THE REPORTER

Vol. XXXVII, No. 4
March 2016

ELULS

THE ENVIRONMENTAL AND LAND USE LAW SECTION

Carl Eldred, Chair • Jeffrey A. Collier, Editor • Douglas H. MacLaughlin, Co-Editor www.eluls.org

# The Uncertain Fundamentals of Federal Regulation of Wetlands

**by Reggie L. Bouthillier, Jacob T. Cremer, & William J. Anderson[1]**

Would it surprise you that a landowner could be uncertain of whether a law confers jurisdiction to federal agencies over her property, but also uncertain of whether a federal court could even consider whether those federal agencies were correct in claiming jurisdiction? Would it surprise you that, even where those federal agencies have promulgated a rule that greatly expands the number of scenarios where properties are deemed to be jurisdictional (rather than subject to intensive case-by-case analysis), it is still unclear whether those agencies' claims of jurisdiction can be challenged in court?

If you are surprised, you may need an update on the latest developments related to the Clean Water Act ("CWA"). The United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Corps") recently issued a rule they call the "Clean Water Rule," but which has become commonly known as "WOTUS."[2] The new rule aims to clarify the definition of "waters of the United States" ("jurisdictional waters"), which is critical to those agencies' jurisdiction under the CWA, but which has been notoriously unclear for decades. Meanwhile, the U.S. Supreme Court has agreed to review a case that asks whether these agencies' assertions of jurisdiction over a waterbody or wetland can be challenged in court, or alternatively whether a landowner has to pursue a permit or move forward with a project and risk fines in order to challenge the agency's jurisdiction.

Both of these developments are important in Florida, which has about

*See "Federal Regulation," page 14*

# From the Chair

Over the past few years, there has been a dramatic change in the way Florida lawyers, and lawyers across the country, get their CLE credits. Each year fewer of us are choosing to leave our office and attend CLE events in person. Instead, we are live streaming a program and watching it in our office, or we are accessing The Florida Bar's on demand, 24/7 online catalog. Like many things in life today, CLE credits on a vast array of subjects are instantly available at the click of a button, at any time of the day, and in pretty much any format you could want.

Having a wide array of CLE on demand is extremely convenient, particularly when you may be trying to get some last minute credit before your deadline. However, it makes it easier for us to stay in our offices and avoid additional human interaction. For many of us who have been involved in coordinating a live CLE event, providing a forum for networking with and meeting fellow practitioners, agency staff, and consultants, has been an important element of a CLE program.

As a section, we want to continue

*See "Chair's Message," page 2*

**INSIDE:**

**CHAIR'S MESSAGE**
*from page 1*

providing opportunities for our members to be able network and to catch-up with colleagues at a relaxed and informal event. For me, getting to meet and work with people through the section and The Florida Bar, people I may not have otherwise met or with whom I would not have developed friendships, has been one of the most rewarding and valuable experiences I've had while being involved in the Section. Over the past few years, the Section has organized regular Section Mixer events, where lawyers, consultants, agency staff and law students have the opportunity to get together over a beverage or two, and get to meet, reconnect, or just shoot the breeze in a social setting. These events have proven popular, and the Executive Council is evaluating additional opportunities to hold more mixers in other cities across the state so that we can hopefully reach out to more of our members. Along those lines, we will be holding a mixer in Boca Raton on April 7. These events, however, would not be possible but for the affiliate consultants and law firms who sponsor them. If you are interested in sponsoring a mixer, please contact Calbrail Bennet, the Section Administrator, and she will be able to put you in touch with the appropriate person.

Also, on June 16, 2016, we will be holding a joint reception with the Administrative Law Section at The Florida Bar Annual Convention, which is being held at The Hilton Bonnet Creek in Orlando. This reception will follow the Section Annual Meeting, at which the executive council and the new slate of officers will be elected. The Annual Meeting is open to all Section members and it is a great meeting to attend if you are interested in getting more involved in the Section. We will also be holding our Annual Update CLE program on Friday June 17, 2016, which will include the General Counsel Roundtable, Legislative Update, and Administrative Law Update.

Finally, I would be remiss in not thanking the following firms who have sponsored our section again this year: Cardno; Geosyntec Consultants; Gray Robinson, P.A.; Golder Associates; Breedlove, Dennis & Associates, Inc.; Burr & Forman LLP; Hopping Green & Sams; and Lewis, Longman & Walker, P.A. Many of the events that the Section organizes would not be possible without the generous support of our sponsors. More important than the financial contribution to our section, these firms consistently encourage and support their lawyers, geologists, engineers, and consultants to be involved in the Section. Thank you.

**Is your E-MAIL ADDRESS current?**

**Log on to The Florida Bar's website (www.FLORIDABAR.org) and go to the "Member Profile" link under "Member Tools."**

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

Carl Eldred, Tallahassee . . . . . Chair
Vivien J. Monaco, Orlando . . . . . Chair-elect
Janet E. Bowman, Tallahassee. . . . . Secretary
David J. Bass, Orlando . . . . . Treasurer
Jeffrey A. Collier, Tallahassee . . . . . Editor
Douglas H. MacLaughlin, West Palm Beach . . . . . Co-Editor
Colleen Bellia, Tallahassee . . . . . Production Artist
Calbrail L. Bennett, Tallahassee . . . . . Section Administrator

# February 2016 Case Law Update

**by Gary K. Hunter, Jr., Hopping Green & Sams**

**Florida's Marketable Record Title Act, MRTA, does not extinguish a covenant spawned from the governmental approval process; the Third District Court of Appeal has determined that a zoning Appeals Board resolution constitutes a governmental regulation. *Save Calusa Trust v. St. Andrews Holdings, Ltd.*, 2016 Fla. App. LEXIS 426 (Jan. 13, 2016).**

The Third District Court of Appeal consolidated appeals from appellants Calusa Trust ("Homeowners") and Miami-Dade County (the "County") and reversed a final summary judgment, entered in favor of St. Andrews holding, Ltd. and Northeastern Golf LLC (together, "Owner"), declaring void a restrictive covenant under Florida's Marketable Record Title Act ("MRTA"). Because the County imposed the subject restrictive covenant as part of its development approval of Owner's property, the covenant is an estate or interest in, or a claim or charge to, title to real property subject to MRTA.

In 2003, St. Andrews holdings acquired a golf course property and in 2006, conveyed a majority interest in the property to Northeastern Golf LLC. Owner sought to redevelop the golf course property and approached the County with a re-zoning application. The golf course property has a zoning history which began with the Owner's predecessor-in-interest, the "Developer." In 1967, the property was originally assigned General Use, "GU" and in order to build single family homes around the golf course, Developer applied for the inside "ring area" to be re-zoned from GU to Estate Use Modified "EU-M." The county's Zoning Appeals Board, "ZAB", conditionally approved Developer's "unusual use" application. In 1968, the Developer sold the property to Most Available, Inc., who recorded the restrictive covenant in the official records of Miami-Dade County. After the recordation of the covenant, over 140 single family homes were developed within 150 feet of the golf course, the "ring." The County refused to process Owner's application for re-zoning. Owner's application did not include confirmation of the terms of the restrictive covenant recorded pursuant to ZAB's approval of Developer's "unusual use."

In 2012, Owner filed a lawsuit asking the circuit court to declare the restrictive zoning covenant void, having been extinguished by Florida's Marketable Record Title Act, MRTA. Owner named the County and each of the Homeowners as defendants in the action. The County and Homeowners argued that MRTA was inapplicable to a government-imposed restrictive covenant, and that Owner failed to exhaust administrative remedies by not seeking quasi-judicial review of the County's refusal to process the application. The trial court granted summary judgment to the Owner and entered a "Final Judgment Invalidating the 1968 restriction and Quieting Title." The court determined that (i) the applicable provisions of MRTA extinguish the restrictive zoning covenant and its Homeowners' consent provision; and (ii) title is quieted as to Owner's golf course property.

The central question is whether a restrictive covenant, recorded in compliance with a government-imposed condition of land use approval, is a title interest subject to extinguishment by MRTA. Owner argued that the subject covenant is neither a zoning regulation nor a development order. Irrespective of its genesis, the covenant is a use restriction that falls within MRTA. Chapter 712, Florida Statutes, mentions "use restrictions," which provides an exception to extinguishment if a use restriction is in the muniments of title beginning with the root of title. The covenant must be extinguished because the subject use restriction was recorded prior to the root of title, it was not identified in a post-root muniment of title and it was not preserved. Additionally, Owner argues that the covenant is subject to the extinguishment provision of section 712.04, Florida Statutes, because the restrictive covenant gives Homeowners an "interest" in how Owner uses its property and a "claim" against the property if Owner were to violate the covenant. Furthermore, owner argued that because the covenant authorizes Homeowners on whether to vacate or use the restriction, then the covenant is private in nature and, therefore subject to MRTA.

The court could not "so readily divorce the covenant from the governmental approval process that spawned it." The court has in previous decisions determined that a ZAB resolution, containing a restrictive covenant, constitutes a governmental regulation with the force of law. The court's holding that MRTA does not extinguish the subject restrictive covenant, is consistent with established Florida law recognizing that government-imposed restrictions on property do not affect marketability of title. Furthermore, the court found that no language in MRTA or the underlying legislative history extends the reach of MRTA to a zoning regulation. Therefore, the duly imposed restrictive covenant in this case is a governmental regulation, not an interest subject to extinguishment under MRTA.

**A modification to an ERP is allowed when the modification is minor and consistent with the conceptual permit. *Alico West Fund, LLC v. Miromar Lakes, LLC & South Florida Water Management District*, 2016 Fla. Div. Adm. Hear. LEXIS 20 (Jan. 27, 2016).**

The issue is whether to approve an Environmental Resource Permit (ERP) modification for the construction of a surface water management system, which will serve a 29.8-acre single-family residential development. DOAH recommended that the South Florida Water Management District enter a final order approving Miromar Lakes, LLC's (Miromar) application, as revised, for a permit modification, subject to some conditions.

The original conceptual permit was issued in 1999. The District,

*continued...*

issued a conceptual approval permit for the development of a large, mixed-use residential development with a golf course known as Miromar Lakes, that lies south of Alico Road. The permit also approved a surface water management system designed to serve a 1481.1-acre mixed-use development within Miromar Lakes. Alico asserts that the permit is so vague in future development details that it is impossible to determine whether Phase IV is consistent with its terms and conditions. However, the 1999 permit was not contested and any attempt to challenge that permit or subsequent modifications to the permit that are final, is untimely. Miromar's proposed changes to the site plan include the replacement of 16 multi-family buildings and drive ways with single family residential lots; removal of the 16 multi-family boat-docks; relocation of the three dry detention areas shown on the proposed site plan; and clarification of the lot grading cross-section to ensure that stormwater runoff will be redirected to the stormwater management system and not Lake 5/6 (which is partly owned by Alico).

Alico objected offering that: (1) the application should be treated as a major modification of the conceptual permit and that Miromar must first satisfy current rules and regulations, and not those in effect in 1999; (2) that both the original and revised applications are inconsistent with the conceptual permit and must be treated as a new design, subject to all current rules and regulations; and (3) that although Miromar agreed to revise its permit to address certain errors identified, Alico contends no revisions can be made at this stage of the proceeding and that a new application must be filed with the District and the review process started new.

If the modification is minor, Miromar is required to satisfy applicable rules for issuance of a permit when the conceptual permit was issued. Additionally, fourteen factors, found in Section 6.2.1 of the Applicant's Handbook, are considered together in determining whether a modification is major. None of the factors is dispositive alone, and the presence of any single factor does not necessarily mean that the modification is major. Based on these criteria, the District determined that the application qualified as a minor modification of a conceptual permit and that it satisfied applicable rules for issuance of a permit for this subsequent phase of the project. After the determination of the type of modification, minor or major, a consistency analysis was conducted. Rule 62-330.056 provides a rebuttable presumption that subsequent consistent development phases are likely to meet the applicable rules and regulations if the factors listed are met. The District views the location and the land use type of the project as the two most important criteria for determining consistency. The District also compares the environmental impacts, control elevations, and discharge rates. Here, the District determined there is no inconsistency. The District determined that the activities in Phase IV, as revised, were similar to or less intensive than those authorized in the conceptual approval permit and may actually provide a net benefit to Lake 5/6.

Alico had the burden to prove the permit should not be issued, as revised, and failed to do so. The Judge found that Miromar's revisions to the permit, while large in number, are supported by evidence and may be incorporated.

**For projects related to wetlands or surface waters, an applicant must provide reasonable assurance that the project will not be contrary to the public interest and clearly in the public interest. *WWALS Watershed Coalition, Inc. v. Sabal Trail Transmission LLC & Department of Environmental Protection*, 2015 Fla. Div. Adm. Hear. LEXIS 496 (December 11, 2015).**

The issue is whether Sabal Trail is entitled to the proposed Environmental Resource Permit and Easement to Use Sovereign Submerged Lands to construct a natural gas pipeline. WWALS challenges the validity of these two authorizations.

For projects related to wetlands or other surface waters, an applicant must provide reasonable assurance that the project will not be contrary to the public interest, or if such activities significantly degrade or are within an Outstanding Florida Water, are clearly in the public interest, as determined by balancing the criteria set forth in rule 62-330.302. The rule lists seven public interest factors to be considered and balanced. When the seven factors are considered, the proposed pipeline is not contrary to the public interest. Demonstrating that a project is clearly in the public interest requires greater assurance that all permitting requirements will be complied with.

Sabal Trail showed clearly that it will comply with all permitting criteria. Sabal Trail and the Department demonstrated the project creates a net public benefit because it would not have adverse environmental impacts that would not be fully mitigated and the project addresses a need determined by the Public Service Commission for additional natural gas transportation capacity into Florida, enhancement of natural gas supply diversity and reliability, and increased competition for natural gas transportation services. WWALS presented no competent evidence to show that any sovereignty submerged lands would lose their essential natural conditions, that fish and wildlife propagation would be diminished or that traditional recreational uses would be interfered with.

**To obtain a water permit pursuant to the provisions of chapter 373, Florida Statues, the applicant must establish that the proposed use of water is a reasonable-beneficial use; will not interfere with any presently existing legal use of water; and is consistent with public interest. *Tropical Audubon Society, Inc., v. Florida Power & Light Company and South Florida Water Management District*, 2015 Fla. Div. Adm. Hear. LEXIS 489 (Dec. 31, 2015).**

The issue to be determined in this case is whether Florida Power & Light Company ("FPL"), is entitled

*continued...*

**CASE LAW UPDATE**
*from page 4*

to a water use permit issued by the South Florida Water Management District ("District") to withdraw water for use at FPL's Turkey Point Power Plant in Miami-Dade County. DOAH recommended that South Florida Water Management District issue a final order that grants the proposed Individual Water Use Permit to FPL.

The Turkey Point Power Plant consists of five electric generating units. The Turkey Point Cooling Canal System "CCS" is a 5,990-acre network of canals which dissipate heat from the water used in the operation of some of the units. Water evaporation in the canals due to the high heat of the water has led to higher salinity content in the water. In August 2014, FPL requested an emergency order to withdraw water from another canal and discharge it into the CCS to reduce salinity and temperature. DEP issued an Administrative Order ("AO") which, among other things, directs FPL to submit a Salinity Management Plan with the primary goal of "reduc[ing] the hypersalinity of the CCS to abate westward movement of CCS groundwater into class G-II groundwaters of the State."

FPL applied for the water use permit at issue so it could continue to use water for reducing temperature and salinity in the CCS. Tropical Audubon contends the proposed project is not entitled to a permit because it would harm the natural resource, increase saltwater intrusion, is not limited to the amount of water needed, and is inconsistent with the DEP National Pollution Discharge Elimination System (NPDES) permit, incorporated into the Certification Order, and the 2014 AO. Tropical Audubon contends the discharge of water, not the withdrawal of water, would interfere with existing legal uses of water, harm offsite land uses, and cause pollution. These claims are derived from the belief that discharging freshwater into the CCS would increase the rate of saline water intrusion. Tropical Audubon failed to prove the proposal would increase saline water intrusion.

The NPDES permit does not specifically prohibit the introduction of water into the CCS. Furthermore, DEP determined that the addition of water would not require a modification of the permit because it would not change the effluent limits or monitoring requirements of the permit. Tropical Audubon's claim that the proposed is inconsistent with the 2014 AO also fails because FPL's compliance with the AO cannot be made a condition of compliance with the proposed water use permit.

In order for the District to issue the permit, FPL had to establish that the proposed use of water is a reasonable-beneficial use; will not interfere with any presently existing legal use of water; and is consistent with the public interest. In summary, FPL provided reasonable assurance that the proposed water would comply with all applicable permit criteria and Tropical Audubon did not meet its burden to prove otherwise.

■ ■ ■ ■


The Florida Bar Practice Resource Institute
PRI
Promoting Excellence in the Profession

# Virtual Career Fair

***Presented by The Florida Bar Practice Resource Institute***

Chat online with top employers looking to hire legal professionals on Thursday, March 31, 12-3 p.m. EDT.

## It's open to lawyers in all settings and specialties.

- Find new career opportunities
- Enhance your career
- Build your professional network

## It's easy to join!

**REGISTER**

**Create your account** and log in any time before the event to learn about participating employers and new career opportunities.

**ATTEND**

On March 31st, log in and join the event from anywhere: desktop, laptop, tablet, or smartphone.

**CONNECT**

During the event chat one-on-one with employers looking to fill legal career openings.

**Register now at:**
http://l.fl.bar.associationcareernetwork.com

# On Appeal

**by Larry Sellers, Holland & Knight**

*Note: Status of cases is as of February 17, 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: Notice filed on July 8, 2015. Note: the Florida Supreme Court already 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; briefing tolled pending resolution of suggestion of mootness filed June 19, 2015. 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.

**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.

*Speak Up Wekiva, Inc., et al., v. FFWCC*, Case No. 1D15-4596. Appeal from order denying motion for emergency temporary injunction of the hunting of the Florida Black Bear. Among other things, the appellants claim that the FFWCC rule establishing the hunt is unconstitutional, lacks a rational nexus to a legitimate state purpose and is arbitrary and capricious. Status: Dismissed November 6, 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.

*City of Jacksonville Beach v. Brothers Five of Jacksonville,* Case No. 1D-15-1168. Appeal from trial court order granting petition for writ of mandamus compelling the City to participate in the mandatory alternative dispute resolution Florida Land Use and Environmental Dispute Resolution Act, section 70.51, Florida Statutes, with respect to relating to an alleged violation of the City's signed ordinance. Status: Affirmed *per curiam* on November 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 set for March 8, 2016.

*Capital City Bank v. DEP,* Case No. 1D14-4652. Appeal from DEP final order approving the county's application for after-the-fact CCCL permit, authorizing the county to construct a rock revetment on Alligator Drive in Franklin County. DEP Case No. 13-1210, DOAH Case No. 14-0517 (final order entered September 8, 2014). Status: Affirmed September 30, 2015.

**SECOND DCA**

*Geraldson v. Manatee County, et al.,* Case No. 2D15-2057. Appeal from final order of the Administration Commission rejecting the ALJ's

*continued...*

**ON APPEAL**
*from page 7*

recommendation, and finding that the 2013 amendments to the Manatee County Comprehensive Plan are in compliance. AC Case No. ACC-14-001; DOAH Case No. 14-0940GM (final order filed May 6, 2015). Status: Affirmed *per curiam* on February 3, 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: Oral argument held on August 31, 2015.

**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 set for 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.

*Tomm Friend and Derek Lamontagne v. Pioneer Community Development, et al.,* Case No. 5D15-1616. Petition for review of SJRWMD final order authorizing an environmental resource permit to construct a stormwater management system for the 2.3 mile extension of Williamson Boulevard through pine forest uplands and cypress swamp wetlands in Volusia County. DOAH Case No. 14-3904 (final order entered April 10, 2015). Status: Affirmed *per curiam* on January 26, 2015.

# Law School Liaisons

## UF Law Update

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

**Public Interest Environment Conference Held**

The University of Florida hosted its annual Public Interest Environmental Conference, featuring a theme of "Five Oceans, One Earth." The conference, held Feb. 11-13, focused on the state of our planet's oceans and the various activities that affect it. Discussion topics included climate change, coral reefs, ecotourism, aquaculture, oceanic pollution, offshore drilling, endangered marine species, estuaries, and coastal communities.

Conference keynote speakers included Ian Urbina, investigative reporter, *The New York Times*, and author of *The Outlaw Ocean* series. He discussed his series, which is a deep exploration of lawlessness on the high seas that touches on a broad array of crimes including murder, slavery, dumping, and abuse of stowaways and crew. Dr. David E. Guggenheim, president and founder of the Ocean Doctor, also was a keynote speaker. He discussed Cuba's ocean ecosystems and the hope they offer the world.

**Environmental Capstone Series Focuses on Ocean, Coastal Issues**

"Ocean and Coastal Law' is the theme for the 2016 Spring Environmental Capstone Colloquium, as announced by Christine Klein, Chesterfield Smith Professor and Director of the LL.M. Program in Environmental and Land Use Law. Colloquium sessions will be held January 21-March 24, 2016, at the University of Florida Levin College of Law.

Speakers and topics include:

- Michael Burger, Executive Director, Sabin Center for Climate Change Law Lecturer-in Law, Columbia Law School, "Local Opposition to Fossil Fuel Export Facilities: Implications for Environmental Assessment and Coastal Consistency Review";
- Robert R.M. Verchick, Gauthier-St. Martin Eminent Scholar and Chair in Environmental Law, Loyola University New Orleans College of Law, "Hurricanes on Steroids and Other Challenges: Climate Resilience on the Coast";
- Josh Eagle, Solomon Blatt Professor of Law, University of South Carolina School of Law, "On the Not-So-Mysterious Disappearance of Ocean Zoning";
- Donna R. Christie, Professor Emerita, Florida State University College of Law, "Beaches, Boundaries, and SOBs"; and
- Robin Kundis Craig, William H. Leary Professor of Law, University of Utah Ouinney College of Law, "Resilience Thinking for Marine Fisheries: Why Climate Change and Ocean Acidification are Undermining Both Sustainability and Sustainable Development."

The Capstone Colloquium is sponsored by Alfred J. Malefatto, Shareholder, Lewis, Longman & Walker, P.A., West Palm Beach, FL, and Hopping Green & Sams, Tallahassee, FL.

**Nelson Symposium Examines Local Government Cases**

The 15th annual symposium focused on four recently decided U.S. Supreme Court cases that have serious implications for local governments. The theme of the symposium was "Thank You SCOTUS! What Do We Do Now About Signage, Housing Discrimination, Cell Towers, and Takings?"

Presenters at the Feb. 5 event were Mark Cordes, Interim Dean and Professor, Northern Illinois University College of Law; Josh Eagle, Solomon Blatt Professor of Law, University of South Carolina School of Law; John Eastman, Henry Salvatori Professor of Law and Community Service, Chapman University Dale E. Fowler School of Law; John Greco, Deputy City Attorney, Miami, Florida; Mohammed Jazil, Hopping Green & Sams, Tallahassee, Florida; Sorrell E. Negro, Robinson + Cole, Miami, Florida; Stacy Seicshnaydre, William K. Christovich Associate Professof of Law and Director, Civil Litigation Clinic, Tulane University Law School; Lisa Sorenen, Executive Director, State and Local Legal Center; and Michael Allan Wolf, Richard E. Nelson Chair in Local Government Law, Levin College of Law.

The symposium honors Richard E. Nelson (who served with distinction as Sarasota County attorney for 30 years) and Jane Nelson, two loyal UF alumni who gave more than $1 million to establish the Richard E. Nelson Chair in Local Government Law, which sponsors the annual event.

**Spring Break Course Examines Marine/Coastal Law**

UF Law's ELULP Program again offered the South Florida Bahamas Ecoregion Spring Break Field Course, which focused on marine and coastal law. The course began in densely developed South Florida with a look at land and water use in and around Biscayne Bay. Participants then went to Nassau to study the unique law of the Bahamas and the Commonwealth Caribbean and the specific issues that face this archipelagic nation. It concluded with an island hopper to one of the Bahamian "family islands" to experience those issues firsthand.

*Law School Liaisons, continued...*

# A 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 and students. It also lists the impressive roster of programs the College of Law is hosting this spring. We hope Section members will join us for one or more of these enrichment events.

## Recent Alumni Accomplishments

- **Paul Amundsen** was promoted to Assistant General Counsel – Regulatory Affairs at Philadelphia Energy Solutions Refining and Marketing, LLC.
- **Timothy P. Atkinson**, a shareholder with the firm of Oertel, Fernandez, Bryant & Atkinson, P.A., was granted renewal of his Florida Bar Board Certification in State and Federal Government and Administrative Law.
- **Amanda Brock** was selected for Gulfshore Business Magazine's 40 Under 40 and was appointed as Stockholder at Henderson Franklin.
- **Kellie Cochran** is a staff attorney for the Senate Committee on Community Affairs with the Florida Senate.
- **David Corry** is General Counsel for Liberty University. In that position he deals with due diligence on real estate purchases, environmental clean ups, and storm water regulations associated with development of campus properties.
- **Jacob T. Cremer**, of Stearns Weaver Miller Weissler Alhadeff & Sitterson, PA in Tampa, was elected to the Hillsborough County Farm Bureau Board of Directors.
- **Chris Hastings** started a new position as an Associate Attorney practicing land use law at Theriaque & Spain.
- **Shelbie Legg** negotiated the ministerial declaration of the 2015 7th World Water Forum on behalf of the U.S. government and the U.S. Department of State. The Forum underscored the importance of water in meeting sustainable development goals, as well as the need to strengthen cooperation over shared waters to reduce the possibility for water-related conflict in the future.
- **Preston McLane** was promoted to the position of Program Administrator for the Office of Business Planning in the Division of Air Resource Management, Florida Department of Environmental Protection.
- **Davis George Moye** is now the Corporate Counsel at General Capacitor, International, where he is also the Research and Development Project Manager.
- **Wayne Pathman** has been elected Chair of the City of Miami's new Sea Level Rise Committee and Chair-Elect of the Miami Beach Chamber of Commerce Board of Governors.
- **Forrest Pittman** is an Attorney-Advisor with the U.S. Department of Transportation in the Pipeline and Hazardous Materials Safety Administration, where he assists in the enforcement of oil and natural gas pipeline regulations, and provides legal counsel to the Eastern Region of PHMSA's Office of Pipeline Safety.
- **Christine Senne** recently opened Senne Law Firm, P.A. She represents clients who have water and environmental permitting issues. Christine is scheduled to present "Ethics in Digital Permitting" at the Florida Bar's Environmental and Land Use Section CLE on January 28, 2016.
- **Floyd Self** has joined the Tallahassee office of Berger Singerman, Florida's Business law firm, continuing his energy and utility regulatory practice as the team leader for the firm's Governmental and Regulatory Practice Team. In December 2015, he spoke to electric power industry leaders in Las Vegas on "The (Potential) Unintended

Brock | Atkinson | Senne | Self | Cremer

*Law School Liaisons, continued...*

Consequences of Environmental Compliance" at the *Power Magazine* conference, "Navigating the Legal Implications of Power Industry Regulations."

- **Jeff Wood**, a partner in the Washington DC office of Balch & Bingham LLP, recently released a report, the *2016 Regulatory Forecast*, which provides useful information on the ways in which environmental and energy laws and policies will continue to have a significant impact across many sectors in the year ahead. To view the forecast, please visit: www.balch.com/forecast.

## Recent Student Achievements

- **Sarah Logan Beasley** received the book awards for Oil and Gas Law and the online section of Energy Law. She has also accepted a clerkship with Judge Robert Hinkle, U.S. District Court for the Northern District of Florida, for 2016-2017.
- **Sarah Logan Beasley** and **Stephanie Schwarz** will be representing FSU Law again this February at the Pace National Environmental Law Moot Court Competition. This year's problem addresses timely questions concerning renewable energy, regulating carbon emissions, and the Clean Air Act.
- The *Journal of Land Use & Environmental Law* is working on its Spring Issue of Volume 31. The issue includes an important article on the Recovery of U.S. Fisheries written by Professor Katrina Wyman, Sarah Herring Sorin Professor of Law and Director, Environmental and Energy Law LLM Program, New York University School of Law, our Distinguished Lecturer from last spring. We are looking forward to this spring's Distinguished Lecturer, Professor Carol Rose, Gordon Bradford Tweedy Professor Emeritus of Law and Organization and Professorial Lecturer in Law, Yale Law School. The Executive Board consists of **Stephanie Schwarz**, **Gannon Coens**, **Joseph Leavitt**, **Stefan Barber**, **Kristen Larson**, and **Lazaro Fields**.
- The current Environmental Law Society Board is composed of President **Sarah Fodge**, Vice President **Travis Voyles**, Secretary **Bailey Howard**, Treasurer **Jess Melkun**, and Social and Networking Chair **Stephanie Schwarz**. ELS has an excellent mentor program that pairs up interested law students with local attorneys who practice environmental law. Along with mentor-mentee mixers every semester and a successful mentor-mentee kayaking trip last semester, we also have a planned camping trip to St. George Island at the end of January and will be participating in a Habitat for Humanity build with attorneys at Hopping Green & Sams in February.
- **Robert Pullen** has begun working at the Florida Fish and Wildlife Commission.

## Spring 2016 Events

### Special Guest Lectures

**Governor Jack Markell (Delaware)** is making a special visit to the College of Law on February 12 to talk with faculty, students, and others about contemporary policy challenges.

### Environmental Certificate and Environmental LL.M. Enrichment Series

The Environmental Certificate and Environmental LL.M Enrichment Series will welcome **Kelly Samek**, Gulf Restoration Coordinator, Florida Fish and Wildlife Conservation Commission on February 17. **Courtney Schoen**, Coordinator, Tallahassee's Think About Personal Pollution (TAPP) spoke with students on January 20.

### Spring 2016 Distinguished Lecture

**Carol Rose**, Gordon Bradford Tweedy Professor Emeritus of Law and Organization and Professorial Lecturer in Law, Yale Law School, will be the spring Distinguished Lecturer. The lecture will take place on March 23 from 3:30 p.m. - 4:30 p.m. in Room 310 with a reception to follow in the Rotunda. CLE credit approval is pending.

### Guest Lecturers

**Brent McNeal (FSU College of Law '09)**, Deputy General Counsel, Division of Vocational Rehabilitation and the Division of Blind Services, State of Florida Department of Education and **Ellen Wolfgang Rogers (FSU College of Law '08)**, Staff Director, Senate Environmental Protection and Conservation Committee, are guest lecturing in Professor Markell's Legislation & Regulation course in March.

**Bram Canter**, Administrative Law Judge, State of Florida Division of Administrative Hearings, will guest lecture in Professor Markell's Administrative Law course in February.

### Spring 2016 Colloquium

The Environmental, Energy and Land Use Law Spring 2016 Colloquium will take place on Wednesday, April 6 from 3:15 p.m. - 5:00 p.m. in Room A221, with a reception to follow in the Advocacy Center Reading Room.

More information on these events is available at http://law.fsu.edu/academics/jd-program/environmental-energy-land-use-law/environmental-program-events.


*Visit the Environmental and Land Use Law Section's website at:*
*http://eluls.org*

**MEMBERSHIP APPLICATION**
**ENVIRONMENTAL AND LAND USE LAW SECTION**
WEBSITE: WWW.ELULS.ORG

---

NAME: _____

EMPLOYER/AGENCY/LAW SCHOOL: _____

ADDRESS: _____

CITY/STATE: _____ ZIP CODE: _____

PHONE: (____) _____ E-MAIL ADDRESS: _____

FLORIDA BAR NO: _____ DATE OF ADMISSION: _____

PROFESSIONAL SPECIALTY(IES)/AREAS OF INTEREST: _____

_____

_____

CHECK ALL COMMITTEES OF INTEREST TO YOU:

☐ AFFILIATE MEMBERSHIP
☐ CLE
☐ ELUL TREATISE
☐ FELLOWSHIPS
☐ LAW SCHOOL LIAISON
☐ FL BAR JOURNAL COLUMN
☐ SECTION REPORTER
☐ YOUNG LAWYERS
☐ LAND USE
☐ POLLUTION ASSESSMENT, REMEDIATION
☐ NATURAL RESOURCES
☐ ENERGY
☐ MEMBERSHIP
☐ PUBLIC INTEREST

**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: _____

11 million acres of wetlands. Because of these issues—and because of the recent death of Justice Scalia—today is a time of more uncertainty in the federal permitting of impacts to wetlands than ever before. The goal of this article is to provide the reader with a working knowledge of the fundamental questions about the CWA that are currently at issue in the federal courts.

## I. Early Uncertainty about the Reach of Federal Jurisdiction

The CWA prohibits the discharge of pollutants into jurisdictional waters. There are two major permitting schemes under the CWA: the Section 402 National Pollutant Discharge Elimination System ("NPDES") and the Section 404 Fill Material Permit ("dredge and fill"). A Section 402 permit is required for any activity that will discharge pollutants from a point source into jurisdictional waters. Section 404 Dredge and Fill permits are required for activities that will cause the discharge of dredged or fill material into jurisdictional waters. The EPA and the Corps implement the CWA concurrently.[3] EPA administers NPDES permits (usually through the states); while the Corps is responsible for issuing dredge and fill permits consistent with regulatory requirements, with the EPA maintaining ultimate, but limited, veto power.[4] In order to obtain an official, written determination of whether a wetland or waterbody is jurisdictional, a landowner can request a jurisdictional determination ("JD").[5]

WOTUS is the federal agencies' first attempt to define jurisdictional waters since their 1986 rule, which defined them as "traditional navigable waters, interstate waters, and all other waters that affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands." Essentially, the agencies interpreted their powers to regulate jurisdictional waters to reach to the outer limits of the Commerce Clause. Three U.S. Supreme Court cases, however, indicated that the agencies' jurisdiction under the CWA is more limited than that.

In *Riverside Bayview Homes, Inc. v. United States*, 474 U.S. 121 (1985), the Supreme Court unanimously afforded deference to the Corps' determination that wetlands directly adjacent to waters within the traditional jurisdiction of the CWA were susceptible to CWA reach. However, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Court held that migratory birds' use of isolated non-navigable intrastate ponds was insufficient to trigger federal regulatory authority under the CWA. Finally, in *Rapanos v. United States*, 547 U.S. 715 (2006), a fractured Court agreed that CWA jurisdiction encompassed some, but not all, non-navigable waters. But the exact test for determining jurisdiction is unclear, since separate opinions by a plurality, a concurrence by Justice Kennedy, and the dissent all reached different conclusions.

*Rapanos* created a great deal of uncertainty about the extent of jurisdictional waters, and the federal agencies have framed WOTUS as a necessary clarification in response to them. Most efforts to develop a test have focused on Justice Kennedy's "significant nexus" test. Under it, if the water has some appreciable impact on a traditionally-regulated water under the CWA, then that water is also subject to federal regulation.[6] While it was clear enough that navigable waters and some of their tributaries were subject to CWA jurisdiction, questions remained about other waters, and about how and when to apply the "significant nexus" test. These questions resulted in the agencies' formulation of informal guidance, including wetland delineation manuals that attempted to use scientific methods to aid case-by-case decision making about whether specific waters were jurisdictional.

## II. WOTUS as an Attempt to Deal with Uncertainty

After decades of using these methods, the agencies developed WOTUS to "increase CWA program predictability and consistency by clarifying the scope" of jurisdictional waters.[7] EPA and the Corps purport that WOTUS does not "protect any types of waters that have not historically been covered by the CWA, add any new requirements for agriculture, interfere with or change private property right rights, or address land use."[8] The Florida Department of Agriculture and Consumer Services, however, has estimated that WOTUS will expand federal jurisdiction across the country to two million new acres of streams and twenty million new acres of wetlands. The Department also estimates that the new rule subjects 13 to 22 percent more wetlands in Florida to federal jurisdiction.[9] The stakes of these disagreements are significant: failure to obtain a permit where one is necessary could result in civil penalties, injunctions, and even criminal penalties.[10]

As explained in more detail below, one clear effect of WOTUS is to make many more waters categorically jurisdictional, rather than subject to a case-by-case review.[11]

### *a. Categorical Treatment is Expanded*

WOTUS expands the scope of waters and wetlands that will be classified *per se*, or categorically, as jurisdictional waters. Waters traditionally regulated under the CWA as categorically jurisdictional remain so: waters currently used, previously used, or susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide; all interstate waters, including interstate wetlands; the territorial seas; as well as impoundments of these waters.[12] Under the new rule, however, many "tributaries" and "adjacent" waters that were previously subject to a case-by-base analysis using the *Rapanos* significant nexus test will now be subject to categorical treatment.[13]

Wetlands remain defined as they are today, as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." Wetlands generally include "swamps, marshes, bogs, and similar areas."[14] Today, the Corps uses its 1987 Wetlands Delineation Manual and its regional supplements to determine whether water bodies are jurisdictional on a case-by-case basis; WOTUS may reduce the use of these resources.

*continued...*

***b. "Tributary and Tributaries" Waters are Treated Categorically***

A tributary is "a water that contributes flow, either directly or through another water (including impoundment)" to a traditionally-regulated water. Because a tributary's physical characteristics should indicate the presence of water flow, they are "characterized by the presence of physical indicators of a bed and banks and an ordinary high water mark." They may be natural or man-made and can include "rivers, streams, canals, and ditches." Once a water meets this definition of tributary, it does not lose its jurisdictional qualification by virtue of any constructed breaks such as bridges, culverts, pipes, or dams.[15] Under the new rule, tributaries are categorically jurisdictional waters, whereas in the past they have been subject to the significant nexus analysis (in that they must be relatively permanent to be jurisdictional).

***c. "Adjacent" Waters are Treated Categorically***

An adjacent water is one that is bordering, contiguous, or neighboring a jurisdictional water. The definition is not limited to laterally adjacent waters, but rather includes any water that is "neighboring" a jurisdictional water. Under the new rule, adjacent waters are categorically jurisdictional waters, whereas in the past they have been subject to the significant nexus analysis unless they directly abutted jurisdictional waters.

***d. "Neighboring" Waters are Treated Categorically***

A neighboring water is, when measured from a jurisdictional water: (1) within 100 feet of the Ordinary High Water Mark (OHWM), (2) within 1,500 feet of the high tide line, or (3) within the 100 year floodplain and also within 1,500 feet of the OHWM. Most waters used for farming and agriculture are excluded from the definition of adjacent. If any portion of the water meets the definition of neighboring, then the entirety of that water is also neighboring.[16] Under the new rule, neighboring waters are categorically jurisdictional waters, whereas in the past they have been subject to the significant nexus analysis in all cases.

***e. Use of the "Significant Nexus" Test is Appreciably Reduced***

Drawing on Justice Kennedy's *Rapanos* concurrence, the proposed rule includes waters meeting the definition of significant nexus as within the scope of the CWA. Significant nexus "means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water" otherwise identified as jurisdictional. The definition further defines "in the region" as draining to the nearest water traditionally regulated. The rule also defines "similarly situated" as when water "functions alike and is sufficiently close to function together in affecting downstream waters." The rule enumerates scientific and physical factors to determine the water's downstream effect on traditional waters, including sediment trapping, nutrient recycling, runoff storage, and other functions. Moreover, the rule now requires that the significant nexus test be applied to any waters within 4,000 feet of the high tideline or OHWM of a jurisdictional water.

Under the new rule, the use of the significant nexus test will be reduced because of the expanded application of categorical tests. The new rule also arguably expands the test beyond Justice Kennedy's conception of it, since it now expands jurisdiction by capturing, in a rather vague fashion, the cumulative impact of completely unconnected waters.

***f. Policy-Based Exclusions are Codified***

Finally, for the first time, WOTUS codifies a number of exclusions that remove qualifying waters from the jurisdictional scope of the CWA, even if they would otherwise qualify under the definition, most of which are based on past agency policy and practice. Some of the categorically excluded waters include "ditches with ephemeral flow that are not a

*continued...*

*from page 15*

relocated tributary or excavated in a tributary." The ditches exclusion also extends to "ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands" and to ditches that do not directly or indirectly flow to a traditional jurisdictional water. Other exclusions include puddles, small artificial ponds associated with farming, groundwater, stormwater control features, and wastewater recycling structures.[17]

## III. Uncertainty Continues with Challenges to WOTUS

The future of WOTUS is in flux as a result of vigorous legal and political challenges. More than half of the states[18] and numerous business and interest groups[19] have filed federal suits attacking WOTUS across the nation. Challengers generally argue that the new rule amounts to an unconstitutional and impermissible expansion of federal power over the states, their citizens and property owners.[20] Suits include cases led by Georgia and Florida,[21] the U.S. Chamber of Commerce,[22] and the Pacific Legal Foundation ("PLF").[23]

The Plaintiffs challenging WOTUS have met early success. On October 9, 2015, the United States Court of Appeals for the Sixth Circuit issued a nationwide stay, based on an initial showing that the plaintiffs would likely ultimately win on the merits of the case.[24] The court concluded that there is a substantial possibility that the Rule runs afoul of both Supreme Court CWA jurisdictional jurisprudence, including *Rapanos*, and that the Rule fails to meet the "logical outgrowth" test required under the APA.[25] The Sixth Circuit's ruling followed a similar August 2015 Federal District Court ruling in North Dakota where a judge issued a preliminary injunction barring the enforcement of the Rule in thirteen states after substantial analysis into the substantive legal principles governing the EPA's authority vis-à-vis the CWA, in addition to finding that WOTUS may also violate the APA's formal rulemaking requirements.[26]

The Sixth Circuit, which has consolidated 20 challenges to the rule, recently ruled that federal Circuit Courts should be hearing challenges to WOTUS, rather than federal District Courts.[27] Although the Plaintiffs opposed this result, they may end up better off for it, since it will likely mean that the Sixth Circuit's nationwide stay will remain in place (although this was not entirely clear as this article went to press). The Eleventh Circuit, which has jurisdiction over Florida's challenge, was holding that case in abeyance pending a decision from the Sixth Circuit, but will likely now allow that challenge to move forward.

Litigation appears likely to continue for some time, especially since legislative solutions have been unavailing. Both the House and the Senate passed a bill that would have required the EPA and Corps to rewrite WOTUS, but President Obama vetoed the legislation in January 2016.[28] Congress failed to override the veto.[29] Meanwhile, the new rule has become even more politicized following findings by the U.S. Government Accountability Office that EPA violated publicity, propaganda, and anti-lobbying laws by its promotions of WOTUS.[30]

## IV. With a Pragmatic Supreme Court, Does Uncertain Jurisdiction Mean More Likely Judicial Review?

At first glance, because agencies receive a great deal of deference when they make decisions under a promulgated rule, the categorical determinations that WOTUS requires could be very difficult to challenge even though those determinations have not been made with much case-specific analysis. No doubt this is some of the "certainty" that the federal agencies were referring to in drafting the new rule. However, a second important development threatens to upend this conclusion.

### *g. Army Corps of Engineers v. Hawkes*

In two other cases being litigated by PLF, the U.S. Supreme Court is poised to decide whether the Corps' assertion of jurisdiction in a JD can be challenged in court, or alternatively whether a landowner can only challenge the Corps' jurisdiction by (1) pursuing a permit and getting denied or (2) moving forward with a project and risking fines. The Supreme Court has accepted certiorari in *U.S. Army Corps of Engineers v. Hawkes Co.*, Case No. 15-290 (2015), in which all parties agree the Eighth Circuit created a split with the Ninth and Fifth Circuits.[31]

In the *Hawkes* case below, a peat mining company wanted to mine in wetlands that its affiliates owned.[32] When the Corps issued a JD concluding that the wetlands were jurisdictional, the peat company sought administrative review within the Corps. On review, the Corps' Deputy Commanding General found that the JD was not supported by the administrative record and remanded for further consideration. Nevertheless, the Corps issued the JD anyway and advised the peat company that this was a final decision. When the peat company sought judicial review of the JD, the district court granted the Corps' motion to dismiss, reasoning that a JD was not final agency action under the Administrative Procedure Act ("APA").[33]

The Eighth Circuit reversed, finding that the district court and other Circuit Courts had misapplied U.S. Supreme Court precedent.[34] The Eighth Circuit explained that the APA allows for judicial review of all final agency actions for which there is no other adequate judicial remedy. According to the Supreme Court, final agency action requires an action that is the consummation of a decisionmaking process, and the action must determine or have legal consequences for someone's rights or obligations.[35]

The Eighth Circuit agreed with every other court that had considered the issue, that a JD was the consummation of a decisionmaking process. Courts disagree, however, whether a JD has legal consequences that would result in a JD being a final agency action. The district court had found that the JD did not have legal consequences, since the peat company could always apply for a permit or move forward with its mining (although admittedly at risk of large fines). The Eight Circuit disagreed, holding the "prohibitive costs, risk, and delay of these alternatives to immediate judicial review" to be inadequate. It reasoned that a decision otherwise would run afoul of both

*continued...*

*from page 16*

the APA's underlying presumption of judicial review, as well as the Supreme Court's "concern that failing to permit immediate judicial review of assertions of CWA jurisdiction would leave regulated parties unable, as a practical matter, to challenge those assertions" in *Sackett v. EPA*, 132 S.Ct. 1367 (2012).[36]

Circuit Judge Kelly perhaps framed the issue best in her concurrence: she found it to be a "close question" whether a JD was reviewable. Ultimately, she deferred to the Supreme Court's recent pragmatism in this area of law and concluded that there must be a practical way to challenge a federal agency's assertion of jurisdiction:

> In my view, the Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction —a threshold determination that puts the administrative process in motion. This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property. This jurisdictional determination was precisely what the Court deemed reviewable in *Sackett*.[37]

***h. Belle Co. LLC v. U.S. Army Corps of Engineers (a/k/a Kent Recycling Services)***

The other case before the Supreme Court raises similar issues but is contrary to the Eighth Circuit in *Hawkes*. In *Belle Co., LLC v. U.S. Army Corps of Engineers*,[38] the Fifth Circuit reviewed a case very similar to that in *Hawkes*: the Corps issued a JD, which the landowner administratively appealed and secured a remand. After remand, the Corps issued the JD, and the landowner sought judicial review. The district court dismissed the case, finding that the JD did not have legal consequences.[39] On appeal, the Fifth Circuit pointed out that every court that had previously considered the issue had held that the district court was correct, and it held that *Sackett* did not change these determinations.[40]

The landowner requested review by the Supreme Court, which initially denied certiorari in *Kent Recycling Services, Inc. v. U.S. Army Corps of Engineers*, Case No. 13-30262 (2014). But PLF moved for rehearing in light of the *Hawkes* decision. As of February 2016, the Supreme Court had not made a decision on the motion for rehearing, so it appears that the Court may be waiting to make a decision in conjunction with *Hawkes*. Even if not, PLF has requested consolidation of the cases, so the Court will surely be taking the cases' relationship and similar issues into account. The Supreme Court will likely resolve both of these cases soon. Oral argument has been set in *Hawkes* for March 30, 2016, and an opinion should follow before the Court recesses for the summer.

## V. Conclusion

It is too early to say how these fundamental questions about the reach of federal jurisdiction into waters and wetlands will be answered. While WOTUS was an attempt to give more regulatory certainty, courts have given preliminary indications that the federal agencies may have overreached in their efforts. Perhaps this is best illustrated by the agencies' need to explicitly exclude "puddles" from the reach of federal jurisdiction. This overreach will lead to years of uncertainty as WOTUS is reviewed by the federal courts. And, as *Rapanos* teaches, environmental practitioners may not end up with any more certainty than before.

The death of Supreme Court Justice Antonin Scalia on February 13, 2016, further complicates the future of WOTUS.[41] Justice Scalia, generally regarded as a skeptic of the EPA's expansion of power, consistently sided with the states over the EPA in *Riverside Bayview* (unanimous decision), *SWANCC* (5-4 split), and *Rapanos* (4-1-4 split). Authoring the plurality opinion in *Rapanos*, Justice Scalia notably characterized federal interpretation of CWA authority as an "immense expansion of federal regulation of land use," "increasingly broad," that would test "the outer limits of Congress' commerce power."[42] Consequently, if WOTUS makes it to the Supreme Court quickly, this may mean the Supreme Court ends up deadlocked and forced to issue a *per curiam* opinion affirming the lower decision.[43]

The question raised in *Hawkes* of whether a JD can receive judicial review now seems all the more important because of the uncertainty raised by WOTUS. In fact, both *Rapanos* and the Eighth Circuit recognized this.[44] Justice Scalia's death may not have as big of an impact on the Supreme Court's review of *Hawkes*: Justice Scalia authored the opinion for a unanimous Court in the Sackett case. If Circuit Judge Kelly was right in focusing on the Supreme Court's recent pragmatism in *Sackett*, then that pragmatism should continue. If nobody knows exactly what waters are subject to regulation under the CWA, shouldn't landowners at least get to ask courts whether their land should be subject to it?

**Endnotes:**

[1] Reggie L. Bouthillier, Esq. is a Shareholder in the Tallahassee office of Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., with over twenty-three years of experience serving private and public sector clients throughout Florida in the areas of environmental, land development, land use, and administrative law. Jacob T. Cremer, Esq. is an Associate in the Tampa office with experience representing clients in the areas of property rights, land use, agricultural, and environmental law. William J. Anderson is a law clerk in the Tallahassee office and is a third-year Juris Doctor Candidate at Florida State University College of Law.

[2] 80 Fed. Reg. 37054 (June 29, 2015); *see also* 40 C.F.R. § 230.3.

[3] The Corps, on the other hand, protects the navigability of waters under the Rivers and Harbors Act of 1899. 33 U.S.C. § 1. It regulates projects and activities that affect navigable waters of the United States. Section 9 of the Rivers and Harbors Act prohibits the construction of any impediment to navigable waters absent congressionally-delegated Corps approval. Section 9 applies to dams, dikes, bridges, and causeways that cross navigable waters. Section 10 of the Rivers and Harbors Act prohibits the obstruction or alteration of any navigable water of the United States. See 33 U.S.C. §§ 401, 403.

[4] *See* 33 U.S.C. §§ 1342, 1344; *see e.g., Mingo Logan Coal Co. v. EPA*, 714 F.3d 608 (D.C. Cir. 2013) (cert. denied) (holding that the EPA impermissibly expanded its authority under Section 404 permit of the Clean Water Act by retroactively reneging on specification of discharge sites three years after the initial permit approval).

[5] 33 C.F.R. § 331.2.

[6] *See Rapanos v. United States*, 547 U.S. 715, 569-87 (2006) (J. Kennedy, concurring).

[7] 80 F.R. 37054 (July 29, 2015).

[8] *What the Clean Water Rule Does Not Do*, Environmental Protection Agency, *available*

*continued...*

*at* http://www2.epa.gov/cleanwaterrule/what-clean-water-rule-does-not-do.

[9] Fla. Dep't Agric. & Cons. Svcs., WOTUS Comments Docket ID No. EPA-HQ-OW-2011-0880, at 1 (Oct. 31, 2014).

10 33. U.S.C. § 1319.

[11] Claudia Copeland, Cong. Research Serv., R43455, EPA and the Corps' Rule to Define "Waters of the United States" (2016) *available at* http://www.fas.org/sgp/crs/misc/R43455.pdf.

[12] The definition of "waters of the United States," i.e., WOTUS, can be found at 33 C.F.R. § 328.3 (Corps) and 40 C.F.R. § 122.2 (EPA).

[13] 33 C.F.R. § 328.3(1)(v)-(vi). For waters meeting the jurisdictional definition as "adjacent," "neighboring," or "tributaries," *see* 33 C.F.R. § 328.3(3)(i)-(iii).

[14] 33 C.F.R. § 328.3(3)(iv).

[15] *Id.* at (3)(iii).

[16] *Id*. at (3)(ii).

[17] 33 C.F.R. § 328.3(2)(i)-(vii).

[18] Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin and Wyoming have all joined law suits against the EPA and Army Corps in response to the rule.

[19] Claudia Copeland, Cong. Research Serv., R43455, EPA and the Corps' Rule to Define "Waters of the United States" 18 (2016) *available at* http://www.fas.org/sgp/crs/misc/R43455.pdf.

[20] *Id*. at 18-19.

[21] *State of Georgia, et al. v. McCarthy*, No. 2:15-cv-00079, 2015 BL 277426 (S.D. Ga. June 30, 2015).

[22] *Chamber of Commerce of the United States, v. U.S. EPA*, 4:15-cv-00386, 2015 BL 246267 (N.D. Okla. July 10, 2015); *see also* agri-business law suits, Claudia Copeland, Cong. Research Serv., R43455, EPA and the Corps' Rule to Define "Waters of the United States" 16-17 (2016) *available at* http://www.fas.org/sgp/crs/misc/R43455.pdf.

[23] Reed Hopper, *PLF Sues the Corps and EPA over Expansive Water Rule,* PLF Liberty Blog, (July 15, 2015) *available at* http://blog.pacificlegal.org/plf-sues-the-corps-and-epa-over-expansive-water-rule/.

[24] *In re Environmental Protection Agency and Department of Defense Final Rule*; "Clean Water Rule: Definition of Waters of the United States," 803 F.3d 804 (6th Cir. 2015).

[25] *Id.*

[26] *North Dakota, et al. v. U.S. EPA*, 3:15-cv-59, 2015 WL 5060744 (D.N.D. 2015).

[27] Timothy Cama, *Court to hear case against Obama's water rule*, The Hill Policy Blog (Feb. 22, 2016), *available at* http://thehill.com/policy/energy-environment/270281-court-to-hear-case-against-obamas-water-rule.

[28] Presidential Statement on Veto of Senate Joint Resolution 22 Regarding Clean Water Rule, Daily Comp. Pres. Doc. DCPD201600024 (Jan. 19, 2016), *available at* https://www.gpo.gov/fdsys/pkg/DCPD-201600024/pdf/DCPD-201600024.pdf.

[29] S.J. Res. 22, 114th Cong. (2015-16) (vetoed).

[30] Letter from Susan A. Poling, Gen. Counsel, Gov't Accountability Office, to Hon. James M. Inhofe, Chairman, Comm. on Env't and Pub. Works, United States Senate (Dec. 14. 2015), *available at* http://www.gao.gov/assets/680/674163.pdf.

[31] *See Kent Recycling Svcs., LLC v. U.S. Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014); *N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008).

[32] *See Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F. 3d 994, 996 (8th Cir. 2015).

[33] *Id.* at 998-99.

[34] *Id.* at 996.

[35] *Id.* at 999.

[36] *Id.* at 1000-02.

[37] *Id.* at 1002-03.

[38] 761 F.3d 383 (5th Cir. 2014).

[39] *Id.* at 387.

[40] *Id.* at 391-95.

[41] Press Release, Chief Justice John G. Roberts, Jr., Statement by the Chief Justice Announcing the Death of Justice Antonin Scalia, *available at* http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_02-13-16.

[42] *Rapanos v. U.S.*, 547 U.S. 715 (2006).

[43] *E.g., Costco Wholesale Corp. v. Omega, S.A.*, 562 U.S. 40 (2010) (Justice Kagan recused herself from participating, resulting in a 4-4 divided court.)

[44] 782 F.2d at 1002.