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ELULS
THE ENVIRONMENTAL AND LAND USE LAW SECTION
Janet Elizabeth Bowman, Chair • Jacob T. Cremer, Editor • Nikki T. Williams, Co-Editor
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Historical Land Use Alone is NOT a Recognized Environmental Condition

By Aaron Getchell, CPG, P.G. (Gannett Fleming, Inc.)

March 2018

INTRODUCTION

Is agricultural land a recognized environmental condition (REC) only because it was historically farmed using common industry practices? Are railroad tracks a REC solely because they were historically maintained and operated in accordance with federal regulations?

Consultants and users of Phase I Environmental Site Assessments (ESAs) have different opinions and risk tolerances when identifying a REC for an ASTM International (ASTM) compliant Phase I ESA. For a consultant, identifying RECs may be the result of a conservative conclusion or increased client-borne exposure to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) liability. In the case of a user, identification of a REC could be unfavorable to a business deal or may not fit with a corporate culture.

Identification of some RECs may be obvious, such as observed staining, stressed vegetation, and odor within a drum staging area; or a previous ESA listing contaminated media above a cleanup standard that has not been remediated to the satisfaction of a regulatory agency. However, identification of some RECs may not be as obvious, such as a Brownfields Area listing in a database search that requires a file review; and often, multiple lines of evidence leading to the conclusion of a single REC. Historical land use of a site may be one line of evidence leading to a REC, but can historical land use, alone, for agricultural land or a railroad corridor be classified as a REC?

This issue has become important as the United States' housing market has grown with urban sprawl covering farmland; and redevelopment of urban areas reclaiming former industrial properties with railroad spurs or adjacent to railroad corridors. According to the United States Department of Housing and Urban Development 2017 statistics: new house construction was up 5.3% percent from the previous year; mortgage interest rate increases were generally flat; and low vacancy rates were observed across homeowners and rentals. These market conditions are favorable, or at least promising, for developers and lenders…thus, citing historical land use alone as a REC could be detrimental to a business deal or planned development.

As a practice, some consultants and users automatically label certain historical land uses as a REC due to the likelihood for non-point sources. Would a finding be classified as a REC if the historical resource reviews, database search results, site visit observations, and interviews do not identify a release, conditions indicative of a release, or a material threat of a future release? Would this lack of evidence paired with historical land use indicate a data failure?

AGRICULTURAL LAND

The use of arsenical pesticides to protect crops has been common industry practice for over a century in the United States. For example, the United States Department of Agriculture approximated that in 1892 the boll weevil crossed the Rio Grande from Mexico into the United States in the vicinity of Brownsville, Texas and spread throughout 87 percent of the cotton belt by the end of 1922. Estimated crop damages ranged from $2,000,000 to $3,000,000 annually (U.S. Department of Agriculture, 1923). Boll weevil spread and infestation were controlled by indirect measures (such as planning harvest times to coincide with boll weevil maturity, rotating cotton crops, and planting a variety of cotton); and direct measures such as dusting crops with poison (such as calcium arsenate).

Arsenical pesticides and organochlorine pesticides were used to protect cotton crops from boll weevils and other crop-destroying insects. Organochlorine pesticides such as dichlorodiphenyltrichloroethane

See "Historical Land Use page 11

INSIDE:

From the Chair

by Janet E. Bowman

The Environmental and Land Use Section has had an active new year. First, I would like to introduce you to our new ELULS Section Administrator, Cheri Wright who started her new position at The Florida Bar in January. Cheri has hit the ground running and proven invaluable in making our March CLE and ELULS Long Range Planning retreat a success.

On March 1st, the ELULS produced a CLE Program on Hurricane Restoration and Resilience that was organized by Robert Volpe, Patrick Krechowski and Jon Harris Mauer. FSU College of Law Students and joined attorneys for the live presentation in Tallahassee while the program was also live streamed for out of town attendees. The program was followed by a mixer at Cascades Park where Ralph Demeo, John Powell of the City of Tallahassee, and Mark Llewellyn of Genesis gave a fascinating history of the hazardous waste cleanup and creation of Cascades Park. Thank you to our sponsors Hopping, Green & Sams and Genesis for sponsoring the event. On April 20th, our section will be co-hosting with the Administrative Law Section an Advanced Seminar on Hot Topics. Register now at: https://member.floridabar.org/s/lt-event?id=a1R36000002kTJkEAM

The Executive Council of the ELULS just returned from a retreat in Savannah where David Bass, the incoming ELULS chair for next year, lead us in a productive discussion of new CLE programming, membership initiatives and law school outreach for 2018-2019. Mark your calendar for the Annual Florida Bar Convention on June 13-16, 2018 at the Hilton Bonnet Creek in Orlando. ELULS section events include a joint reception with the Administrative Law Section on June 14th and a half-day CLE program and our Annual Meeting and Awards lunch on June 15th. We will be adding two new members to the Executive Council and are looking for energetic section members who would like to contribute to the section. Service on the executive council is a great way to connect with public, private and nonprofit environmental and land use lawyers. If you would like to be considered for a position, please send a statement of interest and your resume to me at Janet_Bowman@tnc.org and copy section administrator Cheri Wright at CWright@floridabar.org.

EXECUTIVE COUNCIL RETREAT

See ELULS Executive Council Retreat pictures below.

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

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Cheri Wright, Tallahassee . . . . . Section Administrator

ON APPEAL

by Larry Sellers, Holland & Knight

Note: Status of cases is as of March 14, 2018. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Brevard County v. Waters Mark Development Enterprises, LC, Case No. SC17-2205. Petition for review of the Fifth DCA's decision concluding that the applicable statute of limitations for Bert Harris claim did not commence to run until the county denied the application for site plan approval. 42 Fla. L. Weekly D2247a. Status: Petition for review denied February 7, 2018.

Ricketts and Carroll v Village of Miami Shores, Case No. SC17-2131. Petition for review of the decision by the Third DCA upholding trial court decision rejecting challenge to zoning ordinance prohibiting vegetable garden in front yard. 42 Fla. L. Weekly D2352a. Status: Petition for review denied February 9, 2018.

Pacetta, LLC v. The Town of Ponce Inlet, Case No. SC17-1897. Petition for review of Fifth DCA decision reversing trial court judgment that the town is liable for taking as a result of the enactment of a planned mixed use redevelopment of waterfront property, including by referendum. 42 Fla. L. Weekly D1367b. Status: Petition for review denied on January 23, 2018.

SECOND DISTRICT COURT OF APPEAL

Pinellas County v. The Richman Group of Florida, Inc., Case No. 2D16-3279. Appeal from final judgment awarding the Richman Group of Florida, Inc., over $16.5 million in damages under 42 U.S.C. § 1983, based on the trial court's conclusion that the county violated Richman's substantive due process and equal protection rights by denying Richman's proposed amendment to the county's land use plan. Status: Reversed on November 29, 2017; motion for rehearing en banc denied February 19, 2018; motion to stay issuance of mandate filed March 5, 2018.

THIRD DISTRICT COURT OF APPEAL

Cruz v City of Miami, Case No 3D17-2708. Appeal from trial court order granting city's motion for summary judgment, concluding that a consistency challenge is limited to whether the challenged development order authorizes a use, density or intensity of development in conflict with the applicable comprehensive plan. In so ruling, the trial court applied the Second DCA's holding in Heine v Lee County, 221 So. 3d 1254 (Fla. 2d DCA 2017). Status: Notice of appeal filed December 13, 2017.

Florida Retail Federation, Inc., et al. v. The City of Coral Gables, Case No. 3D17-562. Appeal from final summary judgment upholding the City of Coral Gables' ordinance prohibiting the sale or use of certain polystyrene containers, based upon trial court's determination that three state laws preempting the ordinance are unconstitutional. Status: Oral argument held on December 13, 2017.

FOURTH DISTRICT COURT OF APPEAL

Maggy Hurchalla v Lake Point Phase I LLC, Case No 4D18-763. Petition for expedited writs of prohibition, mandamus and certiorari related to trial court rulings during and after a trial. The jury found Ms. Hurchalla liable for $4.4 million in damages on a claim of tortious interference with a contract for a public project, due to her public comments in opposition to the project. Status: Petition filed March 8, 2018.

City of West Palm Beach v. SFWMD, et al., Case No. 4D17-1412. Appeal from final order granting environmental resource permit for extension of State Road 7 in Palm Beach County Status: Notice of appeal filed May 12, 2017.

Florida's Building Codes Prove Effective Following Active Hurricane Season

by Whitford Remer, Counsel and Director of Public Policy, Insurance Institute for Business and Safety

Introduction

Over the last two decades, Florida has taken aggressive steps to adopt and enforce a statewide building code. Florida is now considered to have one of the strongest building codes in the nation, but as often is the case, it took a major catastrophe for the state to get serious about adopting and enforcing building codes.[1] Preliminary reports indicate that new building codes adopted after Hurricane Andrew (August 1992) were extremely effective in reducing damage from Hurricane Irma, which made landfall on September 9, 2017. As is true in prudent land use and environmental planning, effective building regulations can help communities reduce the worst effects of a disaster and recover quickly afterwards. Concepts of community resilience can be found across the state and nation as more intense and frequent storms continue to impact densely populated regions, which are often located in the most hazard-prone areas.

Florida: Land of Paradise and Peril

In a recent piece for Politico Magazine titled "A Requiem for Florida, the Paradise That Should Never Have Been," author Matt Gruwald recounts letters written by the first U.S. soldiers exploring Florida in the 1830's which describe the state as "hideous," "loathsome," "diabolical," and a "God-abandoned" mosquito refuge.[2] It has been said that Florida is habitable for two reasons: the U.S. Army Corps of Engineers and air conditioning. The former created viable real property out of wetlands and the latter allowed inhabitants to tolerate its weather year around.

Beginning in the 1950's, Florida's population began to soar, adding almost 2 million people every decade until 2010. Construction boomed and fly-by-night contractors worked to keep pace with the demand. Counties vied for additional tax revenue and what resulted were building designs and materials not suited for high-wind regions, confusing building regulations, and low enforcement rates for building codes, if any, existed in the jurisdiction.[3]

Then the reckoning came. In August of 1992, following decades of growth, Hurricane Andrew made landfall in Homestead, Florida. The storm produced high winds and storm surge and caused extensive damage to the coastal areas of southern Dade County, Florida. According to the National Oceanic and Atmospheric Administration ("NOAA"), the storm caused more than $26.5 billion in damage, destroyed more than 63,500 houses, damaged more than 124,000 others, and left 65 people dead.[4]

Following Andrew, nearly 10 years of legislative, political, technical, and engineering debates were had on how to implement a building code to withstand hurricane force winds on a 160-mile-wide peninsula located in the Atlantic Hurricane Basin. In July 1996, the Florida Building Codes Study Commission (the "Commission") was established to evaluate the existing patchwork system of codes that were developed, amended, administered and enforced by more than 400 local jurisdictions and state agencies with building code responsibilities. The Commission found that local codes were inconsistent, complex, and confusing; and, at best, enforcement departments were underfunded and intermittent.

The main recommendation from the Commission was for Florida to adopt a single statewide code. In 1998 the Florida Legislature amended Chapter 553, *Florida Statutes*, Building Construction Standards, to create a single state building code that is enforced by local governments. On March 1, 2002, the *2001 Florida Building Code (FBC)* went into effect, marking the first use of a statewide building code in Florida.

Florida Building Code Proves Its Worth

Today, the Commission is responsible for updating and adopting the FBC every three years. Since its creation, the FBC has been based on model codes developed by the International Code Council© (ICC) and then updated to include hundreds of Florida-specific amendments. In 2017, the Florida Legislature made the most significant change to the FBC in years, by inverting the process, so that each cycle now begins with the Florida Building Code as the base code, leaving the Commission to adopt the updates to the latest model code requirements as they are released.[5] The legislation did not relax important wind mitigation thresholds or jeopardize federal funding, which requires compliance with certain section of the model code.

Hurricane Irma provided a true test of the FBC. Estimates for Hurricane Irma storm damage recently reached over $7.2 billion, however, anecdotal evidence already shows that homes built to post-Hurricane Andrew building codes fared much better than those built prior to adoption of the statewide code. Several studies prior to Hurricane Irma showed the effectiveness of FBC. Irma provided a sort of capstone to this area of research. For example, a 2005 study conducted by the University of Florida looked at the differences in damage between older and newer homes during the 2004 hurricane season and concluded that homes built under the 2002 FBC sustained less damage on average than homes built between 1994 and 2001 under the Standard Building Code. Homes built before 1994 also fared worse than those built after that year.[6] More recent research shows that improvements to the FBC have reduced windstorm losses by up to 72% and that for every $1 of additional construction costs $6 in losses were saved.[7] Those figures mirror a report released last month by the National Institute of Building Sciences, *Natural Hazard Mitigation Saves: 2017 Interim Report*, which shows that for every $1 invested in disaster resiliency and mitigation $6 is saved in disaster recovery.[8]

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FLORIDA'S BUILDING CODES

from previous page

Hurricane Irma's strongest winds on mainland Florida were felt in the west coast and central counties of Florida. Nearly 80% of homes subjected to Irma's highest winds were built after adoption of the statewide building code, mainly in the Ft. Myers and Naples areas.[9] Experts agree that adoption of the FBC and years of updates played a significant role reducing damage from Hurricane Irma. Those advancements include an expanded windborne debris area, enhancing roof and wall sheathing attachment requirements, requiring roof covers with higher wind ratings, and mandating design pressure-rated doors and windows (especially pressure-rated garage doors).

Conclusion

Land use attorneys often hand off a project once development rights are secured, zoning is amended, or special use permits are issued. However, resilient construction techniques can provide critical protection to a project and add tangible value through the length of occupancy.[10] In general, properly designed and constructed buildings should experience fewer storm-related damages when factors of safety required by the building code are taken into consideration. In addition, the value of strong codes goes beyond the walls of specific buildings and affects the environment at large. As the CEO of my company is known for saying "the greenest home is one that doesn't end up in a landfill."

(Endnotes)

1 State building codes are graded by various organizations, including Insurance Institute for Business and Home Safety, which produces a report on 18 states along the eastern seaboard and the Gulf of Mexico *See "*Rating the States."

2 https://www.politico.com/magazine/story/2017/09/08/hurricane-irma-florida-215586 (accessed January 04, 2018). I encourage all readers of this periodical to read the piece and its contemptuous positions on development in Cape Coral, Florida.

3 In 1974, Florida adopted a state minimum building code law requiring all local governments to adopt and enforce codes to ensure minimum standards for public health and safety. Local governments could choose from four model codes, and could amend and enforce the local codes as they desired.

4 See: http://www.nhc.noaa.gov/1992andrew.html (accessed January 17, 2018).

5 See House Bill 1021. H.R. 1021, 2017 Reg. Sess. (Fla. 2017).

6 Kurtis Gurley, Post 2004 Hurricane Field Survey -- An Evaluation of the Relative Performance of the Standard Building Code and the Florida Building Code.

7 Kevin M. Simmons, Economic Effectiveness of Implementing a Statewide Building Code: The Case of Florida, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2963244 (accessed February 5, 2018).

8 In addition to the NIBS report, in January FEMA also released the draft National Mitigation Investment Strategy for comment. The Strategy's overarching goal is to "improve the coordination and effectiveness of "mitigation investments," defined as "risk management actions to avoid, reduce, or transfer risks from natural hazards, including severe weather."

9 On the residential side, see "Estimating the Effect of FORTIFIED™ Home Construction on Home Resale Value," which found that homes in Alabama with a FORTIFIED™ Home to the Fortified designation increased the value of a home by nearly seven percent.

Inconsistent Development Orders? SB 362: "No Harm, No Foul"

by Gennaro Scibelli

For the second year in a row, Senator Keith Perry (R, District 8) has attempted to transform the way that development permits are weighed for "consistency" with the introduction of Senate Bill 362 ("SB 362").

SB 362 sought to amend §§163.3167 and 163.3177, Florida Statutes, by requiring local governments to "address the protection of private property rights in the comprehensive plans of the local governments ("Comprehensive Plans"). Though SB 362 died in Community Affairs, it was substantially similar to a bill that progressed to Environmental Preservation and Conservation in the 2017 session (the "2017 Bill").

SB 362 aimed to amend §163.3177 to require local governments to include a "private property rights element" in the Comprehensive Plans. Section 163.3177 sets forth the required and optional elements for Comprehensive Plans. An example of an element that is currently required would be a capital improvements element, which is designed to "consider the need for and the location of public facilities in order to encourage the efficient use of such facilities." By contrast, local governments have the option to designate adaptation action areas to address "low-lying coastal zones that are experiencing coastal flooding due to extreme high tides and storm surge and are vulnerable to the impacts of rising sea level."

If the 2017 Bill and SB 362 were enacted, the bills would have required all local governments in Florida to include a "Private Property Rights" element. The proposed amendment to §163.3177 stated that the Private Property Rights element must set forth the principles ". . . that will guide the local government's decisions and program implementation with respect to the following objectives:

a. Consideration of the impact on private property rights of all proposed development orders, plan amendments, ordinances, and other government decisions.

b. Encouragement of economic development.

c. Use of alternative, innovative solutions to provide equal or better protection of private property rights than the Comprehensive Plan.

d. Consideration of the degree of harm created by noncompliance with the Comprehensive Plan."

Let's analyze these objectives. The first three "objectives" are ostensibly designed to tip the scales toward the landowner in the decision-making process of a local government as to, well, just about everything that a local government must deliberate upon with respect to land use decisions. "Development Order" is defined by the Community Planning Act (of which §163.3177 is a part) as any order granting, denying, or granting with conditions an application for a development permit." (§163.3164, Fla. Stat.) A "Development Permit" is defined to include "any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land. §163.3164, Fla. Stat.

So, circling back, the 2017 Bill and SB 362 would have required local governments, in considering everything included under the definition of "Development Permit," to consider the "impact" of issuance on private property rights.

Why is this concerning? Because at the moment, local governments must (in general) base their decisions as to approval or denial of development permits on consistency with the Comprehensive Plan, and compliance with the land development regulations of that community. The proposed bills sought to require the addition of the broad concept of "private property rights" into the local government's determination--a broad concept that exists outside of the procedures and considerations enumerated under the Comprehensive Plan and land development regulations.

By way of example, let's consider an application submitted by a developer to rezone a parcel from an agricultural zoning designation to a single-family residential zoning. If the local government determines that, based on factors such as compatibility with the surrounding area, the requested rezoning would render the Comprehensive Plan internally-inconsistent, the local government would be required to deny the rezoning because the Community Planning Act requires all actions taken in regard to development orders to be *consistent* with the Comprehensive Plan.

If SB 362 would have passed, this is not where the decision would have ended. Objective (d) of SB 362 called for "Consideration of the degree of harm created by noncompliance with the comprehensive plan."

This language would completely upend the intent of the Legislature in mandating that development orders be consistent with the applicable Comprehensive Plan. Instead of hinging on whether a proposal for a rezoning (or any other type of development order, and arguably, ordinances, or "other government decision") is consistent with the plan, a local government decision *could result* in a decision that is inconsistent, and then progress to a weighing of the "degree of harm" resulting from such inconsistency. In effect, the turning point for any development order would increasingly become, "Approval of this development order is inconsistent with our comprehensive plan.... but will this actually "harm" anyone?"

Beyond the specific question of whether individual inconsistent determinations *would*, in fact, "harm" adjacent property owners, this language eviscerates the entire purpose of comprehensive planning as applied to any local government in Florida. Indeed, the purpose of the Community Planning Act is enumerated as follows:

> "It is the purpose of this act to utilize and strengthen the existing role, processes, and powers of *local*

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INCONSISTENT DEVELOPMENT
from previous page

> *governments in the establishment and implementation of comprehensive planning programs* to guide and manage future development consistent with the proper role of local government." §163.3161(3), Fla. Stat. (emphasis added).
>
> "It is the intent of this act that adopted comprehensive plans shall have the legal status set out in this act *and that no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act.* §163.3161(6), Fla. Stat. (emphasis added).

The proposed bills fly in the face of the Legislature's intent to ensure that all development remains consistent with Comprehensive Plans by requiring that the *plans themselves* include language that provides an "out" for developers that would ordinarily be required to adhere to a community's vision for long-term growth.

Imagine if a statute that prohibited driving under the influence of alcohol included language to the effect of, "Consideration of the degree of harm created by noncompliance with this statute." You can be drunk behind the wheel, just as long as it doesn't cause "harm." This analogy is admittedly blunt, yet the principle is the same.

In short, the "consideration of the degree of harm" *has* been considered by the Legislature in the realm of keeping development orders consistent with Comprehensive Plans. This is clearly reflected in numerous provisions of the Community Planning Act that mandate consistency of development orders, Comprehensive Plan amendments, and the like.

To require local governments to insert an "out" for consistency into their Comprehensive Plans would render any portion of a community's land development regulations that contemplate "consistency" toothless, and would instead lead to protracted litigation over whether adhering to comprehensive plans could cause "harm." The proposed bills would have effectively made "consistency" an optional requirement, and Sen. Perry may reintroduce similar legislation in 2019.

Gennaro Scibelli is an Associate at Jane West Law, P.L. in St. Augustine, and specializes in land use, zoning, and environmental issues.

Florida State University College of Law March 2018 Update

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

This column highlights recent accomplishments of our College of Law alumni and students. It also features several of the programs the College of Law will host this spring semester. We hope Section members will join us for one of more of our future programs.

Recent Alumni Accomplishments


CREMER


DEWOLF


LEOPOLD


MOYE


TANKEL

- **Janet Bowman** participated in a panel on Florida's resiliency efforts as part of a program entitled "Lessons on Hurricane Recovery and Resiliency," held at the Florida State University College of Law on March 1.
- **Jacob Cremer** was promoted to shareholder at Stearns, Weaver, Miller, P.A., where he practices in the Tampa office.
- **Diane DeWolf** was recently promoted to Partner in Akerman's Litigation and Appellate Practice Group.
- **Matthew Leopold** was confirmed by the U.S. Senate to serve as the EPA General Counsel.
- **Jessica Melkun** is now working with the Florida Department of Environmental Protection.
- **Davis George Moye** served as General Capacitor's representative during Governor Scott's Governor's Business Development Mission to Israel. On December 5, Moye accepted the Governor's Business Ambassador Award on behalf of General Capacitor, in recognition for his participation in the Florida-Israel Innovation Partnership. Moye presented his work to Governor Scott and to leadership of the Israel Innovation Authority.
- **Judith Tankel** is serving as Finance Director for the campaign to re-elect U.S. Senator Mazie K. Hirono of Hawaii. Tankel oversees all operations pertaining to fundraising for the campaign in Hawaii, as well as nationally. This includes event planning, digital and direct mail solicitation. She previously served as finance director for the successful campaign to re-elect Delegate Kathleen Murphy of McLean, Virginia in November of 2017.
- **Robert Volpe**, of Hopping Green & Sams, helped organize a program entitled "Lessons on Hurricane Recovery and Resiliency," held at the Florida State University College of Law on March 1.

Recent Student Achievements

- **Christina Behan, Stephen Cunningham, William Hamilton, Stuart Nincehelser,** and **Guerline Rosemond** have had the special opportunity this year to engage in externships with the Florida Constitution Revision Commission, a body appointed every 20 years to solicit, research, and process proposals for amending the state constitution. Students have assisted with legal research, analysis, and redrafting of the proposals, and drafting of ballot measures for consideration by the Florida Supreme Court before being voted on by the public.
- Several students participated in administrative, environmental, or land use law externships in the Fall 2017 semester:
  - **Abrianne Brookins,** Department of Business and Professional Regulation
  - **Isabelle Campbell,** City of Tallahassee Attorney's Office
  - **Jessica Farrell,** Earthjustice
  - **Janaye Garrett,** NextEra/FPL
  - **Julianne Haun,** Attorney General—State Programs
  - **Kaitlynne Wilson,** Attorney General—State Programs
  - **Cecilia Orozco,** Executive Office of the Governor—Office of the General Counsel
  - **Jessica Rodriguez,** Division of Administrative Hearings
  - **Michelle Snoberger,** Florida Housing Finance Corporation
  - **Mykhaylo Vzevolodskyy,** Attorney General—Consumer Protection
- The following students are working as administrative, environmental, or land use law externs this spring:
  - **John Barr,** Department of Economic Opportunity
  - **Taylor Birster,** Tallahassee City Attorney
  - **Marlie Blaise,** Public Employees Relations Commission
  - **Shannon Brophy,** Department of Health
  - **Rachel Eilers,** Department of Health
  - **Andrew Faris,** Department of Health
  - **Kody Glazer,** Leon County Attorney's Office
  - **Mark Johnson,** Department of Financial Services
  - **Giselle Justo,** Department of Transportation

FSU MARCH UPDATE
from previous page

- **Nico Kairies,** Division of Administrative Hearings
- **Annalise Kapusta,** Division of Administrative Hearings
- **Sarah Korkuc,** Department of Financial Services
- **Ashlee Polfer,** Blueprint Intergovernmental Agency
- **Carly Simpson,** Division of Administrative Hearings
- **Tian Wu,** Florida Housing Finance Corporation

- The College of Law has created a new externship opportunity this spring for a student to work with the lawyers at the **Florida Association of Counties** in Tallahassee on issues of importance to county attorneys throughout the state.
- We are delighted that several students have had their scholarship accepted for publication. **James Brent Marshall's** Note, "Geoengineering: A Promising Weapon or an Unregulated Disaster in the Fight Against Climate Change?," **Michael Melli's** Note, "Policy Mechanisms, Precedent, and Authority For State Implementation of Climate Change Agendas," and **Jessica Farrell's** Note, "The Centennial Shakeup: Is the National Park Service losing its ability to manage and create Aquatic Preserves?," will be published in 33:2 *Journal of Land Use and Environmental Law* (forthcoming 2018). **Valerie Chartier-Hogancamp's** Note, "Analysis of Indirect and Cumulative Impacts: Do the Sierra Club v. FERC Opinions Signal a Limitation of NEPA's Reach?" was published in 32 *Journal of Land Use and Environmental Law* (2017).

Spring 2018 Events

The College of Law has a full slate of administrative law events and activities on tap for the spring semester.

Environmental Law Externships Luncheon

Every year the Externships office hosts the Environmental Law Externship Luncheon for students interested in externships and volunteer opportunities in Environmental and Law Use law. This year's luncheon was held on Tuesday, February 6. Organizations that attended include: **Peter Cocotos,** NextEra Energy/Florida Power & Light; **Patrick Kinni,** Blueprint 2000; **Bonnie Malloy,** Earthjustice; **Louis Norvell,** Tallahassee City Attorney's Office; **Jessica Icerman,** Leon County Attorney's Office; **Michael Gray,** U.S. Department of Justice, Environment & Natural Resources Division; **Judge Robert Cohen,** Division of Administrative Hearings; and **Judge Francine Ffolkes,** Division of Administrative Hearings.

JUDGE ROBERT COHEN

Spring 2018 Distinguished Environmental Lecture

THOMAS MERRILL

Thomas Merrill, *Charles Evans Hughes Professor of Law, Columbia Law School presented our Spring 2018 Distinguished Lecture, entitled "The Supreme Court's Regulatory Takings Doctrine: Common-Law Constitutionalism Runs Aground" on Wednesday, February 7. This lecture is available via livestream.*

Environmental Certificate and Environmental LL.M. Enrichment Lectures

JUSTIN PIDOT

Justin Pidot, *Associate Professor, University of Denver Sturm College of Law, gave a lecture entitled, "Suing the President to Protect the Bears Ears National Monument," on Wednesday, January 24. A recording of his lecture is available on our webpage.*

FSU MARCH UPDATE
from previous page

DANIEL RAIMI

Daniel Raimi, *Senior Research Associate, Resources for the Future, and Lecturer, University of Michigan Gerald R. Ford School of Public Policy, presented his lecture, "The Fracking Debate: The Risks, Benefits, and Uncertainties of the Shale Revolution," on Wednesday, February 21.*

MARIANA FUENTES

Mariana Fuentes, *Assistant Professor, Florida State University, Earth, Ocean and Atmospheric Science Department, will be speaking on Wednesday, March 28 from 12:30 – 1:30 p.m. in Room 310.*

Spring 2018 Environmental Student Colloquium

The FSU College of Law Environmental, Energy and Land Use Law program will hold its annual Spring Colloquium for student papers on Wednesday, April 4 in room A221 of the Advocacy Center. This is an opportunity for students to be recognized for their research and writing achievements, for them to give a short presentation of their work, and to get feedback on their hard work. More information, including the names of the student presenters, will be announced.

Information on upcoming events is available at http://law.fsu.edu/academics/jd-program/environmental-energy-land-use-law/environmental-program-events. We hope Section members will join us for one or more of these events.

(DDT) were applied to other crops besides cotton, such as sweet corn, lettuce, potatoes, snap peas, and tomatoes. In 1959 the domestic use of DDT peaked at approximately 79 million pounds; while U.S. production of DDT peaked in 1963 at 188 million pounds. Before DDT was banned in the U.S. in 1972, cotton crops accounted for nearly 80% of the domestic use (United States Environmental Protection Agency ("EPA"), 1975).

Volatile organic compounds have also been used to protect crops from economic loss; such as ethylene dibromide (EDB). EDB was used as a soil fumigant for citrus, cotton, tobacco, and peanut crops. In 1983, over 20 million pounds of EDB were used in agriculture as a pesticide and over 90 percent of the 20 million pounds was used as a soil fumigant. EDB had been a registered pesticide since 1948, but the United States Environmental Protection Agency suspended the use of EDB as a fumigant in 1983 when studies indicated that the use of EDB for agriculture impacted potable water sources in California, Florida, Hawaii, and Georgia (EPA, 1983).

RAILROAD CORRIDORS AND SPURS

Railroad corridors and spurs have been a major part of the United States infrastructure and have driven industry since the early 1800's. Railroads were the first industry to be federally regulated through the creation of the Interstate Commerce Commission in 1887; the Federal Railroad Administration which was created by the United States Department of Transportation in 1966 now serves as the regulatory agency for railroads. Two of the historical environmental concerns related to railroad corridors and spurs include: the use of treated railroad ties and the application of arsenical herbicides for vegetation control.

Wooden railroad ties have typically been preserved, treated, and repaired using creosote products to protect their structural integrity from fungus and wood boring insects. Of the 300 chemicals that comprise creosote, polynuclear aromatic hydrocarbons are of concern because these carcinogenic compounds can leach from treated railroad ties to soil (ATSDR, 2002). Wooden railroad ties have been used for over 150 years and their structural integrity is critical because they provide load transfer from the rails to the ballast, while maintaining the specified distance between the rails (Bolin, 2013).

Brush and weed control along railroad tracks allows ballast to drain property, reduces fire hazards to railroad structures, and improves site distances for railroad workers and engineers. Railroad spray programs have included herbicide application from on-track equipment such as spray cars and highrail vehicles depending on terrain and setting; and applications have included monosodium methanearsonate (MSMA). As an example of the quantity of MSMA that has been applied to railroad tracks, Class I Railroads spent over $20,000,000 for spray programs on approximately 200,000 miles of railroad tracks in 1975 (Johnston, 1975).

RULE EVALUATION

The first portion of the definition of a REC is "the presence or likely presence of any hazardous substances or petroleum products on, in, or at a property: (1) due to a release to the environment". ASTM E1527-13 Appendix X1 defines a *release* with a list of eleven verbs that are synonyms for *dumping*, that could be interpreted as a land application of a pesticide or arsenical herbicide. However, there is a *pesticide exclusion* listed in ASTM E1527-13 X1.1.4.3(4) "to prevent the typical pesticide user from incurring CERCLA liability when he has done nothing more than to have purchased and applied a pesticide in the customary manner". Please note this exclusion does not apply to "disposal, storage, spills, transport" which, if reported to an agency, would result in an investigation reported by an *environmental record source* (ASTM E1527-13,8.2.1). Thus, if an agricultural site or a railroad site did not contain an area where chemical management occurred (filling, mixing, rinsing, storage, or disposal), then use of these chemicals in accordance with industry standards would not cause a historical land use finding (alone) to be classified as a REC.

There is also a *building materials exclusion* listed in ASTM E1527-13 X1.1.4.3(2) that applies to asbestos containing materials, lead based paint, and lead in drinking water; however, this exclusion could be broadly interpreted to apply to treated railroad ties. For example, treated railroad ties left in place on a functioning or historical railroad corridor or spur would not be considered "dumped" because these ties are part of a structure. Additionally, if the railroad ties had been removed and properly disposed of, then residual creosote staining could be considered analogous to automotive fluid staining on a paved commercial parking lot, that would be classified as a *de minimis condition*.

The definition of a REC continues "(2) under conditions indicative of a release to the environment"; and concludes with "(3) under conditions that pose a material threat of a future release to the environment." Thus, if pesticides were applied at an agricultural site in accordance with common practice and industry standards where no chemical management had occurred, then a finding of historical agricultural land use alone, would not be sufficient to classify that finding as a REC because the pesticides have already been applied. As another example, the use of creosote-treated railroad ties in a railroad corridor or spur would not result in agency action or enforcement resulting a listing on an *environmental record source*. Therefore, the historical land use for railroad corridors or spurs alone, would not be sufficient to classify that finding as a REC.

While not considered a REC alone, historical land use is a very important finding that could contribute to the opinion of a REC. For example, if a historically agricultural site contains the infrastructure for pesticide management (filling, mixing, rinsing, storage, or disposal), with evidence of stressed vegetation, an interview confirming previous management practices, and records containing organochlorine or arsenical pesticides; then these findings would be used as lines of evidence to classify a REC. As another example, if a historically agricultural site was operated as a citrus grove, and the area of the site was listed in the regional EDB database; then these findings would be used as lines of evidence to classify

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a REC. Historical land use as a railroad corridor or spur could be a line of evidence to contribute to a REC finding if an interview confirmed a chemical or petroleum release from a derailment, or paired with evidence of soil samples that identified contamination exceeding a regulatory cleanup criteria. However, while an important line of evidence, historical land use alone does no hold up to a rule evaluation to be used as a REC.

CONCLUSIONS

Based on an evaluation of the definition of a REC, historical land use for agricultural or railroad purposes, does not warrant being classified as a REC by itself. This has become an important issue during environmental due diligence as developers evaluate large tracts of land previously occupied by farms; or Brownfields sites which contain industrial infrastructure such as railroad corridors or railroad spurs.

Historical agricultural land use is often labeled as a REC due to the possibility of arsenical and/or chlorinated pesticide application. Historical railroad corridor land use (even adjacent offsite property) is often labeled as a REC due to the use of treated railroad ties and the use of arsenical herbicide application for vegetation control. These nonpoint sources do not represent dumping or chemicals that have been abandoned, but represent chemicals that have been applied as intended, in accordance with regulations and common industry practice.

While consultants and users of a Phase I ESA have different risk tolerances due to mentoring or corporate cultures, it is unfitting to use a blanket to cover historical agricultural or railroad land use, by itself, as a REC.

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