



## 2015 Florida Legislative Update

by Larry Curtin, Clay Henderson, Larry Sellers, Roger Sims, and Stacy Watson May

The Florida Legislature concluded its 2015 Regular Session on May 1, 2015. However, for all practical purposes, the session ended on April 28, when the House unexpectedly adjourned three days early after it became clear the two chambers could not agree on a budget. The Legislature returned a month later for a special session that began on June 1 and ended on June 19, when the Legislature passed a budget and related implementing bills. The following is a summary of what happened on some of the key measures relating to environmental and land use law.

### BILLS THAT PASSED

#### Amendment 1 Funding

A major priority during the 2015 Regular Legislative Session and Special Session was the implementation of Amendment 1. The Water and Land Conservation amendment was an initiative ratified by 75 percent of the voters during the 2014 general election. By its terms, the initiative dedicates one-third of the existing documentary stamp tax revenues to the Land Acquisition Trust Fund to “acquire, restore, improve and manage” conservation lands for a term of

20 years. The Revenue Estimating Conference forecast that the amendment will raise \$750 million for fiscal year 2015-2016 and in excess of \$20 billion for the life of the amendment.

Although the initiative sponsors stated that no implementing legislation other than an appropriation was required, several bills were introduced in both houses relating to the implementation of what is now Article 10, Section 28 of the Florida Constitution. Sponsors of these bills noted they were designed to show “transparency” for Amendment 1 funding

*See “Legislative Update,” page 22*

## From the Chair

by Carl Eldred

In June, we held the ELULS Annual Meeting and our Update CLE program in conjunction with The Florida Bar Annual Convention, in Boca Raton. You may recall that this year we are transitioning to a new format for our CLE program in the absence of the traditional Annual Update program. So that you would not miss perennial favorites from the old Annual Update, we put on a half-day CLE containing the General Counsel’s Roundtable, Administrative Law Update, and Legislative Update. If you were unable to attend this CLE, and have enjoyed these panels in years past, I encourage you

to visit The Florida Bar website and obtain these programs on demand.

At the annual meeting we began planning our activities for the coming year. As always, we are focusing on bringing you quality CLE programming on important environmental and land use law topics. We have already planned our popular webinar series, which will begin November 12, 2015 with a WOTUS panel titled “What You Need to Know About the New EPA Rule Defining Waters of the United States,” followed by a panel on the “Implications for Sign Regulation after Reed

*See “Chair’s Message,” page 2*

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## CHAIR'S MESSAGE

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v. Town of Gilbert" on December 10, 2015. We are also planning our new two-day CLE program to be held January 28 & 29, in Orlando. This will be the substantive replacement for our Annual Update program. In addition to a new date and location, we are changing the format to offer one full day of environmental programming and one full day of land use programming. These courses will be available individually, so if you are unable to attend both days, you can select the program that interests you most without having to pay for both days. For those that are able to stay for both programs, however, we will have several opportunities for members to get together afterwards. As noted, we are still planning this event, and the venue will be announced soon. Future updates and announcements regarding this CLE will be posted on the ELULS website. For now though, please put this CLE on your calendar.

In addition to CLE programing, we will also focus on improving our membership communications and updating our listservs. Have no fear, this will not mean that you will get bombarded with ELULS emails. To the contrary, we are currently planning on sending a quarterly email that will update members on section activities and opportunities. Hopefully you will find these emails informative. If not, there will be an easy way to unsubscribe from receiving

future emails. In addition to improving our electronic communications, we will continue holding our popular mixer events to provide yet another forum for members to get together in an informal context.

Last, but not least, I wanted to share with you the recipients of this year's section awards which were presented at the joint ELULS and Administrative Law Section reception:

- The Bill Sadowski Memorial Public Service Award - Sid Ansbacher, Upchurch, Bailey and Upchurch
- Public Interest Attorney of the Year Award - Aliki Moncrief, Florida Department of Environmental Protection
- The Judy Florence Memorial Outstanding Service Award - Jon Harris Maurer, Hopping Green & Sams

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Kelly Samek and  
Sid Ansbacher



Jon Harris Maurer, Aliki Moncrief, Kelly Samek, Amy Judkins, Neil Hancock

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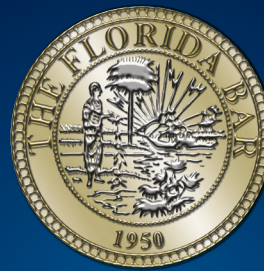
## CHAIR'S MESSAGE

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- The R. S. Murali Memorial Affiliate Member Outstanding Service Award - Neil Hancock, Golder Associates.

Additionally, the winners of the 2015 Malony Contest were announced, both of whom attend the Florida A&M University College of Law. First place went to Amy Judkins, for her paper entitled "Taking it to the Bank: Creating a New Constitutional Standard and Using Blue Carbon Banking to Compensate the Miccosukee Tribe for the Federal "Taking" of their Tribal Lands." Second place was awarded to Felicia Thomas, who wrote "Of Life and Limb: The Failure of Florida's Water Quality Criteria to Test for *Vibrio Vulnificus* in Coastal Waters and the Need for Enhanced Criteria, Regulation, and Notification to Protect Public Health."

The Executive Council is hard at work planning for a successful year ahead. Should you wish to get more involved in the activities of the section, please do not hesitate to reach out to me or any of the Executive Council members to find out what opportunities are available.



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## DEP Update – September 2015 Edition

### Dump the Pumps, Inc., et al. v. Fla. Keys Aqueduct Auth. and Fla. Dep't. of Env'tl. Prot.

In 2010, the Florida Legislature enacted section 403.086(10), Florida Statutes. The Legislature found that:

- the discharge of inadequately treated and managed domestic wastewater from small wastewater facilities and septic tanks and other onsite systems in the Florida Keys compromises the coastal environment, including the near-shore and offshore waters, and threatens the quality of life and local economies that depend on these resources;
- the only practical and cost-effective way to improve

wastewater management in the Florida Keys is for the local governments in Monroe County, which includes Florida Keys Aqueduct Authority (FKAA), to timely complete the wastewater and sewage treatment and disposal facilities pursuant to the June 2000 Monroe County Sanitary Master Wastewater Plan ("Master Plan").

The statute mandates completion by December 31, 2015, of certain wastewater facilities identified in the Master Plan. To implement the Master Plan and this legislative mandate, Monroe County and FKAA entered into an interlocal agreement, which established FKAA's responsibilities to design, construct, operate, and

maintain the central wastewater collection and treatment system.

On various dates, the Department issued notices of intent to issue permits to FKAA, including the four permits authorizing the dryline construction of portions of the Cudjoe Regional Wastewater System for the Upper Sugarloaf Key, Cudjoe Key, Big Pine Key North, and Big Pine Key South. The Petitioners filed timely challenges and the final hearing was held on September 29 and 30, and October 1, 2014, in Key West, Florida. The Administrative Law Judge (ALJ) issued the Recommended Order on February 3, 2015.

The Department issued the Final Order on March 16, 2015. The Final Order adopts the ALJ's recommenda-

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tion to approve the permits at issue. The ALJ concluded that: FKAA satisfied its burden to establish prima facie entitlement to the permits at issue; the Petitioners did not prove that the proposed wastewater collections systems, as designed, fail to comply with or violate applicable Department rules and technical manuals and other applicable standards; the individual Petitioners demonstrated standing to initiate and participate as parties to these proceedings; and that Dump the Pumps, Inc., met the test for associational standing.

In re: Duke Energy Florida Citrus County Combined Cycle Project Power Plant Siting

Duke Energy Florida proposes construction and operation of new electrical generating facilities and associated facilities in northwestern Citrus County, Florida. The proposed electrical generating facilities will be located adjacent to the eastern boundary of Duke Energy Florida's existing Crystal River Energy Complex (CREC) and north of the existing transmission line right-of-way to the CREC. These facilities will consist of two natural gas-fired combined cycle units.

The Project facilities also include several on-site and off-site associated linear facilities, including 230- and 500-kilovolt (kV) electrical transmission lines, as well as pipelines for cooling tower makeup and blowdown, augmentation water, and well water. The only transmission facilities that are needed for the project are the on-site switchyard and transmission lines to connect the Project with the existing Duke Energy Florida transmission facilities connected to Duke Energy Florida's transmission system and the electric power grid in Florida. This includes four new 230-kV interconnections and three new 500-kV connections. The off-site portions of these linear facilities will be located within a corridor wholly

contained within Duke Energy Florida-owned CREC property south of the site.

On April 1, 2015, the ALJ canceled the certification hearing on the request of the parties after they filed a Joint Stipulation on March 31, 2015. The parties stipulated that no disputed issues of fact or law remain to be raised at a certification hearing. Under section 403.509(1)(a), Florida Statutes, the Department is required to prepare and enter a Final Order.

The Department issued the Final Order on May 5, 2015. Based on the stipulated facts, the Final Order concluded that Duke Energy Florida provided reasonable assurance the project will meet all of the other criteria for certification under the Electrical Power Plant Siting Act. The Final Order further concluded that the project will serve and protect the broad interests of the public, so long as the project is implemented in compliance with the Conditions of Certification attached to the Final Order.

Fla. Dep't. of Env'tl. Prot. v. South Palafox Properties, Inc.

South Palafox is a Florida limited liability corporation that operated a construction and demolition disposal facility (C&D) at property in Escambia County (Rolling Hills Construction and Demolition Recycling Center). The C&D operated under a permit issued by the Department. The permit was renewed in February 2013 and would expire in early 2018. Besides the general and specific conditions, the renewed permit incorporated the terms and conditions of a Consent Order executed in November 2012, as well as detailed requirements relating to the operation of the facility, water quality monitoring, an odor remediation plan, financial assurance and cost estimates, and closure of the facility.

In an eight-count Notice of Violation issued on July 31, 2014, the Department proposed to revoke the C&D permit and close the facility for violating permit conditions and rules that govern the operation of the facility. The Notice of Violation was

issued under section 403.087(7)(b), Florida Statutes, which authorizes the Department to revoke a permit when it finds the permit holder has "[v]iolated law, department orders, rules, or regulations, or permit conditions." South Palafox timely requested an administrative hearing to challenge the proposed agency action and an evidentiary hearing was held on December 9-11, 2014. The ALJ issued the Recommended Order March 2, 2015.

On May 29, 2015, the Department issued the Final Order, which revoked the C&D operating permit and requires South Palafox to close the C&D disposal facility in accordance with Florida Administrative Code Rule 62-701.730(9). The Final Order modified the Recommended Order's legal conclusions on mitigation evidence and the standard of proof in section 403.087 permit revocation proceedings. On June 22, 2015, South Palafox appealed the Final Order to the First District Court of Appeal.

Save the Homosassa v. Fla. Dep't. of Env'tl. Prot.

In 2013 the Petitioners, Save the Homosassa River Alliance, Inc., and affiliated parties filed a petition with the Department to challenge whether certain water management district rules were consistent with chapter 62-40, Florida Administrative Code, the "Water Resource Implementation Rule" (formerly known as the "water policy rule"). The water management district rules in question created minimum flows for the Homosassa and Chassahowitzka rivers in Citrus County. The Petitioners alleged, among other things, that the Department failed to implement antidegradation policy when conducting the review. The Department conducted a hearing and issued a Final Order in response to the petition, finding the rule to be consistent with chapter 62-40. The Petitioners filed a timely appeal. The First District Court of Appeal heard oral argument on July 14, 2015. On July 15, 2015, the Court affirmed the Department's Final Order *per curiam* without opinion.

# August 2015 Case Law Update

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

**A “non-residential use” provision in a county’s land development code is not unconstitutionally ambiguous on its face, nor is the enforcement of a non-residential use provision unconstitutionally arbitrary such that it violates substantive due process rights. *Bennett v. Walton County*, No. 1D14-2571, 2015 WL 3824197 (Fla. 1st DCA June 22, 2015).**

The Bennett family owns property in Walton County, frequently renting and using that property as a venue for weddings. Neighbors eventually complained of the frequency with which the property hosted events. Walton County (the “County”) responded to the complaints by issuing citations to the Bennetts for violating the “non-residential use” portion of the land development code. The Bennetts responded by filing suit alleging that the County’s enforcement violated their substantive due process rights. The trial court ruled for the County. This case arose as an appeal from that decision.

Facially, both the trial court and First District Court of Appeal (“DCA”) agreed that the land development code’s “non-residential use” provision provided enough guidance to afford a reasonable person adequate notice of the proscribed conduct. The Court reasoned that there were certain circumstances that obviously violated the rule. For instance, running a “commercial fish packing operation” would clearly be a non-residential use of the property. Therefore, since the parameters of the non-residential use prohibition were capable of definition, at least at the outer edges, the rule was not ambiguous enough to never be applied. Thus the ordinance was not facially unconstitutional.

The harder question presented to the Court was if the non-residential use proscription provided adequate warning such that the County’s application of the non-residential use restriction did not amount to arbitrary enforcement. To decide, the Court first examined the frequency and intensity of the property’s use to determine whether hosting events

qualified as a residential use or not. The Court held that due to the number of events hosted per year and the scope of those events, the Bennetts had “essentially introduced a wedding venue business” into their neighborhood. Therefore, the Court concluded that the Bennetts’ as-applied challenge to the non-residential use provision should fail. In this particular instance, the provision was “sufficiently clear and unambiguous to survive a due process challenge.”

The second part of that question required the Court to examine Walton County’s enforcement of the land development code. The Bennetts argued that because the code was enforced differently and without specificity that said enforcement was arbitrary. The Court disagreed, stating that the County need not set a specific number on the amount of weddings allowed per year to avoid characterizing enforcement as arbitrary. Rather, the Bennetts’ use of the property for so many events per year “clearly offended the LDC’s prohibition.” The Court ruled that enforcement of the land development code was not arbitrary, nor was it inconsistent with the County’s “rationally related residential preservation goals.”

Judge Makar concurred in dismissing the Bennetts’ facial challenge to the non-residential use provision, but dissented with the majority’s decision to affirm the trial court’s dismissal of the as-applied challenge. Makar stressed that the Court’s proper role was to “ensure governmental actions do not cross the line into arbitrariness,” and as such a guardian, the Court should have remanded the as-applied challenge for further fact-finding by the trial court.

**“Condemnation blight” does not sufficiently approximate a physical appropriation of land and therefore is not valid as a takings claim that would independently support an inverse condemnation action. *Teitelbaum v. South Florida Water Management District*, No. 3D14-963, 2015 WL 3875464 (Fla. 3d DCA June 24, 2015).**

The South Florida Water Management District (“SFWMD” or “District”) designated the area around and including Plaintiff’s property as part of the “East Coast Buffer.” SFWMD considered the East Coast Buffer as an essential barrier between the Everglades and Miami-Dade. As such, SFWMD actively sought to purchase all the property within the designated buffer. However, Plaintiffs contended that the District’s methods lowered their property values and then preserved these artificially low prices. Plaintiffs also alleged SFWMD employed these methods in an attempt to acquire the plaintiff’s property at substantially lower prices than they otherwise would have been able to.

Plaintiffs argued that their theory of “condemnation blight” should constitute a per se taking. The trial court dismissed this argument on the District’s motion for summary judgment, holding that “condemnation blight” is properly considered when valuing property after a taking has been established. Therefore, the theory does not give rise to a new takings cause of action. This case arose as an appeal from that decision.

The Third DCA acknowledged that the current state of regulatory takings is anything but crystal clear. However, as the doctrine currently stands, the only per se takings rules apply to permanent physical occupations of property, or instances where government regulation erases all economic value of a parcel. If one of the per se rules does not apply, courts must apply an ad hoc balancing test described by *Penn Central*. According to the Third DCA, all three tests seek to determine if the regulation is functionally equivalent to direct appropriation or ouster. Therefore, because Plaintiff’s proposed test focused on the unreasonableness of the District’s conduct instead of the effects of that conduct on property, the Third DCA considered the condemnation blight theory inappropriate. Rather this examination of diminution in value due to unreasonable

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conduct is only relevant to valuation after condemnation has been established.

**The Bert J. Harris, Jr., Private Property Rights Act provides a cause of action for real property owners whose existing uses or vested rights are inordinately burdened because of government action directed at adjacent real property. *FINR II, Inc. v. Hardee County*, No. 2D14-788, 2015 WL 3618521 (Fla. 2d DCA June 10, 2015).**

FINR owned property in Hardee County that was planned to be developed as a rehabilitation center for traumatic brain injuries, but was currently designated for agricultural uses under the future land use element of Hardee County's comprehensive plan. FINR applied for an amendment to the comprehensive plan to designate its property as a rural center, which would permit the construction of the planned facility. An important part of the change in designation was the resulting prohibition of phosphate mining activities within a quarter-mile of FINR's property boundary. Hardee County approved FINR's application and promptly amended the comprehensive plan to reflect the change.

Approximately three years later, Hardee County granted a special exception to the setback requirements on behalf of CF Industries. This special exception allowed CF Industries to pursue phosphate mining activities closer to the border of FINR's property. FINR filed a claim under the Bert J. Harris, Jr., Act ("Harris Act") alleging that allowing phosphate mining produced excessive noise, vibration and dust. FINR claimed these externalities reduced the value of the property by preventing its best use as a rehabilitation facility. Hardee County filed a motion to dismiss for failure to state a claim. The trial court agreed, holding that FINR could not state a cause of action under the Harris Act.

The Second DCA reversed the trial court's determination and held that FINR could state a claim under the Harris Act based on the Act's plain

language and stated purpose. In doing so, the Second DCA acknowledged its holding directly conflicted the First DCA's ruling in *Smith v. Jacksonville*. However the Second DCA distinguished its reasoning on grounds that the Harris Act should not be confined to actions similar to regulatory takings. The Second DCA sought to give effect to the Legislature's indicated intent to create a separate and distinct cause of action from regulatory takings. The Court relied on a broad interpretation of the language of the Harris Act to buttress this distinction. The Legislature did not expressly restrict what property the Harris Act applied to, and therefore the Court held the Act's language to indicate a causation requirement. In other words, the government's action must bring about the decrease in value of the real property. The government needs not directly target regulation towards the real property, only directly cause its decrease in value. Thus, according to the Second DCA, without direct causation, the Harris Act provides no relief.

Applying that logic, the Second DCA determined that Hardee County's grant of the special exception directly affected FINR's vested right to develop its rehabilitation center. Because FINR properly alleged a direct causal connection the Second DCA held that FINR stated a valid cause of action and reversed the trial court's dismissal of FINR's complaint.

**An assignee with a possibility of reverter has no legal right to contest eminent domain proceedings unless the condition giving rise to the reverter has taken place. *Homestead Land Group, LLC v. City of Homestead*, No. 3D14-2448, WL 3479418 (Fla. 3d DCA June 3, 2015).**

This case arose as an appeal to a final judgment allowing the City of Homestead ("City") to proceed with acquiring property via condemnation. Homestead Land Group ("HLG") sought to contest the City's valuation of a parcel of a larger property that HLG argued it obtained an interest in as assignee from the owner of record.

Miami Baptist Association ("Miami Baptist") originally owned the entire parcel in question. Miami Baptist transferred the entire property to Perine Baptist ("Perine") in 2007

upon the condition that if Perine were unable to secure proper zoning for the construction of a church, the title would revert back to Miami Baptist. In 2014, the City initiated eminent domain proceedings to acquire a portion of the property Perine received from Miami Baptist in 2007. Perine participated throughout the litigation. Miami Baptist, while properly noticed, did not participate. Before the parties entered a stipulated final judgment, Perine gifted the remaining property and the proceeds from the eminent domain proceedings back to Miami Baptist. Miami Baptist subsequently sold the all the property not subject to the eminent domain proceedings to HLG. As part of that sale, Miami Baptist assigned any right it may have had in the condemned property to HLG as well. The day before the stipulated final judgment was to be entered, HLG contested the eminent domain proceeding and asserted that it was the true owner by operation of the possibility of reverter contained in the 2007 deed between Miami Baptist and Perine. The trial court denied HLG's objections and HLG appealed that decision.

The Third DCA affirmed the ruling of the trial court, holding that HLG entered no evidence to support a finding that the possibility of reverter could be exercised. In other words, there was no evidence that Perine ever failed to secure the proper zoning applicable for the construction of a church. Therefore, although HLG was an assignee of any interest Miami Baptist may have had in the parcel, Miami Baptist's possibility of reverter never vested. Accordingly, HLG had no rights in the property and thus had no ground to contest the eminent domain proceedings.

**An easement agreement describing an easement is coterminous with the boundaries and dimensions of the easement. The agreement is not a mere description of where the right to access may be exercised. *Condron v. Arey*, No. 5D13-3593, 2015 WL 2364301 (Fla. 5th DCA May 5, 2015).**

A deed reserving a perpetual easement used the language "over, upon and across" to describe a ten foot "Easement Area" on the servient

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## CASE LAW UPDATE

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estate, which the owners of the dominant estate may use to access the beach. The parties to the lawsuit all agreed that the Easement Agreement and subsequent amendments to the Easement Agreement established a valid easement. However, the parties disagreed as to the extent of the easement. Specifically, the appellants argued that the easement described a general area on the servient estate that may be used for ingress and egress between the beach and dominant estate. However, the appellees considered the Easement Agreement to convey use of the entire ten feet described by the Agreement.

The Fifth DCA looked at the intent

of the parties to determine the extent of the express easement. The Court held that the language “over, upon and across” was explicit proof that the parties intended the easement to cover the entire area described. According to the Court, the word “over” refers to the general portion of the servient estate that the dominant estate may use for access. However, the words “across” and “upon” serve to clarify that the right of access includes the entire dimensions described by the Easement Agreement. The Court cited prior cases all using the same language to support its determination that the parties clearly intended the easement to cover the entire area described. This reasoning was further supported by evidence of the parties’ intention when drafting the Easement Agreement, since the parties stated in the Agreement that

the easement area was to “remain a private, perpetual and non-exclusive easement for the use and benefit” of the appellees.

Another issue before the Court on cross-appeal was whether the Easement Agreement provided for horses to cross the servient estate. The Court relied on prior holdings to stipulate that where an easement is created in general terms, that easement will be construed as “creating a general right for use of all reasonable purposes.” Therefore, since the Easement Agreement provided for a general right of beach access only limited by a prohibition on motorized use, and because there was substantial evidence that horses were permitted to use the portion of beach accessible from the easement, the trial court erred in disallowing equestrian travel through the easement.



# The Link Between Future Flood Risk and Comprehensive Planning

by Erin L. Deady, Esq., AICP, LEED AP and Thomas Ruppert, Esq.

## Introduction

While discussion about sea level rise and climate change in Florida has sometimes been the center of controversy, in 2015 the Florida Legislature passed SB 1094, focusing on flood risk and flood insurance. As part of this, SB 1094 requires consideration of future flood risk from storm surge and sea level rise in certain portions of local government comprehensive plans. As comprehensive plans must be based upon professionally accepted sources of data, future flood risk from storm surge and sea level rise should very likely include the fact that the types of weather and flooding issues we have to plan for in Florida are also undergoing changing conditions.

This review includes an overview of the history of sea level rise and climate planning in Florida law as well as an update of the specifics from SB 1094 and how it is likely to be implemented. Also, we link together other Federal policy shifts in insurance,

risk analysis and climate policy and what they may mean for local governments in Florida.

While there are numerous “sustainability” related initiatives associated with climate change or sea level rise, our focus in this overview is more on the linkage between climate change, flooding, storm surge, insurance, sea level rise and its evolution in Florida law. Florida has made progress in terms of recognizing the changing conditions with which we have to plan for future impacts to our communities. New data, modeling tools and information are being developed rapidly in terms of infrastructure and habitat impacts from future flood risk. With this reality comes responsibility for considering those linkages when we plan our communities.

## Florida’s Early Steps on Greenhouse Gas Emissions, Renewable Energy and Climate

In 2006-2007, the discussion

regarding climate change in Florida began to take a more public stage. The first major steps were taken by then Governor Bush who signed into law the Renewable Energy Technologies and Energy Efficiency Act in June 2006. A major component of the Act was the creation of the new Florida Energy Commission in an advisory role related to state energy policies. The first report of the Commission was also required to include recommended steps and a schedule for the development of a state climate action plan. The report states:

Though some uncertainty still surrounds climate change and the appropriate state policy response, Florida’s 1,350 mile coastline makes its effects – a primary one being sea-level rise – a major concern. Though the scientific community continues to review the potential effects of climate change, it clearly agrees that increasing greenhouse gas

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concentrations are causing an increase in global temperatures, and that man is primarily responsible for this increase. The FEC's Climate Change recommendations are hinged on four areas, and set targets to reduce greenhouse gases, require an inventory of such, put state government in a position to lead by example through education and unification of Florida's energy governance.

In 2007, with a transition in the Governor's office to Charlie Crist, the climate discussion continued with several executive orders and policies enacted. First and foremost, three (3) executive orders were crafted and signed focusing on reductions of greenhouse gas emissions:

- EO 07-126: *Leadership by Example: Immediate Actions to Reduce Greenhouse Gas Emissions from Florida State Government*, which mandates that the state government reduce its greenhouse gas (GHG) emissions by 10% by 2012, 25% by 2017, and 40% by 2025.
- EO 07-127: *Immediate Actions to Reduce Greenhouse Gas Emissions within Florida*, focuses on a statewide reduction of utility GHG emissions to 2000 levels by 2017, 1990 levels by 2025, and 80% of 1990 levels by 2050. The Order also addresses renewable energy targets and vehicle emissions standards.
- EO 07-128: *Establishing the Florida Governor's Action Team on Energy and Climate Change* to create an Energy and Climate Change Action Plan to achieve the targets set out in EO 07-127.

In the 2008 legislative session, HB 7135 was passed to set up a framework for complying with provisions in the aforementioned Executive Orders. In summary, the bill included the "Florida Climate Protection Act" to create a greenhouse gas ("GHG") cap and trade program for utilities and development of a renewable portfolio standard ("RPS"). The bill also dealt with gasoline standards for

ethanol as well as appliance energy efficiency standards. It also authorized the Executive Office of the Governor to include in the state comprehensive plan goals, objectives, and policies related to energy and global climate change amending Section 187.201, F.S. Finally, it also required state, county and municipal buildings to be built to a "green" standard. In 2008, Florida also adopted California's Motor Vehicles Emissions Standards. Interesting to note, Section 186.007(3), F.S., still includes language regarding the state comprehensive plan related climate change today, likely a remnant of this HB 7135 authorization:

...the Executive Office of the Governor may include goals, objectives, and policies related to the following program areas: economic opportunities; agriculture; employment; public safety; education; health concerns; social welfare concerns; housing and community development; natural resources and environmental management; energy; global climate change; recreational and cultural opportunities; historic preservation; transportation; and governmental direction and support services.

In 2008, HB 697 was also passed amending Chapter 163, F.S., to include greenhouse gas reduction strategies in Comprehensive Plans. More specifically, the law required:

- Future land use elements to include energy-efficient land use patterns and GHG reduction strategies;
- Traffic-circulation elements to incorporate transportation strategies to reduce GHG emissions;
- Land use maps in the future land use element to identify and depict factors that affect energy conservation;
- Housing elements to include energy efficiency in the design and construction of new housing and use of renewable energy resources; and
- Each unit of local government within an urbanized area to amend the transportation element to incorporate transportation strategies addressing reduction in greenhouse gas emissions;

The focus to this point on climate-related issues had been largely on

reductions of GHG emissions. But this began to shift in 2009 when the Florida Energy & Climate Commission began meeting. Then Governor Crist also joined numerous other governors at high profile climate and energy-related events and penned multiple support letters for Federal climate and energy initiatives. 2009 is also the year when American Recovery and Reinvestment ("ARRA") funds started being allocated at the Federal, state and local levels. The State of Florida's allocation under its State Energy Program was \$126 Million and \$168 Million under the Energy Efficiency Conservation Block Grant portion of ARRA. Numerous grants to institutional, private sector, home and business owners and local governments were made to promote renewable, clean and energy efficiency and rebate projects.

In the transition years of 2011-2012, energy policy in the State was shifted over to the Department of Agriculture and Consumer Services with more of a focus on policy development than managing grants from ARRA funds which were coming to an end. Several priorities were reorganized in these years in terms of the integration between growth, climate, energy and sea level rise.

A new concept appeared in Chapter 163, F.S.: "adaptation action areas" ("AAAs"). HB 7202 included the concept which was introduced into a local government's group of tools to address these issues. This is a permissive option for local governments to address sea-level rise adaption as part of the coastal management element. Potential criteria to consider when developing an "AAA" include, but are not limited to: areas for which the land elevations are below, at, or near mean higher high water, areas with a hydrologic connection to coastal waters, or areas which are designated as evacuation zones for storm surge. This addition is reinforced with a definition for "adaptation action area" or "adaptation area," which is "a designation in the coastal management element of a local government's comprehensive plan which identifies one or more areas that experience coastal flooding due to extreme high tides and storm surge, and that are vulnerable to the related impacts of rising sea

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levels for the purposes of prioritizing funding for infrastructure needs and adaptation planning.” Other changes in 2011 occurred, for example, the law previously required that the coastal management element limit “public expenditures that subsidize development in high-hazard coastal areas.” The new law changed “high-hazard coastal areas” to “coastal high-hazard areas”. Some argue that this concept was strengthened with this language change. Up until this point, “future conditions” related to flood hazard planning was not a concept contemplated in the law and the focus was on storm readiness and planning to address current flooding conditions.

In 2011, with the elimination of Rule 9J-5, F.A.C., and consolidation of some of the more detailed provisions of that rule into Chapter 163, F.S., some argue that local governments gained wider latitude in terms of what they could address in their Comprehensive Plans on these issues. Regardless of the “flexibility” some of the changes afforded, many of the GHG reduction strategies required in HB 697 from 2008 were eliminated from Chapter 163, F.S., altogether.

### **Addressing Sea Level Rise Head On in Comprehensive Plans**

The year 2015 marked the start of considering future flood impacts in Florida Comprehensive Plans, including the impact of sea level rise on flood risk. In 2015 the Florida Legislature passed, and the Governor signed into law May 21, 2015, SB 1094 “Peril of Flood.” In summary, the bill:

- Requires coastal management plans to include the reduction of flood risks and losses, creates new requirements related to flood elevation certificates, and revises requirements related to flood insurance.
- Requires local governments to now include development and redevelopment principles, strategies, and engineering solutions that reduce flood risks and losses within coastal areas in the Coastal Management Element of their Comprehensive Plan.

- Requires surveyors or mappers that complete an elevation certificate to submit a copy of the certificate to the Division of Emergency Management within 30 days of its completion.
- Allows insurers to sell “flexible” flood insurance coverage which is defined as coverage for the peril of flood that may include water intrusion coverage and differs from standard or preferred coverage within certain parameters.
- Includes numerous other provisions ranging from supplemental flood insurance policy requirements to what needs to be on the declaration page of a premium.

From a planning perspective, the most notable changes relate to Coastal or Coastal Management Elements of Comprehensive Plans. Generally speaking, local governments in coastal areas or contiguous to specific areas must include a Coastal Management Element in their comprehensive plan. This Element must set forth the principles, guidelines, standards, and strategies that shall guide the local government’s decisions and program implementation and it must be based on studies, surveys, and data. The plan must contain a redevelopment component which outlines the principles which shall be used to eliminate inappropriate and unsafe development in coastal areas. SB 1094 modified the language of the original section to add significant detail as to what the mandatory redevelopment component must contain including:

1. Development and redevelopment principles, strategies, and engineering solutions that reduce the flood risk in coastal areas which results from high-tide events, storm surge, flash floods, stormwater runoff, and the related impacts of sea-level rise.
2. Encouraging the use of best practices development and redevelopment principles, strategies, and engineering solutions that will result in the removal of coastal real property from flood zone designations established by the Federal Emergency Management Agency.
3. Identifying site development techniques and best practices that may reduce losses due to flooding and

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claims made under flood insurance policies issued in this state.

4. Being consistent with, or more stringent than, the flood-resistant construction requirements in the Florida Building Code and applicable flood plain management regulations set forth in 44 C.F.R. part 60.
5. Requiring that any construction activities seaward of the coastal construction control lines established pursuant to Section 161.053, F.S. be consistent with Chapter 161, F.S.
6. Encourage local governments to participate in the National Flood Insurance Program Community Rating System administered by the Federal Emergency Management Agency to achieve flood insurance premium discounts for their residents.

With this new law, Section 163.3178(2)(f)1., F.S., now includes “sea-level rise” as one of the impacts that must be addressed in the “redevelopment principles, strategies, and engineering solutions” to reduce flood risk. How these new requirements will be met remains to be seen. Several local governments have already begun completing vulnerability assessments related to future flood risk which could be used to meet these requirements. The bottom line is that there are new considerations in meeting these requirements as well as mutual benefits from planning for future flood risk.

### **Issues to Consider in Implementation of Future Flood Risk Requirements**

A compliance approach for these new requirements would appear to be at the option of the local governments that are required to have Coastal Management Elements in their Comprehensive Plans with regards to when they must be addressed. Section 163.3191(1), F.S., still requires local governments to evaluate their plans at least once every 7 years to determine if amendments are necessary to reflect relevant changes in state law. That said, a local government also has the authority pursuant to Section 163.3191(2), F.S., to make a

determination that amendments are necessary sooner than that 7-year requirement. With that, local governments will have discretion in how they want to comply with these new future flood risk requirements and could do so sooner than their next required evaluation and appraisal report if they chose to do so. The question is not if, it's when.

Issues to consider in meeting these new requirements related to future flood risk primarily relate to the data and timeframes that will be used to support new strategies or policies. Section 163.3177(1)(f), F.S., states that a Comprehensive Plan,

“...shall be based upon relevant and appropriate data and an analysis by the local government that may include, but not be limited to, surveys, studies, community goals and vision, and other data available at the time of adoption of the comprehensive plan or plan amendment. To be based on data means to react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption of the plan or plan amendment at issue.”

The Section goes on to state that data must be taken from professionally accepted sources. Local governments are not required to generate new data. There are numerous resources for considering future flood risk in Comprehensive Plans and the beauty will be in the eye of the beholder. But local governments should consider the source of data to meet these requirements and whether or not it is appropriate under the circumstances.

Additionally, Section 163.3177(5)(a), F.S., states that each local government comprehensive plan must include at least two planning periods, one covering at least the first 5-year period occurring after the plan's adoption and one covering at least a 10-year period. Considering data and timeframe requirements together raises issues that warrant further consideration in the planning process such as:

- What type of data will be used for developing principles, strategies, and engineering solutions that reduce the flood risk in coastal areas which results from high-tide

events, storm surge, flash floods, stormwater runoff, and the related impacts of sea-level rise? What data is available? If a local government wants to consider generating it, how and what tools are available? Should the data only encompass the minimum 5-10 year time periods or much longer time periods? What about developing best practices among local governments that are already looking out 40, 50, and more years when considering sea-level rise?

- What type of data is needed to support development and redevelopment principles, strategies, and engineering solutions that will result in the removal of coastal real property from flood zone designations established by the Federal Emergency Management Agency? The array of strategies could be varied from “retreat” or limitations on growth in certain areas to requiring freeboard ordinances to build at higher elevations above base floor.
- What type of information is needed to identify site development techniques and best practices that may reduce losses due to flooding and claims made under flood insurance policies issued in this state? This could most certainly include freeboard ordinances or further modifications to floodplain regulations.
- What is needed to “encourage” local governments to participate in the National Flood Insurance Program Community Rating System administered by the Federal Emergency Management Agency to achieve flood insurance premium discounts for their residents?

What is clear is that these new requirements focusing on mitigating future flood risk would benefit from the best datasets possible and timeframes that are far enough out that they can actually help project when the damage will occur and where. For instance, a 5- or 10-year planning timeframe may not be far enough out to see any appreciable increase in future flood risk from a modeling perspective. But a 15- or 20-year timeframe might be far enough out to make decisions related to future flood risk and 50-year or longer timeframes, allow for consideration of future flood risk in longer-term infrastructure projects.

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The challenge will be to link major planning decisions such as where areas can develop, where infrastructure should be placed or retrofitted and what habitat to consider acquiring or managing. The harmonizing will occur by tying the “useful life” of infrastructure or investment decisions with where the future flood impacts will occur and when. Where the rubber will meet the road will be the goals, objectives and policies that are required to meet these new requirements.

### **National Flood Insurance Program Overhaul and Sea Level Rise**

The National Flood Insurance Program (“NFIP”) administered by the Federal Emergency Management Agency (“FEMA”) provides federally backed flood insurance within communities that enact and enforce floodplain regulations. As of October 2013, there were 5.5 million residential and commercial policies in force, with over \$1.28 trillion in written coverage with annual premiums of about \$3.8 billion. From 1978 through October 2013, over 2 million losses were paid, totaling over \$50 billion. Over 2 million NFIP policies are written on Florida properties, with approximately 268,500 policies receiving subsidized rates. This accounts for approximately 37% of the total policies written by the NFIP.

Flood insurance through the NFIP is only available in communities that adopt and enforce federal floodplain management criteria (over 21,600 communities in 56 states and territories participate in the NFIP). The Flood Disaster Protection Act of 1973 made the purchase of flood insurance mandatory for the protection of property located in Special Flood Hazard Areas. Special Flood Hazard Areas are defined by FEMA as high-risk areas with a 1% chance of flooding each year, also known as the 100-year or base flood. A home in a Special Flood Hazard Area has a better than a 1 in 4 chance of flooding during a 30-year mortgage. While the NFIP has been effective in making new buildings safe from damage from the 1% chance flood, damage still results from floods that exceed the base flood, from flooding in unmapped areas, and from

flooding that affects buildings constructed before the community joined the NFIP.

In 2012, the Biggert-Waters Flood Insurance Reform Act (“Biggert-Waters Act”) reauthorized the NFIP for 5 years. Key provisions of the legislation required the NFIP to raise rates to reflect true flood risk, make the program more financially stable, and change how flood insurance rate maps (“FIRM”) updates impact policyholders. These changes would have eventually resulted in premium rate increases for approximately 20% of NFIP policyholders nationwide. The Act increased flood insurance premiums for second homes, business properties, severe repetitive loss properties, and substantially-improved and substantially-damaged properties that were receiving subsidies. Policyholders whose communities adopt a new, updated FIRM that results in higher rates would have experienced a 5-year phase in of rate increases to achieve rates that incorporate the full actuarial cost of coverage. The passage of the Biggert-Waters Act was obviously not without controversy.

The Consolidated Appropriations Act of 2014 and the Homeowner Flood Insurance Affordability Act of 2014 rolled back and modified some provisions of the Biggert-Waters Act. In summary the new provisions:

- Reduced the mandatory rate increases for subsidized properties from 25% annually to no less than 5%, generally not to increase more than 18 percent annually.
- Properties that remain subject to the 25% annual increase include older business properties, older non-primary residences, severe repetitive loss properties, and pre-FIRM properties.
- The 20% annual phase in of premium increases after adoption of a new or updated FIRM was reduced to a maximum of no more than an 18% annual premium increase. Policyholder refunds were provided to those whose rate increases were revised by the 2014 changes.
- Additional revisions included increasing the maximum flood insurance deductibles, directing FEMA to consider property specific flood mitigation in determining a full-risk rate, and creating the position of a Flood Insurance Advocate.

FEMA develops maps for coastal flood hazards based on *existing* shoreline characteristics, wave and storm climatology at the time of the flood study (which is the underlying basis for FIRMs). In accordance with the current Code of Federal Regulations, FEMA does not map flood hazards based on anticipated future sea levels or flood risk. FEMA’s basis for this is that over the lifespan of a flood study for establishing FIRMs, changes in flood hazards from sea level rise and climate change are typically not large enough to affect the validity of the study results. Therefore, FIRMs will not be very helpful in evaluating scenarios for future flood risk without further analysis to meet the new Chapter 163, F.S. future flood risk requirements.

This current versus future flood risk analysis is about to change. In accordance with Biggert-Waters, FEMA is to establish a Technical Mapping Advisory Council that will provide recommendations on flood hazard mapping guidelines—including recommendations for future mapping conditions such as the impacts of sea level rise and future development. FEMA will be required to incorporate future risk assessment in accordance with the recommendations of the Council.

Under the Community Rating System (“CRS”), communities can be rewarded for doing more than simply regulating construction of new buildings to the minimum national standards. With NFIP and mapping reforms already being implemented, communities are looking for ways to offset or mitigate the impacts of rate adjustments and CRS has become a more important solution.

### **FEMA’s Community Rating System Program**

“Encouraging” local governments to participate in CRS to achieve flood insurance premium discounts for their residents is a new SB 1094 requirement. The CRS recognizes community efforts beyond the minimum standards by reducing flood insurance premiums for the community’s property owners. Under the CRS, the flood insurance premiums of a community’s residents and businesses are discounted to reflect that community’s work to:

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## THE LINK

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- Reduce flood damage to existing buildings,
- Manage development in areas not mapped by the NFIP,
- Protect new buildings beyond the minimum NFIP protection level,
- Preserve and/or restore natural functions of floodplains,
- Help insurance agents obtain flood data, and
- Help people obtain more cost effective flood insurance.

CRS discounts on flood insurance premiums range from 5% up to 45%. Those discounts provide an incentive for new flood protection activities that can be undertaken to mitigate impacts in the event of a flood. To participate in the CRS, a community can choose to undertake some or all of the 19 public information and floodplain management activities described in the CRS Coordinator's Manual. Based on the points the community earns, they are assigned a class rating of 1 to 10.

Communities can get extra points by undertaking various activities. FEMA will also review activities not listed in the Coordinator's Manual for credit based upon how well those activities increase public safety, reduce property damage, avoid economic disruption and loss, and protect the environment. A community can work with FEMA upfront on any of these additional activities to assure they will translate into scored points and result in actual improvement in the rating process.

One area of overlap related to sea level rise is that the 2013 Coordinator's Manual included new provisions related to credit for climate change and sea level rise planning. This recognizes that the future of how floodplains will look and be managed is an important consideration in planning. Factor's listed affecting future flood risk are included in the Manual such as: increased impervious surfaces in developing watersheds, beach nourishment projects, new fill in floodways, rising sea levels and changes in natural functions of floodplains. While FIRM maps do

not consider these future impacts on the regulatory side, CRS incentivizes their consideration for credits in the following ways:

- Credit is provided under Section 322.c for communities that provide information about areas (not mapped on the FIRM) that are predicted to be susceptible to flooding in the future *because of climate change or sea level rise*.
- To become a Class 4 or better community, a community must (among other criteria) demonstrate that it has programs that minimize increases in *future flooding*.
- To achieve CRS Class 1, a community must receive credit for using regulatory flood elevations in the V and coastal A Zones that reflect future conditions, *including sea level rise*.
- Credit is provided under Section 342.d when prospective buyers of a property are advised of the potential for flooding *due to climate changes and/or sea level rise*.
- Credit is provided under Section 412.d when the community's regulatory map is based on future-conditions hydrology, *including sea level rise*.
- Credit is provided under Section 452.a if a community's stormwater program regulates runoff from *future development*.
- Credit is provided under Section 452.b for a community whose watershed master plan manages *future peak flows* so that they do not exceed present values.
- Credit is provided under Section 512.a, Steps 4 and 5, for flood hazard assessment and problem analysis that address areas likely to flood and flood problems that are likely to get worse in the future, including (1) changes in floodplain development and demographics, (2) development in the watershed, and (3) *climate change or sea level rise*.

As of May 2014, over 235 counties and municipalities in Florida were already in the CRS program. So for communities to meet the new SB 1094 of "encouraging" participation in CRS, a community could 1) enter into the program for the first time, 2) potentially strive to improve the

rating, and/or 3) define policies to maintain or enhance its rating. One way to enhance a rating would be to apply for the above listed credits related to future flood risk analysis. Further analysis shows that upwards of 518 points could be available through addressing sea level rise in the CRS process. Given that the national average Class in CRS is an "8" (1,000-1,499 points and resulting in a 10% reduction in premiums in a Special Flood Hazard Area), 518 "extra" points could become important to achieve a 7, 6, or better Class rating (1,500-1,999/2,000-2,499 resulting in a 15-20% reduction in premiums in a Special Flood Hazard Area).

The savings can be demonstrable. As of January, 2014, there were 1,903,435 policies in effect in Florida with \$923,900,922 in premium costs and \$176,797,176 in CRS savings (19.14% saved). Miami-Dade County had the highest number of policies by far at 186,610 with \$68,493,847 in total premium costs saving \$19,454,923 (28.4% saved). Non-CRS communities spent had total premium costs of \$94 million and received no discount.

Only 18 out of 235 communities in Florida had achieved a Class Rating of 5 and no communities in Florida as of May 2014 had achieved a Class Rating of 4. Given that these future flood risk criteria are relatively new in the CRS evaluation process, FEMA should be consulted to determine examples of where these points have been awarded and what data was used to achieve them.

### **Other Federal Policy Initiatives to Consider**

While Florida law now requires consideration of future flood risk due to sea level rise, Flood Insurance Rate Maps of the NFIP are heading in that direction, and the CRS incentivizes consideration of sea level rise, still other federal actions and changes also promote or assist communities in incorporating sea level rise into their thinking and activities. Examples in this area include:

### **U.S. Army Corps of Engineers ("Corps"):**

The Corps has considered sea-level change in its planning activities since 1986. This is separate from the regulatory aspects of its mission, but

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in 2000, sea-level change considerations were included within its Planning Guidance Notebook. In 2009 the Corps released its first “Engineer Circular (“EC”)” 1165-2-211, “Incorporating Sea-Level Change Considerations in Civil Works Programs,” and EC 1165-2-212 “Sea-Level Change Considerations for Civil Works Programs”. Most recently in December 2013, EC 1100-2-8162 extended this guidance. In July 2014 the Corps created guidance (Engineer Technical Letter 1100-2-1) covering “Procedures to Evaluate Sea Level Change: Impacts, Responses and Adaptation”. The Corps also has available a tool to create vulnerability assessments of non-developed natural coastlines or beach protection projects which was updated for use with the new sea-level guidance.

Considered “regulations”, these policies establish a framework for incorporating the direct and indirect physical effects of projected future sea level change across a project life cycle in managing, planning, engineering, designing, constructing, operating, and maintaining Corps projects and systems of projects.” Again, this does not apply to the Corps’ regulatory review duties of permits; rather, the need to take account of changing sea levels only currently applies to projects the Corps is bound to undertake under Congressional funding and direction.

### **National Environmental Policy Act (“NEPA”):**

On December 24, 2014, the Council on Environmental Quality (“CEQ”) released *Revised* Draft Guidance on how federal agencies should evaluate GHG emissions and the impacts of climate change when conducting reviews pursuant to NEPA evaluation. This guidance updates and expands previous guidance from 2010 and applies to all proposed Federal actions, including land and resource management activities.

Focusing on the climate change and sea level aspects, the new guidance directs agencies to consider the implications of climate change impacts on the proposed action, including

potential adverse environmental effects that could result from drought or sea level rise. While agencies have wide discretion in how to consider climate change and sea levels, two key considerations are: 1) reliance on agency experience and expertise to determine whether an analysis of GHG emissions and climate change impacts would be useful and 2) application of the “rule of reason” to ensure that the type and level of analysis is appropriate for the anticipated environmental effects of the project. The focus is on the long term viability of the project tying design alternatives to climate change effects on a proposed Federal action of the useful life of that project. This is especially the case if it will be located in a vulnerable area or impact vulnerable populations or resources. With the NEPA guidance, the take home message is that while the level of analysis is somewhat flexible, addressing the issue is not.

### **Federal Flood Risk Management Standards (“FFRMS”)**

On January 30, 2015, the President signed Executive Order (“EO”) 13690, “Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input”, which amended E.O. 11988, Floodplain Management, issued in 1977. The standard targets federal investments that are implemented through Hazard Mitigation Assistance Grants, the Public Assistance Program, and any other FEMA grants when they fund construction activities in or affecting a floodplain. These actions include: (1) acquiring, managing, and disposing of Federal lands, and facilities; (2) providing federally undertaken, financed, or assisted construction and improvements; and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities. This applies to all new construction and substantially improved structures (e.g., reconstruction, rehabilitation, addition, and any other improvement) the cost of which equals or exceeds 50% of the value of the structure. The FFRMS builds upon this EO and is to be incorporated into existing Federal department and agency processes used to implement it.

The FFRMS does not impact minimum floodplain management criteria in 44 CFR Part 60 for participation in the NFIP, FIRM or the rating/claims process under the NFIP. What it does do is require all Federal investments in and affecting floodplains to meet higher flood risk standards such as federally funded buildings, roads and other infrastructure. Individual federal agencies will undertake separate rulemaking to implement the EO. The standard outlines 3 approaches for resiliency:

- Utilizing best-available, actionable data and methods that integrate current and future changes in flooding based on science,
- Two or three feet of elevation, depending on the criticality of the building, above the 100-year, or 1%-annual-chance, flood elevation, or
- 500-year, or 0.2%-annual-chance, flood elevation.

It’s important to note that sea level rise considerations are also part of this analysis including 1) use of the U.S. Department of Commerce’s - National Oceanic and Atmospheric Administration’s (“NOAA’s”) or similar global mean sea-level-rise (“GMSLR”) scenarios, adjusted to local relative sea-level (“LRSL”) conditions and 2) a combination of the LRSL conditions with surge, tide, and wave data using state-of-the-art science in a manner appropriate to policies, practices, criticality, and consequences (risk).

Comments on the *Draft Guidelines for Implementing Executive Order, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input* were taken earlier this year with a May deadline.

Among the many questions that the new FFRMS has raised, its potential impact on the National Flood Insurance Program and Housing and Urban Development funding and grants have been critical. In response, both FEMA ([http://www.fema.gov/media-library-data/1433261696599-041232427db8c587d74fd1b5ac-65c7fe/FFRMS\\_FEMA\\_Public\\_6-2-2015.pdf](http://www.fema.gov/media-library-data/1433261696599-041232427db8c587d74fd1b5ac-65c7fe/FFRMS_FEMA_Public_6-2-2015.pdf)) and HUD([http://portal.hud.gov/hudportal/HUD?src=/press/speeches\\_remarks\\_statements/2015/Statement\\_071715](http://portal.hud.gov/hudportal/HUD?src=/press/speeches_remarks_statements/2015/Statement_071715))

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have released information on how the FFRMS implementation guidelines would - and *would not*—impact these programs. FEMA states that the FFRMS will not directly impact flood insurance rate maps, policy premiums, or require properties outside of current Special Flood Hazard Areas to have flood insurance.

As for HUD funding, HUD states:

The proposed rule would not apply to single-family home mortgages for acquisition or refinancing of existing homes under the Federal Housing Administration or any other program. The FFRMS would have no effect on the vast majority of privately owned homes and businesses. The new standard would be incorporated into the existing review process for mortgage insurance, so the elevation or floodproofing component would not apply unless new construction or substantial improvement to an existing structure in a floodplain is proposed with Federal funds. The FFRMS elevation or floodproofing component would only apply when Federal program funds are used to build, or significantly retrofit or repair, structures in and around floodplains, to ensure that those structures are resilient, safer, and long-lasting.

### **The Confluence of Data, Insurance and Planning Related to Sea Level Rise**

The many federal and state programs now incorporating climate change and sea level rise create real synergy supporting local governments integrating appropriate policies to address these challenges in their comprehensive plans. The data needed to support such policies and new risk mapping is some of the same information that likely will also be needed to serve as a foundation

for meeting the new requirements in Chapter 163, F.S., discussed earlier, that requires coastal management elements to consider future flood risk as exacerbated by sea level rise. Some brief examples can illustrate how federal and state programs and requirements are intertwined and are mutually beneficial:

- Most certainly actual participation or improving Class ratings in CRS far exceeds the new requirements to “encourage” participation in CRS and linking that with future sea level rise hazard data can be a means to improve that Class rating. Whenever a local government actually does analyses of sea-level rise and future scenarios to improve their CRS class rating, such work should be reflected in the Comprehensive Plan’s coastal management element as that would help fulfill the new requirement to consider sea level rise and future flooding impacts.
- Local governments will have to determine what is relevant and appropriate to look at as well as the planning periods that should be used in meeting the new statutory requirements to consider sea level rise as part of the flood perils in coastal areas. Of course, there can be linkages and mutual benefits in collecting and managing good data in this process. An example is that of a local government working to get into the CRS program, or improve its Class rating. A key aspect of that FEMA process is typically developing good elevation and mapping information for future flood risk. This type of data is also the foundation for a vulnerability analysis that identifies future impacts from sea level rise. Principles, strategies, and engineering solutions that reduce the flood risk in coastal areas which result from high-tide events, storm surge, flash floods, stormwater runoff, *and the related impacts of sea-level rise* should be based on where the community is vulnerable to these factors. Therefore, collecting good elevation data can provide credits in the CRS program and

also be a building block for good mapping and as well as the basis of a future flood vulnerability analysis to develop strategies for reducing that risk.

- Another example would include methods to create strategies to remove coastal real property from FEMA flood zone designations or reduce losses due to flooding and claims made under flood insurance policies. In certain areas these strategies may include flood-proofing or elevating properties, voluntary relocation programs or structural solutions. Without having accurate information about what areas will be subject to future flooding and when, the location of where these strategies would be effective is unknown or the extent to which they are needed is also unknown. While mapping flood zones or using FIRMs is quite common to identify risk or repetitive loss, enhancing these data sets with better elevation information and integrating future scenarios would be beneficial in determining the return on investment for actual strategies that reduce loss and future risk consistent with new statutory requirements.

### **Conclusions**

There are numerous examples of local governments that are developing vulnerability analyses, new Comprehensive Plan Elements, ordinances, etc. There are numerous local governments involved in CRS (235 out of over 400 communities in the NFIP in Florida). Finally, there is Federal guidance on regulatory and investment decisions that can serve as an example of how more resilient standards can impact agency decision-making. What lacks in many instances is a holistic approach where all of these numerous policies and initiatives come together at the local level. The extent to which SB 1094 will drive that coordination is unknown at this point, but what is clear, is that these new Chapter 163, F.S. requirements reflect a “sea change” in the way we consider the future of flood risk in our communities.





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# On Appeal

by Larry Sellers, Holland & Knight

*Note: Status of cases is as of August 14, 2015. Readers are encouraged to advise the author of pending appeals that should be included.*

## FLORIDA SUPREME COURT

*Hardee County v FINR II, Inc.*, Case No. SC 15-1260. Petition for review of the 2nd DCA's decision in *FINR v. Hardee County*, 40 FLW D1355 (Fla. 2d DCA June 10, 2015), in which the court held that "the Bert Harris Act provides a cause of action to owners of real property that has been inordinately burdened and diminished in value due to governmental action directly taken against an adjacent property," and certified conflict with the 1st DCA's decision in *City of Jacksonville v. Smith*, 159 So. 3d 888 (Fla. 1st DCA 2015) (question certified). Status: Notice filed on July 8, 2015. Note: the Florida Supreme Court already has accepted jurisdiction to review the question certified in *City of Jacksonville* (see below).

*R. Lee Smith, et al. v. City of Jacksonville*, Case No. SC 15-534. Petition for review of the 1st DCA's decision in *City of Jacksonville v. R. Lee Smith, et al.*, in which the majority of an *en banc* court determined that a property owner may not maintain an action pursuant to the Bert Harris Act if that owner has not had a law, regulation, or ordinance applied which restricts or limits the use of the owner's property. 159 So. 3d 888 (Fla. 1st DCA 2015). Status: Jurisdiction accepted on May 22; briefing tolled pending resolution of suggestion of mootness filed June 19, 2015. Note: Legislation enacted during the 2015 regular session clarifies that the Bert Harris Act is applicable only to action taken directly on the property owner's land and not to activities that are authorized on adjoining or adjacent properties. See Chapter 2015-142, *Laws of Florida* (discussed elsewhere in this newsletter).

*SJRWMD v. Koontz*, Case No. SC 14-1092. Petition for review of decision in *SJRWMD v. Koontz*, 39 Fla. L. Weekly D925a (Fla. 5th DCA 2014), on remand from the Florida Supreme Court, in response to the reversal by

the U.S. Supreme Court in *Koontz v. SJRWMD*, 133 S.Ct. 2586 (2013). The U.S. Supreme Court concluded that an exactions taking may occur even in the absence of a compelled dedication of land and even when the unconstitutional condition is refused and a permit is denied. Subsequently, the 5th DCA adopted and reaffirmed its prior decision in *SJRWMD v. Koontz*, 57 So.3d 8 (Fla. 5th DCA 2009), which affirmed the judgment below. Judge Griffin dissented. Status: Notice filed May 30, 2014.

## FIRST DCA

*South Palafox Properties, LLC, et al. v. FDEP*, Case No. 1D15-2949. Petition per view of DEP final order revoking operating permit for construction and demolition debris disposal facility, DOAH Case No. 14-3674 (final order entered May 29, 2015). Among other things, the final order determines that the appropriate burden of proof is preponderance of the evidence and determines that DEP has substantial prosecutorial discretion to revoke (as opposed to suspend) the permit and that mitigation is irrelevant. Status: Notice of appeal filed June 25, 2015.

*DEP v ZK Mart, et al.*, Case No. 1D15-1791. Appeal from final judgment determining that Section 376.309, Florida Statutes allowed DEP to bring a direct action against Defendant/Appellee Mid-Continent Casualty Company but did not allow DEP to hold Mid-Continent Casualty Company strictly liable for petroleum cleanup under Section 376.308, Florida Statutes, and further concluding that DEP is entitled to declaratory and not injunctive relief. Status: Appeal dismissed on June 24, 2015.

*Parker v. Davis and DEP*, Case No. 1D15-1039. Appeal from DEP final order dismissing with prejudice petitioner's amended petition for formal administrative hearing contesting DEP's authorization of the construction of a docking facility. The final order dismissed the amended petition with prejudice for the following reasons: (1) neither the self-certification, which included general

consent by rule, nor the compliance letter are agency action that would entitle the petitioner to a formal administrative hearing under section 120.57, Florida Statutes, and (2) if any listed document or action could have been agency action, the petition is untimely and does not demonstrate standing, and the agency lacks jurisdiction because petitioner raises real property issues that are outside the jurisdiction of a formal administrative hearing under Chapter 120, Florida Statutes. Status: Appeal dismissed on June 3, 2015.

*Herbits, et al. v. Board of Trustees of the Internal Improvement Trust Fund*, Case No. 1D15-1076. Appeal from a final order dismissing an administrative petition filed by the appellants against the Board of Trustees of the Internal Improvement Trust Fund, which challenges the Trustees' decision to approve the City of Miami's request for a Partial Modification of Original Restriction to Deed No. 19447. The final order dismissed the petitioners' second amended petition on the grounds that the second amended petition: (1) is based upon the defective premise that the land in question is sovereign submerged lands; (2) fails to show that the petitioners as third parties may challenge this minor and purely proprietary Board action under sections 120.569 and 120.57, Florida Statutes; and (3) fails to establish that the petitioners' substantial interests will be affected by the Board's action granting Partial Modification of Original Restrictions to Deed No. 19447. Status: Notice of appeal filed March 9, 2015.

*Save the Homosassa River Alliance, Inc., et al. v. DEP*, Case No. 1D14-5872. Appeal from DEP final order of the Department of Environmental Protection rendered pursuant to Section 373.114(2)(a), Florida Statutes, concluding that Florida Administrative Code Rules 40D-8.041(16) and 40D-8.041(17), which establish minimum flows for the Chassahowitzka and Homosassa River Systems, are consistent with the Florida Water Resource Implementation Rule (Fla.

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Admin. Code Ch. 62-40). DEP Case No. 13-0914 (final order entered November 25, 2014). Status: Affirmed *per curiam* on July 15, 2015.

*Capital City Bank v. DEP*, Case No. 1D14-4652. Appeal from DEP final order approving the county's application for after-the-fact CCCL permit, authorizing the county to construct a rock revetment on Alligator Drive in Franklin County. DEP Case No. 13-1210, DOAH Case No. 14-0517 (final order entered September 8, 2014). Status: Notice of appeal filed October 8, 2014.

*Guerrero, et al. v. Spinrad, et al.*, Case No. 1D14-5465. Appeal from ALJ's final order denying request for attorney fees under Sections 120.595(1), 120.569(2)(e), and 57.105(5), Florida Statutes. DOAH Case No. 14-4860F (final order entered October 31, 2014). Status: Affirmed *per curiam* on July 9, 2015; motion for rehearing and written opinion denied July 28, 2015.

*Guerrero, et al. v. Spinrad, et al.*, Case No. 1D14-4496. Appeal from a DEP final order denying the Guerreros' request for attorney fees, costs and sanctions under Sections 120.569(2)(e) and 120.595, Florida Statutes. DEP Case No. 13-0858, DOAH Case No. 13-2254 (final order entered September 8, 2014). Status: Affirmed *per curiam* on July 9, 2015; motion for rehearing and written opinion denied July 28, 2015.

*Ahler, et al. v. Scott, et al.*, Case No. 1D14-3243. Appeal from final judgment denying petition for writ of mandamus seeking to compel defendants to require Georgia-Pacific to obtain authorization for the use of mixing zones associated with its discharge to the lower St. John's River. Status: Affirmed *per curiam* on May 27, 2015; motion for rehearing *en banc* denied July 9, 2015.

## SECOND DCA

*Geraldson v. Manatee County, et al.*, Case No. 2D15-2057. Appeal from final order of the Administration Commission rejecting the ALJ's recommendation, and finding that the 2013 amendments to the Manatee County Comprehensive Plan are in

compliance. AC Case No. ACC-14-001; DOAH Case No. 14-0940GM (final order filed May 6, 2015). Status: Notice of appeal filed May 11, 2015.

*Florida Audubon Society v. United States Sugar Corporation, Sugar Farms Co-Op and SFWMD*, Case No. 2D14-2328. Appeal from final order renewing Everglades works of the district permits for the United States Sugar Corporation, Sugar Farms Co-Op and Sugar Cane Growers Cooperative of Florida. Status: Affirmed on August 7, 2015.

## THIRD DCA

*Miami-Dade County, et al. v. Florida Power & Light Co., et al.*, Case No.: 3D14-1467. Appeal from final order of the Siting Board certifying two nuclear units at Turkey Point as well as proposed corridors for transmission lines. Status: Oral argument set for August 31, 2015

## FOURTH DCA

*Kijewski v. Northern Palm Beach County Improvement District, et al.*, Case No. 4D14-3402. Appeal from a Final Order of the South Florida Water Management District dismissing Petitioners' Response to District's Order Dismissing Amended Petition for Administrative Hearing and Denying Motion to Transfer Case to ALJ. The petitioners requested a hearing to challenge the modification of a previously-issued conceptual permit

and construction authorization for a stormwater management system for part of the project. The petition for administrative hearing was dismissed twice, with leave to amend, for failure to satisfy the requirements of the Administrative Procedure Act. The petitioners responded with a "Response to District's Order Dismissing Amended Petition for Administrative Hearing" and Request to Transfer Case to the Division of Administrative Hearings. The District's final order dismisses this document with prejudice because it failed to meet the requirements of the Florida Administrative Code; the document was not filed with the clerk and was not timely; and the petitioners failed to allege how their substantial interests will be affected by a modification to the permit. SFWMD Case No. 2014-072-DAO-ERP (final order entered August 11, 2014). Status: Affirmed *per curiam* on July 16, 2015.

## FIFTH DCA

*St. Johns Riverkeeper, Inc., et al., v. SJRWMD, et al.*, Case No. 5D-15-2831. Appeal from a final order of the St. Johns River Water Management District approving issuance of consumptive use permit and environmental resource permit for irrigation and support of a grass-fed cattle ranch. DOAH Case No. 14-2610 (final order entered July 15, 2015). Status: Notice of appeal filed August 13, 2015.

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### Update on Environmental Initiatives at Stetson University College of Law: Wetlands, Turtles, Sharks, and More

Stetson University College of Law continues its commitment to environmental education, scholarship, and service at the local, national, and international level. Stetson Law's environmental programs are coordinated through its Institute for Biodiversity Law and Policy (Biodiversity Institute). The Biodiversity Institute's activities and initiatives for 2014–2015 are highlighted below.

#### **Contributing to international and national conservation efforts:**

This year, Stetson continued its support of the Ramsar Convention on Wetlands, an intergovernmental treaty that promotes the wise use and conservation of wetlands. The treaty has 168 countries worldwide that are the Contracting Parties to the Convention, and Stetson is the only law school that has a memorandum of cooperation with the Convention's Secretariat. Professor Royal Gardner, who is the Director of the Institute for Biodiversity Law and Policy, served as the chair of the Ramsar Scientific and Technical Review Panel (STRP) for the 2013–2015 triennium. The STRP is the Convention's scientific advisory body.

As part of Professor Gardner's work on the STRP, he co-authored a Ramsar Briefing Note with ten scientists, titled "State of the World's Wetlands and their Services to People: A compilation of recent analyses." Available in English, French, and Spanish, which are the official languages of the Ramsar Convention, the briefing note highlights the continued loss and degradation of the world's wetlands and the ecosystem services they provide, and it urges Contracting Parties and policymakers to act to restore and protect wetlands. Professor Gardner discussed the state of the world's wetlands and the STRP's activities in his STRP Chair's report at the 12th Meeting of the Conference of the Contracting Parties to the Ramsar Convention. More than 800 representatives from 140 countries attended this meeting, held in Punta del Este, Uruguay, in June 2015.

In June 2014, Stetson hosted a three-day meeting of the Inter-American Convention for the Protection and Conservation of Sea Turtles (IAC), a regional treaty with 15 countries, including the United States. Stetson students were admitted as observers to this international meeting, which

was conducted in Spanish and English with simultaneous interpretation. The students took a special course on sea turtle protection laws in advance of the meeting. As part of the course, the students conducted research on the laws of IAC member countries, which will be posted on the IAC's website.

Ethan Arthur, a May 2015 Stetson Law graduate, and Professor Gardner gave presentations at the 15th International Wildlife Law Conference, which is co-sponsored by the Biodiversity Institute, in Granada, Spain, in March 2015. Ethan discussed his article proposing that elephants be considered cultural property under an international cultural property treaty as a tool to help stem demand for illegal ivory from decreased elephant poaching. Professor Gardner spoke about the Ramsar Convention's role in wetland conservation and wise use. The Biodiversity Institute plans to host the 16th International Wildlife Law Conference in Gulfport, Florida, in April 2016.

Closer to home, Professor Gardner served as one of three reviewers for the EPA's National Wetland Condition Assessment, which is part of the first

*Law School Liaisons, continued...*



Prof. Gardner with STRP members and national focal points at Ramsar COP12 in Punta del Este, Uruguay. Marcela Bonells, the Ramsar Scientific and Technical Support Officer and a 2012 Stetson Law graduate, is on the far right.

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national survey to estimate the condition of wetlands in the United States. Professor Paul Boudreaux worked with Defenders of Wildlife this year on a variety of matters, including commenting on proposed revisions of the Florida Administrative Code for environmental permitting and changes to the state's proposed overhaul of Florida's imperiled species regulations.

In 2015, the Biodiversity Institute joined the St. Petersburg Ocean Team (SPOT), which is a local consortium of over 15 research institutions and agencies that focus on environmental, marine science, and oceanographic issues. Professor Gardner and Erin Okuno, the Foreman Biodiversity Fellow, attended a SPOT meeting in May and will be involved in SPOT's environmental research and educational activities.



Learning outside the classroom: Professor Long with Research and Writing II students at Little Manatee River State Park.

### **Using innovative methods to teach environmental law:**

In spring 2015, Professor Lance Long taught Research and Writing II—Environmental Law. The course is a special section of Research and Writing II that covers the same fundamental skills as other sections but in an environmental context. The students researched and submitted public comments on the U.S. Fish and Wildlife Service's proposed designation of critical habitat for two species

of endangered Florida cacti: *Consolea corallicola* (Florida Semaphore Cactus) and *Harrisia aboriginum* (Aboriginal Prickly-Apple). The students also drafted an appellate brief on the issue of whether oil fracking near a panther preserve required a Clean Water Act NPDES permit. The class continued its education in the field, on a hiking and camping trip to Little Manatee River State Park.

In Professor Long's Environmental Advocacy course, the students learned about the art and skill of persuasion in the environmental arena. Each student selects a particular environ-



Ramsar course students on swampwalk in Big Cypress National Preserve.

mental issue that is personally meaningful and then must craft a project that consists of a FOIA request, some type of media advocacy, and either a collaborative project with a public or private entity, a draft of a citizen's suit, or some type of legislative advocacy. This year's projects included (1) a collaboration with a homeowner's association that,

when fully completed, will remove all invasive species from the common and private property in a large residential community in Sarasota; (2) a collaboration with a local sea turtle preservation organization and local hotels to ensure compliance with ordinances requiring hotels to remove beach furniture at night during sea turtle nesting season; and (3) a collaboration with a Florida charter school to create and teach an environmental curriculum that will serve as a model

for other Florida schools. The class is a model of combining theory, skills, and experiential learning.

The Biodiversity Institute again offered the Ecosystem Banking Workshop, a voluntary enrichment program that teaches students about market-based approaches that may be used to restore and enhance wetlands and their resources, protect habitat for endangered species, improve water quality, and decrease greenhouse gas emissions. At the end of the spring semester, the students gave presentations based on their case studies of mitigation banks in Florida.

In the fall, Professor Gardner taught the Wetlands Seminar and took students from the class on a field trip to the recently restored Ulele Spring, which is adjacent to Stetson's Tampa Law Center. Thomas Ries, of the Ecosphere Restoration Institute, gave the students a tour of the spring, and Andrew Zodrow, a Stetson Law alumnus who now works for the Hillsborough County Environmental Protection Commission, talked with the students about permitting issues.

In January, the Biodiversity Institute offered a special week-long course on Topics in Biodiversity Law: The Ramsar Convention. This interdisciplinary program with Stetson Law students and University of South Florida graduate students featured video discussions with the Ramsar Secretariat (in Switzerland) and CREHO (in Panama). The course culminated with a field trip to the Western Everglades.

### **Creating a dialogue about environmental challenges:**

In November 2014, Stetson and

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the Environmental Law Institute co-sponsored the Second Annual ELI-Stetson Wetlands Workshop on "Wetlands Enforcement: Mining, Mitigation, and More." The workshop was hosted at Stetson's Gulfport campus, and the presentations focused on the impacts of mining on wetlands and how mitigation and wetland permit enforcement can be used to help protect wetlands from the impacts of mining and other activities. Andrew R. Stewart, of the U.S. Environmental Protection Agency, and Deborah Wegmann, of the U.S. Army Corps of Engineers, delivered two Edward and Bonnie Foreman Biodiversity Lectures as part of the workshop. In early 2015, the *National Wetlands Newsletter* published a special "Mining and Mitigation" issue based on the presentations and issues discussed at the workshop. The Third Annual ELI-Stetson Wetlands Workshop will be held at Stetson in November 2015 and will be supported by a special grant from the ELULS.

This spring, Professor Boudreaux was appointed as the editor in chief of the *Journal of International Wildlife Law & Policy (JIWLP)*. The mission of *JIWLP* "is to address legal and political issues concerning the human race's interrelationship with and management of wildlife species, their habitats, and the biosphere." At Stetson, students have the opportunity to serve as student editors for *JIWLP*, in

which capacity they perform "cite and source" reviews of articles and perform other editing tasks. In addition, select student articles are chosen for publication.

Because of the generosity of Edward and Bonnie Foreman, the Biodiversity Institute again offered the Foreman Biodiversity Lecture Series, which is free to the Stetson and larger Tampa Bay communities. Numerous scientists, attorneys, judges, policymakers, and other experts in environmental law and science have presented as part of the lecture series. The lectures are intended to create an open dialogue about important environmental issues. The speakers this last year included Dr. Bradnee Chambers, Executive Secretary of the United Nations Environment Programme Convention on the Conservation of Migratory Species of Wild Animals; Ignacia S. Moreno, CEO and Principal of The iMoreno Group, PLC, and former U.S. Assistant Attorney General in charge of the Environment and Natural Resources Division of the Department of Justice; Dr. John Carlson, a research fishery biologist with the Southeast Fisheries Science Center for the National Marine Fisheries Service; and Kate Killerlain Morrison, Deputy Executive Director of the Sargasso Sea Alliance.

This spring, Stetson again hosted the International Finals of the Stetson International Environmental Moot Court Competition, which is the world's largest moot court competition devoted exclusively to global environmental issues. Stetson Law founded the competition in 1996 and hosts

the International Finals each spring. This year's problem focused on shark finning and trade restrictions.

Students submitted written memorials and presented oral arguments at regional rounds held around the world, and the top teams traveled to our Gulfport campus to compete in the International Finals in April 2015. This year's semifinalists were the University of Hawaii at Manoa, William S. Richardson School of Law, and the Ateneo de Manila University School of Law. The finalist was the University of the Philippines College of Law, and the champion was the Law Society of Ireland. The ELULS was a co-sponsor of the competition again this year, and ELULS members participated as guest judges at the competition. We are very grateful for everyone's continued support of the competition and are looking forward to the 20th anniversary of the competition this coming year!

### **And a special note of gratitude:**

Thanks to the generous support of Mrs. Bonnie B. Foreman, the Biodiversity Institute was able to add a full-time fellow position to assist with the Biodiversity Institute's education, research, and service activities. Erin Okuno, a 2013 graduate of Stetson Law, started working as the Foreman Biodiversity Fellow in January 2015.

For more information about the Institute for Biodiversity Law and Policy or how to support its programs, please contact Erin Okuno at [okuno@law.stetson.edu](mailto:okuno@law.stetson.edu).

*Law School Liaisons continued....*



Participants, coaches, and competition judges after the championship round at the International Finals of Stetson's International Environmental Moot Court Competition.



## UF Law Update

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

### UF Law New Dean Rosenbury

UF Law named Laura Rosenbury as Dean and Levin, Mabie and Levin Professor of Law. Dean Rosenbury is the first female permanent dean in the law school's 106-year history. She comes to UF from Washington University Law School in St. Louis, where she was a professor and served as vice dean for research and faculty development.

"I am excited to collaborate with faculty, students, staff and the college's loyal alumni network to maximize UF's potential," Rosenbury said. "Building upon the faculty's recent strategic planning process, we will make UF the leader in developing innovative responses to the changing legal services market." Rosenbury said UF Law can keep up with a rapidly changing legal profession by bringing alumni and other practicing professionals into the classroom. She also advocated expanding multidisciplinary work, including in the environmental field, by faculty and students.

### Flournoy Returns to ELULP Faculty Full-Time

Alyson Flournoy, who served four years as Senior Associate Dean for Academic Affairs at UF Law, will return to the Environmental and Land Use Law Program faculty full-time in Spring 2016. She ended her term as associate dean this summer and will devote more time to research during a sabbatical this fall, before returning to ELULP to work with students and programs. Prior to being named Associate Dean, she served as director of the ELULP Program from 1998-2011.

### UF Law Hosts Chinese Scholar

Professors Alyson Flournoy and Christine Klein are hosting a visiting scholar, Xiaoyan Li, who is an associate professor and dean at the School of Law of Shanxi University in China. Professor Li is studying sustainable use of mineral resources, with a focus on coal mining and its environmental

effects. Shanxi Province is one of the biggest regions of energy production in China. Professor Li has published papers on ecological compensation mechanisms for coal resource development and a book on China's mineral resources laws. Professor Li arrived in March and will be visiting for the upcoming academic year.

### Stein Meets with Top Energy Officials

Amy Stein, Associate Professor of Law in the ELULP Program, met in Washington, D.C., with top federal energy officials from agencies such as FERC, DOE, EIA, DOI, and the State Department and the state senators and representatives from the top eleven energy producing states. She was invited to present the University Advisory Board Seminar on *Resiliency and the North American Grid* at The Energy Council's 2015 Energy and Environmental Matters Conference (Washington, D.C., March 5-7, 2015).

### Angelo, Researchers Conclude Everglades Research

As part of a six-person interdisciplinary University of Florida team, ELULP Director Mary Jane Angelo evaluated options for reducing harmful discharges to the estuaries and restoring water flow to the Everglades. In a report commissioned by the Florida Senate, the team concluded that accomplishing these goals would require an extremely large amount of land for treatment and storage of the water.

### Ankersen, Conservation Clinic Inform Public Policy

Tom Ankersen, director of UF Law's Conservation Clinic, served as lead on an interdisciplinary project to develop a website entitled "Accessing the Florida Coast." The site provides collects work that the Clinic has done in the areas of beach access, boating access and working waterfronts. The site was promoted by Florida Sea Grant through an "infomercial"

published in Florida Trend magazine.

A number of the clinic's projects are directed toward law reform. The Clinic did the majority of the substantive work (feasibility study) that led to a successful bill in the 2015 legislative session creating the City of Panama (that still requires a local referendum). Working with colleagues across campus, the Clinic drafted a science plan and a community development plan tailored to natural resource adaptation for the Town of Yankeetown (to be incorporated in the Local Government Comprehensive Plan). The Town adopted these by resolution pending a referendum on the comprehensive plan. The clinic did substantial work on proposed legislation to create a regulatory structure for medical marijuana, focusing on local preemption and land use issues. The legislation ultimately failed to gain passage.

Ankersen also presented his work on "the human right to property" at a Conference at the Universidad de Norte en Barranquilla, Colombia, sponsored in part by the Center for Governmental Responsibility's Law and Policy in the Americas Program.

### Cuba focus of CGR's Annual Americas Conference

Cuba was the focus of the 16th annual Conference on Legal & Policy Issues in the Americas on May 11 at the University of Florida Levin College of Law. The conference was sponsored by the Center for Governmental Responsibility and UF's Center for Latin American Studies.

Conference presenters include a variety of legal scholars, practitioners and government officials who concentrate their activities on Cuba. Several speakers are Floridians who were born in Cuba.

"As Cuba continues to be a major topic for discussion in the United States and especially in Florida, we felt it was time to become acquainted

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with the issues and activities involved,” said Jon Mills, CGR director and UF Law dean emeritus. “Our students and faculty have expressed an interest in learning about these activities, and we think the time is

right for these discussions.”

Speakers included Julia Sweig, formerly the Nelson and David Rockefeller Senior Fellow for Latin American Studies and Director for Latin American Studies at the Council on Foreign Relations; Stephen Zack, past president, American Bar Association; and Miami attorney Antonio Zamora.

In addition to discussing current

issues about Cuba, the conference featured presentations about UF activities in Cuba, including work of the Center for Latin American Studies and the Institute of Food and Agricultural Sciences. Specific panels examined the U.S. and Cuba in the areas of legal education, environment and agriculture, and trade and investment.



## LEGISLATIVE UPDATE

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and prevent comingling with general revenue. None of the implementing bills made their way through the Legislature during the regular session, but several were within the call for the special session and were ultimately part of the Conference Committee Report on the Budget. Both houses also passed their versions of a water bill (SB 918 and HB 7003) that would have authorized Amendment 1 appropriations for various water resource development projects and springs protection. Over \$700 million in water infrastructure projects were proposed by sponsors in the House. These bills did not pass and were not part of the Special Session but formed an important part of the conference committee discussions.

SBs 2514A, 2516A, 2518, 2520A, 2522A and 2524A were filed in the Special Session and ultimately 2514A, 2516A, 2520A and 2522A were approved as part of the Conference Committee Report. SB 52516A was a major revision of the Land Acquisition Trust Fund (LATF) and allocations within the documentary stamp tax. The other bills were fairly minor in that they established new trust funds (known as “baby LATFs”) within different departments to be able to spend Amendment 1 revenues. Separate bills are required by the Florida Constitution to establish new trust funds or retire existing trust funds.

SB 2516A implemented Amendment 1 by inserting the requirement for 33 percent of the documentary stamp revenue to be dedicated to the Land Acquisition Trust Fund. It also authorized refinancing of existing

bonds for Florida Forever and Everglades and placed an overall bonding cap of 58.25 percent on Amendment 1 funds. Additionally, the bill terminated existing dedications of revenue in the LATF for invasive plant removal and other land management programs to be replaced by Amendment 1 revenue. The bill also repurposed the LATF to eliminate references to “acquisition and improvement” of lands to fund a broader array of Amendment 1 issues to provide for maximum flexibility for appropriations under the amendment.

The major focus for the Special Session was the budget. Generally speaking the House was focused on land management and water infrastructure projects while the Senate wanted more funds for Everglades and land conservation. Both budgets used Amendment 1 funds for payment of debt service and funding existing operational budgets for state parks, state forests, FWCC law enforcement and the Division of Historical Resources. The House proposed bonding \$200 million of Amendment 1 for mostly water projects but the Senate rejected this proposal because key Senators were concerned there was not enough peer-reviewed oversight of water projects as they would have required in SB 918. Once the conferences could not agree on bonding, the Amendment 1 budget basically became a status quo budget with the largest percentage of funds for existing agency operations. This chart lumps together appropriations from the Senate report.

### Amendment 1 Budget:

	(\$ millions)
Available Revenue	\$741.8
Debt Service	\$191.1
Existing Operations DEP, DHR, FWCC, DACCS	\$291.3
Additional Funding for Land Management	\$67.8
Water Resources	\$45.2
Springs	\$33.8
Beaches	\$25.0
Lake Restoration	\$2.0
Everglades Restoration	\$26.9
Florida Forever/Rural Family Lands/Kissimmee River	\$50.8

Amendment 1 was a major focus of debate on the budget in both houses. Supporters of the budget argued that Amendment 1 did not provide new revenue and did not require funds to be spent on land conservation. Other lawmakers questioned what seemed to be a lack of funds for Everglades and Florida Forever which appears to violate the stated intent of the voters. Supporters and opponents read from the ballot language and from documents provided by the initiative sponsors to support their positions. In the Senate, both President Andy Gardiner and Appropriations Chief Tom Lee noted this will be a 20-year program and that they anticipated more efforts for Everglades and Florida Forever.

On June 22, three environmental interest groups and a citizen filed a judicial challenge to Amendment 1

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funding, seeking a determination that it is contrary to the intent of the voters. *Florida Wildlife Federation, et al v Andy Gardiner, et al*, Case No. 2015 CA 001423 (2d Cir.).

*The act became effective on July 1, 2015; Chapter 2015-229.*

### Growth Management

CS/CS/SB 1216 relating to community development was the major growth management bill to be passed by both houses and approved by the Governor. The bill makes a number of changes to the growth management process – primarily as it affects large community developments such as sector plans and developments of regional impact (DRIs).

For sector plans, the bill clarifies that amendments to master plans and detailed special area plans shall be processed through the requirements for coordinated state review. It further clarifies that agricultural or silvicultural uses within a sector plan may be authorized if consistent with the long-term master plan. Sector plans require provisions for conservation of sensitive areas; the bill provides that conservation easements may be used for mitigation and defined through digital photography.

The Legislature continued its trend of reducing responsibilities of regional planning councils (RPCs). The bill eliminates the Withlacoochee Regional Planning Council and essentially removes the role of RPCs from the DRI process.

To that end, the bill subjects DRIs to the state coordinated review process so that new DRIs are not required to have specific review by the regional planning council.

The bill also addresses a number of other growth management issues. It eliminates some findings regarding compatibility with adjacent military installations and exempts some small local governments that use less than 1 percent of a public water utility's total permitted allocation from having to amend its comprehensive plan in response to an updated regional water supply plan. The bill also creates a 10-year "connected city corridor" program for Pasco County

that makes it easier to tie mixed-use developments to transportation corridors. The bill also adds "sinkholes" to a list of characteristics of blighted areas for the purposes of community redevelopment areas.

There were several controversial provisions of the bill that did not survive. One provision would have required local governments to add a private property rights element to their comprehensive plans. A second would have restricted local control of "constrained agricultural lands," and a third would have limited certain concurrency fees.

*The act became effective on May 15, 2015; Chapter No. 2015-30.*

### Land Application of Septage

The land application of septage is scheduled to be prohibited as of January 1, 2016. Measures filed during the regular session (SB 648 and HB 687) would have repealed the ban, while other proposals would have extended the date. None of these measures were enacted; however, one of the implementing bills passed during the special session (SB 2502-A) extends the effective date to July 1, 2016.

*The act became effective on July 1, 2015; Chapter No. 2015-222.*

### Property Rights

CS/HB 383 clarifies the Bert J. Harris, Jr., Private Property Rights Protection Act and creates a new cause of action independent of the act for property owners subject to unlawful exactions of the type dealt with in 2013 by the United States Supreme Court in *Koontz v. St. Johns River Water Management District*. Under the bill, a property owner is required to provide advance notice of the intent to file a suit seeking damages for a prohibited exaction and provide an estimate of the owner's damages. The governmental entity must then justify the exaction as proportionate or offer to remove or reduce the exaction. At trial, the governmental entity will have the burden of proving that the exaction has the requisite nexus to a legitimate public purpose and is proportionate. The property owner will have the burden of proving damages. Attorneys' fees and costs may be awarded to the governmental entity, but the court is required to award attorneys' fees and costs to the property

owner if it is determined that the exaction has no nexus to a legitimate public purpose. The bill clarifies that it is applicable only to action taken directly on the property owner's land and not activities that are authorized on adjoining or adjacent properties.

*The act becomes effective on Oct. 1, 2015. Chapter No. 2015-142.*

### Ratification of DEP C&D Liner Rule

HB 7083 ratifies the Florida Department of Environmental Protection (DEP) rules requiring liners and leachate collection systems at construction and demolition debris disposal facilities.

*The act became effective on June 11, 2015. Chapter No. 2015-164.*

### Ratification of MFLs

HB 7081 was adopted in order to expedite the effective date of minimum flows and levels (MFLs) for the Lower Santa Fe and Ichetucknee Rivers and associated priority springs. The St. Johns River Water Management District asked DEP to adopt a rule implementing the MFLs due to cross-basin impacts originating outside the district. DEP also proposed regulatory flow recovery provisions since the current flow data showed significant declines from historic levels. A challenge to the DEP-proposed rule was filed with the Division of Administrative Hearings, thus delaying the effective date of the rule. The Legislature passed HB 7081 to allow prompt implementation.

*The act became effective on June 10, 2015. Chapter 2015-128*

### SLAPP

CS/SB 1312 amends provisions relating to strategic lawsuits against public participation (often referred to as "SLAPP suits") thought to be brought to silence critics, particularly in the environmental arena. Under existing law, only governmental entities are prohibited from filing such suits to retaliate against persons or groups exercising rights to participate in government activities. The bill extends the applicability of the anti-SLAPP statute to suits filed by anyone – not just governmental entities. The bill protects free speech in connection with public issues in two

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categories: (1) speech made before a governmental entity in connection with an issue that the governmental entity is considering or has under review; and (2) speech in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report or similar works. The second category does not require any connection to a governmental proceeding. The bill provides for expeditious resolution of a suit that is claimed to be a SLAPP suit.

*The act became effective on July 1, 2015. Chapter No. 2015-70.*

### Surveillance by a Drone

CS/CS/SB 766 prohibits any person from using a drone to capture an image of privately owned real property or of the owner, tenant, occupant, invitee or licensee of such property with the intent to conduct surveillance without his or her written consent if a reasonable expectation of privacy exists. The bill authorizes the use of a drone by a person or a business licensed by the state, or a contractor thereof as long as such use is to perform reasonable tasks within the scope of practice. Such licensed professions include real estate brokers, real estate appraisers, land surveyors and construction contractors. The bill allows property appraisers to use drones solely for assessing property for ad valorem taxes. The bill also allows the capturing of images by or for a utility for the operation and maintenance of its facilities, the inspection related to construction of its facilities, the assessment of vegetation growth on rights-of-way and conducting environmental monitoring. In addition, the bill allows aerial mapping and cargo delivery if the person is operating in compliance with FAA regulations.

*The act became effective on July 1, 2015. Chapter No. 2015-26.*

## BILLS THAT DIED

### Agritourism

SB 594 would have prohibited local government enforcement (and

not merely adoption) of an ordinance, regulation or rule that would have placed limits on agritourism. The bill died on the Senate calendar.

### Contaminated Sites

HB 841/SB 1302 would have provided clarification for the use of risk-based corrective action (RBCA) and the authorization of alternative cleanup target levels without requiring institutional controls. The bills would have expanded the definition of “background concentration” to include some anthropogenic sources. The bills would have created a mechanism for approving long-term natural attenuation for more than five years. The bills also would have revised the cleanup target levels for surface water as long as groundwater contaminants did not cause water quality exceedances in the surface water. Both bills died on the House calendar, but look for these to be re-introduced in the 2016 legislative session.

### Environmental Control

HB 653 and SB 714 started out as the annual “environmental train,” addressing a potpourri of environmental issues that were generally not controversial. These included various organizational changes within the DEP. The bills would have: prohibited permitting agencies from modifying permitted water allocations during the term of the permit under certain conditions; prohibited water management districts from reducing permitted allocations during the term of the consumptive use permit for agricultural irrigation under certain conditions; directed the water management districts to adopt rules providing water conservation incentives, including permit extensions; and required the water management districts to promote expanded cost-sharing criteria for additional water conservation practices. In addition, the bills would have provided that the reclamation timing requirements for phosphate mines and the required financial assurance do not apply to constructed clay-settling areas where their beneficial use has been extended. Finally, the bills included several provisions dealing with solid waste, including: (1) the creation of a solid waste landfill closure account to provide funding for the closing and

long-term care of solid waste management facilities; and (2) providing that for local flow control ordinances, resource recovery facility does not include a landfill gas-to-gas energy system or facility. The House bill was amended on the floor to include most of the House water bill, HB 7003, and then died in the Senate without having been considered.

### Two-Year Extension of Certain Permits

HB 7067, a comprehensive economic development measure, included a provision that would have provided for yet another two-year extension of certain environmental resource permits. The measure passed the House but died in the Senate.

### Oil and Gas Regulation

The Legislature attempted to deal with hydraulic fracturing during the regular session, but the bills fell victim to the early adjournment by the House and the impasse over the budget. HB 1205 and SB 1468 would have preempted permitting of the so-called high-pressure well stimulation activities and would have established that these activities are subject to the same permitting requirements that apply to drilling an oil and gas well. The bills would have required DEP to conduct a study on high-pressure well stimulation and required the agency to designate the national chemical registry as the state’s registry for disclosure of chemicals utilized in the process. HB 1209 and SB 1582 would have provided a limited public records exemption for the information required to be submitted on chemical utilization with exceptions. SB 166 and HB 169 would have prohibited hydraulic fracturing in Florida. This issue is likely to return for the 2016 Session beginning in January.

### Petroleum Restoration

SB 314/HB 733 would have expanded the Abandoned Tank Restoration Program and increased the number of sites eligible for state-funded remediation, including sites where a property owner knew of petroleum contamination at the time of purchase. The bills would have changed the name from Low Score Site Initiative (LSSI) to Low-Risk Site Initiative (LRSI). The bills also

*continued...*

## LEGISLATIVE UPDATE

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would have removed certain criteria and increased the funding limit and time frames in which the LRSI assessment and groundwater monitoring must be completed. The bills also would have increased the annual funding allocation for the Advanced Cleanup Program from \$15 million to \$25 million and allowed a property owner or responsible party to enter into a voluntary cost-sharing agreement to bundle the assessment and remediation of multiple sites. Both bills died on the Senate calendar.

### Private Property Rights Elements

HB 551/SB 1424 would have required local governments to include private property rights protections within their comprehensive plans. The property rights element would have required establishment of principles, guidelines, standards and strategies to guide local government decisions on proposed developments. The bills died in committee. There was also an unsuccessful effort to add this language to the growth management bill.

### Public Records/Public Agency Contracts

HB 163/SB 224 would have revised the procedures for obtaining public records relating to a public agency's contract for services with a private contractor. Among other things, the bills would have required all public records requests relating to these contracts to be made directly to the agency, rather than the contractor. The bills also would have allowed for the award of attorneys' fees in actions to enforce a public records request only if the plaintiff provided the prescribed prior notice to the contractor or agency. The Senate bill passed the Senate, was amended in the House and died in returning messages.

### Water/Policy/Springs Protection

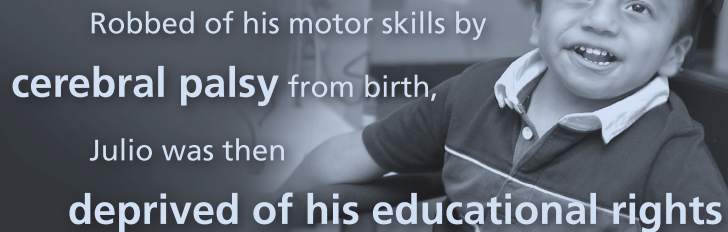
SB 918/HB 7003/HB 653 addressed water policy generally and particularly springs protection and rehabilitation. The Outstanding Florida Springs established by SB 918 included first magnitude springs

and a number of named springs. The House version designated Priority Florida Springs to include first and second magnitude springs, though it did not name any springs. Both bills addressed the integrated nature of springs and aquifer systems, and various provisions were identified for protecting and restoring impaired springs. These provisions included use of MFLs and basin management action plans ("BMAPs"), particularly for "priority focus areas" within spring sheds where the aquifer is most vulnerable to pollution from the surface or shallow water table conditions. Both bills directed DEP to investigate designated springs and to develop strategies to rehabilitate or

protect the springs and implement the statute. The bills also addressed the Everglades and related river systems, employing best management practices and BMAPs. Finally, the Senate bill codified the Central Florida Water Initiative objectives of protecting stressed groundwater systems and developing alternative water supplies.

\* \* \*

Look for a number of the issues that failed to pass in 2015 to be considered again next session-- which will soon be upon us; interim committee meetings commence on September 16, 2015, and the 2016 Regular Session begins on January 12, 2016.



Robbed of his motor skills by  
**cerebral palsy** from birth,  
Julio was then  
**deprived of his educational rights**

when his school told him it couldn't provide the  
**accommodations he needed**  
to function in the classroom.

**... Almost**

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