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ELULS

THE ENVIRONMENTAL AND LAND USE LAW SECTION

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Where's the Harm in This?

Defining "Harmful to the Water Resources" in the 2016 Outstanding Florida Springs Legislation

by Kathryn Slattery; Thomas T. Ankersen, Esq.; and Robert Palmer, PhD

Abstract

In 2016, the Florida legislature amended Florida's consumptive use permitting statute to provide greater protections for Outstanding Florida Springs. This change imposed two mandates on the Florida Department of Environmental Protection: 1) to adopt uniform rules for the issuance of consumptive use permits to prevent groundwater withdrawals that are "harmful to the water resources," and 2) to adopt by rule a uniform definition of "harmful to the water resources." Over three years have passed the fulfillment of these directives.

In the meantime, Florida's first magnitude springs continue to deteriorate while groundwater supplies dwindle. Though many factors contribute to this status, excessive groundwater withdrawals are exceedingly influential. How FDEP ultimately interprets and defines "harmful to the water resources" has the capacity to drastically improve the status and sustainability of Outstanding Florida Springs. This article argues that "harmful to the water resources" is a new, more stringent standard for the protection of springs and recommends that FDEP and the WMDs review the way certain policies are applied to consumptive use permitting in OFS considering this new standard. These include the standard for permit review, cumulative impacts, economic impact analysis, mitigation, and the public interest test. Categorically determining that all OFS are also Outstanding Florida Waters (many already are) would also contribute to the implementation of more rigorous review of water withdrawals in OFS springsheds. Finally, consideration could be given to operationalizing the "precautionary principle."

Introduction to Harm

"Harm" is a recurring concept in environmental and natural resource law. Though seemingly simple, the term is amorphous and often controversial; how "harm" is ultimately defined hinges on social judgments about what interests are controlling.[1] This challenge appears at international, national, and local scales. For example, the International Law Commission's Draft Articles on the Law of Non-Navigational Uses of International Watercourses encapsulates the tension between what factors should be considered in allocating water uses.[2] The principle of equitable utilization in Articles 5 and 6 entails the weighing of costs and benefits of a proposed use of water, whereas Article 7 articulates a model of "no significant harm" to other watercourse states.[3] In the Pulp Mills on the River Uruguay case, the International Court of Justice interpreted the duty not to cause significant harm to be an obligation of due diligence rather than an absolute prohibition on harm.[4] Accordingly, a state's compliance with Article 7 hinges on the reasonableness of their conduct in attempting to prevent harm rather than an outright prohibition on causing harm.[5]

At the national scale, harms to public health and the environment were the impetus for environmental regulation. For example, the National Ambient Air Quality Standards of the Clean Air Act were designed to address harm to human health and welfare caused by air pollution.[6] Similarly, the Clean Water Act regulates the discharge of oil or other hazardous substances into navigable waters "in such quantities *as may be harmful*."[7] Representing a shift from an anthropocentric regulatory perspective, the Endangered Species Act was designed to prevent harm to endangered or threatened species regardless of their value to humans.[8]

Preventing and addressing harm to the environment is also central to

See "Where's the Harm" page 13

INSIDE:

From the Chair

by David Bass

Spring is upon us, and the birds are chirping loudly in my neighborhood. Thank you Rachel Carson! We here at ELULS have had an active first couple of months in 2019 and it's just heating up. Our CLE team organized two more recent webinars. On January 29, Janet Bowman with The Nature Conservancy and David Childs with the law firm of Hopping Green & Sams delivered a "2019 Florida Legislative Forecast". On February 26, Patricia Gleason presented a great overview of "Public Records Law in the in the Age of Social Media". Both webinars were well "attended" and will soon be available on audio for those of you who missed them. On March 26, James Maher with FDEP and Susan Roeder Martin with the South Florida Water Management District presented the "Essentials of Environmental Permitting." And in April, we will be having a webinar on permit challenges; details of that will be forthcoming. As always, if anyone out there has an idea and/or speaker for a webinar, let us know and we'll be sure to try to fit you in.

We had our second Executive Council meeting of the fiscal year on Thursday, February 7th in Tallahassee, which was followed by a mixer in conjunction with the Florida Brownfields Association at Grass-Lands Brewing Company. A great turnout from both groups made it a fun time for all. Our next scheduled Council meeting will be at our Executive Council retreat on May 18 in Fort Lauderdale. All Section members are invited to attend the council meeting. Please try to make if you can, especially if you live in the South Florida area.

We are busy with more mixers as well. We had a successful mixer April 4 at Sparkman Wharf in Tampa, and scheduled, we have a mixer on April 18 at Wicked Barley in Jacksonville and another on May 17 at Park & Ocean in Fort Lauderdale. The May 17 mixer will be held in conjunction with our Executive Council Retreat. All Section members and guests are encouraged to attend these mixers, meet some new (and old) friends, and keep the exchange of ideas and spirit of good will flowing.

Finally, we need energetic, interested, and motivated ELULS members to join the Executive Council. We currently have a few openings and I encourage you to get involved and participate in the Section. Please contact Cheri Wright at cwright@floridabar.org if you are interested in joining the Council, or just want to help organize CLE events or mixers.

Please keep on the lookout on the Section website and email blasts for information on all that is happening. I wish you continued luck and happiness as 2019 progresses.

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

ON APPEAL

by Larry Sellers, Holland & Knight, LLP

Note: Status of cases is as of March 6, 2019. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Daws, et al. v. FWCC, Case No. SC18-1565. Petition for review of an opinion by 1st DCA reversing trial court decision granting temporary injunction requiring FWCC to stop deer hunters and their dogs from trespassing onto Daws' property. *FWCC v. Daws,* Case No. 1D16-4839 (Fla. 1st DCA April 10, 2018), 43 Fla. L. Weekly D1891a. Status: Petition for review denied on December 17, 2018.

Lieupo v. Simon's Trucking, Inc., Case No. SC18-657. Petition for review of decision by 1st DCA in which the court certified the following question as one of great public importance: "Does the private cause of action contained in s. 376.313(3), Florida Statutes, permit recovery for personal injury?" *Simon's Trucking, Inc., v. Lieupo*, Case No. 1D17-2065 (Fla. 1st DCA, April 18, 2018). Status: On November 6, 2018, the Court accepted jurisdiction; oral argument set for April 4, 2019.

FIRST DISTRICT COURT OF APPEAL

Pelican Bay Foundation, Inc. v. Florida Fish and Wildlife Conservation Commission and City of Naples, Florida, Case No. 1D18-4760 Appeal from a final order dismissing the Foundation's challenge to a proposed rule that updated Manatee Protection Zones for all waterbodies within Collier County, which considered but rejected protection for the Clam Bay System. Status: Notice of appeal filed January 29, 2018; all briefs filed; transferred from Second DCA Case No. 2D18-0353 to First DCA on November 9, 2018.

Jose Oliva, Bill Galvano and the Florida Legislature v. Florida Wildlife Federation, Inc., Florida Defenders of the Environment, Inc., et al. Case No. 1D18-3141. Appeal from Final Judgement for Plaintiffs: (1) interpreting Amendment 1 to limit the use of the funds in the Land Acquisition Trust Fund created by Article X, Section 28 to the acquisition of conservation lands or other property interests that the state did not own on the effective date of the Amendment and thereafter, and to improve, manage, restore natural systems thereon, and enhance public access or enjoyment of those conservation lands; and (2) determining that numerous specific appropriations inconsistent with that interpretation are unconstitutional. Status: Notice of appeal filed July 26, 2018.

Elder v. Department of Agriculture and Consumer Services, Case No. 1D18-1886. Appeal from Department of Agricultural and Consumer Services ("DACS") final order denying Elder's petition for hearing requesting that DACS deny applications or proposals for a bulk storage filling plant that had already been constructed on property adjacent to that owned by Elder. Status: Notice of appeal filed May 7, 2018, affirmed *per curiam* on January 30, 2019.

Kanter Real Estate, LLC v. DEP, et al., Case No. 1D17-5096. Appeal from final order denying an application for oil and gas drilling permit, over a contrary recommendation by an administrative law judge. Status: Reversed and remanded on February 5, 2019; motion for rehearing en banc and in the alternative for certification as of great public importance and motion for rehearing, rehearing en banc and to certify as question of great public importance filed on February 20, 2019.

THIRD DISTRICT COURT OF APPEAL

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

Everglades Law Center Inc. v. SFWMD, Case Nos. 4D18-1220, -1519 and -2124. Appeals from Order Denying Writ of Mandamus Against Plaintiff South Florida Water Management District and Entering Final Judgment on Defendant Everglades Law Center's Counterclaim. The Everglades Law Center sought to require disclosure of the transcripts of a "shade" meeting held by the SFWMD Governing Board involving discussions regarding mediation between the District and its Governing Board in attorney-client sessions. The order concludes that the transcripts of such discussions constitute communications at a mediation proceeding within the meaning of Section 44.102(3), Florida Statutes, and therefore are exempt from disclosure under the public records law. Status: Oral argument set for March 12, 2019.

Maggy Hurchalla v Lake Point Phase I LLC, Case Nos. 4D18-1221 and 1632. Plenary appeal from jury verdict finding 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: Oral argument set for March 12, 2019.

Bluefield Ranch Mitigation Bank Trust v. SFWMD and FDOT, Case No. 4D16-3023. Appeal from SFWMD final order dismissing petition for hearing seeking to challenge issuance of permit to FDOT. Status: Reversed and remanded on July 11, 2018; DOT filed a motion for rehearing and SFWMD filed a motion for clarification or correction, both on August 27, 2018; corrected opinion issued on October 31, 2018.

FIFTH DISTRICT COURT OF APPEAL

Adele Simons, et al v Orange County, et al, Case No. 5D18-1418. Appeal from a final order of the Administration Commission finding to be "in compliance" the "Lake Pickett" plan amendments adopted by Orange County. The administrative law judge recommended that the Administration Commission find the plan amendments not in compliance. Status: Oral argument set for March 19, 2019.

A Ray of Sunshine: The PSC Clarifies Terms of Solar Leases in Florida.

by Timothy J. Perry

Everyone knows that Florida is the Sunshine State, so you might be forgiven for assuming that it ranks first in solar power generation. In reality, that title goes to California, with Florida lagging behind some less sunny locales, like New Jersey and Massachusetts.[1] But recent declaratory statements issued by the Florida Public Service Commission ("PSC"), the state's utility regulator, could help pave the way for more solar generation (and other renewables) to be installed here in the future. The declaratory statements help to clarify the terms upon which a company can lease solar panels to customers without running afoul of the law.

The Need for the Declaratory Statements

At this point, you may be wondering how installing solar panels could possibly be unlawful in a place known as the Sunshine State. The answer to that question goes back more than 30 years to a case known as *PW Ventures.*[2]

The *PW Ventures* case involved the potential sale of electricity from a cogeneration[3] project to be developed by PW Ventures.[4] The power generated by the PW Ventures project would have been used by Pratt and Whitney, several affiliated corporate entities of Pratt and Whitney, and by the Federal Aircraft Credit Union, a separate entity from Pratt and Whitney, also located on the same complex.[5] The PW Ventures facility would not have met all of the electrical needs of Pratt and Whitney (not unlike on-site solar generation, which often requires the purchase of supplemental power).[6] Before proceeding with construction of the facility that would provide the power, PW Ventures sought a declaratory statement from the PSC to clarify that it would not be deemed a public utility subject to PSC regulation.[7]

The question at issue in *PW Ventures* was whether the sale of electricity to a single customer makes the seller a public utility as defined in section 366.02(1), Florida Statutes, and therefore subject to regulation by the PSC. The Supreme Court held that it did, affirming the decision of the PSC, and rejecting arguments by PW Ventures that the statute was meant to apply to sale of electricity to the general public and was not meant to apply to a bargained-for transaction between two businesses.

The broader policy question at play in the case was the potential deregulation of the electric utility market in Florida. The Supreme Court recognized that what PW Ventures proposed to do was "to go into an area served by a utility and take one of its major customers."[8] Thus, if PW Ventures interpretation of the law prevailed, it would "drastically change the regulatory scheme in this state."[9]

While *PW Ventures* limits the sale of electric service in a utilities' territory, it also clarifies that self-generation is exempt from PSC regulation. As stated by the court, "[t]he legislature determined that the protection of the public interest required only limiting competition in the sale of electric service, not a prohibition against self-generation."

The PSC's Recent Declaratory Statements

The PSC recently issued several declaratory statements aimed at clearing up uncertainty surrounding solar leasing arrangements. Specifically, would such leases constitute the sale of electrical service of the type prohibited by *PW Ventures?*

Sunrun Inc. ("Sunrun"), filed a petition for a declaratory statement on December 29, 2017.[10] Sunrun is a residential solar, storage, and energy services company with over 160,000 customers in 22 states and the District of Columbia.[11] Prior to filing its petition for declaratory statement, Sunrun was offering solar panels and battery storage to customers for purchase.[12] Sunrun's petition for declaratory statement related to its proposed residential solar equipment lease program.[13]

Two investor owned utilities, Gulf Power Company ("Gulf Power") and Florida Public Utilities Company ("FPUC") filed a motion to participate as *amici curiae* along with a memorandum of law for the PSC's consideration. Gulf and FPUC noted that the question before the Commission was one of first impression with respect to solar leasing, and also noted their substantial interests in avoiding territorial disputes, and uneconomic duplication of generation, transmission and distribution facilities.[14] They also pointed out that Sunrun did not file a copy of its lease agreement with its Petition, which would allow it to be evaluated by the PSC for consistency with Florida law.[15] Florida Electric Cooperatives Association, Inc. ("FECA") filed a letter in support of Gulf Power and FPUC's motion and memorandum of law.[16]

Sunrun later filed a draft solar equipment lease with the PSC, which the PSC used to confirm the facts in Sunrun's petition for declaratory statement.[17] Sunrun's draft lease contained the following relevant provisions: a 20-year lease of a solar panel system with an option to include batteries; fixed lease payments over the 20-year term which do not vary based on output of the solar panels or maintenance activity; and payment amounts based on a negotiated rate of return independent of electric generation, production rates, or any other operational variable of the leased equipment.[18]

The PSC held that Sunrun's lease does not constitute the sale of electricity, will not cause Sunrun to be deemed a public utility under Florida law, and will not subject Sunrun or Sunrun's customer-lessees to PSC regulation. [19] The PSC's decision was based in part on Rule 25-6.065, Florida Administrative Code, and in part on PSC Order 17009, issued December 22, 1986, in Docket No. 860725-EU, *In re: Petition of Monsanto Company for a declaratory statement concerning the lease financing of a cogeneration facility.* [20]

The PSC discussed that in *Monsanto*, it analyzed whether a company's use of lease-financing for equipment to increase the company's own

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on-site generation would render the company subject to its jurisdiction.[21] Although the *Monsanto* declaratory statement considered cogenerators rather than a solar system, the order reflects facts that are similar to the facts presented in Sunrun's Petition because it involved leasing equipment for self-generation.[22] The PSC stated that Monsanto's plan did not trigger its jurisdiction because the company was "leasing equipment which produces electricity rather than buying electricity that the equipment generates."[23] Also, the PSC noted that the most important fact was that the lease payments in Monsanto "would be fixed through the term of the lease."[24]

The PSC also pointed to Rule 25-6.065, Florida Administrative Code, to support its decision on the Sunrun petition for declaratory statement.[25] That rule, titled "Interconnection and Net Metering of Customer-Owned Renewable Generation," was adopted in 2002 after the *Monsanto* declaratory statement and the *PW Ventures* case.[26] The PSC referred to the fact that Sunrun's draft solar lease requires lease customers to utilize their utility's service and interconnection and net metering provisions.[27] The PSC also stated that the lease was consistent with Rule 25-6.065's definition of customer-owned renewable generation:

> The term 'customer-owned renewable generation' does not preclude the customer of record from contracting for the purchase, lease, operation, or maintenance of an on-site renewable generation system with a third-party under terms and conditions that do not include the retail purchase of electricity from the third party.[28]

Shortly after the issuance of the Sunrun declaratory statement, a petition for declaratory statement was filed by Vivint Solar Developer, LLC ("Vivint").[29] Vivint, sought its declaratory statement to remove questions or doubts concerning the applicability of the statutes, rules and orders identified in its particular set of circumstances, including its proposed long-term lease of solar generation equipment to residential customers throughout Florida.[30]

Like Sunrun's lease, Vivint's lease would fix monthly lease payments for a 20-year lease term based on costs to purchase the solar equipment and install the system, plus a rate of return for Vivint's investment.[31] Payments under the Vivint lease would be independent of electricity generated by the system, utility prices, maintenance activities, solar irradiance, or any other operational variable of the leased equipment.[32]

The PSC granted Vivint's petition on the same basis as the Sunrun petition — *Monsanto* and Rule 25-6.065, Florida Administrative Code. The PSC went on to state that it was unsure why Vivint saw a need to request a declaratory statement, that the facts in Vivint's Petition are virtually identical to the facts set forth by Sunrun, and that declaratory statements for each individual company that has an identical fact pattern to Sunrun's or Vivint's Petition are not necessary.[33]

A third declaratory statement was also recently issued to Tesla, Inc. ("Tesla") for its solar lease program.[34] Tesla's petition for declaratory statement also had similar facts to Sunrun and Vivint's, as the Tesla customer will be the end-user of the electricity generated by the solar panels, the lease payments do not depend on electric generation, and the lease customers must utilize their utility's service and interconnection and net metering provisions.[35]

Even though Tesla was aware of Sunrun's and Vivint's declaratory statements, it stated that it sought a declaratory statement because the *Sunrun* and *Vivint* orders were limited only to the specific facts described in Sunrun and Vivint's petitions and were not binding or applicable to Tesla.[36] Also, according to Tesla, it was compelled to seek a declaratory statement to satisfy the requirements of investors who will provide financing for Tesla's SolarLease program in Florida.[37]

The PSC granted Tesla's petition for declaratory statement based on *Sunrun* and *Vivint*. In addition, the PSC expanded on its statement that its orders on solar leasing had precedential significance (although they were not binding precedent) saying, "the *Sunrun* and *Vivint* orders are applicable to any individual entity where the alleged facts show that the company offers residential solar lease programs with lease payments that do not vary based on generation."[38]

Conclusion

The PSC's recent declaratory statements on solar lease programs provide a ray of sunshine for expansion of the solar market in Florida by clarifying that providers may utilize solar leases as an additional option for customers to acquire solar power. Non-utility providers will still not be able to utilize purchase power agreements when developing solar projects for customers, as they do in other states, because those arrangements would run afoul of *PW Ventures*. However, solar lease programs will certainly help increase the amount of solar power installed in Florida. With the addition of utilities' own planned solar power projects,[39] Florida may soon be known as the Sunshine State and the Solar Power State.

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Endnotes

1. https://www.seia.org/states-map.
2. *PW Ventures, Inc. v. Nichols*, 533 So.2d 281 (1988). For additional information, see the underlying Order 18302 issued in *In re: Petition of PW Ventures, Inc. for Declaratory Statement in Palm Beach County*, FPSC Docket No. 870446-EU.
3. Cogeneration involves the use of steam power to produce electricity, with some of the energy from the steam being recaptured for further use. *PW Ventures, Inc. v. Nichols*, 533 So.2d 281, footnote 2.
4. *PW Ventures, Inc. v. Nichols*, 533 So.2d at 282.
5. *Id* at footnote 3.
6. Order 18302 at page 1.
7. *PW Ventures, Inc. v. Nichols*, 533 So.2d at 282.
8. *PW Ventures, Inc. v. Nichols*, 533 So.2d at 283.
9. *Id.*
10. *See In re: Petition by Sunrun Inc. for declaratory statement concerning leasing of solar equipment*, Docket No. 20170273-EQ, http://www.psc.state.fl.us/ClerkOffice/DocketFiling?docket=20170273.

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RAY OF SUNSHINE
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11. See Order No. PSC-2018-0251-DS-EQ, issued May 17, 2018 in *In re: Petition by Sunrun Inc. for declaratory statement concerning leasing of solar equipment*, Docket No. 20170273-EQ at page 3.
12. *Id* at page 4.
13. *Id*.
14. *See Joint Motion of Gulf Power Company and Florida Public Utilities Company for Leave to File Amici Curiae Memorandum at page 2,* http://www.psc.state.fl.us/library/filings/2018/00976-2018/00976-2018.pdf.
15. *See Gulf Power Company and Florida Public Utilities Company Amici Curiae Memorandum at page 3,* http://www.psc.state.fl.us/library/filings/2018/00976-2018/00976-2018.pdf; Order No. PSC-2018-0251-DS-EQ at page 4.
16. See FECA letter at http://www.psc.state.fl.us/library/filings/2018/01182-2018/01182-2018.pdf.
17. See Order No. PSC-2018-0251-DS-EQ at page 6.
18. See Order No. PSC-2018-0251-DS-EQ at page 4.
19. See Order No. PSC-2018-0251-DS-EQ at page 9.
20. See Order No. PSC-2018-0251-DS-EQ at page 5.
21. See Order No. PSC-2018-0251-DS-EQ at page 7.
22. See Order No. PSC-2018-0251-DS-EQ at page 7.
23. See Order No. PSC-2018-0251-DS-EQ at page 7.
24. See Order No. PSC-2018-0251-DS-EQ at page 7.
25. See Order No. PSC-2018-0251-DS-EQ at page 6.
26. See Order No. PSC-2018-0251-DS-EQ at page 6.
27. See Order No. PSC-2018-0251-DS-EQ at page 6.
28. See Order No. PSC-2018-0251-DS-EQ at page 6.
29. See Order No. PSC-2018-0413-DS-EQ, issued August 21, 2018 in *In re: Petition for declaratory statement concerning leasing of solar equipment, by Vivint Solar Developer, LLC*., Docket No. 20180124-EQ at page 1.
30. See Order No. PSC-2018-0413-DS-EQ at page 1.
31. See Order No. PSC-2018-0413-DS-EQ at page 3.
32. See Order No. PSC-2018-0413-DS-EQ at page 3.
33. See Order No. PSC-2018-0413-DS-EQ at pages 2 and 6.
34. See Order No. PSC-2019-0065-DS-EQ, issued February 21, 2019 in *In re: Petition by Tesla, Inc. for declaratory statement concerning leasing of solar electric equipment*, Docket No. 20180221-EQ.
35. See Order No. PSC-2019-0065-DS-EQ, at page 2.
36. See Order No. PSC-2019-0065-DS-EQ, at page 2.
37. See Order No. PSC-2019-0065-DS-EQ, at page 2.
38. See Order No. PSC-2019-0065-DS-EQ, at page 2. A fourth petition for declaratory statement regarding solar leasing was recently filed by IGS Solar, LLC in PSC Docket No. 20190040-EQ.
39. For more information on utilities' upcoming solar projects, see the utilities' ten-year site plans at http://www.psc.state.fl.us/ElectricNaturalGas/TenYearSitePlans.

ELULS Case Law Update April 2019

by Gary Hunter, Hopping Green & Sams

Defenders of Crooked Lake, Inc. and Phillip and Priscilla Gerard v. Krista Howard and Department of Environmental Protection, 2018 Fla. Div. Adm. Hear. LEXIS 647 (DOAH August 16, 2018).

At issue was the Department of Environmental Protection's ("DEP") issuance of a Consolidated Environmental Resource Permit ("CERP") to a residential riparian landowner for construction of a dock. DEP issued a CERP to Howard for the construction of a two-level dock with four slips and a flat platform roof. Howard's neighbors, the Gerards, challenged DEP's permit issuance, alleging that the dock would interfere with the Gerards' riparian rights.

As proposed, the dock would occupy a total area of approximately 2,591 square feet and extend 204 feet into the lake. Several other docks on Crooked Lake are of similar size to the proposed dock and eight are larger. The dock is designed to compensate for known fluctuations in Crooked Lake's water level and extends out to the bottom elevation point of the lake, which is approximately 109.9 feet National Geodetic Vertical Datum ("NGVD"). Howard's boats have 20- and 25-inch drafts and will be stored on a boat lift.

On July 5, 2018, the ALJ submitted a Recommended Order ("RO") to the Department of Environmental Protection. The ALJ found that the dock will not adversely affect or degrade the water quality or the fish, wildlife, or listed species of Crooked Lake. The ALJ also concluded that the dock will not create a navigational hazard or unreasonably infringe upon or restrict the Gerards' riparian right to an unobstructed view. No exceptions were filed to the RO.

The DEP Secretary issued a Consolidated Final Order on August 16, 2018, wherein the RO and the DEP Consolidated Permit were approved with modifications. Notably, the DEP specified that a minimum six-inch clearance, rather than 12-inch, shall be maintained between the top of all submerged resources and the deepest draft of the cradle of the boat life while in use. The DEP also added a condition that prohibits construction of the Dock in any emergent grasses in Howard's riparian area. If emergent grasses cannot be avoided during construction, then Howard must cease construction and apply for a modification to the Consolidated Authorization.

Little Club Condo. Ass'n v. Martin Cty., 2018 Fla. App. LEXIS 16692 (Fla 4th DCA November 21, 2018)

This case concerned the approval for construction of a cellular tower within close proximity to residential homes. Little Club Condominium Association ("Little Club") challenged the Martin County Board of County Commissioner's (the "Board") decision to approve construction of the cellular tower. The trial court denied their petition for certiorari regarding the Board's "stealth" determination and also found that the construction was consistent with the county's comprehensive plan as a matter of law. The district court affirmed the lower court's decisions finding there was no error in the grant of summary judgment and that the stealth issue was limited to certiorari review.

Little Club first challenged the Board's decision at a quasi-judicial hearing, arguing that the cellular tower would not be "stealth" as required by the county land ordinances. Martin Cty., Fla.,Land Dev. Regulations § 4.792. The Board disagreed and approved the construction. Little Club petitioned for certiorari to review the "stealth" determination but was denied certiorari by the circuit appellate court.

At the same time, Little Club filed an action in trial court arguing that the order was inconsistent with "Goal 4.4" and "Objective 4.4D" of the comprehensive growth management plan. Little Club made a second argument that the tower was not stealth and

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thus inconsistent with Goal 4.4 and Objective 4.4D. The circuit court granted summary judgment against Little Club because neither Goal 4.4 nor Objective 4.4D are proper measures to judge consistency.

On appeal, Little Club argued that its expert's testimony that the tower was inconsistent with Goal 4.4 and Objective 4.4D rendered summary judgment improper. Addressing Objective 4.4D, the district court stated that the provision only calls for a policy and does not prohibit particular designs. Thus, specialized knowledge could shed no further light and summary judgment was not precluded. Addressing Goal 4.4, the court stated that the provision is directed towards nonconforming uses and because the construction conforms to land regulations, the tower was consistent as a matter of law.

The district court also distinguished the case from *Howell v. Pasco Cnty, 165 So. 3d 12 (Fla. 2d DCA 2015)* which held that a trial court could not find a land use (mining) per se permissible as a matter of law. The court distinguished the case by noting that in *Howell,* the regulations required an inquiry into the character of activity, which made expert testimony useful and summary judgment inappropriate. In this case, the cited regulations do not make an inquiry into the character of communication towers and so the trial court did not err in holding Goal 4.4 and Objective 4.4D as improper standards to evaluate the tower.

On the issue of stealth, the district court held that the trial court properly dismissed the stealth claim. First, the court noted that the stealth issue had been submitted simultaneously to the trial court and the circuit appellate division, and for that reason dismissal was appropriate. The district court went on to say that the issue of stealth was outside of the trial court's jurisdiction due to the nature of the challenge. *See* §163.3215(3) Fla. Stat. (2018). Finally, because the Board's hearing was quasi-judicial in nature, the factual issue of the stealth determination was limited to certiorari review.

For the previous reasons, the district court affirmed the rulings of the lower court in their entirety.

City of Jacksonville Beach v. BCEL 4, LLC., Fla. App. LEXIS 18245 (Fla. 1st DCA December 18, 2018)

At issue was the City of Jacksonville Beach's (the "City") appeal of a circuit court order granting BCEL mandamus relief and alternatively granting BCEL's petition for writ of certiorari. The district court reversed the portion of the order granting BCEL mandamus relief, stating that "BCEL failed to establish [that] the City's decision to approve or deny its concept plan for plat application was a purely ministerial one". Regarding the grant of certiorari to BCEL, the district court denied the City's petition for second-tier certiorari, stating that the lower court "afforded procedural due process and did not depart from the essential requirements of law."

Florida State University College of Law Spring 2019 Update

by David Markell, Steven M. Goldstein Professor

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

Recent Alumni Accomplishments

Kathy Castor

Melanie Leitman

Brian O'Neil

Travis Voyles

- **Kathy Castor** was recently appointed as Chair of the new Select Committee on the Climate Crisis. She continues to serve as a U.S. Representative of Florida's 14th Congressional district, which includes Tampa and parts of Hillsborough County.
- **David Henning** was certified by the American Institute of Certified Planners (AICP), the nationwide independent verification of urban, city, and regional planners.
- **Alexandra Holliday** is now working as the Assistant District Attorney for Regulatory Programs at the US Army Corps of Engineers, Jacksonville District. In her new role she is responsible for regulatory and environmental matters pertaining to the permitting and enforcement of the Clean Water Act and the Rivers and Harbors Act in Florida, Puerto Rico, and the U.S. Virgin Islands.
- **Melanie Leitman** has joined Stearns Weaver Miller's Tallahassee office as an attorney in the Administrative Law & Regulatory Compliance and Labor & Employment groups. Her practice focuses on both public and private entities in all aspects of civil law, including administrative litigation and regulatory compliance; employment defense litigation; Human Resources compliance, consultation, and training; tort defense; general business and contract disputes; state and federal appellate advocacy; and securing tax exempt status from the IRS for 501(c) entities.
- **Michael Melli** published *The Successful Congressional Challenge of Executive Non-Enforcement* in 31 St. Thomas L. Rev. 55 (2018).
- **Brian O'Neil** was named the Energy Regulatory Lawyer of the Year in U.S. News & World Report's Best Lawyers publication.
- **Christine Senne** has been appointed to the Florida Bar's 10th Circuit Grievance Committee. She also now serves as the Compliance Director for Knox, a medical marijuana company headquartered in Florida. She remains Of Counsel to Manson, Bolves, Donaldson, Varn, where she practices environmental and administrative law.
- **Michael Sjuggerud** was quoted in a Florida Today article on a land use bill proposed in Florida that would ban smoking on Florida beaches.
- **Stephen Varnell** has recently accepted a clerkship with Justice Robert J. Luck at the Supreme Court of Florida.
- **Travis Voyles** is now working at the EPA as the Director of Oversight in the Office of Congressional and Intergovernmental Affairs. In his new role he will be managing all investigative and oversight matters at EPA stemming from the House of Representatives.

Recent Student Achievements

Congratulations to the following students who are currently completing externships in environmental and administrative law:

- **Allison Barkett** – Department of Environmental Protection
- **William Hamilton** – City of Tallahassee, Land Use
- **Race Smith** – Blueprint 2000
- **Daumantas Venckus** – NextEra Energy (Juno Beach)

Spring 2019 Events

The College of Law has hosted and will be hosting a full slate of environmental and administrative law events and activities this spring semester.

Energy Resilience Panel

This panel discussion, held on January 23, explored a variety of laws that are changing or need to change in order to prevent threats to energy reliability or more quickly regain reliability when it is compromised. Participants included **Sara Rollet Gosman**, Associate Professor of Law, University of Arkansas School of Law; **Kevin B. Jones**, Director, Institute for Energy and The Environment, and Professor of Energy Technology and Policy, Vermont Law School; **Romany Webb**, Senior Fellow and Associate Research Scholar, Sabin Center for Climate Change Law, Columbia Law School;

Kevin B. Jones, Sara Rollet Gosman, and Robert Scheffel "Schef" Wright

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FSU SPRING UPDATE
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and **James Van Nostrand**, Director, Center for Energy and Sustainable Development, and Professor of Law, West Virginia University College of Law. **Robert Scheffel "Schef" Wright**, Shareholder at Gardner, Bist, Bowden, Bush, Dee, LaVia & Wright, served as a moderator. The panel is available to view via this link: http://mediasite.capd.fsu.edu/Mediasite/Play/b1db113d8af14fab85c9df47edd76b8b1d.

Spring 2019 Environmental Distinguished Lecture

Richard Revesz, Lawrence King Professor of Law and Dean Emeritus, New York University School of Law, presented our Spring 2019 Environmental Distinguished Lecture titled, "Institutional Pathologies in the Regulatory State: What Scott Pruitt Taught Us About Regulatory Policy." Professor Revesz's lecture was held on February 6 and is available to view via this link: http://mediasite.capd.fsu.edu/Mediasite/Play/a61e990eb232476ca0b6ab9ca3ab74ca1d.


Richard Revesz

Environmental Law Guest Lectures

Tara Righetti, Associate Professor of Law, University of Wyoming College of Law, presented a guest lecture titled, "The Reluctant Environmental Agency," on Wednesday, February 20 at 12:30 P.M. in Room 208.


Tara Righetti

Bruce Huber, Professor of Law and Robert & Marion Short Scholar, University of Notre Dame Law School, presented a guest lecture titled, "Negative Value Property," on Wednesday, March 6, 2019.


Bruce Huber

Michael Gray, Attorney, Appellate Division, Environment and Natural Resources Division, U.S. Department of Justice, presented a guest lecture titled, "Navy Sonar and the Marine Mammal Protection Act," on Wednesday, March 27.

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.

UF Law Update

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

Supreme Court Cites UF Environmental and Land Use Law Scholars

The Supreme Court recently cited the scholarship of Professors Michael Wolf and Danaya Wright in the decision Murr v. Wisconsin, 137 U.S. 1933 (2017). Justice Anthony Kennedy cited Professor Wright in his majority opinion, while Chief Justice John Roberts cited Wolf in his dissenting opinion.

Michael Alan Wolf: Powell on Real Property § 81A.05(2)(a) (M. Wolf ed. 2016).

Danaya Wright: A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis, 34 Environmental Law 175, 180 (2004).

UF Law Public Interest Environmental Conference:

UF Law held its 25th Annual Public Interest Environmental Conference February 7-9, 2019. For 25 years, the Public Interest Environmental Conference (**PIEC**) has sought to promote an understanding of the legal aspects of environmental protection, serve and inform individuals as to the necessity for improvements in environmental legal protection, foster the development of sound environmental legislation, measure the effects of environmental litigation, and assist other groups involved in environmental education. The conference brings together legal practitioners, academics, policy makers, and private citizens to discuss preeminent issues surrounding a different environmental theme each year.

This year's theme, **Our Future: Embracing the Anthropocene**, centered around the hotly debated idea that the world has left the Holocene and entered a new epoch dominated by human impact. The move into the Anthropocene is supported by evidence that we humans have impacted the geological structure of

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our planet so severely that, if we were to disappear, our mark would be permanently ingrained in our planet's fossil record. With panels discussing topics ranging from the future of our oceans to the ethical challenges of geoengineering, the conference explored the indelible imprint of humans on the planet and on the State of Florida, and the law, policy and ethics that must confront this new reality. PIEC collaborated with the Harn Museum, and held its opening reception in conjunction with the Harn's exhibition *The World to Come: Art in the Age of the Anthropocene*, to give its attendees a full cultural and technical perspective. The Opening Reception Keynote Speaker was Professor Andrew Light from George Mason University, who wowed, and at times shocked, the audience with examples of geoengineering and other technological solutions being considered to mitigate or adapt to climate change. From 2013-2016, Professor Light served as Senior Adviser and India Counselor to the U.S. Special Envoy on Climate Change and as a Staff Climate Adviser in the U.S. Department of State's Office of Policy Planning. Professor Light is currently a Distinguished Senior Fellow in the World Resources Institute's Climate Program, where he works on a variety of topics in both U.S. and global climate and renewable energy strategy.

M. VAN ROSSUM

The Keynote speaker for the PIEC Friday evening banquet was Maya K. van Rossum, who has served as the Delaware Riverkeeper and leader of the Delaware Riverkeeper Network since 1994. Van Rossum is also the founder of the national Green Amendment movement. After the movement began to gather momentum and following an important legal victory that established the Pennsylvanian people's constitutional right to a clean and healthy environment, van Rossum authored and published The Green Amendment. In her book, van Rossum advocates altering the legal system through activist movements aimed at amending federal and state constitutions. Her message of inspiring a new agenda for environmental advocacy is timely considering the contemporary global need for urgent restructuring of climate change governance schemes.

The success of the PIEC is due to the hard work of UF student conference co-chairs, Megan Lancaster (2L) and Adam Bentley (2L) and a team of UF Law students and faculty, as well as funding from our sponsors including the ELULS.

Retiring Professor Alyson Flournoy Honored by Quadrupling UF College of Law Solar Panels:

After 31 years at the University of Florida Levin College of Law Professor Alyson Flournoy will be retiring in order to, as she put it, "see what life is like without work." Professor Flournoy has inspired generations of environmental and land use law students, practitioners and scholars at the Levin College of Law, in the Florida Bar and across the nation. Until 2011, she served as founding director of the College's Environmental and Land Use Law Program and helped grow it into one of the nation's top-ranked environmental law programs. Even after stepping down as Director and assuming the role of Associate Dean, Professor Flournoy continued to support the Program and its various curricular, co-curricular and extra-curricular activities. Perhaps presaging her retirement plans, her most recent work has focused on the law of boundaries, beaches, and access in an era of rising seas. Professor Flournoy's contributions to the ELULP, scholarly work, and generosity of spirit were honored at the 25th Annual PIEC. At the PIEC Opening Reception, UF Law Dean Laura Rosenbury recognized the profound impact Flournoy has had on the College of Law and ELULP program and announced that the College of Law is making a $55,000 investment to quadruple its photovoltaic panels and solar electricity generation in honor of Flournoy.

UF Law Conservation Clinic:

As usual, UF Law's Conservation Clinic provided students with exceptional experiential learning opportunities, as well as opportunities to get out into the field, while assisting client's with achieving important conservation goals.

CONSERVATION CLINIC

SEA TURTLE HABITAT PROTECTION VIA CONSERVATION EASEMENT

UF Law's Conservation Clinic braved the season's first blustery weather and traveled to the Atlantic Coast to install signage recognizing what is likely Florida's first conservation easement devoted entirely to the protection of sea turtle habitat. With support from the National Fish and Wildlife Foundation, the UF Archie Carr Center for Sea Turtle Research, Florida Sea Grant and the Sea Turtle Conservancy, the Clinic drafted the first of its kind easement. Former Clinic students and legal fellows Jen Lomberk (JD, 2016), who now works as the Matanzas Riverkeeper, and Justin Caron (JD, 2017) worked to develop the Clinic's sea turtle habitat conservation program, assisted by Sea Turtle Conservancy policy director Gary Appelson, and implemented by Clinic client Alachua Conservation Trust. While on the beach, faculty and students took the opportunity to tour the UF Whitney Laboratory's Sea Turtle Hospital, led by UF's Cat Eastman.

SEA TURTLE HABITAT

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CITIZEN'S SCIENCE, NATURE'S CLASSROOM AND THE LAW

Citizen science has become an increasingly popular and useful means of gathering data, providing valuable information to scientists and managers for decision-making. It's also a great way for law students to get into nature's classroom, and better understand the data gathering process they must rely on, defend or challenge. For UF Levin College of Law Conservation Clinic students Vanessa Fernandez (3L), Caroline Gibble (3L), and Stefano Barchiesi (Ph.D. Interdisciplinary Ecology), it was also a great way to spend a cool autumn day on Florida's Nature Coast, wading the shoreline at high tide to count, measure and tag the annual horseshoe crab migration. Under the leadership of regional Specialized Agent Savanna Barry, the UF IFAS Nature Coast Biological Station and Florida Sea Grant launched the popular citizen science initiative several years ago. It has since been expanded to other areas of the state.

CITIZEN'S SCIENCE

STUDENTS PRESENT CLINIC PROJECTS TO LOCAL BAR

Students and faculty in the UF Law Conservation Clinic recently presented some of the Clinic's locally-focused work at the 8th Judicial Circuit Bar Luncheon in downtown Gainesville. Clinic staff attorney Candace Spencer and 3L student associate Caroline Gibble presented the Clinic's programming in environmental justice and food security in Gainesville and Alachua County, while 3L student associate Vanessa Fernandez presented the Clinic's legal work on drones and wildlife harassment. Staff attorney Justin Caron described the Clinic's work with Alachua Conservation Trust, and Clinic Director Tom Ankersen provided an overview of the Clinic's long history of work across North Florida.

UF Law's Costa Rica Program:

Experiential learning is the hallmark of UF Law's Costa Rica Program, and what separates it from most study abroad programs. With colleagues from throughout Latin America, students in the Program learn, and apply what they learn, to environmental policy problems in Costa Rica and elsewhere in the region. In the process, they are helping to shape conservation policy in meaningful ways. The 2018 Program was no different.

Professor Tom Ankersen and 10 UF Law students, along with six graduate students from a variety of disciplines who are part of UF Water Institute's Graduate Fellows Program traveled to Costa Rica to participate in Environmental Law Study Abroad Program. Recently, the program was named as one of the "Most Unusual" law school study abroad programs.

COSTA RICA PROGRAM

Students in the UF Law Costa Rica Program spent their last full week in San Jose preparing for final practicum presentations, and visiting some of the key institutions that contributed to Costa Rica's reputation as a laboratory for sustainable development law and policy. They visited the "Casa Amarilla," Costa Rica's foreign ministry and heard a talk from Arnoldo Brenes, the Costa Rican lead attorney in the suite of cases in the International Court of Justice between Costa Rica and Nicaragua – cases which have helped to solidify the recognition of transboundary environmental impact assessment as customary international law. They visited the Inter-American Court for Human Rights and discussed the recent advisory opinion to the Government of Colombia which confirms that the right to a healthy environment is a human right in the Inter-American System. The discussion was led by Elizabeth Jimenez, a former Program student, and now a staff attorney at the Court. They capped off the week with a visit to the "Assemblea Legislativa" where they learned about the history of democracy in Costa Rica, and the famous decision in 1948-49 to abolish the military and raise "an army of school children."

ROBUST FACULTY SCHOLARSHIP AND PRESENTATIONS (RECENT SELECTIONS):

Mary Jane Angelo Sam T. Dell Term Professor; Director, Environmental and Land Use Law Program, Research Handbook on Climate Change and Agricultural Law (Edward Elgar 2017) (with Anel Du Pleissis).

Thomas T. Ankersen Legal Skills Professor; Director, Conservation Clinic, Recreational Rights to the Dry Sand Beach in Florida: Property, Custom and Controversy (2019) (with Alyson C. Flournoy and Sasha Alvarenga). Available at SSRN: https://ssrn.com/abstract=3309926 or http://dx.doi.org/10.2139/ssrn.3309926

Joan D. Flocks Director, Social Policy Division, Center for Governmental Responsibility, A Systematic Review of Mancozeb as a Reproductive and Developmental Hazard, 99 Environment International 29 (2017) (with Jennifer Runkle, et al.).

Alyson Craig Flournoy Alumni Research Scholar, Beach-Law Clean-Up: How Sea-Level Rise Has Eroded the Ambulatory Boundaries Legal Framework, 42 Vermont Law Review 89 (2017).

Christine A. Klein Chesterfield Smith Professor, Owning Groundwater: The Example of Mississippi v. Tennessee, 35 Virginia Environmental Law Journal 474 (2017).

Tim McLendon Staff Attorney, Center for Governmental Responsibility, United States Preservation Law: Why Preserve? What Should We Preserve? How Do We Preserve? (Stetson University October 2017).

Amy Stein Professor of Law, Breaking Energy Path Dependencies, 82 Brooklyn Law Review 559 (2017).

Michael Allan Wolf Richard E. Nelson Chair in Local Government, Right Environmentalism: Repurposing Conservative Constitutionalism, 50 Arizona State Law Journal 651 (2018).

Danaya C. Wright Clarence J. TeSelle Professor, A Requiem for Regulatory Takings: Reclaiming Eminent Domain for Constitutional Property Claims, 49 Environmental Law (forthcoming 2019).

Florida statutory provisions pertaining to the use and protection of water resources. For example, §373.042 requires the Florida Department of Environmental Protection (FDEP) and Water Management Districts (WMDs) to set minimum flows and minimum levels (MFLs) for all waters of the state. These MFLs represent the limit and level at which further withdrawals would be "*significantly harmful* to the water resources or ecology of the area."[9] By neglecting to define "significant harm," the Florida legislature left this determination to the WMDs.[10] This has inspired debate over whether "significant harm" should involve purely scientific considerations of impacts to ecological functions or other features of water resources, or whether economic impacts and related factors should also be evaluated.[11]

The term "significant harm" is also found in the water resource and water supply development projects provision of the Florida Forever Act.[12] According to the Act, "a water resource or water supply development project may be allowed only if the following conditions are met: minimum flows and levels have been established for those waters, if any, which may reasonably be expected to experience significant harm to water resources as a result of the project."[13] The Environmental Resource Permit statutory scheme takes a broader approach to harm, requiring a demonstration that activities in surface waters and wetlands will not be "*harmful* to the water resources."[14] This requires reasonable assurance that the activity is not contrary to the public interest.[15] The recurrence of "harm" in statutory, regulatory, and even the common law make defining this term central to the efficacy of these protective measures.

Florida's Springs

Overview

The Floridan Aquifer is composed of 100,000 square miles of underground limestone and dolostone geologic formations with the capacity to hold trillions of gallons of potable water.[16] Much of this water flows through tunnels and caverns and eventually percolates up to spring vents at the surface.[17] This spring flow is directly related to the health of the spring ecosystem and also indicates the amount of water stored in the aquifer.[18] This rate of flow is represented by magnitude, or average flow in cubic feet per second (cfs), of a spring.[19] Florida has 33 "first magnitude" springs, which exceed flow rates of 100 cfs.[20] The 2016 Florida Springs and Aquifer Protection Act imparts distinct protections for 24 of these Outstanding Florida Springs (OFS), defined as all historic first magnitude springs and associated spring runs according to recent Florida geological surveys. This definition lists six additional second magnitude springs and their associated spring runs which constitute OFS for statutory purposes: De Leon Springs, Peacock Springs, Poe Springs, Rock Springs, Wekiwa Springs and Gemini Springs.[21]

Importance

These OFS and 340 other second and third magnitude springs throughout Florida provide habitat for plants and animals, including endangered and threatened species, and contribute to the scientific understanding of aquatic systems.[22] Springs also offer recreational and related economic opportunities such as kayaking, fishing, snorkeling, and diving.[23] The health of these springs exhibits the quality and quantity of water in the Floridan Aquifer, which provides drinking water for the majority of the State's residents.[24]

Degradation

If the balance of water use and recharge into the aquifer is maintained, healthy spring flow can be sustained.[25] Unfortunately, hydrological and environmental conditions of springs are directly influenced by water withdrawals from the Floridan aquifer.[26] Many Florida Springs demonstrate signs of ecological imbalance, increased nutrient loading, and declining flow.[27] These concerns are compounded by overpumping of the aquifer in response to population growth, development, and agriculture over the past several decades.[28]

In the 1970s, Florida was a mostly rural state with a population of 7 million; as of April 2017, Florida is the third most populous state with a population of 20.5 million.[29] Between 2017 and 2035, the population is projected to increase by another 25%- approximately 5 million additional residents.[30] According to water demand projections developed by five WMDs for purposes of planning, from 2015 to 2035, water demand is expected to increase by 17% from 6,407.2 to 7,515.9 million gallons per day (mgd).[31]

Across the state, groundwater and surface water resources can no longer meet the growing water demands while also supporting surface water bodies such as springs.[32] This dilemma is aggravated by a significant increase in impermeable surface area which further reduces the rate of recharge to the aquifer.[33] Though the aquifer is just below the land surface in much of west-central and north-central Florida, in the remainder of the state, the aquifer is confined by overlying beds of sand and clay which may be as much as 600-700 feet thick.[34] In such cases, recharge is slow, with rates varying from one to twenty inches per year depending on geologic and hydrologic conditions.[35] Even under optimal conditions of vegetated natural surface, only 50% of rainwater returns to the aquifer following uptake by vegetation and evaporation.[36] With large-scale impermeable surfaces such as roads and parking lots, as little as 2% of rainwater returns to the aquifer.[37] This low rate of recharge simply cannot keep up with Florida's increasing rates of consumption.

Permitting Groundwater Withdrawals in Florida: Consumptive Use Permits (CUPs)

Florida Statutes Chapter 373, Part II authorizes WMDs to adopt rules regarding consumptive uses of water in their areas, such as municipal water supply, bottling and distribution, and agriculture.[38] This Chapter provides a framework for authorizing consumptive uses across WMDs: the use must be reasonable-beneficial; must not interfere with an existing legal use; and must be consistent with the public interest.[39] "Reasonable-beneficial use" is further defined as "the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest."[40]

The WMDs have exercised their statutory authority over consumptive uses of water through the Consumptive Use Permitting (CUP) Program.[41] Each WMD has adopted its own rules for conditions of issuance of these permits, though the conditions are

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WHERE'S THE HARM
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similar across WMDs.[42] These rules primarily interpret which water uses qualify as "reasonable-beneficial" against the backdrop of the statutory definition and guidance provided by FDEP rulemaking, and case law.[43] The rules are further elaborated by each WMD through detailed "Applicant's Handbooks," which are themselves rules, and which vary somewhat by District, to account for variation.[44]

CUPs are granted for fixed periods with a maximum duration of 20 years, at which time they are subject to renewal.[45] WMDs may require new conditions to protect the environment or require more efficient uses before renewing a user's permit.[46] Accordingly, CUPs are one of the principal means for WMDs to regulate human activities adversely affecting fish, wildlife, and water-dependent natural resources.[47]

The third prong of the CUP statutory framework has yet to be clearly interpreted by the legislature or WMDs.[48] In practice, the public interest component is often treated summarily or conflated with "reasonable-beneficial," in a way that makes it difficult to know the extent to which it is taken into account in permitting decisions.[49] This practice seems to be contrary to the Model Water Code upon which the statutory framework for regulation of water in Florida was based; the Code envisioned that the public interest and reasonable-beneficial use components be evaluated separately.[50] Uses falling within the meaning of public interest as defined by the Code include protecting fish and wildlife; maintaining ecological balance and scenic beauty; and preserving and enhancing waters for navigation, public recreation, and municipal water supply.[51] Each of these factors, and the public interest they represent, may be compromised where excessive rates of groundwater withdrawals take place in Florida.[52] While a separate provision of the Water Resources Act calls for the establishment of "minimum flows and levels" to protect non-consumptive uses, CUPs continue to be issued in spring sheds that have had MFL's established, and are currently below their minimums.

A New Statutory Standard

In response to concerns regarding water quantity and groundwater withdrawals, the Florida legislature amended this consumptive use framework in 2016 – specifically for Springs.[53] These amendments created a new statutory standard for the issuance of CUPs near OFS, mandating that FDEP adopt uniform rules for issuance of CUPs to prevent groundwater withdrawals that are *"harmful to the water resources."*[54] FDEP must also adopt by rule a uniform definition of "harmful to the water resources."[55]

Since the promulgation of these provisions in 2016, the FDEP has issued a Notice of Development of Rulemaking, followed by two Notices of Extension of Rulemaking.[56] These Extensions are based on FDEP's need for "additional time to further develop and solicit public comment on the rules associated with this rulemaking effort."[57] Under F.S. §120.74(5), agencies are free to continue extending the deadline for rulemaking so long as they identify "any issues that are causing the delay in rulemaking."[58] Beyond stating the need for more time to solicit public comment, FDEP did not identify any additional "issues… causing delay."[59]

The efficacy of these rules and their capacity to protect OFS by maintaining the withdrawal/recharge balance hinges on how "harmful to the water resources" is ultimately developed by FDEP. This definition must reflect the fact that this is a new, more stringent standard than that applied in other contexts, and that

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was previously applied to all springs. For example, MFLs are set to reflect the limit and level at which further withdrawals would be "significantly harmful" to the water resources and ecology.[60] Munson et al. considers the legislature's decision to use the phrase "significant harm" rather than merely "harm" establishes that these are, in fact, separate standards.[61] This theory is supported by the South Florida WMD's treatment of harm and significant harm as relative resource protection terms reflecting distinct levels of allowable impact.[62] Under these standards, "harm" is used to denote temporary harm to water resources and recovery within one or two seasons.[63] Representing a less stringent standard than "harm," "significant harm" requires multiple years for the water resources to recover.[64]

Members of the Florida Senate Environmental Preservation and Conservation Committee made clear their intention that "harmful to the water resources" is distinct from – and more stringent than - "significant harm." During a Committee hearing preceding passage of SB 552, Senator Simmons, an original sponsor of the bill, explicitly addressed the "harmful to the water resources" standard to be applied to consumptive use permitting in OFS.[65] Simmons stated that this is:

> "certainly not the same as significant harm…it is something that is a major, major step forward in the protection, preservation and clean-up of our springs…What we're doing is we're putting together a new standard here; not something that has previously been done, but a new standard."[66]

In essence, the Florida Legislature was putting the regulators on notice that Outstanding Florida Springs should be treated more protectively than other waters in the permitting process.

Potential Overlap with CFWI

SB 522 also included a new provision applying exclusively to the Central Florida Water Initiative (CFWI) Area.[67] The CFWI Area spans five counties, including Orange, Osceola, Polk, Seminole and southern Lake.[68] Because the boundaries of their respective WMDs meet in the Area, the St. Johns River, South Florida and Southwest Florida WMDs are engaged with this collaborative effort.[69] The CFWI was created in response to the districts' and FDEP's determination that the Floridan Aquifer is "locally approaching the sustainable limits of use" and to "the need to develop sources of water to meet the long-term water needs of the area."[70] These provisions were intended to build on the established framework of the CFWI Guiding Document of January 30, 2015.[71]

Under F.S. §373.0465(d), the FDEP, in consultation with WMDs of the CFWI Area, must adopt uniform rules for application within the CFWI Area that include a single, uniform definition of the term "harmful to the water resources" consistent with the term's usage in §373.219. There is concern among springs conservation groups that FDEP will take into consideration issues in the CFWI that may not be appropriate for OFS, or that the CFWI process will result in unnecessary complications and delays in the rulemaking process. The use of the term "consistent" in §373.0465(d) for the CFWI definition merely suggests that the two definitions must not be in conflict; this does not suggest that they are to be the same and enacted concurrently.

Giving Meaning to "Harmful to the Water Resources" for OFS

Given the Florida Legislature's determination that certain Springs merit distinction as "Outstanding," a higher standard for determining which groundwater withdrawals are "harmful to the water resources" of OFS is essential. Due to the breadth of factors influencing springs and the delicate balance required to maintain spring health, giving meaning to the term "harmful to the water resources" of OFS must bring something new and additional to the table. It is certainly appropriate that science-based springs-wide and springshed-specific permitting criteria be developed and periodically reviewed as a means of defining harm to OFS. It may also make sense to revisit some general policy constructs typically used in the review of water withdrawals. These include the administrative permit review standard currently employed, more robust consideration of cumulative impacts, disallowing or disfavoring mitigation and related impact substitution options, diminishing economic impact analysis and more stringent public interest review. Consideration could be given to categorically designating all OFS as Outstanding Florida Waters (OFW), a water quality protection rule - making explicit the link between water quantity and water quality. Finally, consideration could be given to incorporating the precautionary approach, a well-known principle of environmental policy, into the permitting process. These are discussed very briefly below, with the caveat that some may require additional legislative authority.

A Stricter Standard of Review

In their Applicant's Handbooks, SJRWMD & WMDs employ "reasonable assurance" as the standard for reviewing permits. Although it is used elsewhere in Chapter 373 and in Chapter 403, Section 373.223 of the Water Resources Act, which governs consumptive use permitting does not use this term. Instead, Section 373.223(1) provides that an applicant "must establish that the proposed use of water" satisfies the three-part test that the use be "reasonable-beneficial," not interfere with "existing legal users," and be "in the public interest."[72] Assuming it is a distinction with a difference and setting aside whether a WMD has administrative discretion to substitute "reasonable assurance" for "must establish" in the first instance, it might make sense to elevate the standard of review in permitting OFS.

Cumulative Impacts

A single groundwater withdrawal permit cannot be evaluated in isolation without potentially causing harm to water resources. Thus, the contribution of both existing and anticipated future consumptive uses based on population and water use projections should be considered in granting a consumptive use permit.[73] The Water Resources Act expressly addresses cumulative impacts in Part IV of the statute governing Environmental Resource Permits,[74] but is silent in Part II, where water withdrawal permits are addressed.[75] WMD rules appear to diminish the extent to which consideration of the cumulative impacts of an individual permit are addressed, at

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least by the applicant.[76] The rules only require a permit applicant to consider the impact of the applicant's permit and "other existing legal users," and provides that "an applicant shall only be required to address its relative contribution of harm to the wetlands and other surface waters."

Economic Impact Analysis

WMD rules authorize the WMDs to take into account the relative cost of modifications to a permit that an applicant must pay to avoid harm.[77] Modifications include development of alternative water supplies, conservation measures and other measures to reduce harm. A WMD can require a modification to a permit to eliminate harm, but only to the extent the modification is "practicable." In considering practicability the District can consider "the cost of the modification for elimination or reduction of harm compared to the environmental benefit such modification would achieve, including consideration of existing infrastructure." The rule does not require that the permit be denied if a possible modification is not economically practicable. Indeed, the implicit assumption appears to be that harm can be allowed in such cases, because the economic costs outweigh the environmental benefits.

Mitigation

Mitigation is a resource management tool that authorizes harm to a resource by a permitted activity, if the harm is compensated for through a related resource protection, enhancement or creation activity. All WMDs allow mitigation for impacts to water resources caused by a permitted activity. However, Mitigation for consumptive use is disfavored for certain resource categories, such as Outstanding Florida Waters, where MFLs have been set, and where listed species may be affected. Explicitly including OFS as one of these resource categories would give meaning to a stricter standard of "harm" in the case of OFS.[78]

Public Interest

This is an opportunity give substance to the public interest factor which commentators argue has been granted insufficient consideration in the general CUP scheme.[79] Under the current rules this requires a determination of whether the use is beneficial to the collective good of the public as a whole in the area, district, or state.[80] Klein et al. suggests a range of factors falling within the public interest including the extent to which the use is sustainable and protects future water availability; effects on fish, wildlife and other ecological resources; effects on recreation; the extent of water conservation; the extent of efficient use of water and energy; the extent to which the use benefits the general population of the state, region, or local area; and the extent to which the use serves a purely public purpose such as fire protection or other public safety and welfare benefits.[81]

To give meaning to the more protective standard envisioned by the Legislature, the public interest analysis as applied to OFS could be based on a more rigorous standard than that applied in the permitting context generally. An elevated standard of public interest review has been applied in the context of permitting construction activities in, on, or over surface waters or wetlands.[82] In ordinary circumstances, an applicant must demonstrate that the activity will not be "contrary to the public interest."[83] However, where the activity either "significantly degrades" or takes place within an Outstanding Florida Water, a heightened standard applies, requiring that the proposed activity be "clearly in the public interest."[84]

Categorical Designation as Outstanding Florida Waters

Many of the listed Outstanding Florida Springs are already listed as OFWs.[85] It may be appropriate to categorically list the remaining OFS as OFWs.[86] In theory, OFW designation provides a heightened non-degradation water quality standard and more rigorous public interest review (discussed above), both of which serve to differentiate OFWs from other waters.[87] If the ambient water quality for any given constituent in an OFW is higher than the numeric standard established by rule for the class of water, then the ambient water quality can't be degraded. Given the special relationship between water quality and water quantity in springs, ensuring that all OFS are also OFWs would help to protect OFS from harm.

Precautionary Approach

"First do no harm," is the well-known maxim enshrined in the Hippocratic Oath, and another way of stating the precautionary principle. Incorporated in various international environmental agreements and declarations,[88] the precautionary principle rests on the notion that lack of absolute certainty regarding particular threats to environmental harm should not be used as an excuse for not taking action.[89] Rather than asking "how much harm is allowable?," the question instead becomes "how little harm is possible?"[90] By shifting to a more preventative approach to Consumptive Use Permitting in OFS, elements such as scientific assessment, monitoring, mitigation and periodic review restrictions could more adequately prevent harm to Florida's water resources.[91]

Conclusion

As Florida's population continues to increase, projections indicate that agricultural and industrial operations will do the same. In order to accommodate Florida's unfaltering growth, it is likely that the demand for groundwater will continue to increase, placing additional pressure on already dwindling supplies. It is critical that rulemaking to limit groundwater withdrawals that cause "harm to the water resources" begin sooner rather than later. The State can take advantage of the wealth of expertise in springs science at its disposal to fashion more robust numerical and narrative criteria; and it can address springs management through the policy reforms discussed above - recognizing the meaningful distinction the legislature made in favor of enhanced protection of certain springs - Outstanding Florida Springs. A precise definition of "harm to the water resources" may continue to elude policymakers, but scrutiny of the policy constructs currently used or potentially available that both prevent and contribute to harm can move the state a long way toward the ends of springs protection.

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WHERE'S THE HARM

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