THE REPORTER

Vol. XL, No. 4
March 2020

ELULS

THE ENVIRONMENTAL AND LAND USE LAW SECTION

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EPA Issues Enforcement Discretion Guidance Regarding Statutory Criteria for Those Qualifying as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners.

By Travis Hearne and Terry Griffin

The U.S. Environmental Protection Administration (EPA) has recognized parties interested in acquiring property for reuse or redevelopment may be concerned about potential liability related to past contamination. Congress, in an effort to address these concerns, enacted the Small Business Liability Relief and Brownfields Revitalization Act ("Brownfields Amendments" to the Comprehensive Environmental Response Compensation and Liability Act, or "CERCLA") in January 2002. The Brownfields Amendments provided landowner liability protections (LLPs) for those landowners that qualify as: (1) bona fide prospective purchasers (BFPPs), 42 U.S.C. § 9607(r) and 42 U.S.C. § 9601(40); (2) contiguous property owners (CPOs), 42 U.S.C. § 9607(q); or (3) innocent landowners (ILOs), 42 U.S.C. § 9607(b)(3) and 42 U.S.C. § 9601(35)(A)(i). To achieve and preserve these LLPs, a landowner must meet certain threshold criteria and satisfy certain continuing obligations, if established.

On July 29, 2019, Susan Parker Bodine, EPA's Assistant Administrator for the Office of Enforcement and Compliance Assurance published an agency guidance memo ("Memo") to clarify how EPA enforcement interprets the statutory requirements for the LLPs.[1] Superseding 2003 interim guidance, the July 2019 guidance extensively discusses cases interpreting the common elements of the three defenses. The memo addresses itself to EPA enforcement personnel and provides that its purpose is "to assist them in exercising their enforcement discretion." Thus, the memo does not address CERCLA liability arising from, for example, private party claims.

The Memo addresses itself to the common elements of these three defenses:

A. Threshold Criteria
   1. Performing "all appropriate inquiries" (AAI) into the previous ownership and uses of property before acquisition, and
   2. Demonstrating "no affiliation" with a liable party.

B. Common Continuing Obligations:
   1. Demonstrating that no disposal occurred at the facility after acquisition;
   2. Complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls ("ICs");
   3. Taking "reasonable steps" with respect to hazardous substance releases;
   4. Providing cooperation, assistance, and access to persons authorized to conduct response actions or natural resource restoration;
   5. Complying with information requests and administrative subpoenas (for BFPPs and CPOs); and
   6. Providing legally required notices (for BFPPs and CPOs).

As indicated above, different obligations/protections may or may not apply for BFPPs, ILOs, and CPOs. The July 2019 guidance provides a chart summarizing differences in the applicability of "common elements" or other requirements for the three categories.

For instance, CERCLA may provide liability protections for BFPPs (if the property is purchased after January 11, 2002), even when the BFPP purchased the property with knowledge of contamination, provided the BFPP conducted all appropriate

See "EPA Issues" page 12

INSIDE:

From the Chair

by Jon Harris Maurer

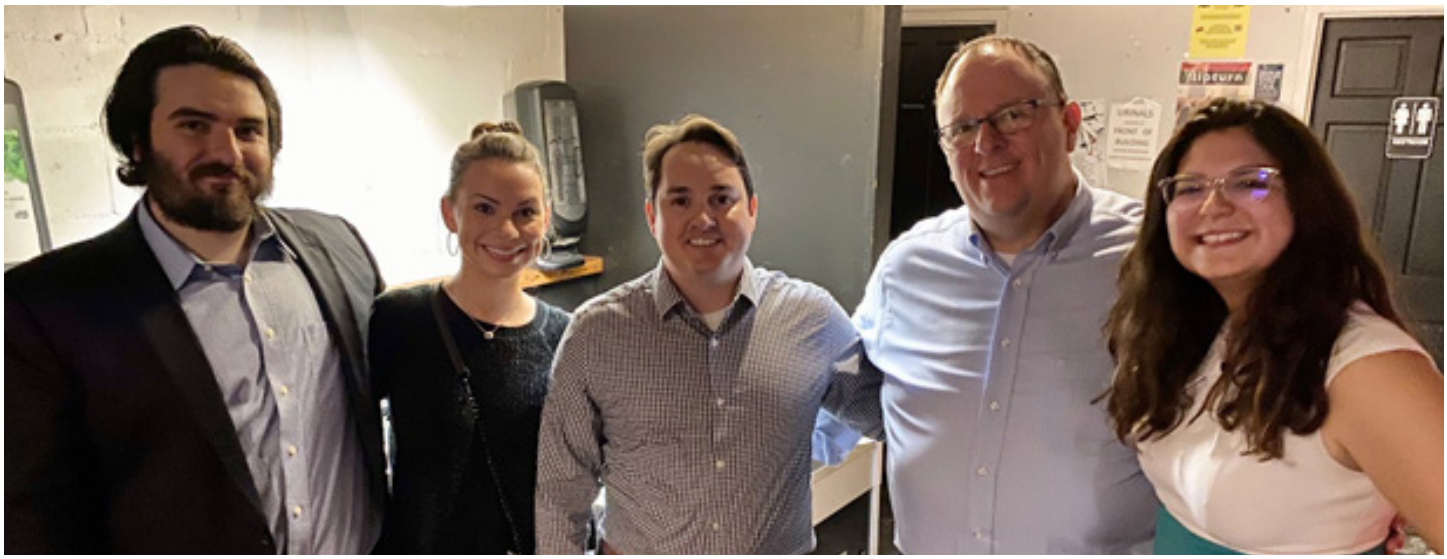
Greetings from Tallahassee! As you probably felt, this past January was reportedly the warmest ever on record. With the unseasonably warm winter, the azaleas and camellias in my neighborhood are already in full bloom, and that means the ELULS spring CLEs must be just around the corner, too.

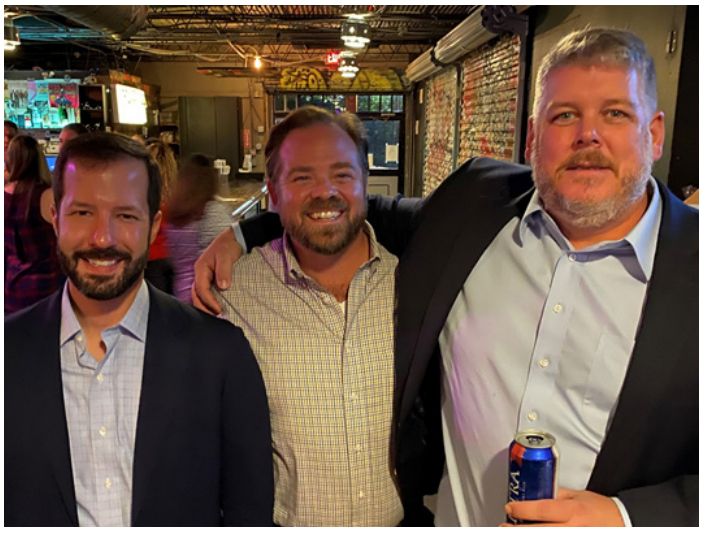
First up, Thomas Ingram (Sodl & Ingram PLLC) and Alberto Vargas (Orange County Planning Division) will present a webinar showcasing the public and private sector approaches to "Navigating Affordable Housing" on March 26.

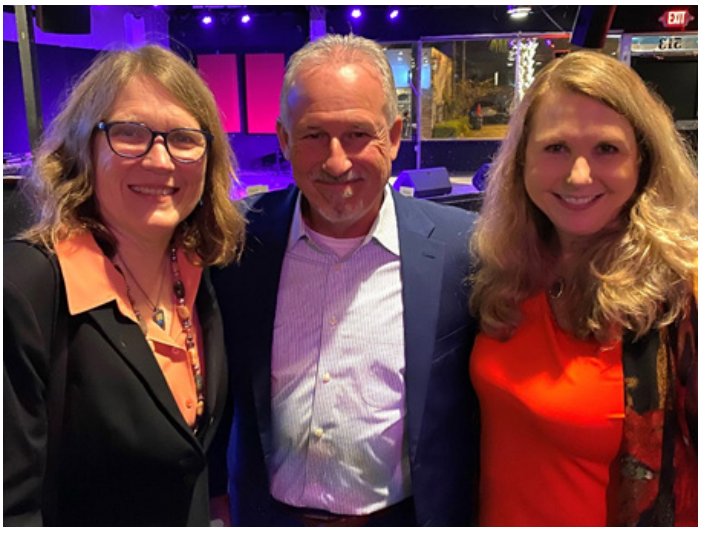
The next day, March 27, is the "Advanced Administrative Law Topics" live CLE in Tallahassee in partnership with the Administrative Law and Government Law Sections. ELULS will be including a "Hemp Update" on regulatory rulemaking by Steven Hall (Fla. Dept. of Agriculture & Consumer Services), Allan Charles (Fla. Dept. of Agriculture & Consumer Services), and Robert Williams (Lewis Longman & Walker), along with a "Public Records and Modern Technology" CLE with Ralph DeMeo (Baker Donelson) and Justin Wolf (Fla. Dept. of Environmental Protection), for those hard-to-come-by technology CLE credits. Additional topics include bid protests, exhaustion and standing, and other DOAH matters.

Of course, ELULS is much more than just CLEs. We're collaborating with Florida law schools and hosting our in-person networking events. Following our most recent ELULS Executive Council meeting, we had a great joint happy hour with the Florida Brownfields Association and Florida Association of Environmental Professionals. The Law Office of Erin Deady hosted a happy hour on March 12th. We hope to see you at future events.

Jon Harris Maurer
Chair, Environmental and
Land Use Law Section







Members of ELULS, the Florida Brownfields Association, and the Florida Association of Environmental Professionals network over drinks and food at The Wilbury in Tallahassee.

ON APPEAL

by Larry Sellers, Holland & Knight, LLP

Note: Status of cases is as of February 21, 2020. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Donna Melzer v. SFWMD, et al., Case No. SC19-1993. Notice to invoke discretionary jurisdiction to review 4th DCA decision affirming in part and reversing in part the Order Denying Writ of Mandamus Against Plaintiff South Florida Water Management District and Entering Final Judgment on Defendant Everglades Law Center's Counterclaim. 44 Fla. L. Weekly D2356a (4th DCA September 18, 2019). 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 district court held that the trial court did not err in determining that statutory mediation communication exemption under Sections 44.102(3) and 44.405(1) preclude disclosure of the full transcript of the shade meeting conducted between SFWMD and its attorneys for the purpose of discussing settlement terms and appending litigation which mediation was ordered; to the extent that the transcript memorialized mediation communications, such portions of the transcript constituted mediated communications, and these communications disclosed by a governmental attorney during a shade meeting are to be redacted from the transcript of the shade meeting when it becomes a public record. The district court also held that the trial court erred when it failed to conduct an in camera review of the transcript based on the parties' agreement that one was not necessary; it is fundamental error a for trial court to rule on an exemption to public access to the full shade meeting transcript by redacting mediation communications without conducting an in camera review to determine if the claimed exemption applies. Accordingly, the court remanded for an in camera inspection of the full transcript to assess whether redactions proposed by the District have been appropriately applied. Status: Notice to invoke discretionary jurisdiction filed November 27, 2019.

Florida Wildlife Federation, Inc., et al. v. Jose Oliva, Bill Galvano and The Florida Legislature, Case No. SC19-1935. Notice to invoke discretionary jurisdiction to review 1st DCA decision affirming in part, reversing in part and remanding the trial court's Final Judgment for Plaintiffs: (1) interpreting Amendment 1 to limit the use of funds in the Land Acquisition Trust Fund created by Article X, Section 28 to the acquisition of conservation lands for other property interests the state did not own on the effective date of the amendment and thereafter, and to approve, manage, restore natural systems thereon, and enhance public access or enjoyment of those conservation lands; and (2) determining the numerous specific appropriations inconsistent with that interpretation are unconstitutional. 44 Fla. L. Weekly D2268a. Status: Notice to invoke discretionary jurisdiction filed November 15, 2019.

The City of Coral Gables v. Florida Retail Federation, Inc., et al., Case No. SC19-1798. Notice to invoke discretionary jurisdiction to review 3rd DCA decision reversing the trial court's final summary judgment upholding the City's ordinance prohibiting the sale or use of certain polystyrene containers, based upon trial court's determination that three state laws preempting the ordinance are not constitutional. 44 Fla. L. Weekly D2089a. (Fla. 3d DCA 2019). Status: On February 12, 2020, the Florida Supreme Court denied the petition for review and declined to accept jurisdiction.

Maggie Hurchalla v. Lake Point Phase I, LLC., et al., Case No. SC19-1729. Notice to invoke discretionary jurisdiction to review the 4th DCA decision upholding 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. 44 Fla. L. Weekly D1564a (Fla. 4th DCA 2019). Status: Notice to invoke discretionary jurisdiction filed October 7, 2019.

Lieupo v. Simon's Trucking, Inc., Case No. SC18-657. Petition

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

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ON APPEAL
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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 December 19, 2019, the Court answered the question in the affirmative. 44 Fla. L. Weekly S298a.

FIRST DCA

John S. Donavan, et al., v. DEP and City of Destin, Case No. 1D19-4101. Appeal from DEP final order issuing consolidated joint coastal permit and sovereign submerged land authorization to the City authorizing periodic maintenance dredging of the federally-authorized East Pass in Destin Harbor navigation channels. Status: Notice of appeal filed November 13, 2019.

GI Shavings, LLC v. Arlington Ridge Community Association, Inc. and Florida Department of Environmental Protection, Case No 1D19-3711. Petition for review of DEP final order approving a consent order between GI Shavings and DEP but denying the application for revisions to its air permit for a wood chip dryer. Status: Notice of appeal filed October 14, 2019.

Crystal Bay, L.L.C. v. Brevard County Utilities Service Department and Florida Department of Environmental Protection, Case No. 1D19-3700. Appeal from DEP Final Order of Dismissal with Prejudice, dismissing a second amended petition seeking to challenge the notice of intent to issue a permit for a wastewater treatment facility owned and operated by Brevard County. The final order concludes that the petition does not demonstrate standing to request a hearing. Status: Notice of appeal filed October 11, 2019.

MarineMax, Inc. v. Larry Lynn & Department of Environmental Protection, Case No. 1D19-2247. Petition to review DEP final order approving Lynn's qualification for an ERP exemption and dismissing MarineMax's challenge. Status: Notice of appeal filed June 20, 2019.

City of Jacksonville v. Dames Point Workboats, LLC and Florida Department of Environmental Protection, Case No. 1D19-1728. Petition to review DEP final order granting consolidated ERP and sovereign submerged lands lease for a commercial/industrial tugboat and marine barge loading facility on the St. Johns River. Status: Notice of appeal filed May 10, 2019.

Imhof, et al. v. Walton County, et al., Case No. 1D19-980. Appeal from a final judgment in favor of the county in an action brought by the plaintiffs pursuant to Section 163.3215 challenging the consistency of a development order with the county's comprehensive plan. The trial court followed the Second District's decision in *Heine v. Lee County,* 221 So.3d 1254 (Fla. 2nd DCA 2017), which held that a consistency challenge is limited to whether the development order authorizes a use, intensity, or density of development that is in conflict with the comprehensive plan. (Regular readers will recall that the Third District recently affirmed *per curiam* a similar ruling in *Cruz v City of Miami*, Case No. 3D17-2708.) Status: Oral argument held January 15, 2020.

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: Affirmed in part, reversed in part and remanded on September 9, 2019; motions for rehearing denied October 22, 2019; notice to invoke discretionary jurisdiction filed November 15, 2019.

SECOND DCA

Kochman v. Sarasota County, et al., Case No. 2D20-18. Petition for writ of certiorari by an adjacent property owner to review a trial court's denial of the petition for certiorari with respect to the County's approval of the Siesta Promenade, a mixed-use project on Siesta Key. Status: Notice of appeal filed January 2, 2020.

Julio Lleras v. Florida Department of Environmental Protection, Case No. 2D19-4138. Petition to review DEP final order relating to the unauthorized use of state-owned lands in Placida Harbor, including order requiring removal of unauthorized dock structure and payment of $2,500 administrative fine. Status: Notice of appeal filed October 25, 2019; motion to relinquish jurisdiction filed January 15, 2020.

Denlinger v. Southwest Florida Water Management District and Summit View, LLC, Case No. 2D19-3835. Appeal from a SWFWMD final order dismissing a petition challenging the extension of an ERP pursuant to section 252.363, F.S., which provides for the tolling and extension of certain permits and other authorizations following the declaration of a state of emergency. Status: Notice of appeal filed October 7, 2019.

THIRD DCA

City of South Miami v. Florida Power & Light Company, Case No. 3D19-0020. Appeal from final order on remand approving certification, after the matter was remanded to the Siting Board for further review to take action consistent with the court's opinion in *Miami-Dade County v. In Re: Florida Power & Light Co.,* 208 So. 3d 111 (Fla 3rd DCA 2016). Status: Affirmed *per curium* on January 15, 2020.

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: Reversed and remanded on August 14, 2020.

FOURTH DCA

The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Waterfront ICW Properties, LLC and Wellington Arms, A Condominium, Inc., Case No. 4D19-3240. Petition to review final judgment quieting title in the name of the appellee and against the Trustees as to certain submerged

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ON APPEAL
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lands constituting a part of Spanish Creek located in the Town of Ocean Ridge. Status: Notice of appeal filed October 18, 2019.

Great American Life Insurance Co. v. The Buccaneer Commercial Unit A, etc., et al., Case No. 4D19-868. Petition to review DEP final order granting consolidated ERP and sovereign submerged land lease for commercial unit A dock, after ALJ determined that the applicants met all applicable navigational criteria. Status: Notice of appeal filed March 27, 2019.

Benjamin K. Sharfi, et al. v. Great American Life Insurance Co. and Florida Department of Environmental Protection, et al., Case No. 4D19-112. Petition to review DEP final order issuing consolidated ERP and sovereign submerged lands lease for replacement dock, after ALJ determined that the applicant met all applicable navigational criteria. Status: Notice of appeal filed January 11, 2019.

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: Affirmed in part, reversed in part on September 18, 2019 (44 Fla. L. Weekly D2356a); motion for rehearing *en banc* denied on November 19, 2019. Notice to invoke discretionary jurisdiction filed with Florida Supreme Court on November 27, 2019.

FIFTH DCA

Glenda Mahaney v. Garber Housing Resorts, LLC and DEP, Case No. 5D19-3517. Notice of appeal from DEP final order denying appellants petition for administrative hearing with prejudice and approving a site rehabilitation completion order. Status: Notice of appeal filed November 27, 2019.

UNITED STATES SUPREME COURT

County of Maui, Hawaii, v. Hawaii Wildlife Fund, Case No. 18-260. Petition to review decision by the U.S. Court of Appeals for the 9th Circuit upholding a district court ruling, rejecting the County's argument that a "discharge" only occurs when pollutants are released directly into navigable waters. The County operates a wastewater treatment plant that injects the treated wastewater through wells into the groundwater; some of that groundwater eventually enters the Pacific Ocean. Issue: whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a non-point source, such as groundwater. Status: Oral argument held on November 6, 2019.

Atlantic Richfield Co. v. Christian, et al., Case No. 17-1498. Petition to review Montana Supreme Court decision that allows state residents to sue Atlantic Richfield Co. for clean-up costs related to the Anaconda Smelter Superfund site's pollution despite remediation work that had already occurred. Issues: (1) whether a common law claim for restoration seeking cleanup remedies that conflict with remedies the EPA ordered is a jurisdictionally barred "challenge" to the EPA's cleanup under 42 U.S.C. § 9613 of CERCLA; (2) whether a landowner at a Superfund site is a "potentially responsible party" that must seek EPA approval under 42 U.S.C. § 9622(e)(6) of CERCLA before engaging in remedial action, even if the EPA has never ordered the landowner to pay for a cleanup; and (3) whether CERCLA pre-empts state common law claims for restoration to seek cleanup remedies that conflict with EPA ordered remedies. Status: Oral argument held on December 3, 2019.

Environmental Case Law Update

by Gary Hunter, Hopping Green & Sams

City of Jacksonville, Petitioner, v. Dames Point Workboats, LLC, and Department of Environmental Protection, Respondents. 2019 Fla. Div. Adm. Hear. LEXIS 232 (Final Order issued April 12, 2019)

Dames Point Workboats (Workboats) proposes to construct and operate a commercial tugboat and barge mooring and loading/offloading facility (the Project). The Project involves the construction of three docks, mooring dolphins, and mooring piles waterward of the mean high-water line on sovereign submerged lands.

The Project will be located in the "Back Channel" area of the St. Johns River, directly north of Blount Island in Jacksonville, Florida. The Back Channel, classified as a Class III waterbody, is impaired for lead. Workboats owns four adjacent waterfront parcels upland of the Project which collectively have approximately 425 linear feet of salt marsh and riprap shoreline bordering the Back Channel.

Respondent Workboats filed a Joint Application for an Individual Environmental Resource Permit, Authorization to Use State-Owned Submerged Lands, and Federal Dredge and Fill Permit in June of 2018. The Department of Environmental Protection (DEP) found that the Project met the requirements for the Consolidated Authorization (CA) and issued the Consolidated Notice of Intent in July of 2018, proposing to issue the ERP and a ten-year sovereign submerged lands lease for the Project.

Petitioner City timely challenged DEP's proposed issuance of the CA. The City argued that the lease is contrary to the public interest, will cause adverse impacts to benthic and salt marsh habitat, will result in the discharge of pollutants into the waters of the Back Channel, will pose a navigational hazard, will cause harm to manatees, and will detract from and interfere with recreational activities in the Back Channel.

The matter was referred to DOAH and a final hearing was held in December 2018. A transcript of the final hearing was filed at DOAH on January 18, 2019. The parties timely filed their proposed recommended orders on January 28, 2019, and the ALJ issued a Recommended Order on March 1, 2019.

In the Recommended Order, the ALJ noted that two types of habitat exist at the Project site: salt marsh and submerged benthic habitat. The ALJ found that the salt marsh at the Project site is healthy, high-quality, high-functioning salt marsh habitat, and was not being removed or otherwise affected and will not be affected by the Project. The submerged benthic sediment at the Project site provides habitat for infauna, such as polychaete worms; and for epifauna, such as shrimp, crabs, and mollusks. No submerged aquatic vegetation or oyster bars were found at the Project site. The CA includes specific conditions to help protect the benthic habitat. Docks will be built four feet above the marsh floor to reduce shading and will be constructed using minimal-impact techniques.

To protect the Florida manatees, the only listed species inhabiting the Project site, the Florida Fish and Wildlife Conservation Commission established a slow speed, minimum wake zone extending 300 feet from the shorelines into the Back Channel. Workboats must install bumpers or fenders to separate vessels and docks, and each vessel must meet minimum clearance requirements to help prevent trapping or crushing of manatees. Additionally, the Project must be constructed and operated according to the Standard Manatee Conditions for In-Water Work.

Workboats has a recent history of noncompliance with DEP rules. Rather than take enforcement action, DEP decided to include a salt marsh restoration corrective action requirement in the CA. To provide reasonable assurance that the Project will not violate ERP statutes and rules, and to add accountability, the ALJ recommended adding five enforceable conditions to the final order.

First, Workboats may only load vessels from a specific dock, and all equipment must be small and light enough to traverse said dock. Second, domestic waste from boat heads must be handled through a waterless incinerating toilet. This condition expressly prohibits any sewage pump-out at the docks or on vessels and prohibits the discharge of incinerator toilet ash waste into waters of the state. Third, Workboats may not install or use fueling equipment at the docks, or conduct major repairs or reconstruction activities including scraping, stripping, and recoating. Fourth, since the Back Channel is impaired for lead, Workboats may not use lead paint or lead-containing welding equipment on the docks or vessels moored in the Lease area. And fifth, the waterward ends of the docks and the mooring dolphins are to be marked by reflectors or lit by solar battery powered lights so that they are visible from the water at night by reflected light.

The ALJ concluded that Workboats met its statutory burden to present a prima facie case of entitlement to the environmental resource permit and issuance of the lease. The ALJ noted that Workboats also presented credible, competent, and substantial evidence beyond what was required. The ALJ found that the Project, with the above conditions, would meet all applicable statutory and rule requirements and not be contrary to the public interest. The burden shifted to the City to demonstrate, by a preponderance of the competent substantial evidence, that the Project does not comply with Florida Statutes and applicable environmental resource permitting rules. The ALJ determined that the City did not meet its burden. Petitioner City timely filed exceptions and DEP and Workboats timely filed responses.

On April 12, 2019, the DEP Secretary released the Final Order. Both of Workboat's exceptions are granted to clarify ownership of the upland property and correct minor scrivener's errors in the ALJ's recommended order. All 14 of the Petitioner City's exceptions were denied. The Final Order adopted the Recommended Order as modified by Workboat's exceptions. The Final Order included the ALJ's five recommended conditions and

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added a sixth condition that explicitly prohibited Workboats from conducting any major repair, reconstruction, or maintenance activities, to ensure that only water-dependent activities are conducted within the lease area.

***Hurchalla v. Lake Point Phase I, LLC*, 2019 Fla. App. LEXIS 9609 (Fla. 4th DCA June 19, 2019)**

Lake Point was a contractor in a public-private partnership agreement with the South Florida Water Management District regarding a stormwater treatment project in Martin County. Maggy Hurchalla, a former Martin County Commissioner and noted environmentalist, protested the project when she learned it would supply water to the City of West Palm Beach. She emailed sitting county commissioners her concerns and detailed ways to stop the project.

Lake Point sued Hurchalla for tortious interference with a contract, and the jury found in favor of Lake Point. Hurchalla filed a motion for judgment notwithstanding verdict, which was denied by the court and then appealed.

On appeal, Hurchalla made two arguments: (1) the trial court erred when it instructed the jury on her First Amendment and state common law defenses, and (2) Lake Point did not present sufficient evidence to defeat both defenses.

On the first argument, the Fourth District noted that Hurchalla, during the charging conference and in her proposed instructions, mixed the elements of her First Amendment defense and her state common law defense. These two defenses have separate standards and burdens of proof. The First Amendment defense can be overcome if the opposing party produces evidence of actual malice. The state common law defense requires express malice. The Fourth District noted that these differences are material to a tortious interference claim. Because of these errors on Hurchalla's part, the Fourth District held that the trial court's incorrect instructions were not reversible error.

On the second argument, the Fourth District pointed to the evidence presented of Hurchalla's false statements in emails with the commissioners in determining Lake Point submitted sufficient evidence to defeat both the First Amendment and state common law defenses.

The Fourth District affirmed the lower court's ruling.

***Department of Environmental Protection v. TD Del Rio, LLC*, 2019 Fla. Div. Adm. Hear. LEXIS 404 (DOAH July 24, 2019)**

At issue was whether TD Del Rio should pay for the Department of Environmental Protection-demanded investigative costs and corrective actions related to property contamination violations. TD Del Rio owned a property contaminated by hazardous substances and petroleum. The Department issued a notice of violation and ordered corrective action.

The ALJ's recommended order found that the property contained hazardous substances and that TD Del Rio should be held strictly liable and TD Del Rio should pay the costs demanded by the Department and take corrective action.

The ALJ rejected third-party and innocent purchaser defenses by TD Del Rio. The third-party defense would have required TD Del Rio to have exercised due care, but TD Del Rio did not conduct a site assessment. The innocent purchaser defense required TD Del Rio to have conducted a sufficient pre-purchase inquiry regarding site pollution but TD Del Rio failed to inquire.

The Department adopted the ALJ's recommended order as its own and TD Del Rio was ordered to pay costs to the Department and undertake corrective action.

***Valencia Reserve Homeowners Ass'n v. Boynton Beach Assocs., XIX, LLLP*, 278 So. 3d 714 (Fla. 4th DCA August 28, 2019)**

The Fourth District Court of Appeals reviewed a homeowners association (HOA) challenge to a developer's use of the "working fund contribution" to offset its financial obligation to the HOA, resting its claim on the assertion that such a practice is prohibited by the Homeowners' Association Act. The Fifteenth Judicial Circuit's grant of summary judgment for the developer prompted the HOA's appeal..

Prior to passing control of the HOA to the homeowners, the developer was required to pay its share of assessments on any lot owned by the developer. Alternatively, pursuant to a Declaration of Covenants, Restrictions, and Easements (Declaration) and the HOA Act, the developer had the right to excuse itself from paying its share of assessments so long as the developer guaranteed itself to pay the deficit of any operating expenses the HOA incurred during the guarantee period (the period between which the developer recorded the Declaration and turned control over to the homeowners). The developer elected to pursue the latter option. Before passing control of the HOA to the homeowners, the developer paid the deficit using funds from the working fund contribution which is comprised of payments from owners, paid at the time legal title is conveyed to each owner, equal to a three months' share of the annual, non-abated operating expenses applicable to such lot. The homeowners then filed suit.

First, the HOA claimed that the developer's use of the working fund contribution is prohibited by Section 720.309(1), Fla. Stat., which requires any grant or reservation must be "fair and reasonable" when it (1) has a term greater than 10 years, (2) is made by an association before control of the association is turned over to the members other than the developer, and (3) provides for the operation, maintenance, or management of the association or common areas. The Court does not question whether this statute applies to the grant in the Declaration that allows the working fund contribution to be used to "offset operating expenses, both during the guarantee period . . . and thereafter." However, the court examined whether this grant in the Declaration is "fair and reasonable" and concluded that since each owner agreed to pay the working fund contribution at the outset and each owner knew that these funds could be used to cover operating expenses and offset the developer's deficit obligation, the grant in the Declaration was fair and reasonable.

Second, the HOA argued that the developer's use of the working fund contributions to pay for operating expenses violated Sections 720.308(4)(b) and 720.308(6), Fla. Stat., both of which state that a developer may not pay for operating expenses using lot assessments which have been

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designated for capital contributions. In this case, however, there existed no language in the Declaration that designated the working fund contributions for capital contributions, leading the Court to determine those provisions do not apply.

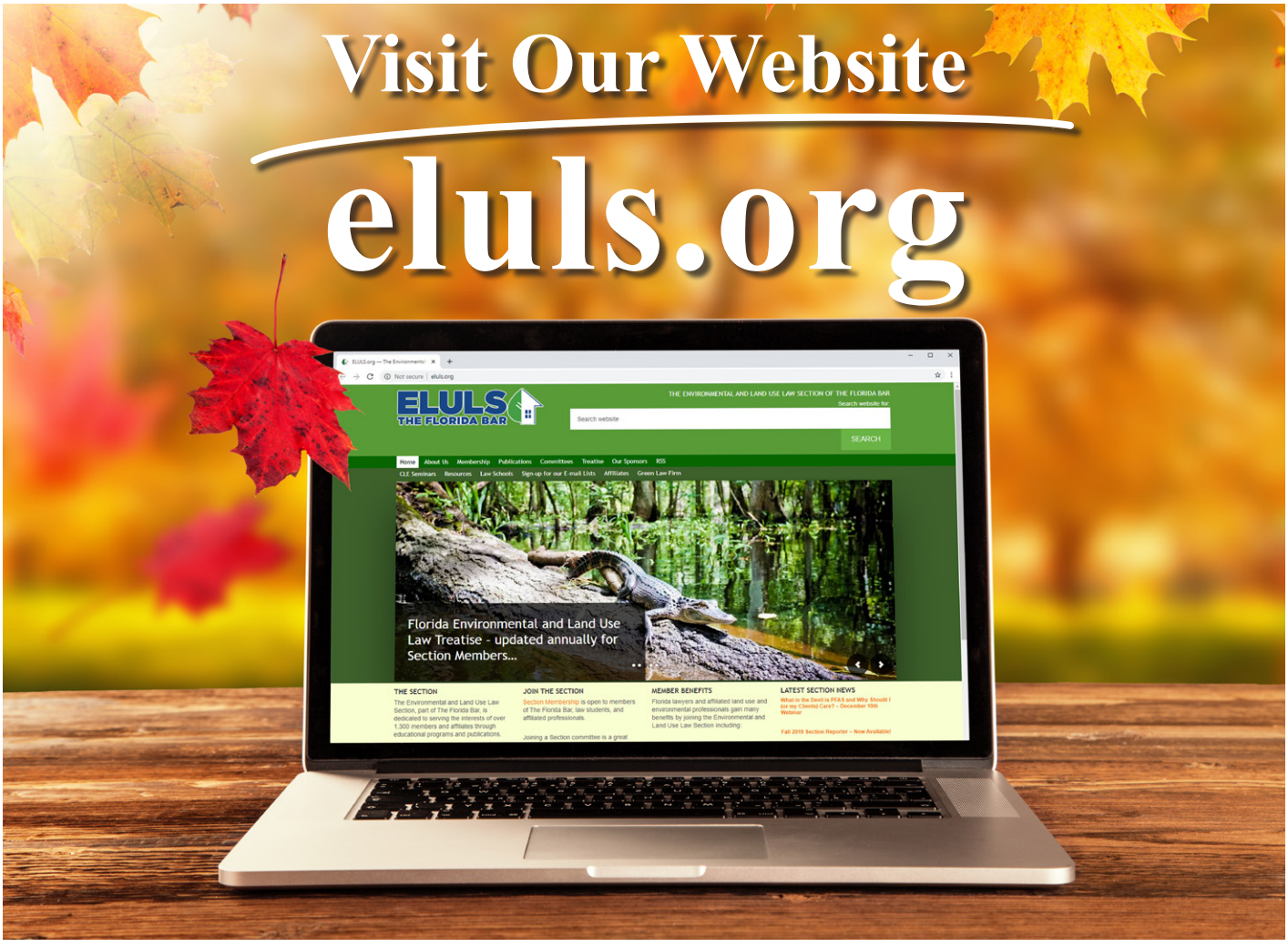
Third, the HOA tried to assert that the lump-sum working fund contribution was not a regular periodic assessment that could be used to pay or offset operating expenses. While the working fund contribution was indeed a one-time payment, the Court viewed the working fund contribution as the *first* regular periodic assessment payable to the HOA, thus allowing the developer to use the fund to offset operating expenses.

***Oliva v. Fla. Wildlife Fed'n, Inc.*, No. 1D18-3141 (Fla. 1st DCA, Sept. 9, 2019)**

This appeal addressed Article X, section 28 of the Florida Constitution. This constitutional provision regarding public land acquisition trust funds began as a citizens' initiative and was passed by Florida voters in the 2014 election. It details the how the state can finance land, water, and other property acquisitions and improvements. After the election, state officials mixed general revenue and Article X, section 28 revenue, and also used the revenue on land acquired before the amendment was passed.

The Florida Wildlife Federation and other plaintiffs sued state officials, alleging that these actions were unconstitutional under Article X, section 28. The trial court agreed based on the provision's scope and intent. The court, in relevant part, held that the constitutional provision (1) created a trust fund for land the state would acquire after the passage of the provision, (2) prevented the state from spending Article X, section 28 revenue on land acquired before the passage of the provision, and (3) prevented the comingling of Article X, section 28 revenue and general revenue. In so holding, the court ordered the state to keep a record of where Article X, section 28 funds are spent and invalidated approximately 100 appropriations that used the mixed revenue.

The First District Court of Appeal heard the appeal and reversed in relevant part. The district court noted that the plain language of the constitutional "provision does not plainly restrict the use of [Article X, section 28] revenue to improvement, management, restoration, or enhancement of lands only acquired before 2015" and "does not plainly limit the improvement of property to those properties only recently acquired." This reading was supported by the Florida Supreme Court's advisory opinion to the Attorney General regarding the citizens' initiative. However, the District Court stressed that it did "not speak to the legality of the appropriations since enactment of Article X, section 28, a question which is now pending."



Florida State University College of Law Spring 2020 Update

by David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of our College of Law students and alumni. It also lists the rich set of programs the College of Law is hosting this semester and reviews recent faculty activities. We hope ELULS members will share their accomplishments with us and join us for one or more of our future programs.

Recent Alumni Accomplishments

Carolyn Haslam

Jessica Icerman

Carolyn Haslam was recently promoted to Partner at Akerman LLP, where she primarily focuses on real estate and land use law.

Jessica Icerman recently joined Stearns Weaver Miller Weissler Alhadeff & Sitterson as an associate.

Recent Student Achievements and Activities

- **The following students will be participating in environmental law externships this spring:**
  - **Deborah Huveldt Sier** – City of Tallahassee, Land Use
  - **Jacob Imig** - Division of Administrative Hearings
  - **Tanner Kelsey** – NextEra Energy
  - **Amelia Ulmer** – Earthjustice
- A team comprised of FSU Law student **Sordum Ndam** and FSU Urban & Regional Planning students **Brittany Figueroa** and **Jonathan Trimble** earned second place in a recent Student Environmental Challenge hosted by the Florida Air and Waste Management Association. The team's task was to select a rural coastal city in Florida and persuade the selection committee, through a written and oral presentation, that this community should be selected for funding of sea-level rise resiliency and adaptation measures. The team presented sea-level rise resiliency solutions for Alligator Point, Florida to an AWMA Selection Committee comprised of representatives from the private and public sectors, and not-for-profit associations.
- **Ashley Englund**, **Alex Purpuro**, and **Steven Kahn** will be competing in the Jeffrey G. Miller National Environmental Law Moot Court Competition at Pace University in February 2020. The team will be coached by Segundo Fernandez and Tony Cleveland, partners with Oertel, Fernandez, Bryant & Atkinson, P.A.
- The Environmental Law Society (ELS) is organizing its annual mentoring program for new members designed to connect students with professionals in their desired area of practice. **Arielle Vanon** is chairing the mentoring program this year. In November, members wishing to become a mentee were invited to fill out a questionnaire to ascertain the mentee's desired practice area and practice location to help pair each mentee with a mentor. This January, ELS will be hosting a mixer for mentees to meet their mentor in a fun, casual setting. ELS is always looking for new mentors or guest speakers for our lunch meetings. If any readers are interested, please email fsuenvironmentallawsociety@gmail.com.
- *The Journal of Land Use & Environmental Law* will be publishing Volume 1 this spring, which will include two articles from students, "National Flood Insurance Program Reform" by **Gabriel Lopez** and "State Farm, Secret Science and the Environmental Protection Agency's Postmodern Attack on Agency Decision-Making" by **Young Kang**. The forthcoming volume will also feature "Puerto Rico's Road to Resilience: An Island's Challenging Transition to a Cleaner, More Resilient Future" by Kevin B. Jones, Sarah MullKoff, and Justin Cooper; "Valuing Resiliency - Approaches and Public Policy Implications" by Schef Wright; "Quantifying The Resilience Value of Distributed Energy Resources" by James M. Van Nostrand; and "Framing Energy Resilience" by Sara Gosman.

Faculty Achievements

- Professor **Shi-Ling Hsu** was among the expert panelists who conducted a workshop for the Israeli Ministry of the Environment at the Bar Ilan University's Faculty of Law in Israel December 9-10, 2019, entitled "Cost-Benefit Analysis and Regulatory Impact Analysis: Government Practice and Implementation." The other panelists were John D. Graham, Dean Emeritus of the Indiana University's School of Public and Environmental Affairs, and a former director of the White House Office of Information and Regulatory Affairs under President George W. Bush; Cary Coglianese, the Edward B. Shils Professor of Law and Director of the Penn Program on Regulation at the University of Pennsylvania School of Law; and Oren Perez, dean of the Bar Ilan Faculty of Law. The workshop included presentations on governmental practices and administrative law in the U.S. and elsewhere on using cost-benefit analysis as a tool for environmental law and policy-making.

From left to right: John D. Graham, Oren Perez, Cary Coglianese, Shi-Ling Hsu

- **David Markell** featured several guest speakers in his Fall 2019 Current Issues in Environmental

continued...

Law and Policy Seminar, including: **John Truitt**, Deputy Secretary for Regulatory Programs, Florida Department of Environmental Protection; **Justin Wolfe**, General Counsel, Florida Department of Environmental Protection; **David Childs**, Partner, Hopping Green and Sams; **Whitney Gray**, Administrator, Florida Resilient Coastlines, FL Department of Environmental Protection Office of Resilience and Coastal Protection; **Jeffrey Wood**, Partner, Baker Botts L.L.P., and former Acting Assistant Attorney General for the U.S. Department of Justice Environment and Natural Resources Division; **Janet Bowman**, Senior Policy Advisor, The Nature Conservancy; **Julie Dennis**, Owner, OVID Solutions; Former Director, Division of Community Development, Department of Economic Opportunity; and **Alisa Coe**, Staff Attorney, Earthjustice.


Professor David Markell

- **Erin Ryan** spent the summer as a Fellow at the Rachel Carson Center for Environment and Society, an international interdisciplinary research center at the Ludwig Maximilians Universität in Munich. She researched Chinese environmental governance and offered two lectures, "Breathing Air with Heft: An Experiential Report on Environmental Law and Public Health in China," and "The Public Trust Doctrine, Private Rights in Water, and the Mono Lake Story." She published "From Mono Lake to the Atmospheric Trust: Navigating the Public and Private Interests in Public Trust Resource Commons," 10 Geo. Wash. J. Energy & Envtl. L. 39 (2019); "Federalism as Legal Pluralism," in The Oxford Handbook On Legal Pluralism (2020); and "Environmentalists: Brace for Preemption, Propertization, and Problems of Political Scale," in Environmental Law, Disrupted (Owley & Hirokawa, 2020). She presented on environmental federalism at a William & Mary symposium on mining regulation, served on a separate panel about Chinese regulation at the same conference, and presented on Chinese environmental law at the ASU Sustainability Conference. She also presented "Rationing Federalism vs. Negotiating Federalism: Mud and Crystals in the Context of Dual Sovereignty" at a Wisconsin symposium about Andrew Coan's book, Rationing The Constitution: How Judicial Capacity Shapes Supreme Decision-Making.


Erin Ryan

- Professor **Hannah Wiseman** will be a Visiting Scholar at the University of Pennsylvania's Kleinman Center for Energy Policy in mid-March. As part of this visit she will deliver a public lecture on Local Energy Externalities and guest teach a seminar.


Hannah Wiseman

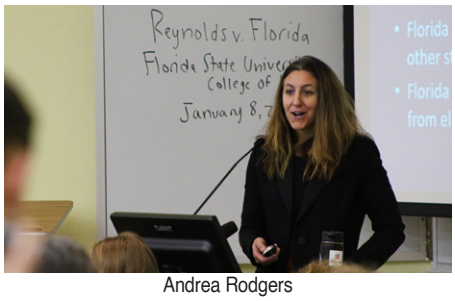
Spring 2020 Events

The College of Law is hosting a full slate of impressive environmental law events and activities this semester.

***Reynolds v Florida* Panel Discussion**

On January 8, a panel discussed Florida climate change litigation in relation to the *Reynolds v Florida* hearing. Panelists included **Andrea Rodgers**, Senior Staff Attorney with Our Children's Trust, and plaintiffs of the *Reynolds v. Florida* lawsuit **Delaney Reynolds**, **Valholly Frank**, **Isaac Augspurg**, and **Levi Draheim**. A recording of the panel is available online at:

https://mediasite.capd.fsu.edu/Mediasite/Play/9a8496fb1b81480e93e947ce0def402e1d.



Andrea Rodgers

Spring 2020 Environmental Distinguished Lecture

Cary Coglianese, Edward B. Shils Professor and Professor of Political Science, University of Pennsylvania Law School, will present the College of Law's Spring 2020 Environmental Distinguished Lecture on Wednesday, March 11 at 3:30 p.m. in Room 310. A reception will follow in the Rotunda.


Professor Cary Coglianese

Local Autonomy and Energy Law Symposium

On February 21 a symposium was held discussing rapid energy transition in the United States. The symposium featured keynote speaker, **Richard Briffault**, Joseph P. Chamberlain Professor of Legislation, Columbia Law School; **Alexandra Klass**, Distinguished McKnight University Professor, University of Minnesota Law School; **John Nolon**, Professor of Law, Pace University Elisabeth Haub School of Law;

continued...

FSU UPDATE
from previous page

Ashira Ostrow, Peter S. Kalikow Distinguished Professor of Real Estate and Land Use Law, Hofstra University Maurice A. Deane School of Law; **Erin Scharff**, Associate Professor of Law, Arizona State University Sandra Day O'Connor College of Law; **Rick Su**, Professor of Law, University of North Carolina School of Law; **Sarah Swan**, Assistant Professor, FSU College of Law; **Shelley Welton**, Assistant Professor of Law, University of South Carolina School of Law; and **Michael Wolf**, Richard E. Nelson Eminent Scholar Chair in Local Government Law, University of Florida Levin College of Law.


Professor Richard Briffault, Keynote Speaker

Environmental Law Enrichment Lectures

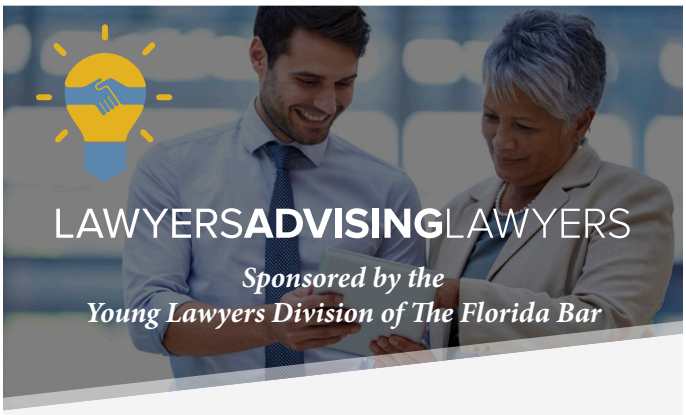
Inara Scott, Assistant Dean for Teaching and Learning Excellence and Associate Professor, Oregon State University College of Business, presented a guest lecture on January 29.


Professor Inara Scott

Shalanda Baker, Professor of Law, Public Policy and Urban Affairs, Northeastern University School of Law, will present a guest lecture on Wednesday, April 1 at 12:30 p.m. in Room 208.


Professor Shalanda Baker

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



Lawyers Advising Lawyers (LAL) is a free service offered to all members of The Florida Bar who may need advice in a specific area of law, procedure, or other legal issue. Currently, the program consists of more than 300 attorney advisors who volunteer to assist other members of The Florida Bar in this program. Advice is offered in more than 50 areas of law and procedure. Each LAL attorney advisor is required to have a minimum of five years of experience in his or her respective area of advice.

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inquiries and adheres to the continuing obligations outlined above. However, the property may be subject to a windfall lien where the EPA's response actions have increased the fair market value of the property.

Similarly, the contiguous property owner (CPO) provision protects parties that are essentially victims of pollution incidents caused by their neighbor's actions. However—unlike BFPPs—CPOs are not protected from liability if they know or have reason to know—prior to purchase of the contiguous property—that the property is or could be contaminated. CPOs must also prove by a preponderance of the evidence that they did not contribute or consent to documented releases.

The innocent landowner (ILO) provisions were initially included in the 1986 Superfund Amendments and Reauthorization Act (SARA) to promote redevelopment and provide more certainty for third-party purchasers. As with the CPO provisions, parties must have acquired property without knowledge of hazardous substance releases and must have conducted AAI prior to purchase in order to establish the ILO affirmative defense. The facility must also have been acquired after all release(s) of hazardous substances occurred.

As outlined in the guidance, the party claiming LLPs bears the burden of proving that they meet all of the applicable requirements. Following is a discussion of the common elements of the three defenses as expounded in the Memo.

A. Threshold Criteria

1. All Appropriate Inquiries

The Memo begins with an overview of the requirements for AAI. All three defenses require AAI to have been made before acquiring the property.[2] A party may still claim the BFPP defense—but may not claim the CPO or ILO defenses—if AAI gave the party knowledge of, or reason to know of, contamination. AAI standards are established by agency rule at 40 C.F.R. § 312. The rule was amended on Dec. 30, 2013 to recognize ASTM E1527-13 (governing Phase I Environmental Site Assessments) as a compliant practice and amended again on Sept. 15, 2017, to recognize ASTM E2247-16 (governing Phase I Environmental Site Assessments for Forestland or Rural Property) as compliant. The rule requires prospective purchasers to conduct AAI within one year prior to the date of acquisition of a property.[3] Certain aspects of AAI must be conducted or updated within 180 days of acquisition,[4] including interviews, government records review, visual site inspection, searches for environmental liens, and the environmental professional's declaration.

2. "No Affiliation"

To claim the BFPP or CPO defenses, a party must not be "affiliated" with a potentially liable party.[5] The BFPP and CPO defenses' "no affiliation" requirements are similarly worded. The ILO defense does not contain this requirement, but the ILO defense's requirement that the act or omission causing the contamination be performed by a third party with whom the party claiming the defense does not have a "contractual relationship" creates a similar but distinct requirement. To be a BFPP, the person invoking the defense cannot be:

a) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through

(I) any direct or indirect familial relationship; or

(II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or

b) the result of a reorganization of a business entity that was potentially liable.[6]

The Memo points to the policy behind the "no affiliation" requirement—preventing potentially responsible parties (PRPs) from "contracting away" CERCLA liability—and cites EPA's Sept. 21, 2011 Affiliation Guidance[7] to establish certain relationships EPA treats as non-disqualifying for the purposes of EPA enforcement actions. These types of relationships are unlikely to be created in an attempt to avoid CERCLA liability:

(i) relationships between a party seeking the defense and a PRP for properties other than the properties to which the defense is relevant,

(ii) relationships that arose after the purchase of the contaminated property at issue,

(iii) contractual or financial documents or relationships that are often executed or created at the time that title to the property is transferred, and

(iv) relationships established between a tenant and an owner during the leasing process.

B. Continuing Obligations

The Memo proceeds to describe various obligations that parties claiming the CERCLA defenses must continue to meet after acquisition, referring to these responsibilities as "continuing obligations." In other words, a party may lose the protection of the defense by failing to meet one of these obligations at some point after acquisition.

1. No Disposal After Acquisition.

The Memo states that a party who can otherwise claim the BFPP or ILO defenses will lose the defense if any improper "disposal" occurs after acquisition.[8] The Memo proceeds to note that courts have recognized three types of "disposal": (1) the initial placement of contaminants on the land, (2) active dispersal of contaminants via site development activities ("Secondary Disposal"), and (3) the movement of contaminants through soil without any active human conduct (i.e., "leaking"). The Memo acknowledges two types of Secondary Disposal: (i) Secondary Disposal that occurs while an owner is taking required "reasonable steps" to manage contamination, and (ii) Secondary Disposal that occurs during other development activities.

Regarding Secondary Disposal type (i), the Memo advises that EPA personnel should exercise enforcement discretion when a Secondary Disposal occurs as a "direct result" of "reasonable steps" taken by the owner, and the owner continues to take "reasonable steps" to manage the contamination. In other words, landowners should not lose liability protection due to the results of their responsible and required actions. Regarding Secondary Disposal type (ii), the Memo advises discretion when the owner's development activities were conducted in a reasonable manner given the circumstances and when the owner proactively and subsequently took reasonable steps to manage the resulting release:

[I]f a secondary disposal

continued...

> occurred in the course of the landowner performing reasonable excavation and grading for its development, and the landowner took reasonable steps to prevent and manage resulting releases to prevent that exacerbation of contamination, that act of moving soil should not, by itself, ordinarily preclude the EPA from exercising enforcement discretion to not treat that act as disqualifying for a liability protection.

The memo emphasizes the reasonableness of the development activities in this analysis, and advises that unreasonable development activities forfeit the defense, even if the party claiming the defense takes reasonable steps to contain the release after the fact.

Regarding "disposal" type (3)—releases occurring without direct human intervention or active conduct—the Memo advises that EPA should exercise discretion so long as the owner takes reasonable steps to address these releases and cooperates with authorities in cleanup. The Memo emphasizes the fact-intensive, site-specific nature of the inquiry involved.

The Memo carefully notes that this analysis applies only to EPA's enforcement discretion and is not applicable in other contexts, including disposal analysis in litigation involving CERCLA, 42 U.S.C. § 9607.

2. Complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls

The BFPP, CPO, and ILO provisions all require: (1) that the party claiming a defense comply with land use restrictions established in connection with a response action; and (2) that the party claiming the defense does not impede the effectiveness of institutional controls (ICs) employed in connection with a response action.[9]

The Memo reiterates that such cooperation with respect to land use restrictions and ICs extends to both (i) complying with restrictions already in place at the time the party claiming a defense acquired the property and (ii) cooperating and assisting EPA in implementing new, post-purchase restrictions or controls that will be imposed in connection with a cleanup remedy.

The Memo provides that the second requirement—cooperation and assistance with implementation of ICs—can obligate ILOs to impose ICs or restrictions on their non-source properties.

The Memo provides several examples of conduct that could be treated as a prohibited impediment to ICs, including a landowner's failure to comply with notice requirements, a landowner's application for a zoning change or variance away from use restrictions on which an IC relies, and a landowner's refusal to implement a property-based IC such as a restrictive covenant or an easement.

The Memo also recommends that parties claiming one of the relevant defenses conduct periodic monitoring of ICs to ensure compliance and efficacy.

3. "Reasonable Steps" with respect to hazardous substances releases

In order to preserve the three defenses, landowners must act responsibly regarding contamination by taking "reasonable steps" to stop continuing releases; prevent threatened future releases; and prevent or limit human, environmental, or natural resource exposures to earlier hazardous substance releases.[10] The Memo surveys case law interpreting what actions constitute "due care" under the CERCLA third party defense to shed light—by analogy—on what actions constitute "reasonable steps" under the later Brownfields Amendments.

The Memo stresses that due care requires "some positive or affirmative steps" by the landowner to protect others from exposure and to control the spread of contamination. It cites an interpretation of the due care standard requiring a landowner to take precautions a "similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances" and notes that courts have applied this interpretation to the "reasonable steps" requirements as well.

The Memo provides several specific examples from cases that interpreted the "reasonable steps" requirement. In a 2013 case, a landowner failed to take "reasonable steps" by failing to clean out and fill in concrete sumps. That failure led to exposure conditions that exacerbated contamination.[11] In another case, a BFPP was held to have taken reasonable steps by removing the contents of underground storage tanks one month after discovering contamination and by cooperating with a state voluntary cleanup program.[12]

The Memo also stresses that other continuing obligations—including compliance with land use restrictions and preserving the integrity of ICs—can themselves constitute reasonable steps that landowners must take to continue to qualify for the defenses. Finally, the Memo discusses the availability of site-specific Comfort/Status Letters through which EPA may suggest particular "reasonable steps" to be taken at a particular site.

The Memo includes a separate Attachment B that provides further detailed examples of precedents construing what actions constitute "reasonable steps." The Attachment identifies several broad categories of actions that have been held to constitute "reasonable steps":

(i) Timely notify appropriate authorities of contamination;

(ii) Comply and cooperate with authorities;

(iii) Prevent public exposure by restricting site access;

(iv) Contain releases by maintaining existing elements of a response action;

(v) Timely mitigate newly discovered releases and address environmental conditions;

(vi) Appropriately assess/inspect the extent of contamination once aware/upon discovery;

(vii) Prevent the exacerbation of contaminated site conditions;

(viii) Monitor lessee conduct and address improper practices;

As a final note on "Reasonable Steps", the CPO provision's legislative history states that absent "exceptional circumstances…. these persons are not expected to…undertake other response actions that would be more properly paid for by the responsible parties who caused the contamination." Nevertheless, the statute does not suggest that Congress intended to allow a landowner to ignore the potential dangers associated with hazardous substances on its property.

4. Cooperation, Assistance, and Access

The Brownfields Amendments require that BFPPs, CPOs, and ILOs provide full cooperation, assistance, and access to authorized persons to

continued...

conduct response actions, including cooperating and access necessary for the installation, integrity, operation, and maintenance of any response action or restoration activity.[13]

5. Compliance with Information Requests and Administrative Subpoenas

The Brownfields Amendments require BFPPs and CPOs to comply with any request for information or administrative subpoena issued under CERCLA.[14]

6. Providing Legally Required Notices

Both BFPPs and CPOs are required to provide all legally required notices with respect to the discovery or release of any hazardous substances at the facility.[15] Further, the burden of determining what notices are legally required falls on the BFPPs and CPOs. To this end, the EPA may require that landowners self-certify that they *have provided* (CPOs), or *will provide* within a certain number of days of purchasing the property (BFPPs), all legally required notices.

Conclusions

While providing potential for LLPs, the EPA has concluded that Congress intended protected landowners to act responsibly with respect to hazardous substances on their property. Additionally, the self-implementing LLP obligations are highly fact-specific, with requirements possibly changing based on-site conditions. As a result, the EPA encourages parties to consult with their own counsel and environmental professionals to evaluate obligations. In the end, courts are the final arbiters as to whether a party took reasonable steps or followed other threshold criteria and continuing obligations allowing the landowner to avail itself of LLP provisions. Therefore, and in order to provide meaningful guidance to EPA staff, landowners, developers, lenders, investors, or other third-party stakeholders, the July 29, 2019 guidance provides a number of examples of findings described by courts and/or recommended in previously-issued EPA comfort/status letters, particularly with regards to what actions may constitute reasonable steps as a continuing obligation.

Chart Summarizing Applicability of "Common Elements" and Other Requirements to Bona Fide Prospective Purchasers, Contiguous Property Owners, and Section 101(35)(A)(i) Innocent Landowners

Common Elements and other Requirements	Bona Fide Prospective Purchaser	Contiguous Property Owner	Innocent Landowner Section 101(35)(A)(i)
	Can acquire with knowledge of contamination	Cannot acquire with knowledge of contamination	Cannot acquire with knowledge of contamination
Threshold Criteria			
Perform All Appropriate Inquiries	✔ 101(40)(B)(ii)	✔ 107(q)(1)(A)(viii)	✔ 101(35)(A)(i),(B)(i)
"No Affiliation" demonstration	✔ 101(40)(B)(viii)	✔ 107(q)(1)(A)(ii)	*See* supra note 23, at 7
Acquisition after January 11, 2002	✔ 101(40)(A)(i)(I)		
Continuing Obligations			
No disposal after acquisition	✔ 101(40)(B)(i)		✔ 101(35)(A)
Compliance with land use restrictions and not impeding institutional controls	✔ 101(40)(B)(vi)	✔ 107(q)(1)(A)(v)	✔ 101(35)(A)
Taking "reasonable steps" to manage releases	✔ Exercise appropriate care 101(40)(B)(iv)	✔ 107(q)(1)(A)(iii)	✔ 101(35)(B)(i)(II)
Providing full cooperation/assistance/access	✔ 101(40)(B)(v)	✔ 107(q)(1)(A)(iv)	✔ 101(35)(A)
Compliance with information requests and administrative subpoenas	✔ 101(40)(B)(vii)	✔ 107(q)(1)(A)(vi)	*See* supra note 89, at 21
Providing legally required notices	✔ 101(40)(B)(iii)	✔ 107(q)(1)(A)(vii)	*See* supra note 90, at 21
No impeding performance of response action or natural resource restoration	✔ 107(r)(1)		
Did not cause/contribute to contamination		✔ 107(q)(1)(A)(i)	
Third-Party Defense requirements (due care and precautions)			✔ 107(b)(3)

All section citations in this table are to the Comprehensive Environmental Response, Compensation, and Liability Act, 42. U.S.C. Chap. 103, §§ 9601-9675. Visit the GPO website for current version of the United States Code.

Mechanick Nuccio Hearne & Wester in Tampa.

***Terry Griffin** is a Senior Principal for Environmental Remediation with Cardno, Inc. and has over 35 years of conducting geologic, hydrogeologic, and environmental investigations*

Endnotes

1. *Enforcement Discretion Guidance Regarding Statutory Criteria for Those Why May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners ("Common Elements"), Available at* https://www.epa.gov/sites/production/files/2019-08/documents/common-elements-guide-mem-2019.pdf.
2. 42 U.S.C. §§ 9601(40)(B)(ii), 9607(q)(1)(A)(viii), 9601(35)(A)(i), (B)(i).
3. 40 C.F.R. § 312.20(a).
4. 40 C.F.R. § 312.20(b).
5. 42 U.S.C. § 9601(40)(B)(viii).
6. § 9601(40)(B)(viii).
7. *Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA's Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections, available at* https://www.epa.gov/sites/production/files/2013-11/documents/affiliation-bfpp-cpo.pdf.
8. 42 U.S.C. §§ 9601(40)(B)(i), 9601(35)(A).
9. 42 U.S.C. §§ 9601(40)(B)(vi), 9607(q)(1)(A)(v), 9601(35)(A).
10. 42 U.S.C. §§ 9601(40)(B)(iv), 9607(q)(1)(A)(iii), 9601(35)(B)(i)(II).
11. *PCS Nitrogen, Inc., v. Ashley II of Charleston, LLC*, 714 F.3d 161, 180 – 81 (4th Cir. 2013).
12. *3000 E. Imperial, LLC v. Robertshaw Controls*, 2010 U.S. Dist. LEXIS 138661, *32–35 (C.D. Cal. Dec. 29, 2010).
13. CERCLA §§ 101(40(B)(v), 107(q)(1)(A)(iv), 101(35)(A).
14. CERCLA §§ 101(40)(B)(vii), 107(q)(1)(A)(vi).
15. CERCLA §§ 101(40(B)(iii), 107(q)(1)(A)(vii).

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MEMBERSHIP OPTIONS / DUES

The Florida Bar dues structure does not provide for prorated dues; your Section dues cover the period from July 1 to June 30. Your application and check should be mailed to The Environmental and Land use Law Section, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

I AM... (check one)	MEMBERSHIP OPTION	ANNUAL DUES
	ATTORNEY – Admitted to Florida Bar	$40
	AFFILIATE – Professionals and Faculty	$50
	AFFILIATE – Students	$20

I understand that all privileges accorded to members of the section are accorded affiliates and law students, except that affiliates may not advertise their status in any way, and neither affiliates nor law students may vote, or hold office in the Section or participate in the selection of Executive Council members or officers.

CERTIFICATION: I hereby certify that I have never been denied admission to any bar, or been the subject of any proceeding questioning my moral character, disbarred from any legal bar, convicted of a felony, expelled from any University or Law School, or investigated for fraud, misappropriation or mismanagement of funds.

SIGNATURE: _____ DATE: _____