

A Brief History of Florida's Energy Efficiency Goals Under the FEECA Statute - Part II

FEECA Goal Setting Through The Decades

By Erik L. Sayler

This is the second part of a two-part article entitled A Brief History of the Florida Energy Efficiency and Conservation Act ("FEECA"). The first part described the purpose of FEECA, outlined some of the major amendments to FEECA, briefly described the cost-effectiveness tests utilized for evaluating energy efficiency measures for establishing goals for demand ("MW") and energy ("MWh") savings, and touched on the role of free riders in establishing energy conservation goals. The second part of this article focuses on FEECA goals established by the FPSC, starting with 1980 but focusing primarily on the conservation goals established during the 2009 and 2014 goal setting proceedings.

FEECA in the 1980s

In 1980, FEECA was enacted and all Florida utilities – investor owned, rural electric cooperative, and municipal, regardless of size – became subject to FEECA. In 1989, the Legislature enacted a 500 gigawatt-hours ("GWh") of annual retail sales floor. The result was that twelve utilities, comprising 94% of retail electrical sales, continued to be subject to FEECA.¹

FEECA in the 1990s

In 1996, the Legislature revised FEECA to increase the minimum retail sales threshold to 2,000 GWhs, which reduced the number of utilities subject to FEECA from twelve to seven. In the 1990s, FPSC goals proceedings were highly litigated. For example, the Legal Environmental

Assistance Foundation ("LEAF") participated in these proceedings and even appealed a decision to the Florida Supreme Court. *See Legal Envtl. Assistance Found. v. Clark*, 668 So. 2d 982 (Fla. 1996).

FEECA in the 2000s

The 2004 FPSC goals proceedings were less litigious, and the FPSC approved goals using its proposed agency action procedure instead of a full administrative evidentiary proceeding pursuant to Section 120.57(1), F.S.²

In 2008, the Legislature substantially amended FEECA, and the resulting 2009 goals setting proceedings were highly litigated by utilities and other stakeholders with many stakeholders submitting pre-filed testimony in support of their proposed energy efficiency goals.

In 2009, the utilities proposed conservation goals based upon an enhanced Ratepayer Impact Measure test ("E-RIM"). However, the FPSC approved goals that were more robust than what each utility proposed using an unconstrained enhanced Total Resource Cost test ("E-TRC") for the five regulated investor owned utilities ("IOUs").³ Enhanced ("E-") meant the Ratepayer Impact Measure ("RIM") and Total Resource Cost ("TRC") goals also included estimated benefits from avoiding carbon dioxide (CO₂) compliance costs.⁴ The FPSC found the following: (1) goals using the E-TRC test, from a system basis, were cost effective; (2) goals did not include utility lost revenues, or

customer incentive payments; and (3) the enhanced portion included cost estimates for future greenhouse gas emissions.⁵ Additionally, instead of screening out free riders,⁶ the FPSC included savings estimates associated with the top ten measures that had a payback of two years or less in the numeric goals established for the five IOUs.⁷ As a result, the FPSC set the highest energy efficiency conservation goals in its history using an ETRC test plus energy savings estimates associated with two-year payback measures.⁸ In order to avoid rate impact, the FPSC based the goals for JEA and OUC upon the programs each municipal utility had in place in 2009.⁹

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From the Chair

by David Bass

Happy New Year ELULS Members! Hope your year is off to a great start and 2019 turns out to be the best year ever (or at least in the top 5). Our CLE team has kept the train a rolling with two more recent Webinars. On October 23rd, Michelle Diffenderfer with LLW, Chelsea Anderson with Gunster, and Jessica Icerman with the Leon County Attorney's Office gave a webinar presenting an Introduction to Environmental and Land Use Law. Then, on November 15th, Josh Coldiron and George Gramling with Gramling Environmental Law, along with Todd Kafka with Geosyntec Consultants, gave a webinar presentation on the Essentials of Property Contamination. Both were well attended and well-received. So, a hearty thank you to all of our speakers and attendees. CLE co-chairs Robert

Volpe Josh Coldiron are organizing webinars for the rest of the year and have many more in the pipeline. The next scheduled webinar will be a Legislative Preview with Janet Bowman of the Nature Conservancy and Gary Hunter with Hopping Green & Sams, scheduled for January 29th. If anyone out there has an idea and/or speaker for a webinar, let us know and we'll be sure to try to squeeze you in.

In addition to the webinars, the Section also co-sponsored a seminar with the American Water Resources Association in Tallahassee on November 30, with a mixer following the seminar at Happy Motoring.

We will be having our second Executive Council meeting of the fiscal year on Thursday February 7th in Tallahassee from 3-5 pm at the law

offices of Hopping Green & Sams at 119 S. Monroe Street (Suite 300). Following the meeting will be a mixer in conjunction with the Florida Brownfields Association at the Grasslands Brewing Company at 603 W. Gaines Street from 5:30-7:30. All Section members are invited to both the meeting and mixer, and I hope you can all make it, especially if you live in the Tallahassee area.

We will have additional meetings and mixers throughout the year and are even trying to organize field trips for the Section later in the year. Please keep on the lookout on the Section website or we'll be sending e-mail blasts advertising these events.

Anyway, I hope you all have a 2019 full of peace and love.

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

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ON APPEAL

by Larry Sellers, Holland & Knight

Note: Status of cases is as of December 7, 2018. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Detzner, etc. v. Anstead, et al., Case No. SC18-1513. Appeal from a trial court order striking from the November ballot proposed constitutional amendments 7, 9, and 11. Amendment 9 prohibits both offshore oil and gas drilling as well as vaping in enclosed indoor work places. Status: Reversed on October 17, 2018.

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: Notice of intent to invoke discretionary jurisdiction filed on September 14, 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.

The Richman Group of Florida, Inc. v. Pinellas County, Case No. SC18-456. Petition for review of decision by 2nd DCA reversing 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. 42 Fla. L. Weekly D2526a (Fla. 2nd DCA 2017). Status: Petition for review denied November 29, 2018.

Pacetta, LLC v. The Town of Ponce Inlet, Case No. SC17-1897. Petition for review of 5th 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; petition for writ of certiorari denied by U.S. Supreme Court on October 1, 2018 (Docket No. 17-1698).

FIRST DCA

Richard Corcoran, Joe Negron 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 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.

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 contrary recommendation by administrative law judge. Status: Notice of appeal filed December 5, 2017.

FWCC v. Daws, et al., Case No. 1D16-4839. Appeal from order granting a temporary injunction requiring the FWCC to stop deer hunters and their dogs from trespassing onto Appellees' property, "to abate the nuisance of the deer hunting dogs from trespassing onto the property of the Plaintiffs, and of the deer dogs and their hunters from interfering with

the Plaintiffs' right to the quiet enjoyment of their private property." Status: reversed on August 16, 2018 by opinion on motion for rehearing and motion for certification, denying Appellees motion for certification, but granting in part Appellees motion for rehearing and withdrawing opinion dated April 10, 2018; dissenting opinion by J. Lewis. Notice of intent to invoke discretionary jurisdiction filed in Florida Supreme Court on September 14, 2018 (see above).

SECOND DCA

Pelican Bay Foundation, Inc. v. Florida Fish and Wildlife Conservation Commission and City of Naples, Florida, Case No. 2D18-0353. Appeal from 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 to First DCA on November 9, 2018.

THIRD DCA

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 2d DCA's holding in *Heine v. Lee County*, 221 So. 3d 1254 (Fla. 2d DCA 2017). Status: Affirmed per curiam on November 7, 2018.

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 DCA

Everglades Law Center Inc. v.

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ON APPEAL

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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: Notice of appeal filed April 20, 2018.

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 for writ of prohibition dismissed on May 11, 2018; to the extent the petition seeks certiorari relief, it is denied; to the extent the petition seeks mandamus, the writ is dismissed without prejudice to file a separate petition for writ of mandamus; motion for rehearing denied June 13, 2018.

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: Notice of appeal filed April 20, 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: Reversed and remanded on August 8, 2018; SFWMD's motion for

rehearing and clarification denied on September 4, 2018.

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.

FIFTH DCA

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 had recommended that the Administration Commission find the plan amendments not in compliance. Status: Notice of appeal filed April 30, 2018; joint motion to dismiss for lack of standing filed May 21, 2018; motion to dismiss denied June 19, 2018, without prejudice for raising arguments in answer brief all briefs have been filed.

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Split of Federal Authority on Groundwater Could Send the US Supreme Court Wading Further Into the “Waters of The United States” Fray-- How That Could Affect Florida

By: Keith L. Williams, Attorney at Law, Saul Ewing Arnstein & Lehr LLP

There has been a split of federal authority between the United States Sixth Circuit Court of Appeals and the Fourth and Ninth Circuit Courts of Appeal on the scope of regulatory jurisdiction under the Clean Water Act (CWA). Some of this confusion was caused by the 2015 adoption of the revised “Waters of the United States” (WOTUS) rule; some confusion was caused by lower court interpretations of the plurality opinion in Rapanos v. U.S., 547 U.S. 715 (2006) (which itself was less than clear). Further muddying the waters are the EPA’s own efforts to suspend the 2015 WOTUS rule and replace it with the prior, less far-reaching rule adopted in 1986. See, 51 Fed. Reg. 41250 (1986). Either way, the Court’s interpretation of the Congressional intent as to the meaning of “point source” versus “non-point source” pollution into “waters of the United States” that triggers jurisdiction under the CWA appears to soon be coming to a head.

Background—Rapanos v. U.S.

Rapanos v. U.S., 547 U.S. 715 (2006), was the most recent decision of the US Supreme Court to interpret the reach of federal regulation over certain isolated wetlands and non-navigable waters. Although it was decided by a plurality opinion of 4-1-4, it was a major decision where the Court ultimately held that some isolated wetlands and other non-navigable bodies of water with either a surface connection or a hydrological connection to navigable waters are subject to the regulatory jurisdiction of the CWA. Unfortunately, the plurality nature of the opinion resulted in two separate tests for determining jurisdiction to regulate discharges under the CWA.

The test authored by Justice Scalia in writing for the Court and joined by three other Justices (Rehnquist,

Thomas, and Alito) held that discharges to navigable waters intended to be regulated by the Act are only those Congress specifically named and those to which the “point source” test could apply, namely those wetlands and waterbodies adjacent to navigable waters from which surface water would carry pollutants to navigable waters from a “discernable, defined, and discrete conveyance” (i.e. through a pipe, ditch, drain, creek or similar outfall). Rapanos, at 753-757. Scalia opined that the CWA could be used to regulate isolated wetlands or non-navigable waters only where such waters are connected to navigable waters by a “continuous surface connection” making it difficult to discern where one ends and the other begins. *Id.*

The test favored by Justice Anthony Kennedy in his concurring opinion rejected the plurality’s “continuous stream” limitation of the CWA and held that “wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters’, if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable’.” Rapanos, at 780. When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term “navigable waters”. *Id.* Thus Justice Kennedy opined that those non-adjacent wetlands and other non-navigable waters not necessarily connected continuously to navigable waters, but which have a “significant nexus” or “continuous hydrological or ecological connection to navigable waters” fall within the jurisdiction of the CWA (even though non-adjacent wetlands or non-navigable waters

were not defined in the 1986 rule as “waters of the United States”).

Both of these tests were based on how a discharge of pollution is defined (“point source” vs. “non-point source”) and whether such discharge enters into something defined as “waters of the United States”. Previous opinions of the Court have fleshed out these definitions, but none has been quite dispositive for all. See, South Florida Water Management District v. Miccosukee Tribe of Florida, 541 U.S. 95 (2004) (a pipe conveying polluted water from one arm of a navigable water to the other arm of the same navigable water constitutes a “point source” of pollution for purposes of the Act) and Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. (2001) (a non-adjacent isolated wetland with no surface connection not a “water of the U.S.” under the Act); United States v. Riverview Bayside Homes, 474 U.S. 121 (1985) (even wetlands sourced by water separated from the navigable water to which they are adjacent are regulated by the Act). It is a final determination of which definitions should confer jurisdiction under the CWA that would give clarity and certainty to everyone.

2015 “WOTUS” Rule

On June 29, 2015, the EPA and the Department of Defense/United States Army Corps of Engineers (USACE) adopted a new rule defining “waters of the United States” (WOTUS) that replaced the existing 1986 rule. 33 CFR 328.3, 80 Fed. Reg. 37054. For the first time, isolated wetlands and other non-navigable waters which were determined to have a “significant nexus” to navigable waters (as opposed to the prior rule requiring such wetlands or non-navigable waters to be adjacent to them) were brought officially under the definition

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of “waters of the United States” and thereby under the jurisdiction of the CWA. See, 33 CFR 328.3(a)(7) and 33 CFR 328.3(c)(5). The EPA stated expressly that this new rule was clearly based on Justice Kennedy’s concurring opinion in Rapanos. (See https://www.epa.gov/sites/production/files/2015_05/documents/technical_support_document_for_the_clean_water_rule_1.pdf). The EPA and USACE also understood that their 2015 WOTUS rule expanded the previous reach of federal regulatory authority under the CWA.

This distinction is important because Justice Scalia’s opinion for the plurality in Rapanos expressly rejected the “significant nexus/hydrologic connection” theory for the regulatory reach of the CWA to isolated wetlands or non-adjacent non-navigable waters. However, Justice Scalia’s opinion also read the 1986 rule to require a continuous surface connection between the wetland and navigable water for jurisdiction to attach. The 1986 WOTUS rule did not contain any specific language regarding the manner of the wetlands’ hydrological connection to navigable waters (See, 51 Fed. Reg. 41250) but the Act still requires the pollution to have a “point source” for jurisdiction purposes. Because the new WOTUS rule contained language adopting Justice Kennedy’s broader “hydrologic connection/significant nexus” theory to define what discharges required permits, several lawsuits were initiated around the country seeking to either invalidate the rule or enforce the rule to further expand the scope of the CWA to include any pollution to non-adjacent non-navigable waters that may have a “significant nexus/hydrologic connection” to navigable waters, whether or not such waters or discharges were expressly contained within the text of the CWA requiring “point sources” or the definitions within the prior WOTUS rule.

Current State of the 2015 WOTUS Rule

As of this writing, the 2015 WOTUS rule is still applicable in 23 states (California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New

Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia and Washington), pursuant to an injunction entered by USDC SC on August 16, 2018, which invalidated EPA’s efforts to suspend the 2015 rule via adopting a “Suspension Rule” in February of 2018. South Carolina Coastal Conservation League v. Pruitt, 318 F. Supp.359, USDC, S.C (8/16/2018). Simultaneously, application of the 2015 WOTUS is blocked in 24 states due to an early injunction issued in North Dakota v. US EPA, 127 F. Supp. 3d, 1047 (USDC N.D. 8/27/2015) (covering Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming), and a recent injunction entered in State of Georgia v. Pruitt, 326 F. Supp. 3d 1356 (USDC SD GA 6/24/2018) (covering Alabama, Georgia, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin). An injunction against WOTUS may be pending for the three remaining states of Louisiana, Mississippi, and Texas, but may have been superseded by the injunction entered on 8/16/2018. See, American Farm Bureau, et al. v. EPA, USDC SD TX, Case No: 3:15-cv-165 (although no injunction or order from the Texas District appears to have been issued following the 8/16/2018 injunction from USDC SC, the court has a pending motion for injunction before it and has been notified of the nationwide injunction issued by the District of South Carolina). Additionally, the Trump Administration is still proceeding on the repeal of 2015 WOTUS under the procedures of the APA, but they are still in the comment period for the draft rule and the EPA and USACE have moved to stay the injunction issued in the South Carolina Coastal Conservation League case. However, by EPA’s own estimation, the 2015 Clean Water Rule and guidance memos adopted by federal agencies regarding application of the rule will likely remain applicable for those 22 states where suspending the 2015 WOTUS Rule has been enjoined by the district court injunction issued in South Carolina.. See for example: <https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update>.

Does the CWA Apply to

Groundwater Under the 2015 WOTUS Rule?

While it seems settled by the Court that the CWA clearly covers isolated wetlands and other non-navigable waters under either test, the question of whether the CWA covers groundwater is the chief issue of several citizen suits brought under the CWA after adoption of the 2015 WOTUS rule. The underlying question is whether discharges to groundwater that may “significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable’” were intended to be protected by Congress under the CWA.

It is important to note that groundwater was not specifically mentioned or defined by Congress in either Section 402, regulating point source discharges pursuant to the National Pollution Discharge Elimination System (NPDES), or Section 404 Permit Program regulating the discharge of dredged or fill material into waters of the United States, as contained within the CWA. The old 1986 WOTUS rule did not contain groundwater within its definition of WOTUS; the 2015 WOTUS rule expressly defined groundwater as “not a water of the United States”. 33 CFR 328.3(b)(5).

However, neither the definition of “wetland” or “significant nexus” under the 2015 WOTUS rule or the definition of “wetland” under 1986 WOTUS rule specified or limited the manner of hydrological connection to navigable waters protected under the CWA outside of specifying whether it was “point source” or “non-point source”. Since “non-point source” pollution may be considered jurisdictional under the “significant nexus” definition, a logical step would be to require permits for those discharges which “significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable’, regardless of source.

Thus, after adoption of the rule, there were a number of citizen lawsuits (allowable under the CWA’s citizen suit provision) in both federal district and circuit courts, which mainly sought to enjoin continuous or intermittent discharges to groundwater under the “significant nexus” portion of the new rule. While the U.S.

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Supreme Court clarified in National Association of Manufacturers, Inc. v. Department of Defense/USACE, 138 S. Ct. 617 (2018) that all citizen suits seeking injunction under the WOTUS rule or challenging the rule must first be filed in federal district courts rather than a direct appeal to circuit courts, the question of the regulatory limits of the CWA has yet to be reached.

As a result, there are several pending appellate cases involving this specific question where the Court may grant certiorari review and finally answer the questions left hanging by the plurality in Rapanos. The requests for certiorari in the cases discussed below were briefed by November 7, 2018 and the Court may decide whether to take them as early as its November 30, 2018 conference.

Current CWA “Hydrologic Connection” Theory vs. “Point Source” Theory Cases on Appeal to the United States Supreme Court

In two recent appellate cases in the Ninth Circuit Court of Appeal, the federal circuit upheld application of the “hydrological connection” theory. In Hawaii Wildlife Fund v. County of Maui, 886 F.3d 737 (9th Cir. 2018) the Ninth Circuit held that the migration of pollutants from the Hawaii county of Maui’s wells through groundwater to a navigable waterway is actionable under the CWA if the discharges are “fairly traceable” to “navigable waters”.

In US v. Robertson, 875 F.3d 1281 (9th Cir. 2017) a separate and factually distinct criminal case involving discharges from privately held lode mining surface ponds to navigable waters within National Forest System Lands in Montana, the Ninth Circuit upheld a defendant’s conviction for failure to obtain a federal dredge and fill permit under Section 404 of the CWA. In Robertson, the defendant challenged his conviction based on the argument that the statutory term “waters of the United States” is unconstitutionally vague (based on the differing interpretations under Rapanos) and therefore deprived him of warning that his conduct was criminal. The Ninth Circuit affirmed the conviction, opining

that Justice Kennedy’s “significant nexus” test was its preferred reading of Rapanos. Robertson, at 1292. In both cases, certiorari review has been sought to determine whether the Circuits were proper in adopting Justice Kennedy’s “hydrological connection” theory when applying the CWA.

In Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637 (4th Cir. 2018) the Fourth Circuit Court of Appeal held that groundwater that is “sufficiently connected” to “navigable waters” will allow for citizen suits under the CWA. The Kinder Morgan case, from South Carolina, involved a citizen suit to enjoin groundwater discharges even though the offending pipe no longer discharged to potential groundwater sources. The Kinder Morgan and County of Maui cases were considered by the U.S. Supreme Court for certiorari review at its November 30, 2018 conference. See, United States Supreme Court Order List, 528 U.S. ____ (December 3, 2018). The Court did not deny certiorari in either case and invited the U.S. Solicitor General to file briefs in the cases expressing the views of the United States by 4:00 p.m. on January 4, 2019. The Robertson case had not been fully briefed and counsel for Robertson filed a blanket consent for parties on either side to file amicus briefs on November 29, 2018.

The decisions of the Fourth and Ninth Circuits are in stark contrast to the Sixth Circuit Court of Appeals, which recently rejected Kennedy’s “hydrological connection” theory as embraced in the EPA’s 2015 WOTUS rule. See, Tennessee Clean Valley Network v. Tennessee Valley Authority (905 F.3d 436 (6th Cir. 2018) and Kentucky Waterways Alliance, et al v. Kentucky Utilities Company, 905 F.3d 925 (6th Cir. 2018). In both Sixth Circuit cases, the Plaintiffs alleged that the limestone substrate (known as “karst” terrain or topography) underlying a pollutant filled pond allowed the pollution to seep through groundwater to navigable water. The Sixth Circuit explicitly rejected Kennedy’s concurring opinion in Rapanos (and its use by the Fourth and Ninth Circuits) to reach the opposite conclusion. Tennessee Clean Valley at 445; Kentucky Waterways, at 932, 933. The Sixth Circuit opined in both cases that, although pollutants are being discharged to “navigable water”

as defined under the Act, neither discharge is from a “discernable, defined, and discrete conveyance” that would qualify as a surficial “point source” discharge intended to be covered by the CWA. As these opinions create the split of federal authority on the scope of the CWA, both cases will undoubtedly be part of the consideration for certiorari review of the Fourth and Ninth Circuit cases by the US Supreme Court.

Under every previous interpretation of the CWA it does not appear that federal regulation of groundwater was proper. Under the CWA, discharges of pollution to non-navigable waters is defined in the WOTUS rule are “non-point source” pollution. See Sec. 33 U.S.C. 1314(f) and 1362 (12). Under previous Supreme Court interpretations, these “non-point source discharges” are to be regulated solely by the states. See, Rapanos, at ; Miccusukee Tribe, at 114; see also 33 U.S.C. 1251(g). However, because of the Fourth and Ninth Circuit’s application of Justice Kennedy’s “significant nexus/hydrological connection” test and the Sixth Circuit’s express rejection of the “hydrological connection” theory, application and enforcement of the CWA to groundwater discharges must be determined by the Court. It is of paramount concern to citizens in all states because this interpretation will govern which pollution discharges require a permit from EPA or USACE and which are regulated solely by the individual states.

What Could This Mean for Florida?

The US Supreme Court’s answer to the separate requests for certiorari review from the Fourth, Sixth, and Ninth Circuits and the ultimate interpretation of the CWA’s jurisdictional reach will be very important for the people of Florida. Essentially, the substrate of the entire state is a porous karst limestone aquifer system interspersed with even more porous muck and sand. See, Water Resources Atlas of Florida, Institute of Science and Public Affairs, Florida State University (1998). Approximately 2/3 of this aquifer system underlying the state is surficial, meaning groundwater exists within 100 feet of the surface. Most, if not all, of Florida’s groundwater could be determined at some point to “significantly affect the

GROUNDWATER

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chemical, physical, and biological integrity of other covered waters more readily understood as “navigable” in accordance with the “significant nexus/hydrological connection” test.

Based on this more expansive interpretation of the CWA (by EPA’s own admission), federal EPA or US-ACE permits may be required for many more private or public land uses where a pollutant is discharged to ground rather than being discharged from a “point source” to a “navigable water”. Such an expansion of federal authority would also impermissibly impinge upon state pollution prevention programs under Chapter 376 and 403, Florida Statutes and may hinder FDEP attempts to assume the Federal 404 Dredge and Fill Program from the USACE. Neither the State of Florida, the Florida Department of Environmental Protection nor any Florida water management districts filed briefs in either the Kinder Morgan or County of Maui cases, which is surprising given the previous involvement by the South Florida Water Management District in determining the scope of the CWA before the

US Supreme Court. See, Miccosukee Tribe, above.

One only has to imagine the countless hundreds or thousands of roadways, septic systems, private wells, neighborhood stormwater treatment systems, roadside ditches or swales, compost piles, dog parks, backyard gardens, or other mundane uses of land by private landowners or public entities that might be required to now also obtain additional federal NPDES permitting under the more expansive WOTUS test. For example, a state permitted county owned roadway where runoff containing pollutants discharges to groundwater at any point might also require a NPDES permit; a person who owns a five (5) acre plot in an unincorporated area of any Florida county where water and sewer systems have not been expanded may now have to incur the expense to obtain CWA permits for their simple well water and septic tank discharges; a citrus farmer with a self-contained surface water management system may face a requirement to obtain federal permits due to seepage from that contained system to groundwater. In the extreme, a homeowner or apartment dweller who washes their car on the lawn may be prosecuted criminally

under the CWA for causing pollution under this expanded interpretation of the Act. Indeed, a citizen suit has been recently filed against a New England resort over its use of a septic tank system permitted under state law; the defendants moved to dismiss on November 30, 2018 based on the failure to assert federal jurisdiction under the CWA. See Conservation Law Foundation, Inc. v. Longwood Venues and Destinations, Inc., et al., Case Number 1:18-cv-11821 (USDC MA, 2018).

This uncertainty in the interpretation of the CWA, until resolved by the Supreme Court, means there will likely be more state and federal confusion regarding proper application of the CWA, increased citizen suits for “non-point source” or groundwater discharges, increased challenges to existing permitted or unpermitted activity, increased challenges to new permit applications, and an overall increase in the legal activity surrounding any permitting of pollution discharges, regardless of existing state pollution control programs in existence. For Floridians, that could mean many more days in court over matters once considered the sole province of state and local law.



Ethics Questions?

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Knick, and Reevaluating Williamson State Court Exhaustion

By: Jay W. Small, Mateer Harbert, Attorneys at Law

The right to own private property is no less a fundamental pillar of our society than any other constitutionally protected right. When a governmental entity takes private property, Article X, Section 6(a) to the Florida Constitution or the Fifth Amendment to the U.S. Constitution demands payment of full or just compensation. Article X, Section 6(a) provides that “[N]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner.”¹ The Fifth Amendment states that “nor shall private property be taken for public use, without just compensation.”² These clauses do not prevent a governmental taking of private property, but they condition the taking on payment of compensation to the owner.

Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), established a federal procedural doctrine that seriously chips away at this pillar by forbidding owners from vindicating their Fifth Amendment rights in federal court unless they first exhaust state takings remedies.³ This doctrine leads to bizarre results. If owners bring federal takings claims in federal court under 42 U.S.C. §1982, their complaints may be dismissed because they first failed to assert them in state court. Yet if owners first bring their federal claims in state court, their complaints may be removed to federal court and then dismissed because a state court did not finally adjudicate their state claims. This doctrine discriminates against property owners, as a specific class of litigants, and strips them of reasonable access to federal and state courts. On March 5, 2018, the Court granted a petition for a writ of certiorari in *Knick v. Township of Scott*, ___, U.S. ___ (2018), which can remedy this anomalous doctrine.⁴

The precise issue in *Knick* is whether to reconsider *Williamson*’s exhaustion doctrine. The Township of Scott lies in Lackawanna County, Pennsylvania, near the Poconos. Scattered throughout Pennsylvania are historical private family gravesites,

some dating to the Colonial era. Over generations, land with these private cemeteries transferred through the hands of successive owners. The Township adopted an ordinance requiring owners of property on which the Township *believed* were cemeteries to allow access for the public to visit family gravesites and for code inspectors to assure compliance with the ordinance. Rose Knick’s family farm is one such parcel subject to the ordinance. No official state records indicate that a private cemetery was ever on her farm. In federal court, she alleged, *inter alia*, a violation of her Fifth and Fourteenth Amendment due process and just compensation rights. Based on *Williamson*, the Third Circuit Court of Appeals affirmed the dismissal of her takings claim.⁵

The courts recognize two types of regulatory takings cases – “facial” and “as-applied” claims.⁶ “Facial” takings claims involve regulations which deprive owners of all economically beneficial use of property upon enactment.⁷ “As applied” claims require a detailed *ad hoc* factual analysis to examine “[t]he economic impact of [a] regulation. . . and. . . the extent to which [it]. . . interfere[s] with distinct investment-backed expectations” after the regulation is applied to property.⁸

In as-applied cases, historically the courts asked the question whether a regulation is final enough so that a claim is “ripe” for judicial review. Owners cannot file as-applied takings suits “unless ‘the governmental entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.’”⁹ An owner cannot pursue federal or state as-applied regulatory taking cases until the challenged government action causes some final injury to property.¹⁰ Requiring a meaningful attempt to get a development application approved by a governmental entity provides a metric to gauge whether the severity of the regulation’s impact is so great that it causes a serious enough loss amounting to a taking.

Williamson, however, added another ripeness factor in dicta by requiring an owner to show an unsuccessful attempt to obtain just compensation in state court before filing a federal suit.¹¹ *Williamson* involved a challenge to a zoning ordinance that reduced the allowable density in a residential subdivision. It identified two rationales for deciding the ripeness question against the owner: (1) the owner did not obtain a final decision regarding the application of zoning ordinances and subdivision regulations; and (2) the owner did not use the state’s procedures to obtain just compensation.¹² The first rationale is largely accepted.

Regarding the second rationale, the Court primarily relied on footnote 40 in *Hodel v. Virginia Surface Mining & Reclamation Assn, Inc.*, 452 U.S. 264 (1981)¹³ for support of its additional ripeness requirement. The Court’s reliance on *Hodel* has since been criticized. Footnote 40 in *Hodel* restated the general rule that takings claims are unripe for consideration until after a final administrative determination; it did not identify any existing or new comity principle requiring takings claims to be reviewed differently than other federal claims also reviewed by state and federal courts.¹⁴ Although state courts are generally competent to protect federal rights concurrently with federal courts, *Williamson*’s dicta does not explain why plaintiffs alleging federal takings claims should be singled out for differential treatment from other classes of plaintiffs seeking to vindicate federally protected rights.

Knick dealt with a facial taking claim and thus whether facial claims were exempt from the second prong of *Williamson*.¹⁵ It is difficult to conceive of a plausible reason why *Williamson*’s additional second-tier exhaustion doctrine ever should apply to a facial takings case since this sort of taking occurs, by its very nature, upon the enactment of the land use regulation, or the action by the local governmental entity. In *Knick*, the Court may also reanalyze *Williamson* exhaustion in as-applied cases.

Justices also have questioned the

continued...

second ripeness rationale in *Williamson*. In *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005), four Justices argued for overruling *Williamson*.¹⁶ In *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tl. Prot.*, 560 U.S. 702 (2010), Justice Kennedy characterized this second rationale as the "Court's dicta in *Williamson*".¹⁷ The rationale has been described as being at odds with the plain language of the Fifth Amendment which makes just compensation a prerequisite for public use.¹⁸ The Court has never obligated itself to be bound to its dicta if a more complete argument demonstrates that the dicta is incorrect.¹⁹

Williamson's curious dicta barricades federal courthouse doors to a discrete class of federal plaintiffs seeking protection in federal courts for federal rights. It creates a takings "No Man's Land." Litigating in state court virtually guarantees them that later federal claims are barred by res judicata.²⁰ Alternatively, a federal court may decline review of a federal takings claim based on lack of subject matter jurisdiction until after a plaintiff has exhausted state takings remedies.²¹ To avoid these potential defenses, owners may sacrifice their rights protected by the U.S. Constitution rather than enter a procedural minefield which could explode both state and federal takings claims. Hardly any other federal prudential limitation presents an insular class of federal plaintiffs with a similar "Hobson's Choice" either between selecting a judicial forum or waiving a substantive constitutional right all-together.

Williamson distorts the ripeness doctrine by directing focus on the forum where a case is filed instead of the finality of the regulation's application or the actions of the governmental entity. *Williamson* itself provides a reason for unraveling its confusing additional to the ripeness doctrine. It conceded that ripeness does not require a claimant to exhaust state remedies because the focus is whether a decision-maker formulates a definitive regulatory position that inflicts an actual, concrete injury.²² Abandoning this dysfunctional notion will not give owners carte blanche to raise unripe takings claims because they must still comply with

Williamson's first ripeness requirement: that they demonstrate that the government's actions have achieved that degree of finality such that a reviewing federal court can determine whether the regulation's fiscal impact on the property amounts to a taking.²³

Williamson's dicta clouded the sharpness of the ripeness inquiry and blurred its distinct edges. In *Knick*, the Court's choice is to refocus the historic ripeness inquiry back to the finality of a regulation's impact on property. *Williamson* intended that its prudential restraint limit the ability of federal courts to review state land use decisions. Yet experience and history have shown that *Williamson* not only limited access to federal courts in as-applied regulatory takings cases, but it also limited the ability to adjudicate federal property rights in state courts. *Knick* affords the Court the opportunity to revisit *Williamson*.

On October 3, 2018, the Court held oral argument in *Knick*. A month after oral argument, the Court added an interesting postscript to the story and entered an order resetting *Knick* for supplemental briefing and argument. It directed the parties and the Solicitor General to address the distinction between an inverse condemnation claim and a claim for compensation in an eminent domain case. It also directed argument on the issue of whether a taking is complete based on the actions of the responsible governmental entity at the time of the taking, or on whether a state court provides a remedy.

That the Court would ask for further argument on these issues indicates that it may be wrestling with how the issues were presented. The narrow legal issue in *Knick* is whether an owner should be required to exhaust state court takings remedies before asserting them in federal court. This is a federal procedural and prudential question. The Court may be commingling this question with another distinct takings question: whether an

inverse condemnation claim is ripe, for federal purposes, when the governmental entity charged with the taking denies payment of compensation or whether a state court in an inverse condemnation case rules the owner has no remedy.

Knick is set to be reargued on January 16, 2019.

Endnotes

- 1 Article X, § 6(a), Fla. Const.
- 2 Fifth Amendment, U.S. Const.
- 3 *Williamson County*, 473 U.S. at 194-196
- 4 ___ U.S. ___, 138 S.Ct. 1262, 200 L.Ed. 2d 416 (2018).
- 5 *Knick v. Township of Scott*, 862 F.3d 310, 328 (3rd Cir. 2017).
- 6 *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 538 (2005).
- 7 *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); see also, *Keshbro, Inc. v. City of Miami*, 801 So.2d, 864, 871 (Fla. 2001).
- 8 *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).
- 9 *Palazzo v. Rhode Island*, 533 U.S. 606, 618 (2001) (quoting *Williamson*, 473 U.S. at 186).
- 10 *San Remo Hotel, v. City & County of San Francisco*, 545 U.S. 323, 346-47 (2005).
- 11 *Williamson County*, 473 U.S. at 195 – 196.
- 12 *Id.* at 185, 194.
- 13 *Hodel*, 452 U.S. at 297, n. 40.
- 14 *Id.*
- 15 *Knick*, 862 F.3d at 328.
- 16 *San Remo Hotel, L.P.*, 545 U.S. at 348-52 (Rehnquist, C. J., concurring).
- 17 *Beach Renourishment, Inc.*, 560 U.S. at 742.
- 18 *Arrigoni Enterprises, LLC v. Town of Durham, Conn.*, 136 S. Ct. 1409 (2016) (Thomas, J., dissenting from denial of petition for writ of certiorari).
- 19 *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013).
- 20 *San Remo Hotel*, 545 U.S. at 346-47; *Rockstead v. City of Crystal Lake*, 486 F.3d 963, 968 (7th Cir. 2007) (property owner who goes through entire state proceeding and loses cannot maintain federal suit because of res judicata); *Trafalgar Corp. v. Miami County Bd. of Comm'rs*, 519 F.3d 285, 287 (6th Cir. 2008) (Because "the issue of just compensation under the Takings clause . . . was directly decided in a previous state court action, it cannot be relitigated in federal district court.")
- 21 *Reahard v. Lee County*, 30 F.3d 1412, 1414 (11th Cir. 1994).
- 22 473 U.S. at 192-93.
- 23 *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 n.17 (2002) ("In determining whether government action affecting property is an unconstitutional deprivation of ownership rights under the Just Compensation Clause, a court must interpret the word 'taken.'").

Visit the Environmental and
Land Use Law Section's website at:

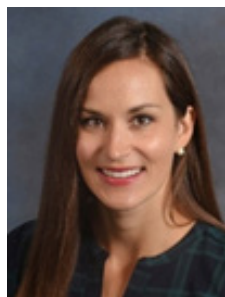
<http://eluls.org>

Florida State University College of Law January 2019 Update

by Jennifer Walsh, Environmental Program Associate

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 upcoming spring semester. We hope Section members will join us for one of more of our future programs.

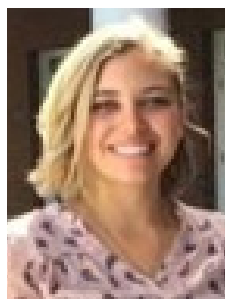
Recent Alumni Accomplishments



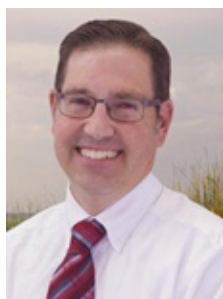
Crystal Anderson



Terry Cole



Jessica Melkun



Joe Ulló

- **Crystal Anderson** is now working as the Senior Attorney with the Senate Committee on Environmental Preservation and Conservation
- **Terry Cole** has been recognized as a Florida Super Lawyer 2018 and Florida Trend Legal Elite 2018.
- **Jessica Melkun** is now working with the Florida Department of Environmental Protection.
- **Floyd R. Self**, of Berger Singerman LLP, has been elected to a three-year term to the Board of Directors of the Energy Bar Association, based in Washington, D.C. The EBA is a national association of energy attorneys and non-lawyer professionals who promote professional excellence and ethical integrity in the practice, administration, and development of energy laws, regulations, and policies. As a

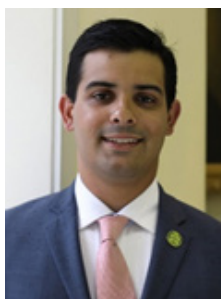
Board member, Mr. Self serves as the Co-Vice Chair of the Regional Enhancements Task Force and the liaison to the Networking and Outreach Membership Committee, the Natural Gas Regulation Committee, and the Southern Chapter.

- **Joe Ulló** recently accepted a position as Shareholder at Strearns, Weaver, Miller.
- **Travis Voyles** is working for the U.S. House of Representatives Committee on Science, Space, and Technology, conducting oversight investigations on issues including federal scientific research and development, environmental and energy policy, and emerging cybersecurity developments.

Recent Student Achievements



Laurel Tallent



Nicholas Rodriguez-Caballero

- Our Animal Legal Defense Fund (FSU ALDF) student organization has been named Chapter of the Year by the national Animal Legal Defense Fund. This is the second time since 2014 that FSU's chapter has received this award. The award recognizes an Animal Legal Defense Fund chapter that has shown incredible efforts in advancing the field of animal law and advocating for animals through original projects and initiatives. **Laurel Tallent**, who serves as FSU ALDF president, **Ashley Englund**, **Jasmine Henry**, and **Judah Lieblich** accepted the award in Chicago on October 12.
- **Alan LaCerra** recently received book awards in Sports Law, Corporations, and Twentieth Century American Legal History.
- **Nicholas Rodriguez-Caballero**

received a tuition scholarship from the Rocky Mountain Mineral Law Foundation for the 2018-2019 academic year. He was selected as a scholarship recipient from a large pool of applicants at 32 law schools.

Spring 2019 Events

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

Energy Resilience Panel

This panel discussion, organized by **Professor Hannah Wiseman**, will explore issues related to energy resilience. Participants include **Sara Rollet Gosman**, Assistant Professor of Law, University of Arkansas School of Law; **Kevin B. Jones**, Director, Institute for



Sara Gosman



Kevin Jones



Romany Webb



James Van Nostrand



"Scheff" Wright

continued...

FSU JANUARY UPDATE

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Energy and The Environment, and Professor of Energy Technology and Policy, Vermont Law School; **Romany Webb**, Senior Fellow, Sabin Center for Climate Change Law, Columbia Law School; 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, will moderate. This panel will be held on Wednesday, January 23 at 3:15 P.M. in Room 310.

Spring 2019 Environmental Distinguished Lecture

Richard Revesz, Lawrence King Professor of Law and Dean Emeritus, New York University School of Law, will present our Spring 2019 Environmental Distinguished Lecture. Professor Revesz’s lecture will begin at 3:30 P.M. on Wednesday, February 6 in Room 310 and will be followed by a reception in the College of Law Rotunda.



Richard Revesz

Environmental Law Guest Lectures

Tara Righetti, Associate Professor of Law, University of Wyoming College of Law, will present an environmental law certificate lecture on Wednesday, February 20 at 12:30 P.M. in Room 310.



Tara Righetti

Bruce Huber, Professor of Law and Robert & Marion Short Scholar, University of Notre Dame Law School, will present an environmental law certificate lecture on Wednesday, March 6 at 12:30 P.M. in Room 310.



Bruce Huber

Michael Gray, Attorney, Appellate Division, Environment and Natural Resources Division, U.S. Department of Justice, will present an environmental law certificate lecture on Wednesday, March 27 at 12:30 P.M. in Room 310.

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.

Stetson’s Institute for Biodiversity Law and Policy Continues Local, National, and International Efforts to Protect Wetlands

Submitted by Erin Okuno, Foreman Biodiversity Fellow, Institute for Biodiversity Law and Policy, Stetson University College of Law

On November 8, 2018, Stetson’s Institute for Biodiversity Law and Policy hosted the Sixth Annual ELI-Stetson Wetlands Workshop on its Gulfport, Florida campus. Presented in collaboration with the Environmental Law Institute (ELI) and with support from the Environmental and Land Use Law Section (ELULS) of The Florida Bar, the theme of this year’s workshop was “The Role of NGOs and the Public Sector in Implementing Wetland Restoration Projects: Trends, Lessons Learned, and Best Practices.” Speakers and panelists discussed the roles that in-lieu fee compensatory mitigation programs and public mitigation

banks and programs play in wetland restoration locally, statewide, and nationally. Attendees included students, academics, attorneys, scientists, regulators, and other professionals.

The event began with a morning field trip to Boyd Hill Nature Preserve. The workshop included a lunchtime Foreman Biodiversity Lecture by Dr. M. Siobhan Fennessy (Kenyon College), who discussed wetland restoration. The first panel session in the afternoon focused on in-lieu-fee compensatory mitigation programs. Professor Royal Gardner (Director of the Institute for Biodiversity Law and Policy at Stetson Law) moderated the panel, which included presentations

by Dr. Rebecca Kihlsinger (ELI), Erin Okuno (Stetson Law), Karen Johnson (The Nature Conservancy), and Alex Robertson (Georgia-Alabama Land Trust, Inc.). The second panel discussed the role of public mitigation banks and programs. Moderated by Clay Henderson (Director of the Institute for Water and Environmental Resilience at Stetson University), the panel included David Urban (Ecosystem Investment Partners), Martha Gruber and Philip Rhinesmith (Southwest Florida Water Management District), Andrew Zodrow (Environmental Protection Commission

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STETSON'S UPDATE

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of Hillsborough County), and Michael Dema (City of St. Petersburg). The event concluded with an evening networking reception in the Banyan Courtyard.

The Institute is grateful to the attendees, speakers, and many other people who make the workshop possible each year. We would especially like to thank Mechanik Nuccio Hearne & Wester, P.A. for sponsoring the evening networking reception and the Law School Liaison Committee of the ELULS for providing a special grant in support of the workshop this year.

The Biodiversity Institute also has continued its work to conserve wetlands at the international level. Professor Gardner and Dr. Max Finlayson of Charles Sturt University in Australia were the lead coordinating authors and Erin Okuno was a

contributing author on the recently released *Global Wetland Outlook: State of the world's wetlands and their services to people* (2018). The Outlook is the flagship publication for the Ramsar Convention, an inter-governmental treaty with 170 parties that promotes the wise use and conservation of wetlands. The publication was launched at the 13th Conference of the Parties in the United Arab Emirates in October 2018 and is available online at <https://www.global-wetland-outlook.ramsar.org/outlook/>. The Outlook provides information about the global status and trends in wetlands, drivers of change in wetlands, and responses to the continued decline and degradation of wetlands. At the end of the year, Professor Gardner will conclude his second term as chair of the Scientific and Technical Review Panel (STRP) for the Ramsar Convention. The STRP is the convention's scientific advisory body, and Professor Gardner has

served as the STRP chair since 2013.

The Institute for Biodiversity Law and Policy coordinates Stetson Law's environmental programs and initiatives and serves as an interdisciplinary focal point for educational, research, and service activities related to local, national, and international biodiversity issues. We host international speakers and conferences, and we coordinate externships, courses, and seminars on a variety of topics, including wetland law and policy, environmental law, natural resources, and international environmental law. The Biodiversity Institute was the 2016 recipient of the Distinguished Achievement in Environmental Law and Policy Award from the American Bar Association's Section of Environment, Energy, and Resources. To support our programs or for more information, please visit <http://www.stetson.edu/law/biodiversity> or contact Erin Okuno at okuno@law.stetson.edu.



Attendees on the field trip at Boyd Hill Nature Preserve



Dr. Fennessy presenting at the ELI-Stetson Wetlands Workshop

ENERGY EFFICIENCY

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In addition, the FPSC found that the 2008 amendments to Section 366.82(2), F.S., required the establishment of goals for demand-side renewable energy systems even though none of the resources were found to be cost-effective according to the analyses by the utilities.¹⁰ The FPSC directed the IOUs to create pilot programs to encourage solar water heating and solar photovoltaic (“PV”) technologies, but implemented a ten percent cap on the expenditures to be recovered through the annual Energy Conservation Cost Recovery clause.¹¹ The FPSC stated “we can meet the intent of the Legislature to place added emphasis on these [demand-side renewable energy] resources, while protecting ratepayers from undue rate increases by requiring the IOUs to offer renewable programs subject to an expenditure cap.”¹²

FEECA in the 2010s

During the 2010s, the FPSC established energy conservation goals in 2014 and will again in 2019. In discussing the 2014 proceeding, it is helpful to reference the 2009 proceeding. According to Section 366.82(3), F.S., the first step in developing demand

side management (“DSM”) goals is to conduct a “full technical potential [study] of all available demand-side and supply-side conservation and energy efficiency measures....” In 2009, the utilities worked together with input from intervenor stakeholders National Resource District Council and Southern Alliance for Clean Energy (“SACE”) to form a collaborative to conduct a full Technical Potential Study (“TPS”).¹³ In 2014, rather than conducting a full TPS from the beginning, the IOUs updated the 2009 TPS.¹⁴ The FPSC found that: (1) the IOUs worked jointly on the methodology for updating the TPS for the 2015-2024 goals period using the 2009 TPS as the common reference point for each of the utilities; (2) the IOUs made adjustments to compensate for the increase in mandatory equipment and appliance efficiency codes as well as new standards required by state and federal entities;¹⁵ (3) the IOUs took into account changes to the Florida building codes and Federal equipment manufacturing standards that affected potential energy efficiency savings; (4) the IOUs eliminated outdated and obsolete energy efficiency measures from the updated TPS; and (5) the updated TPS added new commercially available efficiency and demand savings

measures that have become available since the 2009 goal-setting proceeding, but did not include emerging or non-standard efficiency technologies.¹⁶ The FPSC noted that the increase in mandated building codes and appliance efficiency standards by state and federal authorities led to a large decrease in the technical potential as compared to 2009.¹⁷ Intervenors SACE and Sierra Club disagreed with the IOUs’ updated TPS, stating it was insufficient, flawed, too conservative, was missed potential savings, ignored important efficiency technologies, and resulted in savings estimates that were too low.¹⁸

Section 366.82(3)(d), F.S., also requires the FPSC to consider the cost of greenhouse gas regulations when establishing goals. In 2009, the IOUs’ proposed goals included estimated benefits from avoided carbon dioxide compliance costs.¹⁹ In 2014, the IOUs proposed goals that did not include benefits from avoiding the cost of greenhouse gas regulations because there were no state or federal regulations on greenhouse gas emissions in effect during that goal setting proceeding.²⁰ In setting the 2014 goals, the FPSC did not include any estimated benefits from avoiding greenhouse gas compliance costs, but

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ENERGY EFFICIENCY

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stated it had the right to review and modify goals if and when greenhouse gas compliance costs are known.²¹

As for the appropriate cost effectiveness tests for setting goals, the FPSC once again determined that Section 366.82(3)(a), F.S., requires that the Participants Test be considered.²² “The Participants Test is a useful tool in assessing the impacts on potential participants, since this screening test fully accounts for all potential benefits received, as well as costs incurred, by a customer participating in a DSM measure.”²³ The energy efficiency and demand savings goals proposed by the IOUs in 2014 were based on measures which all passed the Participants Test.²⁴

In 2014, the IOUs proposed goals based on measures which passed the RIM and Participants Test. They stated that proposed RIM based goals were lower than the 2009 goals due to lower costs and changes in codes and standards, but these goals would address concerns with cross-subsidization between participants and non-participants.²⁵ SACE argued that Section 366.82(3)(b), F.S., required the use of the TRC test and Sierra Club argued the TRC was the best test to use. Sierra Club and SACE proposed goals which would eventually equal at least one percent of retail energy sales by 2019.²⁶ The Florida Industrial Users Group (“FI-PUG”) and the National Association for the Advancement of Colored People (“NAACP”), and PCS Phosphate did not oppose the IOUs’ proposal to use RIM and Participants Test.

Similar to its decision in 2009, the FPSC determined that the RIM and TRC tests fulfilled the requirements of Section 366.82(3)(b), F.S.,²⁷ stating that a combination of Participants, RIM, and TRC tests can be used to establish DSM goals.²⁸

After evaluating all the evidence submitted by the IOUs and intervening parties, the FPSC ultimately adopted annual conservation goals for residential, commercial, and industrial customers based on an unconstrained RIM achievable potential with a two-year payback free-rider-ship screen and no CO₂ compliance costs included.²⁹ The unconstrained RIM based goals approved in 2014

were substantially lower than the E-TRC goals approved in 2009 for the IOUs. The FPSC’s order approving 2014 goals also discussed “free riders,” the need for educating customers about these cost-effective measures, and the need to assist and educate low-income customers with respect to measures with a two-year or less payback.³⁰

After considerable analysis, the FPSC found that the solar pilot programs approved in 2009 should continue through December 31, 2015, but that these programs were not cost-effective.³¹ The 2014 order noted that those previously approved solar rebates represented a large subsidy from the general body of ratepayers to a very small segment of utility customers who received rebates.³² In addition, the FPSC noted that consumers have continued to install solar photo voltaic (PV) systems without any rebates.³³ The continued trend of customer-owned distributed solar generation is likely due in part to the falling cost of installed solar PV, available federal tax credits, the IOUs’ net-metering programs, and individual customers’ desires to personally address climate change.

FEECA 2019 and beyond

In conclusion, the FPSC has started the process for the 2019 goal setting proceeding. In the coming months, individual dockets will be opened for each of the seven participating utility stakeholders as well as a procedural order governing the upcoming goal setting proceedings. Stakeholders will pre-file testimony by experts in support of the efficiency goals they want the FPSC to approve. The FPSC will likely do the following: (1) review and approve the 2019 technical potential study submitted by the IOUs, (2) evaluate the appropriate cost effectiveness test(s) for establishing energy efficiency goals for 2020 to 2029, (3) address the issues of free rider-ship and whether to use a two-year payback screen, (4) determine what is needed to promote customer-owned renewable energy generation pursuant to FEECA, and (5) resolve other issues raised by the stakeholders in the upcoming proceeding. The FPSC must render its decision, approving new energy efficiency goals for 2020 to 2029, by December 31, 2019. Based upon the number of potential intervenors who participated in the June and

October 2018 informal meetings, the 2019 goal setting proceeding promises to be interesting and active.

About the author: Erik L. Sayler actively participated in the 2009 and 2014 goal setting proceedings while serving with the Florida Public Service Commission and Florida Office of Public Counsel. Currently, he is a senior attorney with the Florida Department of Agriculture and Consumer Services. The information in this article was obtained from publicly available documents, and any opinions expressed herein are his alone and not that of his current or former employers.

Endnotes

- 1 2006 FPSC FEECA Report at 6, available at <http://www.psc.state.fl.us/Files/PDF/Publications/Reports/Electricgas/AnnualReport/2006.pdf>
- 2 See e.g., Order No. PSC-2004-0763-PAA-EG, issued August 9, 2004, available at <http://www.psc.state.fl.us/ClerkOffice/DocketFiling?docket=20040029>
- 3 JEA and OUC did not have enhanced goals.
- 4 Order No. PSC-09-0855-FOF-EG at 15.
- 5 Order No. PSC-09-0855-FOF-EG at 15-16.
- 6 “A free rider is defined as a customer who receives an incentive for a measure he/she would have installed even without receiving a financial incentive from a utility-sponsored program.” Order No. PSC-14-0696-FOF-EU at 23. The FPSC had previously screened-out measures with a payback of two-years or less.
- 7 Id. At 16.
- 8 Id. At 16.
- 9 Id. At 16.
- 10 Order No. PSC-09-0855-FOF-EG at 29
- 11 Id.
- 12 Id.
- 13 Order No. PSC-09-0855-FOF-EG at 5-6.
- 14 Order No. PSC-14-0696-FOF-EU at 6.
- 15 Order No. PSC-14-0696-FOF-EU at 6.
- 16 Id. At 7.
- 17 Id. At 7.
- 18 Id. At 9-10.
- 19 Order No. PSC-09-0855-FOF-EG at 12, 15
- 20 Id. At 15, 18-19. DEF and FPL included estimated CO₂ compliance costs as a sensitivity, but Gulf and TECO did not.
- 21 Id. At 19-20.
- 22 Id. At 10, citing Order No. PSC-09-0855-FOF-EG at 12.
- 23 Id. At 11.
- 24 Id. At 10.
- 25 Id. At 28.
- 26 Id. At 28.
- 27 Id. At 12-13, citing Order No. PSC-13-0386-PCO-EU.
- 28 Id. At 22.
- 29 Id. At 40, 42. Table 4-6 (Residential Cumulative Goals) and Table 5-1 (Commercial/Industrial Cumulative Goals) showed the cumulative goals proposed by the utilities, intervenors, RIM, TRC, and FPSC approved goals.
- 30 Id. At 24-27.
- 31 Id. At 48-60.
- 32 Id. At 60.
- 33 Id. At 60.



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