



# Thinking Big and Going Long: Adapting Florida's Conceptual Permitting Approach to Large-Scale, Long-Term Habitat Restoration

by Rachael L. Dunn & Thomas T. Ankersen<sup>1</sup>

## Introduction

Florida has just entered into its golden age of ecosystem restoration. When the United States Department of Justice and BP entered into a consent decree that would finally resolve the nearly \$15 billion dollars worth of outstanding civil claims for natural resource damages, civil penalties, future injuries and other claims,<sup>2</sup> restoration ecologists received a bonanza

that would allow restoration to occur on a scale that have heretofore been reserved for only the most iconic of ecosystems: The Everglades, Chesapeake Bay and the San Francisco Bay Delta. Now, up and down Florida's Gulf Coast, communities that were affected by the spill have been given the opportunity to "think big" – and "go long" – as they consider investing in their offshore, near shore and

shoreline habitats. Restoration planning involving multiple habitats, not only those that are already degraded, but those that are threatened by future climate-induced degradation, requires long-term planning – including the sequencing of projects in phases, along with the ability to adaptively manage along the way. Restorationists faced with this large-scale,

*See "Thinking Big," page 13*

## From the Chair

For this edition of the Reporter, I wanted to share the Section Annual Report that was recently submitted to The Florida Bar.

This year, the Environmental and Land Use Law Section ("ELULS") introduced its newest CLE program: New, Different, Unusual & Uncertain – Environmental and Land Use Law Issues Facing all Floridians. This was a two-day event held in Orlando, January 28 & 29, 2016. The first day was dedicated to environmental topics, with panels on the Waters of the US Rule and related litigation, endangered species, the status of

water and land conservation following the passage of Amendment 1 in 2014, the cleanup of environmental contamination and redevelopment, and a fascinating presentation on the ethical implications of sea level rise and climate change. The second day was dedicated to land use topics, including free speech and sign ordinances, golf course redevelopment, the regulation and use of drones, recent trends in community development districts, the regulation of charitable solicitation bins, and an update on the Bert Harris Act. The speakers

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## CHAIR'S MESSAGE

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and presentations were well received, and I encourage you to listen to the recorded programs on demand at the <http://eluls.org/cle-seminars/>.

Providing quality CLE in a format that is convenient and effective for our members is a core focus of the ELULS. Due to economic pressures over recent years, we've had to take a hard look at our traditional CLE programming and activities to identify those that are no longer responsive to member needs. Additionally, we have tried to be creative in maximizing the benefit from those programs and activities that are popular and successful. For example, the ELULS is fortunate to have a strong relationship with various environmental and land development consultants who comprise a large percentage of our

affiliate membership. In recent years, the Section has coordinated regular social events with our affiliate members at which lawyers, consultants, agency staff and law school students have the opportunity to meet and network in an informal setting. These events have proven very popular, and the Section is evaluating ways to combine these mixers with a convenient and engaging CLE component. Our membership demands online access to CLE and we do our best to provide CLE programming in popular formats. As a Section, however, we encourage our members to leave the office and attend in-person events. We hope that by providing informative and accessible CLE coupled with a social opportunity to network, we will foster a dynamic and lively interaction that our members will find productive and enjoyable.

Recognizing the ongoing demand for more bite-sized and frequent CLE

programs, the Section offers an audio webinar series throughout the year. The series this year included the following topics: What You Need to Know About the New EPA Rule Defining Waters of the United States; Implications for Sign Regulation after *Reed v. Town of Gilbert*; Taking Stock of the Clean Power Plan; Annual Legislative Update; Taking the Fear (and Roadblocks) Out of Redevelopment in Florida; and Professionalism Among Attorneys in Local and State Administrative Cases. In addition, the ELULS offers free web-based programming as a benefit of membership. These programs and the audio webcast series are available at <http://eluls.org/cle-seminars/>.

The Section Treatise on Environmental and Land Use Law, which can be found at <http://eluls.org/elul-treatise/>, remains a popular member benefit. The Treatise contains articles

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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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## CHAIR'S MESSAGE

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on a multitude of environmental and land use law topics, and has proven to be an important professional resource valued by members. The ELULS also publishes its quarterly newsletter, *the ELULS Section Reporter*, which contains substantive articles, case-law updates, administrative law updates, governmental agency updates, and law school updates. *The Reporter* is available on our website at <http://eluls.org/reporter/> and is fully searchable.

The ELULS is committed to supporting law student and law school engagement in environmental and land use law, through the work of the Law Schools Liaison Committee. This committee administers our law school grant program and the Dean Frank E. Maloney Memorial Writing Contest. Following the Section Annual meeting, the awards for the

2015-2016 Maloney Writing Contest were presented. First Place went to Amy Judkins, a student at Florida A&M University College of Law, for her paper entitled "Taking it to the Bank: Creating a New Constitutional Standard and Using Blue Carbon Banking to Compensate the Miccosukee Tribe for the Federal 'Taking' of Their Tribal Lands." Second place was awarded to Felicia Thomas, also a student at Florida A&M University College of Law, who wrote "Of Life and Limb: The Failure of Florida's Water Quality Criteria to Test for *Vibrio Vulnificus* in Coastal Waters and the Need for Enhanced Criteria, Regulation, and Notification to Protect Public Health."

Several other Section awards were presented following the Section Annual Meeting. Notably, the Bill Sadowski Memorial Public Service Award was given to Sid Ansbacher with Upchurch, Bailey and Upchurch, and the Public Interest Attorney of the Year Award went to Alik Moncrief with

Florida Conservation Voters and formerly with Florida's Water and Land Legacy. Additionally, the Judy Florence Memorial Outstanding Service Award went to Jon Harris Maurer with Hopping Green & Sams, and the R. S. Murali Memorial Affiliate Member Outstanding Service Award went to Neil Hancock with Golder Associates.

The Section continues to evaluate its traditional activities and member services to determine whether they still provide a benefit and value to Section members. As our membership and their expectations change, we as a Section need to change in order to match those expectations. For this, we need our volunteer members who put in time and energy to deliver the member services outlined here. Without these volunteers, the Section would not exist, and I would like to personally thank the Section Officers, Executive Council and others who generously volunteer their time to the ELULS.



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# FDEP Update

## **St. Joe Ecosystem Management Agreement No. 3:**

The Department is currently negotiating a third Ecosystem Management Agreement (EMA 3) under section 403.0752, Florida Statutes, with the St. Joe Company. Two prior EMAs with the St. Joe Company, covering a total of 74,000+ acres in Bay and Walton Counties, have resulted in over 65% of wetlands and uplands in those areas being preserved from development. Other net ecosystem benefits contained in all St. Joe EMAs include “above and beyond” avoidance and minimization of wetland impacts (with special consideration for high quality wetlands), enhanced protection of state and federal listed threatened and endangered species, delineation of wetlands at their most landward extent, inclusion of extensive wetland buffers, no fill for wastewater disposal systems in wetlands, and enhanced stormwater management systems. Additionally, EMA 1 included the creation of two regional mitigation banks.

EMA 3 will, once executed, contain 28,000+ acres, and will fill the gap between the lands in EMAs 1 and 2. Net ecosystem benefits similar in nature to those in previous St. Joe EMAs are expected. The lands contained in the combined EMAs enhance the environmental and recreational value of other publically held lands, and create extensive wildlife corridors.

St. Joe lands covered by the EMAs are also within an area covered or that will be covered by a Regional General Permit (RGP) adopted by the U.S. Army Corps of Engineers. Conditions of the RGP are in large part identical to those of the EMA, and are available to other landowners within the RGP boundaries who may want to obtain coverage under it. For the St. Joe Company the EMAs and RGPs result in consistency and certainty in both state and federal wetlands permitting, in exchange for the net ecosystem benefits and commitments set forth in the EMA. EMA 1 and 2, and proposed EMA 3, can be viewed at: <http://www.dep.state.fl.us/northwest/StJoeEMA/joeema.htm>

**WWALS Watershed Coalition vs. Sabal Trail Transmission, LLC, and DEP:** On July 10, 2015, the Department published its Consolidated

Notice of Intent to Issue Environmental Resource Permit and Easement to Use Sovereign Submerged Lands to Sabal Trail for the Sabal Trail Natural Gas Pipeline. The Sabal Trail Natural Gas Pipeline is an interstate pipeline project that would start in Tallapoosa County in Alabama, cross twelve Florida counties, entering the state in Hamilton County and terminating in Osceola County. The primary purpose of the pipeline is to support electric power generation in Florida.

The Petitioner filed a petition for hearing on August 7, 2015, challenging the validity of these two authorizations. The Petitioner is a Georgia not-for-profit corporation with a mission to advocate for conservation and stewardship of the Withlacoochee, Willacoochee, Alapaha, Little, and Upper Suwannee River watersheds in South Georgia and North Florida. After assignment of the challenge to the Division of Administrative Hearings (DOAH), Sabal Trail filed a motion for summary hearing under section 403.973(14)(b), Florida Statutes, which was granted. The final hearing was conducted on October 19 through 21, 2015, in Jasper, Florida. The administrative law judge (ALJ) issued the Recommended Order on December 11, 2015.

On January 15, 2016, the Department issued the Final Order adopting the ALJ's recommendation to approve issuance of the Environmental Resource Permit and grant an easement to use sovereign submerged lands to Sabal Trail for the Sabal Trail Natural Gas Pipeline. The ALJ concluded that Sabal Trail provided reasonable assurance that the pipeline project will comply with all applicable regulatory criteria such that it is entitled to the Environmental Resource Permit. The ALJ further concluded that Sabal Trail proved the pipeline project will comply with all applicable criteria and it is entitled to the easement to use sovereign submerged lands. The ALJ found that, under the associational standing test, the Petitioner failed to establish its standing because it did not show that a substantial number of its members could be affected by the project. The ALJ concluded that the speculative concerns of the

Petitioner's members regarding the pipeline's impacts on their use and enjoyment of the Suwannee River, Santa Fe River, and surrounding areas, are not sufficient to confer standing.

## **Last Stand and George Halloran vs. KW Resort Utilities and DEP:**

The Florida Legislature, in 2010, enacted section 403.086(10), Florida Statutes, which addresses the discharge of domestic wastewater in the Florida Keys. That statute directs that after December 31, 2015, all new or expanded domestic wastewater discharges must comply with the treatment and disposal requirements of the statute and Department rules. Specifically, domestic wastewater treatment facilities having design capacities greater than or equal to 100,000 gallons per day must provide basic disinfection of the wastewater pursuant to Department rule and must treat the wastewater to “advanced wastewater treatment” (AWT) standards. Section 403.086(10)(e) also imposed requirements regarding disposal of treated domestic wastewater effluent through underground injection into Class V wells serving domestic wastewater treatment facilities.

KW Resort Utilities (KWRU) is permitted to operate a domestic wastewater facility on Stock Island, in Monroe County, Florida. Stock Island is located immediately east and slightly north of Key West. On April 15, 2014, KWRU applied to the Department for a permit modification seeking to expand the capacity of the facility. On June 23, 2014, the Department issued its Notice of Intent to Issue the wastewater facility permit modification and two underground injection control (UIC) permits for two new Class V injection wells. The Petitioners, Last Stand and George Halloran, challenged the permit and the case was referred to DOAH, where the ALJ conducted an administrative hearing and issued a Recommended Order.

On February 24, 2016, the Department issued the Final Order adopting the ALJ's recommendation that the Department approve issuance of the permit. The ALJ concluded that KWRU satisfied its burden to

*continued...*



establish prima facie entitlement to the permit. The ALJ further concluded that the Petitioners alleged numerous grounds for denial of the permit, but did not prove that the proposed project, as designed, fails to comply with or violates Section 403.086(10) and applicable rules. The ALJ also found that George Halloran demonstrated standing to challenge the permit, but that Last Stand did not demonstrate standing. The Final Order does not adopt the ALJ's conclusion that the antidegradation policy does not apply when considering the Monroe County-specific UIC rule applicable to Class V injection wells. *See* Fla. Admin. Code R. 62-528.630(7).

**Florida Power & Light Company Turkey Point Power Plant Units 3-5 Modification to Conditions of Certification:** Florida Power & Light Company (FPL) filed a petition for modification under the Florida Electrical Power Plant Siting Act (PPSA) of Condition XII of an existing Site Certification to authorize three system improvement projects related to water use. On December 23, 2014, the Department issued a notice of intent to modify Condition XII to authorize the three proposed projects. The Department received three written objections to the proposed production wells to provide water for use in the cooling canal system (CCS). No objections were raised regarding the two other FPL projects and the Department issued a final order approving those two modifications to Condition XII. This modification proceeding involved only the proposal to construct and operate new UFA production wells to discharge water into the CCS.

Miami-Dade County, Tropical Audubon Society, Inc., and South Florida Water Management District (SFWMD) each filed notices of their intent to be parties to the modification proceeding. Miami-Dade County and Tropical Audubon Society, Inc., later voluntarily withdrew from the proceeding. Atlantic Civil, Inc. (ACI), was granted intervention on April 3, 2015. The final hearing was held on December 1-4, 2015, in Miami, Florida. On January 25, 2016, the ALJ submitted a Recommended Order.

On April 1, 2016, the Siting Board

issued its Final Order adopting the ALJ's recommendation that the Siting Board approve the modification as proposed by the Department on December 23, 2014, with an additional condition that was stipulated by the parties. The ALJ found that FPL provided reasonable assurance that the proposed modification would comply with all applicable water use regulatory criteria. The ALJ also concluded that the proposed modification met the PPSA criteria for approval in section 403.509(3)(a) through (g), Florida Statutes. The Final Order modifies certain conclusions of law regarding ACI's standing to challenge the limited scope of this PPSA modification.

**Atlantic Civil, Inc. vs. Florida Power & Light Co. and DEP:** On December 23, 2014, the Department issued Administrative Order OGC No. 14-0741 (AO) related to the Turkey Point Power Plant cooling canal system (CCS). The CCS is a 5,900-acre network of canals, which provides a heat removal function for Units 1, 3, and 4, and receives cooling tower blowdown from Unit 5. Florida Power & Light Company (FPL) constructed the CCS to satisfy a 1971 consent judgment with the U.S. Department of Justice which required FPL to terminate its direct discharges of heated water into Biscayne Bay. The CCS canals are unlined, so they have a direct connection to the groundwater. The original salinity levels in the CCS were probably the same as Biscayne Bay. However, because the salt in saltwater is left behind when the water evaporates, and higher water temperature causes more evaporation, the water in the CCS became saltier. Salinity levels in the CCS are also affected by rainfall, air temperature, the volume of flow from the power plant, and the rate of water circulation.

On February 9, 2015, petitions for administrative hearing challenging the AO were filed by Tropical Audubon Society, Inc., Blair Butterfield, Charles Munroe, and Jeffrey Mullins; Miami-Dade County; ACI; and the City of Miami. After referral to DOAH, the four cases were consolidated for hearing. Prior to the final hearing in November 2015, Miami-Dade County; Jeffrey Mullins; and Tropical Audubon Society, Blair Butterfield, and Charles Munroe filed Notices of Voluntary Dismissal. The ALJ conducted the final hearing

on November 2-4, 2015, in Miami, Florida.

In the ALJ's Recommended Order, the ALJ found that the AO stated that western migration of saline water "must be abated to prevent further harm to the waters of the state," and that a detailed Salinity Management Plan shall have the goal of reducing hypersalinity of the CCS to abate westward movement of CCS groundwater. The ALJ found that the AO defined the term "abate" as "to reduce in amount, degree or intensity; lessen; diminish." The ALJ ultimately found that "[i]f the success criteria in the AO are achieved, hypersaline water will no longer sink beneath the CCS, the rate of saltwater intrusion will be slowed, and the existing hypersaline plume would begin to freshen."

The ALJ recommended that the Department enter a final order that rescinded the AO or amended it as described in the RO. The ALJ concluded that the AO was an unreasonable exercise of the Department's enforcement discretion for three reasons. First, the ALJ concluded that the AO lacked the fundamentals of an enforcement action because it did not charge a party with one or more violations of the law, which the party has the right to refute. Second, the ALJ concluded that the AO's success criteria did not require FPL to come into compliance with standards or specify a reasonable time to come into compliance. Third, the ALJ concluded that the AO's "success criteria are inadequate to accomplish DEP's stated purposes."

On April 21, 2016, the Department issued its Final Order approving the AO, finding that contrary to the ALJ's legal conclusions, the AO is an enforcement instrument authorized under section 403.061(8), Florida Statutes. It contains findings, and it requires FPL to comply with Condition of Certification X.D. by submitting and implementing a Salinity Management Plan that will achieve the goals and timelines specified in the AO. The AO is a reasonable exercise of the Department's enforcement discretion under Sections 403.061(8) and 403.151, and its provisions can be enforced by appropriate administrative and judicial proceedings. Thus, the ALJ's recommendation to rescind the AO as an unreasonable exercise of enforcement discretion or amend it as suggested was rejected in the Final Order.

# On Appeal

by Larry Sellers, Holland & Knight

*Note: Status of cases is as of May 4, 2016. Readers are encouraged to advise the author of pending appeals that should be included.*

## FLORIDA SUPREME COURT

*Hardee County v FINR II, Inc.*, Case No. SC 15-1260. Petition for review of the 2nd DCA's decision in *FINR v. Hardee County*, 40 FLW D1355 (Fla. 2d DCA June 10, 2015), in which the court held that "the Bert Harris Act provides a cause of action to owners of real property that has been inordinately burdened and diminished in value due to governmental action directly taken against an adjacent property," and certified conflict with the 1st DCA's decision in *City of Jacksonville v. Smith*, 159 So. 3d 888 (Fla. 1st DCA 2015) (question certified). Status: Jurisdiction accepted on August 18, 2015. Note: the Florida Supreme Court also has accepted jurisdiction to review the question certified in *City of Jacksonville* (see below).

*R. Lee Smith, et al. v. City of Jacksonville*, Case No. SC 15-534. Petition for review of the 1st DCA's decision in *City of Jacksonville v. R. Lee Smith, et al.*, in which the majority of an *en banc* court determined that a property owner may not maintain an action pursuant to the Bert Harris Act if that owner has not had a law, regulation, or ordinance applied which restricts or limits the use of the owner's property. 159 So. 3d 888 (Fla. 1st DCA 2015). Status: Jurisdiction accepted on May 22, 2015; suggestion of mootness denied on March 18, 2016. Note: Legislation enacted during the 2015 regular session clarifies that the Bert Harris Act is applicable only to action taken directly on the property owner's land and not to activities that are authorized on adjoining or adjacent properties. See Chapter 2015-142, *Laws of Florida*.

*SJRWMD v. Koontz*, Case No. SC 14-1092. Petition for review of decision in *SJRWMD v. Koontz*, 39 Fla. L. Weekly D925a (Fla. 5th DCA 2014), on remand from the Florida Supreme Court, in response to the reversal by the U.S. Supreme Court in *Koontz v. SJRWMD*, 133 S.Ct. 2586 (2013). The U.S. Supreme Court concluded that an exactions taking may occur even in the absence of a compelled dedication of land and even when the unconstitutional condition is refused and a permit is denied. Subsequently, the 5th DCA adopted and reaffirmed its

prior decision in *SJRWMD v. Koontz*, 57 So.3d 8 (Fla. 5th DCA 2009), which affirmed the judgment below. Judge Griffin dissented. Status: Notice filed May 30, 2014; Petition for review denied on February 19, 2016.

## FIRST DCA

*Putnam County Environmental Council, Inc. v. SJRWMD*, Case No. 1D15-5725. Appeal from final order of the Florida Land and Water Adjudicatory Commission determining that SJRWMD's fourth addendum to the 2005 water supply plan is consistent with the provisions in purposes of Chapter 373, Florida Statutes. Status: Notice of appeal filed December 16, 2015.

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

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

by the Board's action granting Partial Modification of Original Restrictions to Deed No. 19447. Status: Oral argument held on March 8, 2016.

## THIRD DCA

*Miami-Dade County, et al. v. Florida Power & Light Co., et al.*, Case No.: 3D14-1467. Appeal from final order of the Siting Board certifying two nuclear units at Turkey Point as well as proposed corridors for transmission lines. Status: Reversed and remanded to the Siting Board for further review on April 20, 2016.

## FOURTH DCA

*DEP v. Beach Group Investment, LLC*, Case No. 4D14-3307. Appeal from order determining that plaintiff Beach Group Investments, LLC, prevailed in its claim for inverse condemnation based on DEP's refusal to issue the requested Coastal Construction Control Line permit. Status: Oral argument held on March 22, 2016.

## FIFTH DCA

*McClash, et al., v. SWFWMD*, Case No. 5D15-3424. Petition for review of SWFWMD final order issuing environmental resource permit (ERP) to Land Trust for its proposed project on Perico Island in Bradenton, over contrary recommendation by the administrative law judge. The ALJ recommended that SWFWMD deny the ERP because practicable modifications were not made to avoid wetland impacts and cumulative adverse effects and the project would cause significant environmental harm. In its final order, SWFWMD concludes that the mitigation proposed by the applicant is sufficient and that reduction and elimination of impacts to wetlands and other surface waters was adequately explored and considered. Status: Notice of appeal filed September 29, 2015.

*St. Johns Riverkeeper, Inc., et al., v. SJRWMD, et al.*, Case No. 5D15-2831. Appeal from a final order of the St. Johns River Water Management District approving issuance of consumptive use permit for irrigation and support of a grass-fed cattle ranch. DOAH Case No. 14-2610 (final order entered July 15, 2015). Status: Notice of appeal filed August 13, 2015.



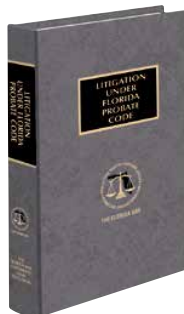
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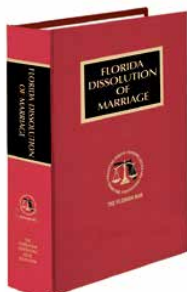
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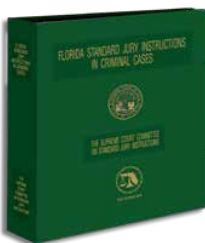
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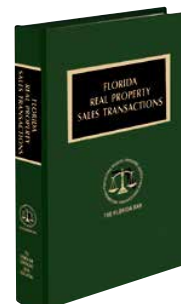
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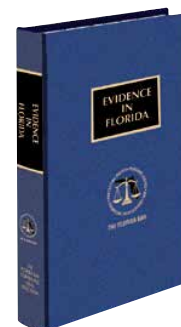


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# Law School Liaisons

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## UF Law Update

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

### ELULP Faculty Participate in UF Law Cuba Conference

Four ELULP faculty members participated in the historic interdisciplinary conference in Havana, Cuba, co-sponsored by the University of Florida and University of Havana. ELULP Director Mary Jane Angelo and Professors Amy Stein, Tom Ankersen, and Michael Olexa will make presentations on issues related to agriculture, energy and sustainability.

The conference featured academics from both countries with a goal of fostering long-term research collaboration. The annual Conference on Law and Policy in the Americas was held May 9-10 for faculty, students, lawyers and judges. The conference included panels on comparative legal systems and legal education; women in society; international commerce and investment; and agriculture and environmental issues. Proceedings will be published and presented in English and Spanish.

Attendees included UF Law Dean Laura A. Rosenbury, Dean Leonardo A. Villalón from the UF International Center, Philip J. Williams, director of the Center for Latin American Studies, and 10 professors from UF Law and the Institute of Food and Agricultural Sciences. Also representing UF are alumni Rosemary Barkett (JD 70), former 11th U.S. Circuit Court of Appeals judge and an arbitrator on the Iran-United States Claims Tribunal; and Stephen N. Zack (JD 71), a partner with Boies, Schiller & Flexner, LLP, Miami, a former president of the American Bar Association.

### Conservation Clinic Looks at Underground Rivers

The UF Law Conservation Clinic hosted a program on "From Exploration to Conservation: The Science, Law and Management of Florida's Underground Rivers" on April 26 in Gainesville. The program featured presentations by Sean Denney, Ph.D. candidate in Geomatics at UF, and Rachel Dunn, an LL.M. Candidate in Environmental and Land Use Law at UF Law.

Presenters examined the common belief held that the Floridan aquifer provides a limitless source of fresh drinking water lying deep beneath the ground that has existed since "time immemorial." They discussed the work of a group of scientist-explorers who have been slowly and methodically mapping the karst caves that riddle the Floridan aquifer with volumes, flows and linear extent that rival our surface rivers. With these maps comes the opportunity to improve decision-making over activities that threaten both the physical karst cave formations and the quality of the water that flows through them. They argued that greater efforts should be made to map Florida's submerged cave systems, and that known caves should be managed as "cavesheds," with appropriate consideration being given to the human activities that threaten them.

### Professor Stein Participates in Climate Change Discussion

UF Law Professor Amy Stein participated in a discussion on "Free Enterprise Solutions for Climate Change" on March 30. Stein

specializes in clean energy law, electric grid governance, distributed energy resources and reliability, and environmental law and federalism.

The program featured Bob Inglis, former South Carolina Congressman, 2015 JFK Profiles in Courage Award winner, and founder of RepublicEn, an energy optimist and solutions organization. Additional presenters included Kristin Jacobs, Florida House of Representatives 96<sup>th</sup> District, founding member of the Southeast Florida Climate Compact, and member of the Federal Task Force on Preparedness and Resilience; Dr. Wendell Porter, UF Department of Agricultural and Biological Engineering; and Jonathan Dain, Director of the Natural Resources Leadership Institute.

### UF Law Accepting LLM Applications

The University of Florida Levin College of Law is accepting applications for its LLM in environmental and land use law through June 15, 2016. For additional information, please contact [llmenviron@law.ufl.edu](mailto:llmenviron@law.ufl.edu).

UF Law is part of a multi-dimensional university that is a public land-grant, sea-grant, and space-grant research university, and a member of the Association of American Universities. LL.M. students will be expected to take six credits from relevant graduate-level courses in UF departments outside the law school, including offerings in wildlife ecology, environmental engineering, wetland science, fisheries and aquatic sciences, coastal and oceanographic engineering, forestry resources and conservation, and many others.

*Law School Liaisons, continued...*



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## Spring 2016 Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of our College of Law alumni, students, and faculty. It also features the programs the College of Law has hosted this spring.

We are delighted to report that our Environmental Law Program has again been ranked in the top 20 in the United States by *U.S. News & World Report*, for the twelfth consecutive year.

### Recent Alumni Accomplishments

- **Paul Amundsen** is the Assistant General Counsel – Regulatory Affairs with Philadelphia Energy Solutions Refining and Marketing LLC (PES) in Philadelphia PA. PES operates the largest petroleum refinery complex on the eastern seaboard. Paul is Board Certified by the Florida Bar in State and Federal Government and Administrative Practice. He is also admitted to practice as Corporate Counsel in Pennsylvania.
- **Frederick Aschauer, Jr.** was recently named General Counsel of the State of Florida Department of Environmental Protection.
- **Mark Barnebey** recently completed his term as Chair of the Bradenton Area Economic Development Corporation. He is participating as a speaker on land use, for the 21st year, at the City, County and Local Government Law Certification Review Course.
- **Jake Cremer** was elected to the Hillsborough County Farm Bureau Board of Directors and was appointed to the Tampa Bay Agency on Bay Management. He also recently co-authored an article with William Anderson (FSU Law 2016) in the Florida Bar Environmental and Land Use Section's Reporter, The Uncertain Fundamentals of Federal Regulation

of Wetlands (March 2016).

- **Angelina Gonzalez** is now working at Panza, Maurer, & Maynard, primarily practicing administrative law.
- **David Henning** has joined the land use consulting and urban planning firm, Clarion Associates of Chapel Hill, NC, as an Associate.
- **Tom Kay** was re-elected President of the Alliance of Florida Land Trusts (AFLT), the statewide umbrella organization for all land conservation trusts in the state of Florida.
- **Shelbie Legg** has assumed the role of the Standards Executive for the U.S. Department of State. In her position Ms. Legg is responsible for implementing White House guidance to federal agencies on the use and development of regulatory standards and their impact on international trade obligations.
- **Christina Scaringe** is the General Counsel of Animal Defenders International.
- **Susan Stephens** has become Board Certified by The Florida Bar in State & Federal Government & Administrative Practice.
- **Joseph Ullo, Jr.** was recently named Director of the Waste Management Division of the State of Florida Department of Environmental Protection.
- **Thornton Williams** was recently elected as the chair of the Advisory Board of the Center for



BARNEBEY



STEPHENS



WOOD

Urban Transportation Research (CUTR).

- **Jeff Wood**, in February, served as pro-bono legal counsel on an amicus curiae brief filed in the EPA Clean Power Plan litigation currently pending before the U.S. Court of Appeals for the D.C. Circuit on behalf of more than 200 members of Congress, including the Speaker of the House, the Senate Majority Leader, and the chairmen of the key environmental committees of jurisdiction in the House and Senate. Jeff is currently a partner in the Washington DC office of Balch & Bingham LLP.

### Recent Student Achievements

- **Stephanie Schwarz** and **Sarah Logan Beasley** represented FSU



STEPHANIE SCHWARZ AND SARAH LOGAN BEASLEY

*Law School Liaisons, continued...*

## LAW SCHOOL LIAISONS

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Law at the 2016 Pace Environmental Law Moot Court competition for the second consecutive year. The College of Law's team was one of nine teams to reach the semifinal round. **Sarah Logan Beasley** was named the competition's overall Best Oralist out of more than 200 competitors.

- The 2016-2017 Journal of Land Use & Environmental Law Executive Board consists of: **Travis Voyles**, Editor-in-Chief; **Daniel Wolfe**, Executive Editor; **Tyler Parks**, Executive Editor; **Suhail Chhabra**, Senior Articles Editor; **Brent Marshall**, Administrative Editor; and **Melina Garcia**, Associate Editor.
- The 2016-2017 Environmental Law Society Executive Board consists of: **Jess Melkun**, President; **Jessica Farrell**, Vice President; **Blair Schneider**, Treasurer; **Janaye Garrett**, Secretary; and **Travis Voyles**, Networking Chair.

### Recent Faculty Achievements

- **Shi-Ling Hsu** was a guest speaker at the University of Oregon School of Law in January, where he presented his article, "Capital Transitioning: a Human Capital Strategy for Climate Technologies." In March, Shi-Ling Hsu was a speaker at the J.B. and Maurice Shapiro Environmental Law Symposium at George Washington University Law School, where he presented "The Case for a Carbon Tax 2.0," and also at the University of Illinois School of Law, where he presented his work on climate change technologies.
- **David Markell's** article, "Next Generation Compliance," was published in the ABA Natural Resources & Environment journal, <http://ssrn.com/abstract=2662105>. His article, "Dynamic Governance in Theory and Application, Part I," is forthcoming in volume 58 of the *Arizona Law Review*, <http://ssrn.com/abstract=2734304>. Professor

Markell presented his paper "Sea-Level Rise and Changing Times for Florida Local Governments" during a workshop at Columbia Law School's Sabin Center for Climate Change Law. For a blog post on the Sabin Center website concerning this paper, see [sabincenter.org/1jdTfu](http://sabincenter.org/1jdTfu). Prof. Markell's article about sea-level rise in Florida, *Emerging Legal and Institutional Responses to Sea-Level Rise in Florida and Beyond*, will be published in 42 *Columbia J. of Environmental Law* \_\_ (2016), <http://ssrn.com/abstract=2765569>

- **Erin Ryan** presented *Secession and Federalism in the United States* in November at an international federalism conference at the University of the Basque Country, Spain. She presented a new book chapter, *Environmental Federalism's Tug of War Within*, at the University of Kansas in September and at a Federalist Society Conference in January. In March, she presented a version adapted for Chinese academics at the University of Chicago, as the opening presentation for an international environmental governance project, *Chinese and American Environmental Governance Compared: System, Capacity, and Performance*. In April, she presented an article, *Federalism, Regulatory Architecture, and the Clean Water Rule* at a symposium about the Waters of the United States Rule at Lewis & Clark Law School. In February, she published a short essay, *The Clean Power Plan, The Supreme Court, and Irreparable Harm*, on the AMERICAN CONSTITUTION SOCIETY BLOG, THE HUFFINGTON POST, and the ENVTL. LAW PROF BLOG.
- **Hannah Wiseman** was a panelist at the Nicholas Institute for Environmental Policy Solutions, Duke University conference entitled "Navigating the EPA's Clean Power Plan: Charting a Course for Southeast Energy." She also presented her paper "Disaggregating Preemption in Energy Law" in colloquia at the Buchmann Faculty of Law, Tel Aviv University and at the Northwestern University Pritzger School of Law.



CAROL ROSE

### Spring 2016 Events

#### Spring 2016 Distinguished Lecture

**Carol Rose**, Gordon Bradford Tweedy Professor Emeritus of Law and Organization and Professorial Lecturer in Law, Yale Law School, was the spring Distinguished Lecturer.

#### Guest Lecturers

**Brent McNeal**, Deputy General Counsel, Division of Vocational Rehabilitation and the Division of Blind Services, State of Florida Department of Education, **Ellen Wolfgang Rogers**, Staff Director, Senate Environmental Protection and Conservation Committee, **Suzanne Van Wyk**, Administrative Law Judge, Florida Division of Administrative Hearings, and **Christina Shideler**, Assistant General Counsel, Florida Department of Economic Opportunity, guest lectured in Professor Markell's Legislation & Regulation course in March.

**Judge Bram Canter** guest lectured to Prof. Markell's Administrative Law class.

#### Energy Road Show

The Young Lawyers Council of the Energy Bar Association presented a special program for College of Law students entitled Energy Road Show: Career Possibilities and Current Trends in Energy Law. Speakers included **Richard Brightman**, Shareholder, Hopping Green & Sams; **Diana Caldwell**, Staff Director, Florida Senate Committee on Regulated Industries; **JR Kelly**, Florida Public Counsel (Office of Public Counsel); **Cindy Miller**, former senior counsel

*Law School Liaisons, continued...*



## LAW SCHOOL LIAISONS

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at the Florida Public Service Commission; **Angela Morrison**, Partner, Berger Singerman; **Lisa Edgar**, Commissioner, Florida Public Service Commission; and **Floyd Self**, Partner, Berger Singerman.

### Networking Nosh Luncheon

**Michael Gray**, United States Department of Justice Environment and Natural Resources Division, spoke with students about opportunities with the Department of Justice. He also participated in the College of Law's Environmental, Energy and Land Use Law Spring 2016 Colloquium.

### Environmental, Energy and Land Use Law Spring 2016 Colloquium

The Spring 2016 Colloquium honored seven J.D. students for their outstanding papers.

- **Britton Alexander**, *Cleaning Up the Clean Power Plan: Wavering Deference to the Environmental Protection Agency*

- **John Baker**, *Oil and Reform a la Mexicana: On Mexico's Past Troubles, Present Challenges, and Future Expectations*
- **Sarah Logan Beasley**, *Hydraulic Fracturing Fluid in Our Food System: Emerging Issues Related to Recycling Wastewater for Agricultural Purposes*
- **Steffen LoCascio**, *The Apalachicola-Chattahoochee-Flint River Dispute: Atlanta vs. Apalachicola, Water Apportionments' Real Version of David vs. Goliath*
- **Sarah Marshall**, *The Clean Water Act's TMDL Requirements: Could Prosecution of TMDL Violators Be A Possible Solution To Nonpoint Source Pollution?*
- **Jazz Tomassetti**, *We're All in This Together: A Fair Share Approach to Renewable Energy*

- **Travis Voyles**, *Clearing up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation*

### Wakulla Springs Alliance

On February 20, Jim Stevenson, of the Wakulla Springs Alliance led FSU environmental law students on his Wakulla Springs watershed tour. A veteran of many environmental battles, Jim shared with students his long history of advocacy for Florida's springs, and the issues facing Florida's endangered springs today.

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.

ENERGY ROAD SHOW



WAKULLA SPRINGS WATERSHED TOUR





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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
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	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.

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long-term scenario encounter a problem all too familiar to those occupying a parallel universe, those who master plan large phased development and redevelopment projects and ports. These projects often require a plethora of environmental permits, none of which are guaranteed, yet each of which is dependent upon the other.

Florida law provides a unique approach to permitting these sorts of long-term, large-scale projects. Termed a “conceptual permit” or “conceptual approval permit” this approach has typically been used for ports, urban redevelopment plans (stormwater) and multi-phased residential and commercial development. However, this approach also lends itself to restoration projects, particularly those projects that involve multiple sites and habitat types within a defined area, such as a bay or estuary. Using this approach, the applicant benefits from a measure of regulatory certainty that future individual permits will be issued if circumstances do not significantly change at the time the individual permit is sought. In the context of restoration, using a conceptual permitting framework may enhance the opportunity to seek funding for a suite of “shovel-ready” restoration projects that achieve an ecosystem-based restoration goal.

This article begins by briefly discussing a few ecosystem scale restoration initiatives currently underway. We then describe some current approaches to restoration, fisheries enhancement, and sea level rise adaptation planning and permitting on greater scales and longer time horizons. We conclude by discussing the current legal basis for conceptual permitting in Florida and suggest that it be made explicit for long-term large-scale restoration projects. Unfortunately, in the absence of a parallel process at the federal level, some of the efficiencies to be gained for this approach will be lost.

### **Dialing for Dollars: Deepwater Horizon and Restoration in Florida**

After the Deepwater Horizon oil spill in the Gulf of Mexico in 2010,

a long awaited decision arrived on April 4, 2016 resolving the U.S. government’s civil penalty claim, holding that BP must pay for its Clean Water Act violations in the amount of 5.5 billion (plus interest), 8.1 billion in natural resource damages, and up to \$700 million for future natural resource injury and adaptive management issues.<sup>3</sup> This would allow \$4.9 billion to be awarded to the Gulf States, with up to an additional \$1 billion for claims from local governments.<sup>4</sup> Florida in particular is set to receive \$3.252 billion over a period of 15 years.<sup>5</sup> An interactive map that shows the projects that have been funded in the state can be found on the Florida Department of Environment Protection website.<sup>6</sup>

Twenty-three counties along the Gulf coast will receive proportionate shares of the funds, all with different plans on how to use the money according to the needs of the particular county. Those that will receive a greater share of money will be those counties that saw a greater impact from the oil spill, specifically the eight Panhandle counties.<sup>7</sup> Projects range from restoring and conserving habitat, restoring water quality, replenishing and protecting living coastal and marine resources, and building and enhancing recreational opportunities, such as boat ramps and fishing piers.<sup>8</sup> Having a 15-year guaranteed allocation of funds is important to the idea of long-term planning and permitting because Florida and its eligible local governments will have a steady revenue stream for implementation and adaptive management.

### **Thinking Like a Fish: Tethered Coastal, Marine and Ecosystem Restoration**

An idealized ecosystem scale restoration effort might include, over time and within the same aquatic environment, the restoration and/or enhancement of beaches, salt marsh, mangrove stands, oyster reefs, submerged aquatic vegetation (sea grasses), and even soft and hard coral hard-bottom habitats (live-rock). While there does not appear to be a large literature on the complementarity of multiple habitat restoration in the context of the coastal/estuarine/marine habitat complex, one recent Florida study does suggest that there are synergistic benefits to be gained from a

multiple habitat restoration effort.<sup>9</sup>

Thinking beyond restoration to climate adaptation, one might consider whether to enhance or even newly construct estuarine beaches, those thin, ephemeral slivers of sand relied upon by nesting shorebirds, diamond-back terrapins and other species. As the sea rises, these beaches will be the first to go, followed by the marsh and mangrove behind them. Thinking beyond restoration and adaptation to fisheries enhancement and resource-based tourism, one might consider whether to track the life history of a commercially and recreationally important species such as grouper by strategically placing artificial reefs of varying size at graduated depths. Throw in some additional shallow water structure and one creates a snorkel trail to attract nature-based economic development. Suddenly, in the post-BP settlement world, this all sounds feasible.

### **Examples of large-scale, long-term restoration projects**

Beyond the iconic mega-restoration projects alluded to above, examples of the sort of large-scale, long-term approaches to restoration over time appear fewer and farther apart, even more so when they involve multiple habitats. Focusing solely on oyster habitat restoration, the Charlotte Harbor National Estuary Program (CHNEP) created a Restoration Suitability Model, which included guidance plans for the CHNEP area, where approximately 40,000 acres in the CHNEP area are deemed suitable for oyster habitat restoration.<sup>10</sup> More recently, using Gulf restoration funding, the Nature Conservancy has initiated the Pensacola East Bay Oyster Restoration project along an eight-mile stretch of coast.<sup>11</sup> According to the Conservancy, “Phase 1 provides for three years of pre-restoration monitoring, project design and permitting...”<sup>12</sup> In Lee County, a smaller but more complex project in Clam Bayou combined hydrologic, shoreline (mangrove) and oyster reef restoration with good results.<sup>13</sup>

### **Large-scale, long-term restoration planning and permitting programs**

While they do not achieve the sort

*continued...*

## THINKING BIG

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of holistic multiple habitat approach envisioned in this article, there are several examples where marine and coastal planners have sought to expand the time and terrain of projects in order to achieve a more holistic approach to planning and permitting. These offer insights into the sort of efficiencies to be gained by thinking big and going long.

### A. Large area permits for fisheries enhancement with artificial reefs

Coordinated by the Florida Fish and Wildlife Conservation Commission, Florida has robust and growing program for enhancing fisheries habitat through artificial reef development.<sup>14</sup> These projects are typically undertaken county by county in a piecemeal and opportunistic manner, contingent on funding political

will.<sup>15</sup> The U.S. Army Corps of Engineers (USACE) has regulatory authority for the proposed artificial reef sites in federal waters and both USACE and the Florida Department of Environmental Protection (FDEP) have regulatory authority when the proposed artificial reef project is in state waters.<sup>16</sup> The USACE has given license to fishery scientists and artificial reef managers to advance identify and permit suitable sites for the installation of multiple artificial reefs in federal waters.<sup>17</sup> This is accomplished through a “large area permit.”<sup>18</sup> In an experiment led by Florida Sea Grant and its state and local partners a “large area permit” was sought and obtained which allowed the placement of 500 artificial patch reefs in an area referred to as the Steinhatchee Fisheries Management Area (SFMA).<sup>19</sup> This federally funded management area was designed and constructed to test the growth and survival of the juvenile gag grouper population.<sup>20</sup> The SFMA

was enhanced with 500 small and scattered artificial reefs designed to improve the growth rates and survivorship of juvenile gag, as juvenile habitat are patch reefs on the shallow continental shelf.<sup>21</sup> These particular studies emphasize the benefits of artificial reefs to the growth of a particular fish species. Locations for the reefs were advance identified pursuant to the plan and a single permit was issued authorizing the placement of multiple reefs over time.

### B. The USACE Regional Sediment Management Program

Dredging coastal waters to maintain federal navigation channels such as inlets and the Intracoastal Waterway is a continuous operation and is ordinarily conducted by the USACE. Disposal of the dredged spoil has typically been done in the most efficient and cost-effective manner, which historically has meant offshore disposal. However, in the age of restoration and sea level rise adaptation, dredged spoil can become a valuable asset, even beyond the nourishment of sandy beaches. Regional Sediment Management (RSM) is being promoted as a means to conserve and manage sediments in the littoral zone.<sup>22</sup> The USACE has initiated an RSM program that looks beyond the obligatory metric of economic efficiency<sup>23</sup>, and made the Corps’ Jacksonville District a Regional Center of Expertise.<sup>24</sup> To address the planning aspect, the RSM and any dredged material management plans, along with other required regulatory frameworks, can include provisions detailing the use of sediment from a dredging project for inlet or navigational channel maintenance to be used for beach renourishment and other types of restoration.<sup>25</sup> For example, dredged spoil has been deployed to build up sediment to restore salt marsh habitat that has been eroded away by boat traffic.<sup>26</sup> Even placing the sediment near shore may allow the material to become available to the littoral system through natural processes.<sup>27</sup> Properly considered, the continuing availability of sediment to manipulate the geophysical environment and replicate historic conditions offers planners an important and perhaps overlooked tool for restoration.



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### **C. The West Coast Inland Navigation District's Regional Waterway Management System**

The Southwest Florida Regional Waterway Management System promotes safe access and navigation, protection of aquatic resources, and a streamlined channel maintenance permitting process. FDEP, Florida Sea Grant College Program, and the West Coast Inland Navigation District (WCIND) collaborated on a memorandum of agreement (MOA) to implement the regional waterway management system.<sup>28</sup> This MOA recognized the high recreational and ecological value of the region's waterways, the need for a science-based management framework, and the significant use of the waterways by recreational vessels traversing sensitive habitats.<sup>29</sup> The effort ultimately led to the creation of a general permit authorizing channel dredging based on a schedule.<sup>30</sup> Because dredging, even in maintained channels, can affect aquatic resources, mitigation is often required. Understanding when and where channel maintenance dredging will occur over time provides an opportunity for analogous mitigation planning,<sup>31</sup> perhaps gaining more benefits than ad hoc project-by-project mitigation.

### **D. The Adaptation Action Area**

In 2011, the state legislature revised Florida's long-standing growth management legislation and created the Florida Community Planning Act. Included in the new statute was a provision authorizing – but not requiring – local governments to include “adaptation action areas” in their local comprehensive plans.<sup>32</sup> Adaptation Action Areas (AAA's) include “one or more areas that experience coastal flooding due to extreme high tides and storm surge, and that are vulnerable to the related impacts of rising sea levels for the purpose of prioritizing funding for infrastructure and adaptation planning.”<sup>33</sup> While this planning tool was undoubtedly created to facilitate planning within the built environment, the language is sufficiently broad to include planning for

natural resource adaptation as well. To this end, the Town of Yankeetown recently amended its comprehensive plan to establish a natural resource AAA (NR-AAA) with accompanying goals, objectives and policies for its coastal and near shore marine environment.<sup>34</sup> A significant component of this includes restoration for sea level rise adaptation, a sort of “back to the future” approach to restoration. A logical next step in this process could be the identification of a suite of projects that fulfill the goals of the NR-AAA, and that would undoubtedly require a series of permits over time.

### **Restoration Permitting in Florida**

Florida authorizes activities over submerged lands and in wetlands, including restoration activities through the vehicle of an Environmental Resource Permit. There are three types of environmental resource permits that are available under the Environmental Resource Permitting statute and rules: general<sup>35</sup>, individual<sup>36</sup>, and conceptual<sup>37</sup>. In addition, certain activities may be exempt from permitting. For example, in the context of restoration FDEP has created an exemption for small-scale “living shorelines,” a means by which waterfront property owners can restore degraded shorelines.<sup>38</sup> General permits are categorical in nature and apply to activities where impacts on a project-by-project basis have been determined in advance to be individually and cumulatively minimal. For example, FDEP has created a general permit for “small-scale, low profile oyster habitat restoration.”<sup>39</sup> Individual permits apply to all projects where an exemption or general permit do not otherwise apply.<sup>40</sup> Most aquatic restoration activities of any size will require one or more individual permits.

### **Conceptual Permitting in Florida**

Conceptual permits represent a third approval category, but these do not absolve an applicant from obtaining a general or individual permit for any specific project. Instead, conceptual permits operate more like a procedural overlay to allow large-scale phased projects with the potential for multiple individual and general permits to gain some certainty over

future permitting. Conceptual permits are authorized by statute in the case of ports,<sup>41</sup> by statute in the case of a local government stormwater master plan for urban infill and redevelopment,<sup>42</sup> and by rule in the case of “other” phased activities.<sup>43</sup>

In each case, issuance of a conceptual approval permit results in a determination that the conceptual plans for a phased suite of projects included in the application are likely to be consistent with applicable rules at the time the conceptual permit was issued.<sup>44</sup> In each case, the first phase of a project can also be approved and authorized by an individual permit at the same time the conceptual permit is approved, assuming sufficient detail is provided.<sup>45</sup> The duration for all three types of permits is 20 years, with an opportunity to extend the duration prior to expiration.

Port conceptual permits subsume “conceptual sovereign submerged lands authorizations” and a determination of consistency with the state Coastal Zone Management Plan.<sup>46</sup> Importantly, final agency action to approve future activities identified in the port conceptual permit may only be challenged by a third party under a claim that the additional facility is inconsistent with the original port conceptual permit.<sup>47</sup> These provisions are unique to the Port Conceptual permit process.

### **“Other” Conceptual Approval Permits**

It is the rule-based authorization for “other conceptual approval permits” that opens the door for restoration planning and permitting. Florida Administrative Code Rule 62-330.056 governs the issuance of these permits. Unlike ports and local government stormwater master plans in redevelopment areas, there is no specific statutory authority for this “other” category of conceptual permits. Instead, DEP relies on a suite of statutes that provide general rulemaking authority and for ERP permitting generally.<sup>48</sup> Rule 62.330(056)(1) provides:

“A conceptual approval permit is available for an applicant who desires approval of design concepts for a master or future plan to construct, alter, operate, maintain,

*continued...*

remove, or abandon projects that require an individual permit under this chapter. This includes activities that are to be developed in phases, such as phased development master plans and projects for which an Application for Development Approval has been made pursuant to Part I of Chapter 380, F.S., and whenever an applicant has not yet developed detailed design or construction plans for a future activity.”

While some of the language, such as the reference to Chapter 380, in this and other provisions in the rule suggest that it was drafted to facilitate multi-phased, long-term development projects, such as those for residential and commercial development, nothing appears to preclude its application to multi-phased long-term restoration projects. Indeed it would appear to be well suited to this application.

The rule-based other conceptual approval permit creates a “rebuttable presumption” that future projects encompassed in the conceptual plans are “likely to meet applicable rule criteria for issuance of permits in subsequent phases of the project...”

## Conclusion

DEP’s regulatory scheme for Conceptual Approval Permitting would appear to offer a significant opportunity to streamline the permitting process for large-scale, long-term multi-dimensional coastal, estuarine and marine habitat restoration, enhancement and adaptation. In particular, shifting the burden of proof through the creation of a rebuttable presumption on the agency to show why restoration projects that are consistent with a conceptual plan should not be permitted would go a long way toward alleviating the permitting uncertainty that currently surrounds big picture restoration planning. Because it appears to have been intended for multi-phased development activities, rather than environmental restoration, it would be worthwhile to consider amending the rule, or creating a new rule (or statute), that is specific to restoration activities.

For example, it would be valuable to follow the lead of the port conceptual permit statute and include the conceptual submerged lands authorization and coastal zone consistency determination as part of the approval process – something the current rule lacks. A more detailed analysis would likely yield additional considerations that are unique to aquatic restoration permitting, including impacts to navigation, regulatory and informational signage, as well as perhaps formalizing a degree of latitude for adaptive management. Providing explicit statutory authorization for the “other” conceptual approval would put what is now a rule-based provision on firmer legal footing. Finally, while it is all well and good to streamline state permitting for restoration, unless the federal government can be engaged in a similar process, much of the efficiency that conceptual approval permitting stands to offer will not be realized.

## Endnotes:

- <sup>1</sup> Rachael L. Dunn graduated in 2016 from the University of Florida Levin College of Law with her LL.M. in Environmental and Land Use Law. Thomas T. Ankersen is a Legal Skills Professor and the Levin College of Law where he directs the Conservation Clinic. He also serves as Florida Sea Grant’s Legal Specialist.
- <sup>2</sup> The text of the agreement can be found at: The U.S. Dep’t of Justice, *Deepwater Horizon*, <https://www.justice.gov/enrd/deepwater-horizon>
- <sup>3</sup> *Id.*
- <sup>4</sup> *Id.*
- <sup>5</sup> Ocean Conservancy, *Ocean Conservancy’s Analysis of the Settlement Agreement with BP* (Oct. 2015), <http://www.oceanconservancy.org/places/gulf-of-mexico/bp-settlement-fact-sheet.pdf>
- <sup>6</sup> Fla. Dep’t of Env’tl. Prot., *Deepwater Horizon Florida* (Feb. 02, 2016), <http://www.dep.state.fl.us/deepwaterhorizon/>
- <sup>7</sup> Melissa Nelson-Gabriel, *Florida counties have different plans for oil spill funds*, Orlando Sentinel (Dec. 20, 2015), <http://www.orlandosentinel.com/news/breaking-news/os-ap-florida-oil-spill-funds-20151220-story.html>
- <sup>8</sup> Ocean Conservancy, *Ocean Conservancy’s Analysis of the Settlement Agreement with BP* (Oct. 2015), <http://www.oceanconservancy.org/places/gulf-of-mexico/bp-settlement-fact-sheet.pdf>
- <sup>9</sup> E.C. Milbrandt, M. Thompson, L.D. Coen, R.E. Grizzle, K. Ward. A multiple habitat restoration strategy in a semi-enclosed Florida embayment, combining hydrologic restoration, mangrove propagule plantings and oyster substrate additions. *Ecological Engineering* (83) 2015, 399-404.
- <sup>10</sup> *Charlotte Harbor National Estuary Program Oyster Habitat Restoration Plan* (Dec. 2012), [CHNEP-Oyster-Rest-Plan-No-Appends-Final-2012-12-17.pdf](http://www.sarasota.wateratlas.usf.edu/upload/documents/</a></li></ol>
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<sup>11</sup> The Nature Conservancy, *Oyster Habitat Restoration is Coming to Pensacola’s East Bay*, <http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/florida/explore/florida-east-bay-oyster-reef-restoration.xml>

<sup>12</sup> *Id.*

<sup>13</sup> E.C. Milbrandt, M. Thompson, L.D. Coen, R.E. Grizzle, K. Ward. A multiple habitat restoration strategy in a semi-enclosed Florida embayment, combining hydrologic restoration, mangrove propagule plantings and oyster substrate additions. *Ecological Engineering* (83) 2015, 399-404.

<sup>14</sup> The Fla. Artificial Reef Program, Chapter 68E-9. As of the Florida Artificial Reef Summit in 2015, 2,900 patch reef locations existed along 34 coastal counties after 34 years of federal and state funding. 2015 Florida Artificial Reef Summit, Abstracts & Program, supported by the National Sea Grant College Program ([https://www.flseagrant.org/wp-content/uploads/2015ARSummitProceedings\\_Web.pdf](https://www.flseagrant.org/wp-content/uploads/2015ARSummitProceedings_Web.pdf)).

<sup>15</sup> *Id.* Permits may be issued to local coastal governments after a “rigorous individual permit application process.”

<sup>16</sup> *Id.*

<sup>17</sup> Fla. Fish and Wildlife Conservation Comm’n., *Artificial Reef Program*, <http://myfwc.com/conservation/saltwater/artificial-reefs/ar-program>

<sup>18</sup> 33 C.F.R. §320.4

<sup>19</sup> Florida Sea Grant, *Artificial Reefs Placed in Steinhatchee Fisheries Management Area* (June 28, 2011), <https://www.flseagrant.org/news/2011/06/artificial-reefs-steinhatchee/>

<sup>20</sup> Lindberg, W.J., Dodrill, J., Mille, K. 2014. Rationale and Evaluation of an Artificial Reef System Designed for Enhanced Growth and Survival of Juvenile Gag, *Mycteroperca microlepis*

<sup>21</sup> *Id.*

<sup>22</sup> Lynn R. Martin, U.S. Army Corps of Engineers Institute for Water Resources, *Regional Sediment Management: Background and Overview of Initial Implementation* (July 2002), [http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/02ps2sed\\_man.pdf](http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/02ps2sed_man.pdf).

<sup>23</sup> U.S. Army Corps of Engineers, *Regional Sediment Management*, <http://rsm.usace.army.mil>

<sup>24</sup> U.S. Army Corps of Engineers, *Regional Sediment Management Program Jacksonville District (SAJ): RSM-Regional Center of Expertise (RCX)* (Jan. 2015), [http://rsm.usace.army.mil/initiatives/facts/2015/FY15\\_SAJ\\_FS\\_RCX2.pdf](http://rsm.usace.army.mil/initiatives/facts/2015/FY15_SAJ_FS_RCX2.pdf)

<sup>25</sup> U.S. Army Corps of Engineers, *Regional Sediment Management*, <http://rsm.usace.army.mil>

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Memorandum of Agreement Between FDEP, FL Sea Grant College Program and WCIND Relating to Mgmt. of Public Waterways in Southwest Fla. (June-July, 2010), [https://www.dep.state.fl.us/legal/Operating\\_Agreement/agreements/wcindMOU07-01-10.pdf](https://www.dep.state.fl.us/legal/Operating_Agreement/agreements/wcindMOU07-01-10.pdf)

<sup>29</sup> R.A. Swett, C. Listowski, D. Fry, S. Boutelle, D. Fann. A Regional Waterway Management System for Balancing Recreational Boating and Resource Protection. *Environmental Management* (2009) 43: 962-971.

<sup>30</sup> 62-330.052, F.A.C.

continued...

## THINKING BIG

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<sup>31</sup> See Althea S. Hotaling, R. Benjamin Lingle & Thomas T. Ankersen, *Comprehensive Seagrass Restoration Planning in Southwest Florida: Science, Law and Management*, 4 Sea Grant L. & Pol'y J. 61 (2011).

<sup>32</sup> F.S. 163.3154(1), See also So. Fla. Reg. Planning Council in P'ship with DEO, Broward Cty. and City of Ft. Lauderdale, *Adaptation Action Areas: A Planning Guidebook For Fla. Local Gov'ts*, <http://www.floridajobs.org/docs/default-source/2015-community-development/>

community-planning/crdp/aaaguidebook2015.pdf?sfvrsn=2

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 101-03; Ordinance 2015-03 Town of Yankeetown, Levy Cty., Fla. amending conservation and coastal management element of comprehensive plan to establish a natural resource adaptation action area.

<sup>35</sup> 62-330.052, F.A.C.

<sup>36</sup> 62-330.054, F.A.C.

<sup>37</sup> 62-330.055, F.A.C.

<sup>38</sup> 62-330.051(1)(e), F.A.C.

<sup>39</sup> 62-330.632, F.A.C.

<sup>40</sup> 62-330.054, F.A.C.

<sup>41</sup> F.S. 373.4133, Under the statute, port conceptual permits are only available to those

seaport facilities created by statute, essentially Florida's deep-water ports. F.S. 373.4133(2)

<sup>42</sup> F.S. 373.4131(1)(b)

43 62-330.056, F.A.C.

<sup>44</sup> *Id.*

<sup>45</sup> So. Fla. Water Mgmt. District, *Environmental Resource Permit Information Manual* (2014) Section 3.4

<sup>46</sup> *Id.* at 1.3.1.1(c)

<sup>47</sup> F.S. 373.4133(8)(c)

<sup>48</sup> Rulemaking Authority: 373.026(7), 373.043, 373.118(1), 373.406(5), 373.4131, 373.414(9), 373.4145, 373.418, 403.805(1) FS. Law Implemented: 373.118(1), 373.406(5), 373.4131, 373.414(9), 373.4145, 373.416, 373.418, 373.426 FS. Fla. Admin. Code Ann. r. 62-330.056





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