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• Michelle Diffenderfer, Chair • Thomas R. Gould, Co-Editor • Jeffrey A. Collier, Co-Editor

The Re-birth of the ASTM E1903-07 Phase II Environmental Site Assessment Standard

by Nicholas Albergo, P.E., DEE

ASTM International ("ASTM") is in the process of finalizing its revised E 1903 Standard Practice for Environmental Site Assessments: Phase II Environmental Site Assessment Process ("Phase II"). Although this Standard Guide has been in publication since 1997, it has never gained the mass appeal of its counterpart, the E 1527 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process ("Phase I"). For those of

us who had a hand in writing both of these documents, the general opinion is that the disparity in "embracing" the Phase II Standard Guide, when compared to the universal acceptance of the Phase I Standard, lies in its commercial applicability. This is largely the result of the difference in who is likely to review and accept the results of having complied with the Standard(s).

For instance, in general, the Phase I does not include the gathering of

new data (it simply organizes sources of existing data); the Phase II, on the other hand, often times does include an element of sampling and analysis that results in information that previously did not exist. Sometimes the "User," be it a private party prospective purchaser, lending institution, insurance company, etc., will make an informed decision, consistent with their business environmental risk model, as to whether or not they desire to move forward with, or be

See "RE-BIRTH," page 18

From the Chair

by Michelle Diffenderfer



It's Spring and we are in full swing! By the time the Reporter is on your desk (or desktop) we will have held the 14th Annual Public Interest Environmental Conference in Gainesville, had our first meeting of the Young Lawyers Committee, had our spring Affiliates Mixer and the Federal Seminar held in Washington D.C. March 24-25, 2008. We continue to create wonderful opportunities for our members to get involved and meet others. We hope you will take advantage of some

of our upcoming programs like our always popular Hot Topics program April 25, 2008 in Hollywood and the Affiliates mixer planned for the evening of that program. If you are planning on attending The Florida Bar's Annual Convention in Boca Raton, please plan on stopping by our joint reception with the Administrative Law Section June 19th at 6:30 p.m.

We have also begun planning for this year's Council Retreat, which is to be held in Costa Rica in association with our first ever CLE program there, scheduled for June 27th in San Jose. Our retreats are open to all section members and we highly encour-

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FROM THE CHAIR

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age your participation. This year's unique retreat location promises to provide opportunities for learning of shared experiences with Costa Rican lawyers, a wild ride down a white-water rafting trip, a breathtaking climb to the top of a cloud forest, or perhaps sipping some lovely Costa Rican coffee while watching Volcan Arenal erupt in the distance. Please consider joining us for this once in a lifetime experience.

Our new Committees are moving forward with planning programs and outreach efforts. As discussed, the Young Lawyers Committee has already had two meetings and the Water, Wetlands, Wildlife and Beaches group is busy planning a number of educational site visits around the state. Make sure you join and get involved in at least one of our Committees this year. Please check our web-site at www.eluls.org for the Chairs of our Committees and further contact information.

Please contact me if you have any thoughts or ideas about how our Section could be better serving you and to find out more about getting involved. Thank you for being a part of our Section and in helping us make this the premier organization for Environmental and Land Use lawyers.

Michelle Diffenderfer can be reached at mdiffenderfer@llw-law.com or (561) 640-0820.

New Bar password procedure outlined

Florida Bar members who don't already have a password to access restricted areas of the Bar's Web site will soon have an opportunity to select two methods to obtain one. A form will be mailed along with the annual membership fee statement enabling Bar members to instantly get a password to access members-only sections of the Bar's Internet Web site.

Communications Committee Chair-elect Richard Tanner presented details at the Board of Governors' recent meeting.

Having a password gives Bar members access to a variety of online services through the Bar's Web site, www.floridabar.org. Those include the Fastcase free legal research service, paying annual membership fees, changing their membership records such as their official Bar address, designating an inventory attorney for their practice, inquiring about their CLE credits, posting CLE credits for a course, and registering and paying for CLE courses.

Members who want an instant password must provide the Bar with their e-mail address and the last four digits of their Social Security number, Tanner said, using the form in the annual membership fee statement. Once the Bar has received that information, the member can instantly get a password online through the Bar's Web site by following the instructions.

Having the e-mail address and last four digits of the member's Social Security number enables the Bar to verify the specific member requesting the password, Tanner said.

Members who don't want to use the form will be able to use the current system. That system allows members to request a password online, but it is then mailed to them, a process that usually takes five to seven business days, he said.

In response to a question, Tanner said that under public records laws, members' e-mail addresses becomes public record once the Bar has them. However, the last four digits of their Social Security numbers remain confidential to prevent identity theft.

Members who already have a password for the restricted areas will see no change and can continue to use their current password, Tanner said. However, the new system can be used if they lose or forget their password or need to replace it for security reasons.

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

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Greening Your Law Firm

by Nicole C. Kibert

The next time you climb over the mountain of paper in your wastebasket at the end of the day, perhaps you should consider whether it is time to take a serious look at your business operations and determine how to reduce your environmental impact. As an individual adopting just one new sustainable behavior a month, you can have a significant, positive environmental impact by the end of the year. Just imagine what greening your entire office or all the offices in your firm can do.

Employees at all levels of a firm or business can help green their law firm. Below are recommended good practices for lawyers and their staff to explore in making their law firms more environmentally friendly.

Communication. Identify at least one attorney and one staff member in each office who can explain any existing sustainability initiatives and act as greening champions. Ask them the following:

- What is currently being recycled (paper, plastic bottles, printer cartridges)?
- Are your shredding vendors recycling?
- What is the policy on electronics disposal?
- Does the firm distribute all firm-wide communications electronically?

Procurement. Review your company's purchasing policy and revise it to include products that are environmentally friendly, such as:

- "post-consumer waste" products, including stationery, packaging materials, paper towels, and other supplies, which prevent waste from ending up in landfills;
- nontoxic cleaning supplies, inks, and other chemicals; and
- throwaway products (plates, cutlery) made of materials such as cornstarch that will quickly breakdown in a landfill.

Surplus products

- Find innovative uses for excess inventory such as outdated electronics by partnering with local trade schools or recyclers.
- Ask employees to come up with

ways to turn that waste into something useful.

Consumption

- Turn off lights and appliances that are not being used.
- Replace high-energy-use light bulbs, fixtures, and equipment with their low-energy-use equivalents (look for Energy Star, LED, and compact fluorescents).
- Conduct more business online by transmitting documents as PDFs via e-mail rather than by delivery service (but make sure you can easily strip metadata away).
- Consider purchasing Renewable Energy Credits to offset your company's energy consumption.
- Sponsor office challenges to encourage sustainable use of resources.

Lifestyle changes

- Reduce fuel consumption and pollution by encouraging carpooling and use of mass transit.
- Encourage reuse rather than waste by asking employees to bring their own coffee cups and water bottles to work instead of supplying them with wasteful paper, plastic, and Styrofoam cups. To make this work, you may need to have dishwashing space in each break room or add dishwashers.
- Institute paper, can, glass, and plastic recycling if your office hasn't already.

Investment policies

- Consider including sustainable fund choices in investment plans, e.g., Calvert Funds (www.calvert.com/) or Green Century Funds www.greencentury.com. Socially Responsible Investing (SRI) balances financial investments with a wide range of social issues.

Office space

- Review your leases to identify recycling services that are to be provided in your Common Area Maintenance (CAM) charges and take advantage of buildingwide activities.
- Encourage other tenants in your building to participate in your greening initiatives.
- If you are renovating or expanding an existing space or constructing

a new office, be sure to ask your architect about green building options and installation of energy- and water-saving devices.

Resources

- ABA-EPA Law Office Climate Challenge: www.abanet.org/environ/climatechallenge/home.shtml
- ABA Website for Sustainable Law Offices: www.abanet.org/publicserv/environmental/sustainable_law_office.shtml
- EPA's Green Power Partnership Program: www.epa.gov/greenpower/
- EPA's Wastewise Program: www.epa.gov/wastewise/
- EPA/DOE's Energy Star Program: www.energystar.gov/

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Florida Caselaw Update

by Gary K. Hunter, Jr. & D. Kent Safriet

Agreements that require CIP Amendments are legislative in nature. *D.R. Horton, Inc. v. Peyton*, 32 Fla. Law Weekly D1496 (1st DCA June 18, 2007).

Developer D.R. Horton, Inc. challenged the mayoral veto of a resolution of the Jacksonville City Council, which had approved a "fair share assessment contract," under which the developer was authorized to undertake a proposed development in the City. Under the City's Charter, the mayor does not have the authority to veto council decisions that are quasi-judicial.

The 1st DCA held that the Council's decision approving the developer's fair share assessment contract was a policy decision that was legislative and not quasi-judicial in nature. The court reasoned that consideration of the developer's fair share assessment contract required the Council and the mayor "to evaluate the likely impact of the contract on the City's provision of local services, on its planned capital expenditures, and on its overall plan for the managed growth and future development of the surrounding area." The decision to approve the fair share assessment contract "involved considerations well beyond [the developer's] 150-acre development."

Despite the requirement under Jacksonville's code that the proposed development be consistent with the comprehensive plan, the Council approved a fair share assessment con-

tract that would require an amendment to the capital improvement element of the Comprehensive Plan. An amendment was required because the developer's proposed development required "such substantial transportation infrastructure improvements," as provided by the terms of the developer's fair share assessment contract with the City. It seems under this analysis that, in the 1st DCA, the approval by a local government of a fair share assessment contract under Section 163.3180(11), F.S., is a legislative act if its implementation will require the local government to amend its Comprehensive Plan's Capital Improvement Program or transportation element's list of improvements.

A reviewing court is not required to defer to an administrative interpretation of a law or ordinance where the plain meaning may be applied. *City of Coral Gables Code Enforcement Bd. v. Tien*, 32 Fla. Law Weekly D2434 (3rd DCA Oct. 10, 2007).

A landowner, whose yacht was tied up in the waterway in front of his property but extending into the waterway in front of his neighbor's property, was cited for violating a city ordinance. The ordinance prohibited any person from tying up a boat to waterfront property abutting the waterways within the city unless that person is the owner of the property to which the boat was moored. The yacht

owner appealed to the Code Enforcement Board, which read the literal language of the ordinance to require ownership of the land to which the boat is tied and not the land in front of which the boat merely sits. The circuit court disagreed with the Board's decision and held that, because the yacht extended over the neighbor's seawall, the yacht owner violated the ordinance. On second-tier certiorari, the 3d DCA quashed the circuit court's decision and found that "it would be a violation of 'clearly established law' and a substantial 'miscarriage of justice' if this mega-yacht was banned from the City of Coral Gables based upon this ordinance."

The City filed its own petition for certiorari, taking the side of the neighbor whose property was blocked by the yacht. Citing *City of Hialeah Gardens v. Miami-Dade Charter Found. Inc.*, 857 So. 2d 202, 206 (Fla. 3d DCA 2003), the City suggested that the court defer to its interpretation of the ordinance. Finding the City read too much into *Hialeah*, the 3d DCA held that it is not required to defer to an agency's construction or application of a law or ordinance where the court can interpret the plain meaning. Accordingly, the court held that the plain meaning of the ordinance requires it to quash the decision below. In addition, the court noted that, "although legislative intent is not our polestar," it doubted that the City was concerned about mega-yachts when the ordinance was adopted in 1958. Rather, the court found that the terms of the ordinance suggest a concern about boats being tied onto land without the property owner's permission.

DCA remands for Volusia County to demonstrate its historic use of beachfront property. *Trepanier v. County of Volusia*, 32 Fla. L. Weekly D2197 (5th DCA Sept. 14, 2007).

Like much of Florida's coastline, Volusia County has experienced hurricane driven accretion and avulsion to its beaches. Due to the sudden loss of land, public use of portions of the beach and the County's regulation

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of the public use shifted inland and onto the plaintiffs' land. These owners of platted beachfront lots sued the County, alleging that the County improperly used their property by setting up public driving lanes and parking, absent any easement or property interest that would authorize such use. In its defense, the County claimed that the public had a right, by "dedication, custom, or prescription," to drive and park on the beachfront property owners' lots. The County asked the court to establish an easement across the owners' land and sought an injunction against the owners under the doctrine of "pre-emption," which the court explains is "an encroachment upon public rights and easements by appropriation to private use of that which belongs to the public."

The trial court agreed with the County, ruling that the County "holds a superior claim to possession and use of the beach landward of the mean low water mark" to the spot where there is a "marked change in material or physiographic form, or to the line of permanent vegetation in accordance with the definition set forth in Fla. Stat. section 161.54(3) (2004)." The trial court permanently enjoined the property owners from "acting in any manner inconsistent with the free use of the beach by the public, including access by motor vehicle . . ." The trial court also found prescriptive rights based on open and historic use of the beach.

The 5th DCA reversed, holding that there were genuine issues of material fact as to whether the public had been driving continuously on the subject portion of beach and whether the public's use was adverse. These factual issues precluded summary judgment in favor of the County's prescriptive easement claim. The court held that the public did not have a right to use private owners' platted lots of beachfront property on the basis that lots were dedicated. In addition, the court held that there were genuine issues of material fact as to whether the public had a customary right to use private owners' beachfront property for driving and parking, and if so, whether migration of the public's customary use of the beach had occurred.

3d DCA requires a reasonable amount of time for hearing pre-

sentations and holds that a facial challenge may not be raised in a petition for certiorari. *Hernandez-Canton v. Miami City Comm'n*, 32 Fla. L. Weekly D2473 (Fla. 3d DCA Oct. 17, 2007).

Objectors sought certiorari review of city's zoning resolution, alleging that the resolution had been overturned by an earlier decision of the DCA. The 3d DCA held that the city commission and circuit court erred in interpreting an earlier decision it had issued and, as a result of the prior decision, the zoning resolution was defective.

Notably, the DCA held that the commission's allotment of eight minutes per side for presentations at the hearing regarding the zoning resolution was insufficient. While the DCA did not specify a specific amount of time, it required that, on remand, a reasonable amount of time shall be given to each side.

In their petition, the objectors raised a facial challenge to an ordinance. The 3d DCA reminded the litigants that a petition for certiorari is an improper mechanism for challenging the constitutionality of a statute or ordinance. Rather, such a challenge must be determined in the original proceedings.

4th DCA allows museum to bring consistency challenge. *Stranahan House, Inc. v. City of Ft. Lauderdale*, 32 Fla. L. Weekly D2702 (Fla. 4th DCA Oct. 31, 2007).

This case is part of a long drawn out saga to develop a parcel of property known as the Hyde Park Market Site in Ft. Lauderdale. The case pits three parties against each other: The property owner, the City of Ft. Lauderdale and the Stranahan House, Inc. (Stranahan). The Hyde Park Market Site is located adjacent to the Stranahan House, which is a historical museum and is located in the City's historical preservation zoning district while the Hyde Park Market Site is located in the Downtown Regional Activity Center.

Following the property owner's attempt to develop a 38 story condominium on the site, the City, with assistance from Stranahan, sought to prevent the development by acquiring the Hyde Park Market Site through eminent domain. Following the circuit court's rejection of the City's attempt to use eminent do-

main, the City entered into a Consent Final Judgment with the property owner which included, among other things, the property owner to submit an alternative site plan. The Consent Judgment found the original site plan complied with all land development regulations and was consistent with the comprehensive plan. When the City approved the developer's alternative site plan in accordance with the Consent Judgment, Stranahan sued, alleging that the alternative site plan was not consistent with the City's Comprehensive Plan under § 163.3215, F.S.

The Circuit court dismissed the complaint finding that the consistency issues had been litigated and decided in the Consent Judgment. On appeal, the 4th DCA held that the issues of consistency had not been previously adjudicated in the Consent Judgment. The Court reasoned in part, that the consent judgment contains no findings regarding the alternative site plan, nor could it have since the alternative site plan was not submitted to the City until after the Consent Judgment. Thus, any findings in the Consent Judgment were only applicable to the original site plan.

The Court further held that an agreement between the City and Stranahan, which authorized the City to act for Stranahan, extended only to the City's action in acquiring the Site by eminent domain and did not give the City the authority to represent Stranahan with respect to any subsequent counterclaims or consistency issues. Thus, the Court reversed the dismissal of Stranahan's complaint finding Stranahan had standing to bring a consistency challenge against the alternative site plan under the statute.

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On Appeal

by Stacy Watson May and Lawrence E. Sellers, Jr.

Note: Status of cases is as of March 24, 2008. Readers are encouraged to advise the authors of pending appeals that should be included.

FLORIDA SUPREME COURT

Florida Department of Environmental Protection, et al. v. Save Our Beaches, Inc, et al., Case No. SC06-1447 and 1449. Petition to review decision of First DCA relating to DEP's final order allowing the renourishment of 6.9 miles of beaches and dunes within the City of Destin and Walton County. 31 Fla. L. Weekly D1173. The First DCA certified as a question of great public importance whether the Beach and Shore Preservation Act (Part I of Chapter 161) has been unconstitutionally applied so as to deprive the members of Stop the Beach Renourishment, Inc., of their riparian rights without just compensation for the property taken, so that the exception provided in Rule 18-21.004(3), F.A.C., exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights, does not apply. Status: Oral argument held on April 19.

Advisory Opinion to the Attorney General re: Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans, Case No. SC06-521. The Attorney General has asked the Court for an advisory opinion as to whether the financial impact statement prepared by the Financial Impact Estimating Conference on the constitutional amendment, proposed by initiative petition and entitled "Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans," is in accordance with section 100.371, Florida Statutes. Status: On July 12, 2007, the Court remanded the financial impact statement for the petition to the Financial Impact Estimating Conference for redrafting because the statement did not meet statutory requirements in its current form. On July 27, 2007, the conference for-

warded a redrafted financial impact statement. On November 27, 2007, the Court issued a briefing schedule. The Court will hear oral argument on the redrafted financial impact statement on May 6, 2008.

Steven W. Boldt v. Patrick W. Brannon and Kathryn C. Brannon, Case No. SC07-563. Appeal from the Second DCA concluding that holders of an easement by implication to access the water did not have the right to fish or remain on the property for extended periods. The Second DCA interpreted *Cartish v. Soper*, 157 So.2d 150 (Fla. 2d DCA 1963), and considered the nature and extent of riparian rights transferred to lot owners as an easement by implication but not those rights transferred in an express easement. Status: Dismissed on November 1, 2007, 32 Fla. L. Weekly S684a; jurisdiction improvidently granted.

Department of Environmental Protection v. Contractpoint Florida Parks, LLC, Case No. SC07-1131. Petition for Review of First DCA decision finding that, absent legislative intent to do so, Section 11.066, F.S., did not "overturn twenty-two years of case law subjecting the state to breach of contract actions." Section 11.066, provides that the state or its agencies shall not be required to pay monetary damages except pursuant to an appropriation made by law. The court certified the following question to be one of great public importance: "Does Section 11.066, Fla. Stat., apply where judgments have been entered against the state or one of its agencies in a contract action?" 32 Fla. L. Weekly D1416b. Status: Petition for Review granted July 9; oral argument held December 5, 2007.

FIRST DCA

Don and Pamela Ashley v. State of Florida Administration Commission, et al., Case No. 1D07-95. Appeal from final order determining amendments to Franklin County Comprehensive Plan were not in compliance as defined in § 163.3184 (1)(b), Florida

Statutes. The order also required the County to adopt remedial measures regarding capital improvements, affordable housing, coastal high hazard area and planning periods. Status: Remanded on December 31, 2007, 33 Fla. L. Weekly D97a, motion for rehearing filed on January 14, and denied on March 14, 2008.

Brenda D. Dickinson and Vicki A. Woolridge v. Division of Legislative Information of the Offices of Legislative Services, et al., Case No. 1D073827. Appeal from final judgment rejecting a constitutional challenge to executive and legislative lobbyist compensation reporting requirements. Status: Answer brief filed January 11.

SECOND DCA

Peace River/Manasota Regional Water Supply v. State, Department of Environmental Protection, Case No. 2D06-3891 and 2D07-3116 (consolidated cases). Appeals from final order granting environmental resource permit to Mosaic for Ona Mine. Status: All briefs have been filed.

Peninsular Properties Braden River, et al. v. City of Bradenton, Florida, Case No. 2D06-5302. An appeal of the lower court's dismissal of petition as untimely. The petition for review of the City of Bradenton's denial of petitioners' Mira Isles project was filed after expiration of the jurisdictional thirty-day timeframe for seeking judicial review of local government action. The trial court determined it was without jurisdiction to rule on the merits and dismissed the petition, rejecting section 70.51(10)(a) "as an unconstitutional infringement on the Supreme Court's rule-making authority." Status: Reversed and remanded. 32 Fla. L. Weekly D1815a. The Florida Supreme Court denied review on January 10.

Marine Industries Association of Collier County v. Florida Fish & Wildlife Conservation Commission, Case No. 2D07-1777. Appeal from a final order approving the Fish and Wildlife Commission's permit granted to the City for the placement of

waterway markers. The final order rejected much of the Administrative Law Judge's recommended order finding that 1) the parties had standing to challenge the permit and the necessity of the ordinance underlying the waterway marker permit application and 2) the Fish and Wildlife Commission was obligated to independently determine whether the local ordinance was needed. Status: Oral argument date set December 5, 2007.

THIRD DCA

Florida Power & Light Company v. Department of Environmental Protection, et al., Case No. 3D07-840. Appeal from a final order determining that DEP's proposed CAIR Rule is a valid exercise of delegated legislative authority. DOAH Case No. 06-2871RP. Status: Affirmed December 7, 2007. 32 Fla. L. Weekly D2652c

Jimmy T. Bauknight, et al. v. Monroe County Board of County Commissioners, et al., Case No. 3D07-915. Appeal from trial court's order granting County's motion for summary final judgment declaring that appellant property owners failed to exhaust administrative remedies prior to seeking compensation for temporary taking of their properties. This is a result of the County's application of

transportation concurrency requirements. Status: Oral argument held December 30, 2007.

CNL Resort Hotel, L.P. v. City of Doral, Florida, et al., Case No. 3D07-1528. Petition for review of non-final administrative order dismissing or striking challenge to plan amendments based on allegation that the amendments are inconsistent to the extent they impair CNL's property rights. Status: Oral argument held on September 5, 2007.

FOURTH DCA

1000 Friends of Florida, et al. v. DCA, Case No. 4D05-2068. Appeal of final order determining that proposed amendments to Palm Beach County Comprehensive Plan to accommodate the proposed Scripps biomedical campus are in compliance. Status: Response to Court's Order requesting status of Ordinances 2004-34 to 2004-39 and 2004-63 to 2004-64 and whether appeal is moot, filed June 5, 2006; jurisdiction relinquished to the Department of Community Affairs on July 12, 2006 (for 120 days); joint status report filed November 27, 2006; order granting extension of time for relinquishment of jurisdiction rendered December 7, 2006, and recommending case remain with the

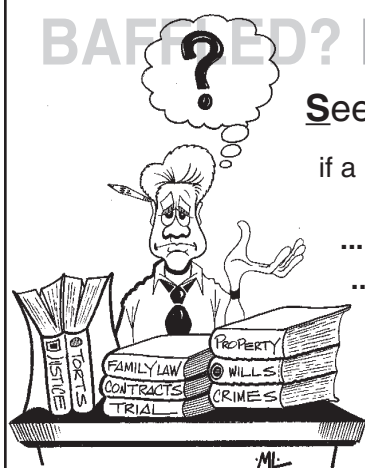
DCA through October 15, 2007; extension of time granted through January 31. On March 4, 2008, DCA vacated its Final Order based on the County's rescission of the plan amendments. Therefore, the DCA dismissed the case as moot on March 10, 2008.

FIFTH DCA

Alfred J. Trepanier, Successor Trustee, et al. v. County of Volusia, Florida, Case No. 5D05-3892. Appeal by owners of oceanfront property from a summary judgment for the County. The owners had sued the County for allowing (and directing) the public to park on property they claim they own. Status: Affirmed in part and reversed in part, on September 14, 2007, 32 Fla. L. Weekly D2197a.

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DEP Update

by Amanda G. Bush, Senior Assistant General Counsel and Kelly Samek, Senior Assistant General Counsel

ACF Update

Settlement meetings were scheduled for mid-February in Alabama.

In the D.C. litigation, the United States Court of Appeals for the District of Columbia Circuit reversed the lower court's approval of the settlement agreement which had been entered into between Georgia, the U.S. Army Corps of Engineers and certain power producers. The D.C. Circuit concluded that, on its face, the agreement's reallocation of water storage space in Lake Lanier constituted a major operational change, thus violating the Water Supply Act, 43 U.S.C. § 390b(d). This appellate court decision obviates the need for NEPA review of the invalidated settlement agreement. The parties have forty-five days to file a petition for rehearing.

The Corps provided notice that it will begin updating the water control manuals for the ACF Basin, a process that the Corps anticipates will take approximately three years to complete.

Mid-Chattahoochee River Users v. Fla. Dep't of Env'tl. Protection, 966 So.2d 967 (Fla. 2007); No. SC07-520

On September 4, the Supreme Court of Florida declined to accept jurisdiction to review the decision of the First District Court of Appeal (948 So.2d 794) in this case. In the *Mid-Chattahoochee River Users* decision, the First District confirmed that allegations of economic interest alone do not suffice to establish third-party standing to challenge the denial of an environmental resources permit (this case involved a joint permit and consent to use sovereign submerged lands, to dredge the Apalachicola River and place spoil material on the river banks).

Potter v. Kennedy and DEP, 967 So.2d 239 (Fla. 3rd DCA 2007)

On August 15th, the Third DCA issued an opinion affirming the Department's final order dismissing Potter's petition for lack of standing. In this permitting case, Potter wanted to challenge the exemption letter issued to his neighbor, Kennedy, to install a

boat lift on his existing dock. There is an enforcement case below involving the same parties and dock.

DCA v. City of Weston, DOAH No. 07-2299GM

The Department was granted intervention into the administrative litigation regarding the City of Weston's proposed amendment to their comprehensive plan. The amendment would effectively block implementation of the C-11 CERP/Accerler8 project. DCA objected to the amendment and the SFWMD and the Regional Planning Council have also intervened in support of DCA.

Florida Power & Light v. DEP, et al, 970 So.2d 401 (Fla. 3rd DCA 2007)

FPL had appealed the Department's Final Order regarding the Clean Air Interstate Rule (CAIR). On November 7th, the Third DCA affirmed the Department's Final Order and declared the rule valid. The challenged provisions were exactly the same provisions adopted by EPA in both their model CAIR (model rule was developed for states to use to ensure consistency among states participating in the cap-and-trade program) and in the EPA federal implementation plan (FIP), which would take effect in Florida if Florida did not adopt a rule in response to the CAIR. Florida is required to submit a state implementation plan revision to EPA indicating that it has adopted all necessary rules to implement all the emissions reduction requirements of CAIR.

Enforcement Cases

DEP v. Jimmie Crowder Excavating and Land Clearing, Inc.

In operations at the Big Buck Mine in Franklin County, the Respondent dredged 32 acres of jurisdictional wetlands without a permit, discharged industrial wastewater from the site during mining operations, and failed to notify the Department of its mining operations at the site. The Respondent agreed to a Consent Order that requires them to pay \$427,000 in civil penalties, restore the damaged wetlands, conduct offsite mitigation,

provide financial assurance for the restoration and mitigation, provide a conservation easement on all wetlands on the site, and design and implement an environmental management system for the company's operations.

DEP v. United States of America / Defense Logistics Agency

Consent Order with 14 Department of Defense facilities (Air Force, Navy, Marine, and Coast Guard) citing current compliance violations and creating a compliance plan for anticipated missed deadlines for storage tank updates. The facilities are located throughout the state and include Homestead, Tyndall, Jacksonville, Eglin, MacDill and Hulbert Air Force Bases; Mayport Naval Station; Jacksonville Fuel Depot; Jacksonville, Panama City, and Key West Naval Air Stations; Blount Island Marine facility; Destin Coast Guard facility; and Port Tampa Air Force facility. A draft Consent Order has been presented to DLA and a meeting of all the parties is being set in Washington DC in March.

Mulberry Acid Spill

The Trustees (DEP, NOAA) and Hillsborough County EPC have reached agreement on restoration projects in Tampa Bay to compensate for damages to estuarine resources caused by the Mulberry process water spill in 1997. The projects include mangrove enhancements and shoreline restorations at MacDill AFB and oyster reef creation on two islands in Tampa Bay. Identification of restoration proposals for the freshwater damages, including the nutrient damages is proceeding and should be completed soon.

DEP v. Bob Allen

A Partial Satisfaction of Judgment was worked out with Bob Allen and the Trust for Public Lands (TPL) allowing the sale of a portion of Mr. Allen's property to TPL. In exchange, Mr. Allen signed an Amended Consent Final Judgment and a Trust Agreement requiring Mr. Allen to deposit \$200,000 from the proceeds of the sale of the property to TPL into a trust to be held by the trustee,

Wakulla Bank, until Mr. Allen completes all corrective actions required under the Amended Consent Final Judgment. The estimated cost of the corrective actions is \$100,000. The closure on the sale of the property to TPL occurred December 18th and the \$200,000 in financial assurances has been deposited in the trust account with Wakulla Bank.

Jerry Potter v. Monte Kennedy and DEP, Case No. 3D07-639 (Fla. 3rd DCA 2008)

On January 23, the Third DCA per curiam affirmed the Department's Final Order which dismissed Potter's petition for lack of standing. Potter's petition challenged a consent order that resolved a violation of filling a wetland without authorization from the Department. The issues on appeal were (1) Potter's standing, (2) whether the Department correctly determined that Potter did not have an extra five days to respond to the Department's Motion to Relinquish Jurisdiction where the ALJ's order specified when the filing of Potter's response was required, and (3) whether the ALJ properly reviewed Potter's motion for disqualification.

The Affiliate's Corner

by David Bass and Erin Deady

Greetings, the ELULS Affiliate Committee has had four well-attended and entertaining yet productive mixers this fall and winter to get the year kicked off in fine fashion. The October mixer in Jacksonville was held at Square One on the 18th, and a mixer was held at Andrew's Capitol Bar and Grill in Tallahassee on November 8th. After the New Year, we held a mixer in Tampa at the Ybor City Brewery on January 24th, and the latest mixer was held in Gainesville on February 28th at the U.F. President's house in conjunction with the University of Florida Water Institute Symposium and the Public Interest Environmental Conference. Thanks to all who sponsored and attended. The last two mixers of the year will be held in Fort Lauderdale on April 25th, and in Orlando in mid to late May. More information will be forthcoming on those two mixers.

As always, the Affiliate Committee

is looking for papers to be published in the *Section Reporter*. Our next publishing deadline will be June 15th for Affiliate Committee members. We are also seeking a commitment from affiliate members to potentially co-author an article for publication in the *Florida Bar Journal*.

If you are interested in writing an article for the *Section Reporter* or *Bar Journal*, or interested in sponsoring a mixer, please contact David Bass at 407-481-9006, or by e-mail at dbass@esciencesinc.com.

It's not too early to be thinking about the ELULS Annual Update in Amelia Island in August. We sent out an e-mail to the affiliates requesting ideas for topics and speakers and are currently analyzing the responses to assist the Section in developing the agenda. Thanks for all the ideas, and please send more if you have them.

Stay tuned for more updates on the Affiliate Committee.

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DCA Update

by Kelly Martinson, Assistant General Counsel

Ashley v. Franklin County, et al., DOAH Case No. 05-2361GM, First DCA Case No. 1D07-0095

The Ashleys appealed a Final Order of the Administration Commission finding all but a few challenged provisions of Franklin County's evaluation and appraisal report based amendments "in compliance." The First DCA reversed the Administration Commission's finding that two future land use categories are not mixed-use categories, as both categories contemplate a variety of uses in addition to residential. The Rural Village category also permits a restaurant, hotel services, an outfitters store, and recreational uses. As for the Conservation Residential category, although it prohibits "[f]ree standing non-residential or commercial uses intended to serve non-residents," the First DCA found that it may by negative implication allow free-standing, non-residential, commercial uses intended to serve residents. The case has been remanded to the Administration Commission to determine whether the two categories comply with the standards for mixed-use categories in Rule 9J-5.006(4)(c), F.A.C. A Motion for Rehearing or in the Alternative Motion for Clarifica-

tion filed by the Ashleys was denied on March 14, 2008.

Runyan, et al. v. City of St. Petersburg, et al., DOAH Case No. 07-2239GM

Petitioners challenged the Department's "in compliance" finding for an 18 acre Future Land Use Map amendment in the City of St. Petersburg. Focusing on six acres of the amendment going from Institutional to a category allowing a mix of residential, office, and commercial, Petitioners alleged that no need existed for additional commercial uses, and policies in the Comprehensive Plan restrict the addition of commercial uses. Although not necessarily disputing that no need exists for solely commercial uses, Respondents argued that the policies restricting the addition of commercial uses do not apply to mixed use categories. In support, Respondents pointed to plan policies that encourage mixed use developments and infill. The ALJ agreed, issuing a Recommended Order finding the amendment "in compliance."

Grassy Key Beach Subdivision, Inc. v. City of Marathon, et al., 2007-CA-240-M (Fla. 16th Cir.)

In this case, Plaintiff seeks to

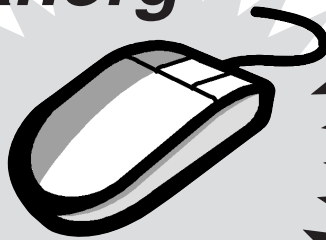
establish that it has a vested right under Section 380.05(18), F.S., to develop property without regard to the Florida Keys Area of Critical State Concern regulations and the Rate of Growth Ordinance that limits the number of building permits that can be issued annually. Plaintiff relies on the recordation of a plat by Plaintiff's predecessor in title in 1950 and subsequent expenditures for improvements to the property (roads, canals, potable water) by the three immediate past owners. In granting Defendants' Motion to Dismiss, the Court found that a subsequent purchaser must demonstrate how it relied upon an official act of government and changed its position because of such act and cannot tack on to the reliance and change of position of a prior owner. Plaintiff has filed an Amended Complaint which Defendants have moved to dismiss.

Judkins v. Walton County, Final Order No. DCA08-DC-003 (DOAH Case No. 08-0302GM)

This case involves a Section 163.3213, F.S. challenge to a Walton County land development regulation (LDR) as being inconsistent with the Walton County Comprehensive Plan. Petitioners assert the LDR is inconsistent because it allows borrow pits as a special exception from the Land Development Code without consideration for the land use category limitations in the Comprehensive Plan. Although the LDR does not expressly restrict the land use categories in which borrow pits may be allowed as a special exception, the Department determined it is consistent with and implements the Comprehensive Plan because the Comprehensive Plan allows borrow pits by special exception only in the General Agriculture and Large Scale Agriculture land use categories. The issue is now before the Division of Administrative Hearings and a hearing is set for April. On February 15, 2008, the Judkins' petition was dismissed without prejudice for failure to comply with the pleading requirements of Uniform Rule 28-106.201, F.A.C. The Judkins filed a Second Amended Petition on February 22, 2008.

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Water Management District Update

Southwest Florida Water Management District

by Amy C. Duffey, Staff Attorney

New Governing Board Member Takes Office

On February 26, 2008, Albert G. Joerger took his oath of office to begin his term on the District's Governing Board. Joerger was appointed by Governor Crist to fill the newly-created at-large seat for Charlotte and Sarasota Counties. Joerger, a Sarasota resident, is the founder and president of the Sarasota Conservation Foundation, which works with landowners and local governments to protect and preserve Sarasota County's bays, beaches and barrier islands for future generations. Joerger also assumes responsibility as chair ex officio of the District's Manasota Basin Board. Joerger's term ends March 1, 2011.

Governing Board Approves Weeki Wachee Agreement

On February 26, 2008, the District's Governing Board voted unanimously to approve an agreement that will further pave the way for Weeki Wachee Springs to become a state park. The vote ends four years of litigation between the District, Weeki Wachee Springs, LLC and the City of Weeki Wachee regarding the lease of the District-owned property upon which the attraction sits. The agreement calls for Weeki Wachee Springs to become a state park by November 1, 2008; however, if it fails to become a state park by that date, the litigation will resume. The District's primary goals have always been to protect the significant water resource that is Weeki Wachee Springs, and to ensure that those operating the facility are protecting the safety of the visitors and employees at the attraction.

Cedar Hames and Nora H. Scholin v. Florida Department of Environmental Protection and Southwest Florida Water Management District, 12th Judicial Circuit, Manatee County Case No. 2007-CA-001649; and Southwest Florida Water Management

District v. Cedar Hames and Nora H. Scholin, Second District Court of Appeal Case No. 2D08-631

On May 3, 2005, Cedar Hames and Nora H. Scholin (Applicants) submitted an application to the District requesting issuance of an environmental resource permit for the purpose of building single family residences on eight lots consisting almost entirely of sovereign submerged lands in Manatee County. On July 31, 2006, the District denied the permit application due to lack of completeness. In March 2007, approximately 8 months after denial of their only development proposal, the Applicants filed an inverse condemnation action in circuit court. Competing motions for summary judgment were filed. The Applicants argued that they can avoid the 90-day filing deadline for invoking circuit court jurisdiction prescribed by Section 373.617, F.S., which controls takings claims brought in circuit court following permit denial, because the statute only applies to a circuit court's review of whether a permit denial was "unreasonable." That is, if a plaintiff does not dispute the reasonableness of the denial, such a plaintiff is not required to bring a taking claim within the 90-day time parameters required by the statute. The District disagreed, arguing that the Applicants' claim was untimely and as such the circuit court could not entertain their claim. The circuit court granted the Applicants' motion and denied the District's motion. In response to the adverse trial court ruling, on February 12, 2008, the District filed a petition for writ of prohibition with the Second District Court of Appeal. The District argued that a writ of prohibition is warranted to prohibit the circuit court from exercising jurisdiction over the Applicants' taking claim, and to quash the circuit court's summary judgment order. On February 19, 2008, the Court issued an Order to Show Cause as to why the District's petition for writ of

prohibition should not be treated as a petition for certiorari and dismissed as untimely. On February 22, 2008, the District filed its response to the Order to Show Cause. Having shown good cause, on February 27, 2008, the Court issued an order requiring the Applicants to respond to the District's petition for writ of prohibition within 20 days. This case is of heightened interest due to the extreme and far-reaching ramifications to the District and other public permitting agencies if the circuit court's ruling is upheld.

Tampa Bay Nitrogen Management Consortium

On February 26, 2008 the District's Governing Board approved the Declaration of Cooperation of the Tampa Bay Nitrogen Management Consortium (Declaration) and the Tampa Bay Nitrogen Management Strategy, 2007 Update to the Reasonable Assurance Document (Update). The Declaration renews the District's commitment to participating in the Tampa Bay Nitrogen Management Consortium and identifying and implementing projects to reduce nitrogen loads in Tampa Bay. The purposes of the Update are: (1) to provide an update on the implementation of the Tampa Bay Nitrogen Management Strategy; (2) to provide adequate documentation to the Florida Department of Environmental Protection (FDEP) to allow them to find that reasonable progress has been made in meeting the goals set for Tampa Bay; and (3) to request an extension of the determination by FDEP that the Tampa Bay Nitrogen Management Strategy will continue to provide reasonable assurance that the nutrient impairment in Tampa Bay will be adequately addressed in order to meet designated uses. The Governing Board approved the Declaration and Update as being in the interests of all stakeholders to continue this successful approach which has resulted in remarkable progress towards Tampa Bay's recovery.

Law School Liaisons

Barry University Law School — Framing an Earth Jurisprudence for a Planet in Peril February 29, 2008 - Orlando

The nation's initial Earth Jurisprudence symposium on ecological crisis, including climate change, drew overflow attendance and internet observers from sixteen states and six countries. Leading thinkers and practitioners of law, philosophy, and Native American traditions emphasized the necessity of fostering law and public policies that restore the health and well-being of the Earth community as a whole. The key messages were that human law must tailor itself to the realities of Earth's ecological laws, respond to the human face of suffering caused by unprecedented ecological crisis, and rapidly address emerging challenges to the public welfare. Co-sponsors of the symposium were the Center for Earth Jurisprudence and the Barry Law Review which is set to publish the proceedings of the symposium in its fall 2008 issue.

Opening the event was Cormac Cullinan, South African environmental attorney and author of *Wild Law: A Manifesto for Earth Justice*. Wild law recognizes and embodies the qualities of the natural Earth system in which humans exist. Cullinan proposed that the question is not whether trees have standing in human law, but whether humans

have standing within the laws of nature which ultimately transcend and govern human law. Winona LaDuke, Program Director for the Honor the Earth Fund, presented key tenets of indigenous wisdom, such as reciprocity in all human interactions with Earth, making decisions from the perspective of future generations, and understanding humans as belonging to the living land. LaDuke and Barbara Wall, philosopher from Villanova University, referenced the law of the Creator as formative influence in human law. Cullinan noted that transition to wild law could also follow from complexity theory, systems theory, the physical sciences, as well as human self-interest in survival.

Attorney Donald Goldberg represented Inuit villagers whose homes are sinking into the encroaching sea. Their petition before the Inter-American Commission on Human Rights sought to hold the United States accountable for greenhouse gas emissions that far exceed an allotted percentage based on world population. The Commission denied the petition but scheduled a later thematic hearing to study multiple causation problems in anticipation of future human rights petitions. Andrew Kim-

brell, of the plaintiffs' attorney team in *Massachusetts v. EPA*, discussed strategy, significance, and challenges in the first U.S. Supreme Court decision to address global warming. He elaborated on the classical Greek notion of natural law that viewed all beings as ends rather than means. He suggests development of public trust, guardianship, and citizen supervision legal strategies. When attorney Joseph Guth studied the history of the common law, he noted how judges shift their decisional approach to fulfill their obligation to the public welfare as challenges to society change over time. Mr. Guth suggests that courts reviewing ecological torts and public nuisance claims shift from a financial cost-benefit analysis to the precautionary principle when an ecosystem approaches the limit of ecological sustainability. Each of the above presentations will be available for viewing on the Center for Earth Jurisprudence's website at www.earthjuris.org by April 1. Student participation in the symposium was funded in part by a grant from the Environmental and Land Use Law Section.

For more information contact Sister Patricia Siemen, OP, Esquire, Executive Director.

FSU Environmental and Land Use Law Program: Activities During the 2007-2008 Academic Year

by Professors Donna Christie, Robin Craig, Dave Markell, and J.B. Ruhl

The Florida State University College of Law's Program in Environmental and Land Use Law has been engaging in a number of activities during the 2007-2008 academic year.

The Program and the College of Law's *Journal of Land Use and Environmental Law* have presented two **Distinguished Lectures in Environmental Law**. On November 7,

2007, Professor Julian Juergensmeyer, Ben F. Johnson, Jr. Chair in Law, Georgia State University College of Law, delivered the Fall Distinguished Lecture, "Infrastructure and the Law: Florida's Past, Present, and Future." On February 20, 2008, Professor Jutta Brune, Metcalf Chair in Environmental Law, University of Toronto, delivered the Spring Distinguished Lecture, entitled "All Together Now?

Europe, the United States and the Global Climate Change Regime." Articles based on these lectures will appear in future issues of the *Journal*.

The Program co-hosted a **Panel on Innovative Financing of Public Infrastructure** on November 6, 2007. Panelists included Professor Julian Juergensmeyer, Ben F. Johnson, Jr. Chair in Law, Georgia State University College of Law; Jim

Nicholas, Emeritus Professor of Urban & Regional Planning and Emeritus Professor of Law, University of Florida; Mark Mustian, Tallahassee City Commissioner and partner at Nabors, Giblin & Nickerson; and Tom Pelham, Secretary, Florida Department of Community Affairs.

On November 14, 2007, the Program hosted its **Fall Environmental Forum**, entitled "Cleaning It Up: TMDLs and Water Quality Trading in Florida." Speakers included William Green, co-founder of Hopping, Green & Sams; Daryll Joyner, Program Administrator of the Florida Department of Environmental Protection's Bureau of Watershed Management; FSU alum Rebecca O'Hara, Legislative Director of the Florida League of Cities; and J. Allison Defoor, State Coordinator for EarthBalance. Lauren Moody, third-year Environmental Certificate Program student and President of the College of Law's Environmental Law Society, introduced the Forum, and Professor Robin Craig moderated.

Several distinguished speakers have addressed the Program's **Environmental & Land Use Certificate Seminar**. Professor Randall Abate from the Florida Coastal

School of Law spoke to the seminar students on public nuisance claims for climate change impacts. Professor Royal Gardner from the Stetson Law School spoke on wetlands mitigation, while Professor Mary Jane Angelo from the University of Florida School of Law spoke on the use of environmental resource valuation in law.

In the fall, the *Journal of Land Use and Environmental Law* issued its weighty Spring 2007 volume (Volume 22:2), containing proceedings from the Program's Spring 2006 **Symposium on the Law and Policy of Ecosystem Services**. Volume 23:1 will be published shortly and will contain Professor Daniel Farber's (Sho Sato Professor of Law, University of California, Berkeley) article on climate change compensation, based on his Fall 2006 Distinguished Lecture. This volume will also contain papers presented on the 13th Annual Public Interest Environmental Conference.

Students in the Program have been active as well. In Fall 2007, **Darrin Dest** participated in an externship at the Florida Department of Environmental Protection, while **Shaun Amarnani** and **Eric Reinerman** both completed externships at the

Department of Community Affairs. In Spring 2008, **Ellen Wolfgang** is pursuing a full-time externship with the U.S. Department of Justice in Washington, D.C.

Finally, the College of Law's **Environmental Law Society**, under the leadership of President **Lauren Moody**, has been quite active within the law school, on the wider university campus, and within the community. Ms. Moody and **Asaf Naor** helped to run the Second Annual Campus & Community Sustainability Conference, "Getting to GREEN," which took place October 14-16, 2007. In the Fall, the Environmental Law Society also hosted an Alternative Transportation Week at the law school during the week of November 5-11. The Society is organizing and paying for travel and accommodations, and providing scholarships to cover conference fees, so that students in the Program can attend the Public Interest Environmental Conference at the University of Florida from February 28 to March 1, 2008. Finally, the Environmental Law Society will be participating in the FSU Campus Earth Week from March 31 to April 5, encouraging recycling and proper disposal of hazardous wastes across campus.

University of Florida Levin College of Law Update

by Alyson C. Flournoy

Our spring update focuses on the many environmental and land use law programs hosted by UF Law during this season, and provides a highlight on one Conservation Clinic project.

2008 Environmental Speaker Series

The Spring 2008 Speaker Series began in January with a presentation by Dawn Jourdan, a newly appointed UF professor with a joint appointment in law and urban and regional planning. Professor Jourdan spoke on Evidence Based Ordinance Drafting: The Regulation of Signage Based on Scholarship. The schedule for the remaining speakers is:

Alexandra Klass

Associate Professor of Law, University of Minnesota Law School
Modern Public Trust Principles:

Recognizing Rights and Integrating Standards

March 20, 3-5 pm

Luis E. ("Ricky") Rodriguez-Rivera

Associate Professor of Law, University of Puerto Rico School of Law
The Development of Land Use Law in Puerto Rico

March 27, 3-5 pm

C. Anthony Arnold

Boehl Chair in Property and Land Use & Professor of Law
University of Louisville, Louis D. Brandeis School of Law
Models of Clean-Water Land Use
April 3, 3-5 pm

Space for the Speaker Series is limited, so please contact Lena Hinson at elulp@law.ufl.edu to reserve a seat. The Speaker Series is made

possible through the generous support of Hopping Green & Sams, P.A., Lewis Longman & Walker, P.A., and the ELUL Section.

The Richard E. Nelson Symposium in Local Government Law

UF Law students and faculty, state and local government agency representatives and building contractors gathered to discuss the many implications of "Going Green" to improve the environmental landscape for future generations. The Seventh Annual Nelson Symposium featured a diverse panel of speakers from law and related fields to explore the construction of green building, its positive impact on the environment and its implications for state and local governments.

The conference, entitled "Green Building: Prospects and Pitfalls for Local Governments," examined top-

continued...

LAW SCHOOL LIAISONS

from page 7

ics including the legal landscape of green building, Leadership in Energy and Environmental Design (LEED) and other certification programs, the state of Florida's climate change initiatives and private environmental lawmaking.

Speakers included Bahar Armaghani, Assistant Director of UF's Facilities Planning & Construction Division, Douglas Buck, Director of Governmental Affairs, Florida Home Builders Association, Professor Kristen Engel, University of Arizona James E. Rogers College of Law, Professor Charles Kibert, University of Florida M.D. Rinker, Sr. School of Building Construction, Errol E. Meidinger, Vice Dean for Research and Professor, University of Buffalo Law School, and Joshua Yaffin, Energy Coordinator, Florida Department of Management Services.

14th Annual Public Interest Environmental Conference

The University of Florida Levin College of Law's 14th Annual Public Interest Environmental Conference (PIEC) was held Feb. 28- Mar. 1, 2008, at the UF Law campus, with over 200 people in attendance. The theme of this year's conference was "Reducing Florida's Footprint: Stepping Up to the Global Challenge." The conference focused on Florida's role in global issues on energy, land use, biodiversity, and water. The PIEC took place in conjunction with the 1st Annual University of Florida Water Symposium - "Sustainable Water Resources: Florida Challenges, Global Solutions." The conference was organized by UF Law students with the support of the Public Interest Committee of the Environmental and Land Use Law Section and the Section.

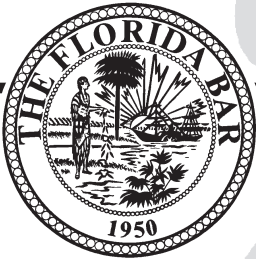
On the evening of Wednesday, Feb. 27, the PIEC opened with a pre-conference keynote speech by Sheila Watt-Cloutier, an Inuit climate change and human rights activist and 2007 Nobel Peace Prize nominee. Shannon

Estonez, Governing Board Member, South Florida Water Management District, delivered the keynote address at the opening reception at the UF President's House on Thursday. The conference continued on Friday and Saturday with two days of panel discussions, plenary presentations and a workshop, involving dozens of participants on such topics as sea-level rise, climate change, agricultural challenges, water resources, community land management, carbon markets, the Comprehensive Everglades Restoration Plan, the impact of war on the environment, and Florida's needs for sustainable energy. Speakers covered topics from global environmental law to nutrient flows to environmental justice and bridging the science-policy divide. David Hunter, Assistant Professor of Law and Director of the Program on International and Comparative Law at American University Washington College of Law, delivered a keynote address at Friday's banquet highlighting the evolution of international environmental law and its potential.

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Conservation Clinic Students Work With Graham on Water Bill



Conservation Clinic student Kim Koleos (pictured left) goes over the clinic's draft Water Resources Restoration Act bill with former U.S. Senator Bob Graham (pictured right) at a recent meeting of the Everglades Coalition on Captiva Island in South Florida. Koleos and recent UF Law graduate Ashley Henry have been working with Graham to develop a policy justification and bill draft that would remove water restoration projects like the Everglades from the Federal Water Resources Development Act (WRDA), which also funds controversial navigation and flood control projects. Graham announced the initiative during his keynote address at the annual meeting of the Everglades Coalition in early January. Center for Governmental Responsibility water law expert Richard Hamann has been advising the clinic on the project.

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8:15 a.m. – 8:40 a.m. **Late Registration**

8:40 a.m. – 8:45 a.m. **Introduction**

8:45 a.m. – 9:35 a.m.

Recent Developments and Issues with the ERP Permitting Program

- How recent rulemaking may affect the program, new restoration initiatives, etc.

Robert M. Brown, SFWMD

Luna E. Phillips, Gunster, Yoakley & Stewart, P.A.

9:35 a.m. – 10:00 a.m.

Status Update on Unified Statewide Stormwater Rule Update

Susan R. Martin, SFWMD

10:00 a.m. – 10:50 a.m.

The Ever Changing Landscape of Land Use

- New cases
- Growth Management Act revisions
- Current legislation
- New trends

Robert N. Hartsell, Everglades Law Center

10:50 a.m. – 11:05 a.m. **Break**

11:05 a.m. – 12:00 noon

Alternative Water Supply – New Frontiers and Challenges

- Water Policy and Regulations: What initiatives are reducing alternative water supply
- Impacts of Lake Okeechobee Regulation Schedule, Regional Water Availability, etc.
- 2008 legislative initiatives
- Alternative water supply solutions, costs, obstacles, regulations and policy issues

John J. Fumero, Esq., Lewis, Longman & Walker, P.A.

Giselle L. Colbert, E Sciences, Inc.

12:00 noon – 1:30 p.m. **Lunch (included in registration fee)**

1:30 p.m. – 2:20 p.m.

New Paradigm Shifts for Conserving Water in Florida

- Revamping the drought management policy, including year-round water restrictions – agency regulations, etc.
- Land and water uses and how water is allocated during drought
- Discussion of enforcement responsibilities

John D. Mulliken, SFWMD

Bruce Adams, EMC Engineers, Inc.

2:20 p.m. – 3:10 p.m.

ETHICS: Perception or Reality?

- When is a conflict of interest real or perceived and how to tell the difference?

Tara W. Duhy, Lewis, Longman & Walker, P.A.

3:10 p.m. – 3:25 p.m. **Break**

3:25 p.m. – 4:15 p.m.

Federal Update: Cleaning Up Our Waters and Protecting Wetlands

- Federal Wetlands and Water Quality Update

T. Neal McAliley, White and Case, LLP

4:15 p.m. – 5:00 p.m.

Making New Law in the Courts: The Big Federal and State Cases

- S-2 & S-3 (NPDES)
- Lakebelt
- Endangered Species

Keith W. Rizzardi, SFWMD

5:30 p.m. – 7:00 p.m.

Affiliate/Attorney Mixer (seminar attendees welcome)

Location TBD, Ft. Lauderdale

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City, County & Local Government: 7.5 hours

Civil Trial: 5.5 hours

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State & Federal Gov't & Administrative Practice: 7.5 hours

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a party to, the acquisition of commercial/industrial property based on the results of the Phase I. Other times, the results of the Phase I raise environmental concerns that leave open-ended questions that, dependent upon the User's risk tolerance, may result in a request that further investigation be performed. This is generally termed "Phase II."

When a User requests a Phase II, they are typically doing so in the hopes that the results of the Phase II generates enough confirmatory information so that they may, among other desired outcomes, (i) establish the future costs of assessment and/or cleanup, (ii) evaluate the likely involvement and outcome of the regulators with jurisdictional authority, (iii) weigh the potential for stigma or diminution in value of their real estate acquisition, and (iv) analyze the potential for third-party liability. Stated in other terms, the Phase II assists the User in understanding better the contaminant migration, the identification of potential restrictions to future property use, the cost to demolish or significantly remodel existing structures, and/or the liability associated with a host of other related concerns, including those associated with the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA").

Next to quantifying the likely costs associated with "cleanup," satisfying the appropriate regulatory authorities is often on the forefront of questions/concerns that occupy those parties involved in the real estate transaction. Each state, and many local agencies, have established their own criteria for environmental professional credentialing as well as corporate licensure. In addition, a myriad of investigatory nuances

pertaining to media type, sample frequency/techniques, analytical methods, quality assurance/quality control, etc., exist and must be satisfied through the submittal of a report that is reviewed by the applicable agency, before the agency offers a determination regarding a regulatory closure. Therefore, it is impractical to reference an ASTM Standard such as the existing Phase II to guide the scope of work, especially since it was intentionally designed without such specificity.

However, recent legislation has provided a window to revise the existing E 1903 Phase II Standard Guide so that it too can enjoy the universal acceptance and applicability that the Phase I Standard has gained over the past 14 years. On January 11, 2002, the Small Business Liability Relief and Brownfields Revitalization Act ("Brownfield Amendments") was passed, which amended the *innocent purchaser (landowner) defense* ("ILD") 42 U.S.C. §9601(35)(B)(i)(II) and added the following two new subsections providing protection from CERCLA liability: (i) The *Contiguous Property Owner* ("CPO") liability protection pursuant to 42 U.S.C. §9607(q); and, (ii) *Bona Fide Prospective Purchaser* ("BFPP") liability protection pursuant to 42 U.S.C. §9607(r). This opportunity presents itself largely through the legal/regulatory "hooks" that now exist and that would necessarily compel that due diligence efforts beyond that of a Phase I be pursued in order to receive one or more of the defenses to CERCLA liability.

With the enactment of the Brownfields Amendments, a person may purchase commercial real estate with knowledge that the property contains *chemicals of concern*, or purchase (after conducting *all appropriate inquiries*) commercial real estate and later discover chemicals of concern on the commercial real estate, and nevertheless have a defense to CERCLA liability. However, in order to assert this defense, the property owner must

take certain actions both before and after acquiring title to the property. The actions that must be taken prior to acquisition of title to the property are set forth in the Environmental Protection Agency's "All Appropriate Inquiries" rule, 40 C.F.R. Part 312, and in the ASTM Phase I Standard. In addition, to continue to enjoy a defense to CERCLA liability, the property owner must comply with certain *continuing obligations* post-closing. This mandate (I'll refer to it as a "regulatory hook") represents the best opportunity for the Phase II to gain traction and become a Standard with similar universal applicability to that of the Phase I.

With this as background, the current thinking and direction of the 2007 Phase II Standard is to design it as a tool to straddle the "grey area" that exists between the finality of a Phase I, and prior to a state or comparable regulatory authority, becoming involved (which often triggers its own unique set of criteria) in the contamination assessment process. Therefore, the goal of the revised ASTM Phase II in terms of its market value is to identify the "hooks" that would necessarily assist in compelling a User (or environmental professional) to specify use of an ASTM Phase II over some other criteria.

What are the hooks?

1. Additional appropriate investigation - When a User requests that the environmental professional perform "*additional appropriate investigation*" in accordance with ASTM E1527-05. This is defined as an effort to obtain additional information that already exists (i.e., no new data) and that would bring greater clarity to an identified recognized environmental condition ("REC"), but that was not required during the performance of an ASTM Phase I. The "hook" that compels a User to pursue additional appropriate investigation would likely be tied to their interest in securing either the federal ILD or CPO defenses, since both require "no knowledge" based on "obvious" sources of information.

2. Data Gaps - A data gap is a lack of, or inability to, obtain information required by the ASTM Phase I Standard. In many instances, it is the result of the "incompleteness" of the information gathered. In rare instances the data gap could be so

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significant that it leads to the conclusion of a REC, based on the "likely presence" of a hazardous substance or petroleum product on a property under conditions that indicate (suggest) a release. Here, the Phase II would simply seek to confirm or refute the conclusion of a REC by addressing the data gap; again, this confirmation would likely be under the pretense that the User is interested in securing one of the Federal Landowner Liability Protections ("LLPs") to CERCLA.

3. Reasonable Steps - CERCLA requires compliance with the following ongoing obligations as a condition for maintaining LLPs such as the BFPF defense. The User must exercise appropriate care with respect to chemicals of concern found at the facility by taking reasonable steps to – (i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substances. Clearly, if the User intends to maintain such a defense he must first know what he is dealing with. Because the Phase I simply identifies the presence (or likely presence) of a release, be it past, present or material threat, it generally does not include the type of specificity (*i.e.*, nature, quantity, distribution, affected media, etc.) that would be necessary to understand what "reasonable steps" would be required to maintain the defense.

4. Qualify for Brownfield funding – EPA has expressed its desire to incorporate the ASTM Phase II Standard into its Grant funding process. The EPA would like the Standard structured so that it necessarily "commits" persons seeking access to an EPA Brownfields Assessment and Characterization Grants awarded under CERCLA 42 U.S.C §9604(k)(2)(B), to identify that they have confirmed, rather than suspected, releases. The Phase II can easily satisfy this goal wherein the Phase I may not.

Beyond these regulatory hooks, there are also legal and business hooks wherein the Phase II Standard might suffice. For instance, a User may be less worried about the site impacts (*i.e.*, high risk tolerance) so long as there is no evidence that the contamination has spread to adjacent properties resulting in third-party

liability. Alternatively, the Phase I may have uncovered site conditions that do not meet the definition of a REC, but are nonetheless of interest to the User because of their risk tolerance, future intended use of the property, reason(s) for ordering the Phase I (*i.e.*, other than to qualify for the LLPs), or other business environmental risk concerns.

The key to the Phase II, as we envision its final form in late-fall of this year, will be to establish how one takes that "next logical step" beyond the Phase I. The procedure should be similar in all cases and therefore it is reasonable that a Standard with universal applicability can be designed. To this end, we are employing the well-known "Scientific Method," which we were all exposed to in school (at least the engineers were – who knows what the geologists did with their time.). In this instance, the E1903 Scientific Method would:

1. ask that the "question" be defined by the User (*i.e.*, What is the Scope in consulting language?);
2. ensure that sufficient "research" is performed through either a Phase I or similar effort to make certain that available and obvious sources of data are examined;
3. be used to develop a hypothesis wherein one "predicts," based on the existing data, the likely outcome;
4. guide the performance of sampling and analysis (*i.e.*, execute the site assessment plan);
5. describe how to analyze the data, including a thorough quality assurance review to ensure the data is valid;
6. direct that conclusions acknowledge whether the question was answered and whether the outcome was/is consistent with the hypothesis or expectations; and
7. outline the essential elements of a Phase II Report.

The prescriptive aspects of the Phase II Standard will likely end rather abruptly upon the gathering of this baseline information. That is because any further effort beyond the Phase II would very likely require some level of regulatory coordination, and anybody that has remained in this business for any length of time understands that there is no way to write a Standard that would be applicable in the different regulatory agencies of each state.

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