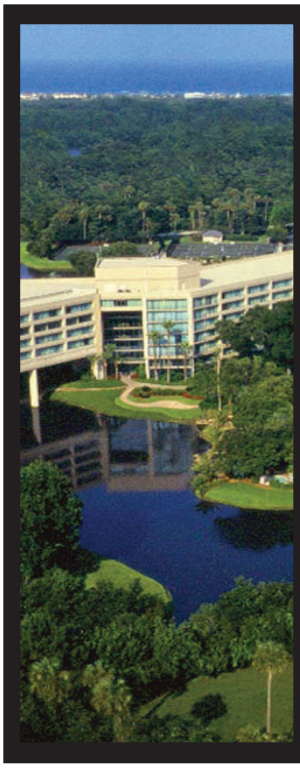

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