



THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

SPECIAL ENERGY EDITION

Vol. XXXIV, No. 2
December 2012

• Erin L. Deady, Chair • Jeffrey A. Collier, Co-Editor • Anthony J. Cotter, Co-Editor

Update on Pace One Year Later: Litigation, Legislation and New Initiatives

by Erin L. Deady, Herb Thiele, Ed Steinmeyer & Chad Friedman

I. INTRODUCTION TO PACE

Last year, we provided an update on property assessed clean energy (“PACE”) programs that have been developing across the U.S. Here, we outline another one year update on the development of PACE programs across the U.S. focusing on the national challenges on the residential side, the rise of new PACE approaches, and the status of PACE in Florida. Programs are still challenged due to actions by the Federal Housing and Finance Agency (“FHFA” a federal

agency of the U.S. government), Fannie Mae (“Fannie”) and Freddie Mac (“Freddie”) concerning the residential PACE programs. Two federal bills were previously introduced in 2010 and 2011 to resolve the concerns with neither passing. Federal litigation continues and a federal rulemaking process is being completed. While the legal issues remain, PACE programs are still being launched with various funding approaches and a mix of either commercial, residential or both types of targeted property owners.

In a PACE program, a local government uses its home rule powers (usually through non ad-valorem assessment powers) with a lien attached to a property and repayment through the annual tax bill to finance energy improvements. Property owners participate in this on a voluntarily basis without any costs borne by non-participating property owners. Generally, improvements can include energy efficiency, renewable energy or water conservation (differing across programs), but

See “Update on Pace,” page 24

From the Chair

by Erin L. Deady

As our new year launches, I am happy to report the Executive Council has adopted a budget for the 2012-2013 Calendar Year. We have taken great strides to reduce expenditures as much as possible and project a goal of increased revenue through sponsorships and hopefully new growth in membership. Based on the information we gathered when drafting this year’s Strategic Plan, the feedback we received was to pursue both strategies to balance our budget and I believe we have struck that balance. This will be a recurring issue though in the years to come as the Section attempts to continue providing high quality programming and benefits

with flat or reduced revenues largely influenced by the current economy. As we work towards meeting this budget this year, please remember that as Section Members, we should be discussing the benefits of Section membership with our peers and explaining all the wonderful services that are available with membership. With a concerted outreach effort, we can grow our membership and services provided.

I am also happy to report that the Section is continuing to provide you with excellent services and we are working creatively on CLE programs, restructuring sponsorship opportunities, improvements to the

See “Chair’s Message,” page 2

INSIDE:

Determinations Of Need In Florida – Electrical Power Plant and Transmission Line Siting Proceedings.....	3
From Sawgrass to Switchgrass.....	8
Florida Case Law Update.....	13
On Appeal.....	15
Law School Liaisons.....	20
Center for Earth Jurisprudence	20
An Update on Developments at the Florida State University College of Law: Fall 2012.....	21
UF Law Update.....	22

CHAIR'S MESSAGE

from page 1

website, Treatise articles, and great outreach and networking activities. Please visit www.eluls.org for the latest updates on programs and services available to you as a Section Member! Communications regarding Section services and activities continues to be a high priority as we have enhanced those services with upgrades to the website, publication of the e-newsletter and additional list serves. The CLE Committee is working tirelessly to review proposals and structure the Annual Update program while also building content for webinars and other programs for the year.

Section services are generally shaped by the various Committees and we urge you to reach out to Committee Chairs to get active on a Committee. Several of the Committees have launched efforts to provide substantive networking or information exchange opportunities through articles, webinars, list serves or events. We encourage everyone to find a Committee of interest to get more active and help us continue to provide high quality services to our profession.

One issue on the horizon is to work towards having the various Committees begin integrating their annual goals with those in the Strategic Plan. Soon Committee Chairs will be receiving correspondence identifying those goals from the Plan so the Committees can begin reporting on

progress towards achievement. With this process, we can provide an overview of measurable progress at the Annual Meeting in August.

The Affiliates have launched their very successful networking mixer series and we anticipate continued strong turnout at these events. The first event this fall in Delray Beach had about 50 attendees and was quite successful. Additional mixers are planned for January 24 in Tampa, March 28 in Jacksonville and June 6 in Tallahassee, so mark your calendars and look for final locations to be announced soon! Please contact Bob Wojcik if you are interested in becoming active with sponsorship or attendance at these events.

I am looking forward to great and productive year!

Moving?

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Determinations Of Need In Florida – Electrical Power Plant and Transmission Line Siting Proceedings

by Robert Scheffel Wright, Partner/Shareholder, Gardner, Bist, Wiener, Wadsworth, Bowden, Bush, Dee, LaVia & Wright, P.A.

Summary

As part of Florida's comprehensive state permitting processes for major electrical power plants and major transmission lines, the Florida Public Service Commission ("PSC") must make an affirmative determination of need for such plants and transmission lines. In summary, the statutes require the PSC to make an affirmative determination of need for major power plants and transmission lines in order to ensure that the need for the proposed facility, considering economic and reliability factors, is sufficient to justify the environmental impacts "resulting from construction and operation of the facility," including impacts on "air and water quality, fish and wildlife, and the water resources and other natural resources of the state."¹

This article addresses the purpose and function of these need determination processes, jurisdictional thresholds under the need determination statutes, the processes and procedures that the PSC uses and follows, and key issues that have arisen in need determination cases over the years.

PSC Need Determinations in Power Plant Permitting Proceedings

Purpose and Function of Need Determination Statutes

Power plants and transmission lines are generally very expensive to build,² and once built, their costs are paid by electric customers through their rates. Thus, the State has a strong interest in ensuring that such expenditures are, in fact, needed before construction commences. Additionally, the construction and operation of electrical power plants and transmission lines has environmental impacts, and the need determination statutes function to ensure that the need for such power plants and power lines justifies their environmental impacts.

Statutory Overview

The Florida Electrical Power Plant Siting Act ("PPSA") was originally enacted in 1973 and is codified at Sections 403.501-403.518, Florida Statutes, Chapter 73-33, Laws of Fla. The power plant need determination statute and the related transmission line certification statute were enacted in 1980 as part of the Florida Energy Efficiency and Conservation Act ("FEECA").³ Because the need determination statute is an integral part of the power plant site certification process, the power plant need determination statute is codified at Section 403.519, Florida Statutes.

Under the PPSA, the PSC is a mandatory party to the site certification proceeding for a power plant for which certification is sought. Fla. Stat. § 403.508(3)(a). Under Section 403.507(4)(a), Florida Statutes, the PSC must "prepare a report as to the present and future need for electrical generating capacity to be supplied by the proposed electrical power plant." The PSC's report "shall include the commission's determination [i.e., the determination of need] pursuant to s. 403.519 and may include the commission's comments with respect to any other matters within its jurisdiction." *Id.* The PSC's need determination order "shall serve as the commission's report required by s. 403.507(4)." An "affirmative determination of need" is "a condition precedent to . . . conduct of the certification hearing."⁴

The key substantive provisions of the statute, applicable to plants fueled by fossil fuels and solar energy, are set forth in Section 403.519(3):

(3) The commission shall be the sole forum for the determination of this matter, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum. In making its determination, the commission shall take into account the need for electric

system reliability and integrity, the need for adequate electricity at a reasonable cost, the need for fuel diversity and supply reliability, whether the proposed plant is the most cost-effective alternative available, and whether renewable energy sources and technologies, as well as conservation measures, are utilized to the extent reasonably available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant. The commission's determination of need for an electrical power plant shall create a presumption of public need and necessity and shall serve as the commission's report required by s. 403.507(4). An order entered pursuant to this section constitutes final agency action.

Section 403.519(4) sets forth similar substantive provisions applicable to nuclear plants and a particular type of coal-fired plant known as an "integrated gasification combined cycle" plant.⁵ Both nuclear and IGCC units are designed and operated as "base load" power plants, meaning that they operate to serve broad loads during all hours of the year. With respect to such plants, Section 403.519(4) specifically requires the PSC to consider "the need for base-load generating capacity" and "the need for adequate electricity at a reasonable cost," but does not include the specific requirement that the PSC consider whether a proposed nuclear or IGCC unit is "the most cost-effective alternative available," a criterion that applies to other units pursuant to Section 403.519(3).

The "need for fuel diversity and supply reliability" criteria were added in 2006.⁶

continued...

ELECTRICAL POWER PLANTS

from page 3

Applicability

Under the Siting Act, power plants that have 75 megawatts or more of steam or solar generating capacity must be certified in order to be built and operated, and thus such plants must also obtain an affirmative determination of need from the PSC. An applicant for site certification for a power plant that is below the jurisdictional threshold may seek, but is not required, certification under the Siting Act. As discussed further below, only utilities that have an obligation to provide power for end-use customers and entities that have contracts to provide power to such utilities, are proper applicants under the Siting Act.

PSC Power Plant Need Determination Procedures

The PSC's need determination procedures are set forth in Rules 25-22.080-082, Florida Administrative Code ("F.A.C.").⁷ The requirements of Rule 28-106.201, F.A.C., Initiation of Proceedings, govern the procedural requirements for need petitions.

The PSC's rules also prescribe the times within which the docket must be processed in order to satisfy the requirement of Section 403.507(4) (a) that the PSC must issue its order within 150 days after the site certification application is filed. (A petition for determination of need may be filed before the site certification is submitted, Rule 25-22.080(1), F.A.C., but the timelines within the PSC's rules still apply.) Within seven days of filing, the PSC must set the hearing date, which must be within 90 days of receiving the petition to determine need. Notice must be published at least 21 days before the PSC's need hearing.⁸ Following its rules, the PSC schedules a decision on the petition no later than 135 days from the date of filing, in order to allow for the order to issue within the 150 days prescribed by the statute.

Power plant need determination hearings are conducted pursuant to Chapter 120, Florida Statutes. The PSC's normal procedures provide for the pre-filing of written testimony by all parties, discovery,

cross-examination, briefing, and a final PSC decision based on a written recommendation submitted by the PSC Staff. Following the PSC's vote, the final order to grant or deny the need petition is rendered. As a matter of practice, the PSC normally allows for testimony by members of the public at the outset of the evidentiary hearing on a need petition.⁹

Substantive Evaluation of Proposed Power Plants

As noted in the statutory overview above, Sections 403.519(3) and (4) specify the substantive criteria that the PSC must consider in evaluating need petitions and in making its decisions thereon. For fossil-fueled plants, those criteria are: "the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, the need for fuel diversity and supply reliability, whether the proposed plant is the most cost-effective alternative available, and whether renewable energy sources and technologies, as well as conservation measures, are utilized to the extent reasonably available."

In its consideration of a petition for need determination, the PSC must consider all factors,¹⁰ but the legislature did not prescribe the weights to be accorded to any specific factor or factors, and no one factor is determinative. Further, a proposed power plant need not satisfy every criterion in order to obtain an affirmative determination of need. The PSC summarized this as follows in a recent need order.

While the applicable need determination statute makes it clear that each of these factors must be taken into consideration, the statute does not prescribe what importance or weight should be given to each. Therefore, we have broad authority to determine how each of these may be weighed, and we have the discretion to determine the need for an electrical power plant based upon one or more of the qualifications above, so long as each has been considered as a component of the final decision. See Nassau Power Corp. v. Beard, 601 So. 2d 1175, 1176-77 (Fla. 1992) (noting the Commission must make findings for each of the statutory criteria); Order No. 10108, issued June 26, 1981, in Docket No. 810045-EU, In re: JEA/FPL's

Application of need for St. John's River Power Park Units 1 and 2 and related facilities (considering, in addition to the statutory need criteria, the socio-economic need of reducing the consumption of imported oil in the State of Florida and the adoption of the Florida Energy Efficiency and Conservation Act (FEECA)); Order No. 10320, issued October 2, 1981, in Docket No. 810180-EU, In re: Petition for Certification of Need for Orlando Utilities Commission, Curtis H. Stanton Energy Center Unit 1 (considering, in addition to the need for power, the socio-economic need of reducing the consumption of imported oil and conservation goals established pursuant to FEECA); Order No. PSC-08-0518-FOF-EI, issued August 12, 2008, Docket No. 080148-EI, In re: Petition for determination of need for Levy Units 1 and 2 nuclear power plants, by Progress Energy Florida, Inc. (noting that the Commission also considered Section 366.93, F.S., which allows pre-construction cost recovery for nuclear power plants).¹¹

In keeping with the statute's provision that the PSC may consider "other matters within its jurisdiction," the PSC also noted that, "The promotion of the development of renewable energy in the State of Florida is a matter falling within our jurisdiction," and went on to cite the State's pro-renewable energy policies articulated in Section 366.92, Florida Statutes, in granting the requested determination of need.¹²

Although there have been exceptions, the "most cost-effective alternative" criterion is generally to be the most important. For example, in a 2007 case, the PSC denied a petition for determination of need for a proposed coal-fired plant, Glades Power Park Units 1 and 2. The PSC recognized the need for fuel diversity and further recognized that coal generating technologies "may play an appropriate part in a utility's generation mix for fuel diversity and affordable supply reliability," as well as "the need for additional generation to meet current and future growth." However, while observing that "uncertainty about cost-effectiveness alone will not necessarily control the outcome of every need determination decision," the PSC concluded in that

case “that the potential benefits regarding fuel diversity offered by FPL in support of” the Glades Power Park Project were insufficient “to mitigate the additional costs and risks of the project, given the uncertainty of present fuel prices, capital costs, and current market and regulatory factors.”¹³ It is worth noting that in that case the PSC specifically considered potential costs associated with possible future regulation of carbon emissions.¹⁴

Key Issues

Who Is a Proper “Applicant?”

Section 403.519(1), Florida Statutes, provides that, “On request by an applicant or on its own motion, the PSC shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act.”¹⁵ However, the PPSA does not provide clear guidance as to who may be an applicant. Section 403.503(5), Florida Statutes, defines “Applicant” as “any electric utility which applies for certification pursuant to the provisions of this act.” There is no further definition of “electric utility” in the PPSA or FEECA, but Section 366.02(2), Florida Statutes, defines “Electric utility” as “any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.”

Thus, in 1998, the question arose as to whether an entity that wished to build a “merchant” power plant, i.e., a plant that would be built at the developer’s risk and sell in market transactions, could be an applicant for the PSC’s determination of need. The would-be applicant in that case, an affiliate of Duke Energy, advanced the theory that it would own generation in Florida, and that it would thus be a utility under Florida law as well as subject to regulation by the Federal Energy Regulatory Commission. No Florida utility would have been forced to buy the plant’s output. The PSC ultimately agreed and issued its determination of need.¹⁶ On appeal, the Florida Supreme Court reversed, holding basically that “the statutory scheme embodied in the Siting Act and FEECA was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida

customers who purchase electrical power at retail rates.”¹⁷

This issue has been fleshed out and liberalized somewhat since the *Duke* case. In 2001, the PSC approved a need determination for a proposed plant being developed by Calpine Construction Finance Company where the output of the plant would be sold to Seminole Electric Cooperative, which provides bulk power and transmission service to member cooperatives that in turn serve retail customers in Florida. The power sales agreement between Calpine and Seminole committed approximately 66 percent of the plant’s output (350 megawatts out of total capacity of 529 megawatts) to Seminole for a minimum period of five years, and the PSC held that this was sufficient to satisfy the retail-serving commitment criterion.¹⁸

Measuring Cost-effectiveness

As noted above, the cost-effectiveness criterion is generally the most important of the criteria. This naturally leads to the question of how cost-effectiveness is measured. Generally, in this context, it is measured by whether adding the proposed power plant into the utility’s generation portfolio or “fleet” will result in the lowest long-term costs. Long-term costs are measured as the net present value of the utility’s total costs (“revenue requirements” in utility regulatory parlance). In the Glades Power Park case, the PSC discussed the cost-effectiveness analysis of the proposed Glades Power Park Project as follows.

To support the cost-effectiveness of its FGPP proposal, FPL performed sixteen economic scenarios combining four different fuel and four different environmental compliance cost projections. Each scenario calculated the cumulative present value revenue requirement for two generation expansion plans, one with coal and one without coal. The difference between the two plans was intended to demonstrate each plans’ relative cost-effectiveness compared to available alternatives.¹⁹

Sole Forum for Determination of Need

Section 403.519(3), Florida Statutes, states explicitly that the PSC “shall be the sole forum for the

determination of this matter, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum.” In practical terms, this means that a party that desires to challenge a proposed power plant on the basis that the plant is simply not needed to ensure reliable and cost-effective electric supply must mount its challenge in the need determination, and may not thereafter raise the need issue in the site certification hearing.

In 1981, the Orlando Utilities Commission sought and obtained the PSC’s determination of need for a 415-megawatt coal-fired power plant.²⁰ The Florida Chapter of the Sierra Club did not participate in the PSC’s need determination proceeding, although it did send a letter urging the PSC to consider conservation alternatives to the plant.²¹

The Sierra Club intervened in the subsequent site certification proceedings and argued that the hearing officer in the site certification case was required to “balance the degree of need versus the environmental impact of the project” and that the need for the proposed plant changed after the PSC’s order had been issued and become final.²² The Sierra Club also proffered testimony into the record of the site certification hearing to the effect that conservation programs could have avoided the need for the plant.²³ On appeal, the Fifth District Court of Appeal affirmed the issuance of the site certification, stating, among other things, that the Sierra Club had been “entitled to participate before the PSC, but specifically refused to do so,” that the “proper forum for the introduction of [the proffered energy conservation] evidence would have been the PSC hearing on need,” and that the “determination of need is solely within the jurisdiction of the PSC.”²⁴

The PSC’s “Bid Rule”

Rule 25-22.082, F.A.C., Selection of Generating Capacity, requires public utilities – i.e., utilities that are owned by investors as opposed to those that are owned by municipalities or cooperatives, see Section 366.02(1) and (2), Florida Statutes, to conduct a “request for proposals” (“RFP”) process before they may file a petition for need determination. The process is intended to ensure that the

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utility selects the most cost-effective generating alternative available by requiring the utility to consider and evaluate bids from others to supply electric power and energy needed by the proposing utility. Since this rule was originally adopted in 1994, no investor-owned utility has selected an entity who submitted a bid in the utility's RFP process to provide needed power; instead, in each instance, the investor-owned utility has selected the plant that it originally – before the RFP process - proposed to build as the final preferred option.

PSC Need Determinations in Transmission Line Permitting

Major transmission lines must be certified under the Transmission Line Siting Act (“TLSA”), which is found at Sections 403.52-403.5365, Florida Statutes. The associated need determination statute for transmission lines is set forth at Section 403.537, Florida Statutes. Because they cover many miles and are highly visible, the impacts of transmission lines are widespread and they frequently evoke significant opposition. Accordingly, the purpose of the transmission line need determination statute is the same as that of the power plant need statute: to balance the need for transmission lines, where need includes electric system reliability and the system's capability to deliver power as cost-effectively as practicable, with the broad interests of the public, which interests include environmental and land use interests as well as the public health, safety, and welfare.²⁵ In the experience and opinion of this author, it may fairly be said that obtaining certification for a transmission line corridor is more controversial and more difficult than for a large power plant.

Statutory Overview

As with the PPSA and its associated need determination statute, the TLSA *per se* does not include the transmission line need determination statute. The need determination statute, Section 403.537, was also enacted as part of FEECA. Chapter 80-65, Laws of Fla. The key

substantive provision is found in Section 403.537(1)(c), which provides as follows:

In the determination of need, the commission shall take into account the need for electric system reliability and integrity, the need for abundant, low-cost electrical energy to assure the economic well-being of the residents of this state, the appropriate starting and ending point of the line, and other matters within its jurisdiction deemed relevant to the determination of need. The appropriate starting and ending points of the electric transmission line must be verified by the commission in its determination of need.

Like its power plant counterpart, the transmission line need determination statute provides that the PSC “shall be the sole forum in which to determine the need for a transmission line,” and once granted, the PSC's determination “is binding on all parties to any certification proceeding under” the TLSA.²⁶ Also like its power plant siting counterpart, the TLSA provides that the PSC's determination of need “is a condition precedent to the conduct of the certification hearing prescribed therein.”²⁷

Applicability

Transmission lines that are “designed to operate at 230 kilovolts [230,000 volts] or more” must be certified under the TLSA, except that transmission lines that are either (a) “less than 15 miles in length” or (b) “located in a single county within the state” are exempt from mandatory certification under the TLSA.²⁸ The need for transmission lines may also be determined in power plant need determination proceedings where such lines are considered as “associated facilities” that support a proposed power plant.²⁹ In practical terms, this means that relatively few transmission lines are actually subject to separate need determination proceedings at the PSC.

PSC Transmission Line Need Determination Procedures

The PSC's conduct of transmission line need proceedings is fundamentally identical to its conduct of power plant need hearings, as described above.³⁰ However, pursuant to Section 403.537(1)(a), Florida Statutes, the schedule and time deadlines are more

compressed than for power plant need proceedings, with the PSC required to hold its need hearing within 45 days after the applicant's petition is filed, and the PSC's order must be “rendered within 60 days after such filing.” *Id.*

Under the PSC's rules, a transmission line need petition must include the following:

- (a) A general description of the existing load and electrical characteristics of the transmission system and the location of the proposed line or lines within the system;
- (b) A general description of the proposed transmission lines, including the starting and ending points of the line, the operating voltage, the approximate cost, and the projected in-service date of the line;
- (c) A statement of the conditions that the applicant asserts indicate a need for the proposed new transmission line;
- (d) A summary discussion of the available transmission lines or transmission system improvements evaluated by the utility in arriving at the decision to pursue the proposed line;
- (e) A statement of the major reason or reasons for adding the proposed transmission line, where such reasons may include improving or maintaining reliability, improving power transfer opportunities, accommodating load growth, improving power system economics (e.g., by enabling less costly power to be delivered to areas that would otherwise be served by more costly power resources), or serving “any other useful purpose;”
- (f) An evaluation of the adverse consequences which will result if the proposed line is delayed or not constructed; and
- (g) The time needed for full development of the transmission line project.³¹

Substantive Evaluation of Proposed Transmission Lines

The PSC considers the above information within the context of the statutory criteria. As the PSC stated in a recent transmission line need determination order,

As provided in section 403.537,

Florida Statutes, we are required to take the following into account in determining the need for a proposed transmission line subject to our review under Florida's Transmission Line Siting Act (sections 403.52-403.5365, Florida Statutes):

[T]he need for electric system reliability and integrity; the need for abundant, low-cost electrical energy to assure the economic well-being of the citizens of this state; the appropriate starting and ending point of the line; and other matters within [our] jurisdiction deemed relevant to the determination of need.³²

In the Bobwhite-Manatee case, the PSC considered reliability by noting that the proposed line would provide additional transmission reinforcement and capacity, serve increasing customer load, and provide for enhanced reliability by locating the proposed new line in a new, separate right-of-way rather than in an existing corridor.³³ Regarding the need for abundant, low-cost power, the PSC found that the proposed line would "assure the economic well-being of the citizens of the state by serving projected new electric load in the region, and improving the region's electric reliability by minimizing the region's exposure to single contingency events," and by reducing transmission line losses.³⁴ Finally, the PSC determined that the appropriate starting and ending points were the existing Manatee Substation in Manatee County and a proposed new substation, the Bobwhite Substation, to be built in eastern Sarasota County.³⁵

The evaluation of need for transmission lines is technical, *e.g.*, evaluating potential reliability problems due to overloaded transmission lines and reliability under hypothesized unforeseen events, such as loss of a transmission line due to electrical or natural events. However, these analyses are also generally straightforward.

One of the more interesting aspects of the transmission line need determination process is that the PSC only determines whether the line is needed, and if so, its appropriate starting and ending points. This leaves the issue of the specific route for the line to be litigated in the corridor certification hearing, and as noted above, since many members of the general public really do not want a

transmission line in their backyards, the routing issue can be quite contentious in the corridor certification hearing. In the Bobwhite-Manatee certification case, for example, the applicant utility, FPL, and various intervenor parties proposed no fewer than 15 alternate corridors.³⁶

Conclusion

As part of the State's comprehensive permitting processes for electrical power plants under the Florida Electrical Power Plant Siting Act and the Florida Electric Transmission Line Siting Act, the Florida PSC must make affirmative determinations that proposed power plants and power lines are, in fact, needed to provide adequate, reliable, and cost-effective electric service. The practitioner should note well the jurisdictional limitations in the PPSA and the TLSA – power plants using steam or solar technologies of more than 75 megawatts capacity, and power lines designed to operate at voltages of 230,000 volts or more and that both cross a county line and are greater than 15 miles in length; other facilities may obtain permits under the PPSA and TLSA processes but certification under those statutes is not mandatory.

The practitioner should also note well that the PSC's need determination proceedings are conducted on relatively compressed time lines, 150 days filing date to order issuance date in the case of power plants and 60 days in the case of transmission lines. This is particularly important if the practitioner is called upon to represent opponents to a proposed power plant or power line, because testimony filing dates occur relatively early in the PSC's processes.

This article addresses the criteria that the PSC applies when evaluating the need for proposed power plants and transmission lines, as well as some of the more interesting issues that have arisen in need determination proceedings. Need determinations are inherently fact-specific, and the practitioner representing either an applicant or an opponent should be familiar with these criteria and how the PSC considers and applies them.

The views and opinions expressed in this article are the author's, not that of his clients or the ELULS Section.

Endnotes:

- ¹ Fla. Stat. § 403.502(2). All references to the Florida Statutes are to the 2012 edition.
- ² For reference, a new natural gas fueled plant may cost in the range of \$1.2 billion. See, *e.g.*, Florida Power & Light Company's Ten Year Power Plant Site Plan, 2012-2021, at 103-105. A new nuclear plant may cost upwards of \$20-25 billion, including capitalized interest during construction. See, *e.g.*, In Re: Nuclear Cost Recovery Clause, Prehearing Order No. PSC 12-0455-PHO-EI, August 31, 2012, at 26 and 53.
- ³ Chapter 80-65, Laws of Fla.
- ⁴ Fla. Stat. § 403.507(4)(b).
- ⁵ An integrated gasification combined cycle ("IGCC") plant is fueled by coal or potentially other solid fuels, such as petroleum coke; the coal is first gasified and the combustible gases thus produced are then fired in combined cycle units to produce electricity.
- ⁶ Chapter 2006-230, s. 43, Laws of Fla.
- ⁷ Pursuant to Rule 25-22.081(1), F.A.C., the substantive content of a petition for determination of need must include:
 - (a) A general description of the utility or utilities primarily affected, including the utility's load, generating capability, and interconnections;
 - (b) A general description of the proposed electrical power plant, including the plant's size, technology, fuel, fuel supply, estimated cost, and projected in-service date;
 - (c) A statement of the conditions that the applicant asserts indicate a need for the proposed power plant;
 - (d) A summary discussion of the major available generating alternatives, including considerations of fuel diversity and supply reliability, that the applicant utility considered in arriving at the decision to pursue the proposed generating unit;
 - (e) A discussion of viable non-generating alternatives including potential conservation measures that may avoid the need for the proposed plant;
 - (f) An evaluation of the adverse consequences which will result if the proposed electrical power plant is not added in the approximate size sought or in the approximate time sought; and
 - (g) If the generation addition is the result of a purchased power agreement between an investor-owned utility and a non-utility generator, a discussion of potential impacts of the proposed contract on the utility, its financial condition, and its system reliability.
- ⁸ Fla. Stat. § 403.519(2).
- ⁹ See, *e.g.*, In Re: Joint Petition to Determine Need for Gainesville Renewable Energy Center, PSC Docket No. 090451-EM, Hearing Transcript, Volume 1 at 13-167, PSC Document No. 10-03740 (May 3, 2010).
- ¹⁰ On a few occasions, the PSC has not made findings, or has not made affirmative findings, on all factors but still determined need for proposed power plants. See, *e.g.*, In Re: Petition of Pasco County for Determination of Need for a Solid Waste-Fired Cogeneration Power Plant, Docket No. 870193-EG, Order No. 17752 at 2 (Fla. Pub. Serv. Comm'n, June 26, 1987); In Re: Petition of Florida Crushed Stone Company for Determination of Need, Docket No. 820460-EG, Order No.11611 at 3-6 (February 14, 1983).
- ¹¹ In Re: Joint Petition to Determine Need for Gainesville Renewable Energy Center, PSC Docket No. 090451-EM, Final Order Granting

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Petition for Determination of Need for Proposed Biomass Plant, Order No. PSC-10-0409-FOF-EM at 4 (June 28, 2010).

¹² *Id.*

¹³ *In Re: Petition to Determine Need for Glades Power Park Units 1 and 2*, Order No. PSC-07-0557, Decision to Deny Petition for Determination of Need at 4 (July 2, 2007).

¹⁴ *Id.* at 3.

¹⁵ Although it has the authority under Section 366.05(8), Florida Statutes, “to require installation or repair of necessary facilities, including generating plants and transmission facilities, with the costs to be distributed in proportion to the benefits received,” the PSC has never initiated a need determination proceeding on its own motion.

¹⁶ *In Re: Joint Petition for Determination of*

Need by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P., PSC Docket No. 981042-EM, Order No. PSC-99-0535-FOF-EM at 55 (1999).

¹⁷ *Tampa Electric Co. v. Garcia*, 767 So. 2d 428, 435 (Fla. 2000).

¹⁸ *In Re: Joint Petition for Determination of Need for the Osprey Energy Center in Polk County by Seminole Electric Cooperative, Inc., and Calpine Construction Finance Company, L.P.*, PSC Docket No. 001748-EC, Order No. PSC-01-0421-FOF-EC, Final Order Granting Petition to Determine Need for Electrical Power Plant at 2 (Fla. Pub. Serv. Comm’n, 2001).

¹⁹ *Glades Power Park* at 4.

²⁰ *In re: Petition for Certification of Need for Orlando Utilities Commission, Curtis H. Stanton Energy Center Unit 1*, Docket No. 810180-EU, Order No. 10320 (Fla. Pub. Serv. Comm’n 1981).

²¹ *Sierra Club v. Orlando Utilities Comm’n*, 426 So. 2d 383, 386 (Fla. 1st DCA, 1983).

²² *Id.* at 387-88.

²³ *Id.* at 388.

²⁴ *Id.* at 388-389.

²⁵ Fla. Stat. § 403.521.

²⁶ Fla. Stat. § 403.537(1)(b)&(d).

²⁷ Fla. Stat. § 403.537(1)(d).

²⁸ Fla. Stat. §§ 403.522(2) & 403.524(2)(d).

²⁹ Fla. Stat. § 403.503(7).

³⁰ The PSC’s procedures for transmission line need determination proceedings are set forth in Rules 25-22.075-.076, F.A.C., and the requirements of Rule 28-106.201, F.A.C., Initiation of Proceedings, also govern the procedural requirements for transmission line need petitions.

³¹ Rule 25-22.076, F.A.C.

³² *In re: Petition for Determination of Need for Bobwhite-Manatee 230 kV Transmission Line by Florida Power & Light Company*, Docket No. 060424-EI, Order No. PSC-06-0723-FOF-EI at 3 (Fla. Pub. Serv. Comm’n 2006).

³³ *Id.* at 3.

³⁴ *Id.* at 4.

³⁵ *Id.* at 4-5.

³⁶ *In re: Florida Power & Light Company Bobwhite-Manatee 230KV Transmission Line Project*, DOAH Case No. 07-0105TL Recommended Order at 5-7, 18 (August 11, 2008).

From Sawgrass to Switchgrass

by Sharon J. Walker, Law Offices of Sharon J. Walker, P.A.

The need to produce renewable biofuels from Florida’s abundant farm and timber lands is an idea whose time has come, as America moves toward addressing energy independence, economic growth, national security, global warming and reduction of greenhouse gas (GHG) emissions. But the law of unintended consequences is an idiomatic warning that an intervention in a complex system, such as an ecosystem or natural environment, tends to create unanticipated and often undesirable outcomes.

INTRODUCTION

The explosion in federal and state incentives and mandates for renewable energy, has led to increased demand for cheap and plentiful biomass from a variety of plants.¹ This increased demand for bioenergy feed-crops has led to ramped up cultivation across the United States, and more particularly in Florida, of a number of exotic and potentially invasive species.² Indeed, some of the same characteristics that makes a plant ideal and attractive as a

bio-energy feed-crop, such as rapid growth, competitiveness, tolerance of a range of climate conditions and marginal soil, are the same characteristics that make plants potentially invasive.

Certain exotic plant species presently grown in Florida for biofuel production, such as Camelina, Switchgrass, Giant Reed, Napiergrass a/k/a Elephant grass and Miscanthus, are either invasive species in areas other than Florida, or likely to escape cultivation and become invasive. Florida runs the risk of exotic biofuel crop producers unleashing the next invasive species catastrophe that could transform native ecosystem, deplete scarce water resources, and require significant financial resources to control. Section One of this article will discuss the drivers that led to an increased interest in planting potentially invasive biofuel feed-crops across the United States, particularly in Florida; and Section Two will discuss Florida’s natural systems, and the increased risk of ecological harm from potentially invasive biofuel feed-crops.

1. Drivers Behind Ramped Up Production of Biofuel Crops

The world events of the past decade have spurred renewed interest in significantly reducing the U.S carbon footprint and U.S. oil consumption. National security issues, fear of rising oil prices, and an appreciation of the potential adverse impacts of climate change have caused Congress to pass major legislation to address these concerns and reduce the United States dependence on foreign oil and other fossil fuels.³ As a result of the foregoing, the federal government required the U.S. Environmental Protection Agency (EPA) to develop and implement regulations to ensure that transportation fuel sold in the United States contains a minimum volume of renewable fuel through the Renewable Fuel Standard legislation (RFS1). As a result of the foregoing, the Energy Policy Act of 2005 (EPAAct) was enacted and included significant provisions to increase biomass use for purposes of biofuel production in the United States.⁴ RFS1 was further expanded in 2007 by the passage of the Energy and Security Act of 2007

(EISA), which served as the legislative tool for Renewable Fuel Standard two (RFS2), whose goal is to produce 36 billion gallons of renewable fuel in the United States by 2022. This mandate cannot be met with current agricultural, forestry, and municipal residue alone. It necessitates large scale planting of dedicated energy crops that do not compete with food or feed. When fully implemented in 2022, RFS2 is expected to reduce GHG emissions by 138 million metric tons, the equivalent of removing 27 million vehicles from the road.⁵

In the United States to date, the primary drivers of renewable energy development have been state renewable portfolio standards (RPS), federal stimulus funds⁶ and federal renewable fuel standards. A typical RPS mandates that a percentage of electricity sold within a state must be derived from renewable resources. States typically tailor their RPS requirements to satisfy particular policy objectives, electricity market characteristics, and renewable resource potential. Consequently, there is a wide variation in the minimum requirement of renewable energy, implementation timing, eligible technologies and resources, and other policy design details of a typical state RPS. To date, twenty nine states, Washington, D.C., and two territories have adopted some version of an RPS,⁷ either requiring or encouraging an increase in renewable energy. At all levels of government, policymakers are responding by crafting laws to promote renewable energy.

a. Energy Independence and Security Act of 2007 (EISA) - RFS2

Passed by Congress in 2007, EISA served as the legislative vehicle for RFS2 with Congress making sweeping revisions to the previous RFS1 system mandated by EPA.⁸ The stated purpose of EISA is to move the United States toward greater energy independence and security; increase the production of clean renewable fuels; protect consumers; increase the efficiency of products, buildings and vehicles; promote research on and deploy GHG capture and storage options; and to improve the energy performance of the Federal Government. Some of the more salient features of RFS2 are discussed below.⁹ RFS2 imposed renewable fuel obligations on all transportation fuel, not just

road gasoline. It requires that transportation fuel sold or introduced into the stream of commerce in the U.S. include a minimum of 9 billion gallons of renewable fuel in 2008 and 36 billion gallons per year, by 2022.¹⁰ RFS2 created 4 basic fuel types and each fuel type had a threshold level of GHG reduction, to be considered an advanced biofuel. The GHG emission reduction threshold for Cellulosic biofuel is 60 percent reduction; bio-mass based diesel, 50 percent GHG reduction; advanced biofuels, 50 percent GHG reduction; and renewable fuels (not considered advanced biofuels, such as corn-ethanol), 20 percent GHG reduction. RFS-2 addressed the long term sustainability of expanded biofuels production by including a lifecycle GHG emissions analysis, including direct and indirect land use changes (ILUC). It requires strict record keeping and the feedstock must be traced back to the land, including producers using woody biomass, waste products such as used cooking oil, animal fats, greases and foreign producers using conventional agricultural products must record and report the sources of their renewable biomass sources.¹¹

In order to move the renewable fuel through the commercial chain, EISA provides for a credit-trading program that is open to everyone, provided they are registered with the EPA to participate. Prior to introducing their fuel into the market place, obligated parties must demonstrate that a certain percentage of their fuel, based on the regulatory percentage for a particular year, is blended with renewable fuels.¹² An obligated party is a refiner that produces gasoline and/or an importer that imports gasoline within the forty eight contiguous states.¹³ Certain blenders of gasoline products are also considered obligated parties.¹⁴

Renewable Identification Numbers (RINs) are commonly referred to as the currency of compliance. A RIN is a tradable credit and is used by obligated parties to demonstrate compliance with their required share of a particular year's mandate.¹⁵ RINs are created, traded and retired using the EPA Moderated Transaction System (EMTS).¹⁶ The RIN trading scheme is designed to move the RIN through the entire supply chain and not be stalled in its journey, or hoarded by the producers of renewable fuels.¹⁷

The RIN is also used as a tracking device to track the gallons of renewable fuels through the network of production, refinement and distribution operation.¹⁸ A RIN is created and assigned to a batch of renewable fuel when it is first produced. In order to use the RIN for compliance, the RIN must be separated from the renewable fuel with which it is associated. Initially, the RIN can only be transferred with the physical transfer of fuel, and is not considered a tradable credit at that point.¹⁹ Subsequently, the RIN is separated from the fuel, thus activating it as a tradable credit and it can now be used for compliance purposes and can be traded independently of the fuel.²⁰ The separation event occurs when the renewable fuel is blended with petroleum products, or whenever an obligated party purchases the renewable fuel.²¹ With this dynamic market based system in place, speculators and investors are also driving the need to produce renewable fuels and its associated RINs.

Before a fuel type can be designated a renewable fuel to be used for compliance by an obligated party, and to participate in the generation of RINs, the fuel and fuel pathway must be approved by EPA before it can be considered a renewable biofuel under RFS-2.²² The biofuel is assessed by EPA based on the feedstock and the production technology. For fuel pathways that utilize feedstock that were not modeled in the RFS2 rulemaking, the applicant must submit information on the feedstock that will be used in the conversion process.²³ EPA's focus in qualifying a new fuel and fuel pathway has been on the lifecycle assessment, direct and indirect land use changes and the food versus fuel debate.²⁴ By approving a new biofuel feedstock, biofuel producers are more likely to invest in the cultivation, harvest, and processing of biofuel feed-stocks that are approved and can generate RINs.

b. Florida's 2012 Energy Bill

Florida has 3.4 million acres of cropland, and is one of the top agricultural producers in the nation and the third largest user of energy. Given its renewable energy potential and its burgeoning population, Florida lags far behind other states in renewable energy production. Florida imports from outside the state 97 percent of

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the fuels that are burned, such as natural gas, coal, oil, and uranium, to generate Florida's electricity needs. Practically speaking, all its transportation fuel is also imported from outside the state. This leaves Florida vulnerable to the volatility in the world fluctuating energy market and higher gasoline prices.

EISA calls for a rapid expansion and production of advanced renewable fuels by 2022, with yearly increases to reach thirty six (36) billion gallons by 2022. This volume cannot be met with current agricultural, forestry, and municipal residue alone.²⁵ It necessitates large scale planting of dedicated biofuel crops that do not compete with food or feed crops.²⁶ With its ability to convert fast growing crops and trees due to its climate and long growing season, agricultural residue, forest debris, undergrowth in timber-stands, leftover materials from the wood products industry, animal manures, urban wood waste, invasive plant species, and algae to various forms of renewable energy; Florida has caught the attention of the biofuel feed-crop industry.

The Florida Legislature recently seized upon this opportunity to attract more renewable energy investors to the state, create jobs, create tax revenues and retain more of its energy tax dollars by passing the 2012 Energy Bill (HB 7117). The 2012 Energy Bill has several measures to encourage the development and expansion of the renewable fuel sector in Florida, including biofuel production and distribution. The impact report accompanying HB 7117, states that the incentives contained in the bill, will generate an annual average of 28.7 million in new tax revenue over the fiscal year 2012-2016 and provide as many as 3,350 new jobs in all sectors of the Florida economy by 2017.²⁷

(1) Tax Incentives and Biofuel Feedstock Permitting

Among other tax incentives, the legislation streamlines the permitting process for biofuel feedstock crops and revises financial assurance requirements; expands the Renewable Fuel Standards to include "alternative fuel"

as defined in the bill; clarifies that retail dealers are not prohibited from selling or offering to sell unblended gasoline; directs the Florida Department of Agriculture and Consumer Services (DACS) to compile a list of retail dealers that sell or offer to sell unblended gasoline in the state and post the list on the department's website. In Florida, renewable fuel is defined as fuel produced from biomass that is used to replace or reduce the quantity of fossil fuel present in motor fuel or diesel fuel.²⁸ The Renewable Energy Technologies Investment Tax Credit was reinstated for the biofuel portion of this credit for another four years and expands it to include materials used in the distribution of other renewable fuels, up to a limit of \$10 million dollars in taxes for all taxpayers per fiscal year. The credit is capped at one million dollars, per taxpayer, per fiscal year.²⁹ The Florida Renewable Energy Production Credit was reinstated and modified the production tax credit for electricity produced and sold after January 1, 2013, through June 30, 2016.

(2) Permitting Process for Cultivating Nonnative Plants

HB 7117 revised the renewable fuel standard to include "other alternative fuel" which is defined as a fuel produced from biomass. Florida does not allow more than two acres of the cultivation of a nonnative plant, including genetically engineered plants that have been introduced for the purpose for biofuel production, unless a Biomass Permit is first obtained.³⁰ The permit is issued by the DACS, Division of Plant Industry (DPI).³¹ A permit is not required for plantings that are used for agricultural purposes, or if DPI determines, in conjunction with the Institute of Food and Agricultural Sciences at the University of Florida (UF), that the plant is not invasive under Florida environmental conditions and subsequently exempts the plant as provided for by 5B-57.011(4) Florida Administrative Code. The exemptions are determined on a case by case basis.

The application process to obtain a permit is fairly inexpensive and straightforward, considering the economic and environmental harm it is meant to prevent. The application must be submitted with a \$50.00 non-refundable fee. If the application is approved, a bond issued by a surety

company and approved by the DPI, or a certificate of deposit must be submitted before the permit is approved and the compliance agreement is issued.³² Permits are not issued for plants on the Florida Noxious Weed List or the Federal Noxious Weed List.³³ Prior to the passage of the 2012 Energy Bill, the bond or certificate of deposit for each biomass planting, had to be in an amount *no less* than 1.5 times the estimated cost of removing and destroying the planting. If a biomass planting was abandoned; the permit holder ceases to maintain or cultivate the plants authorized by the permit; the permit expires; or if the permit holder ceases to abide by the condition of the permit, then the permit holder is required to completely remove and destroy the plants that are subject to the permit and they must notify DPI within 10 days of the removal of the plants. The 2012 Energy Bill allows, in addition to a bond or certificate of deposit, any other type of security adopted by rule that would provide financial assurance of cost recovery for the removal of a planting. The bill decreased the bond amount *no more* than 1.5 times the estimated cleanup costs. It authorizes the decrease or removal of the bond or certificate of deposit when a decrease in the cultivating operations of the permit holder occurs, or research or practical field knowledge and observation indicate low risk of invasiveness by non-native species. Indeed, the 2012 Energy Bill has created less protection for Florida's natural systems from invasive exotic species, in an effort to ease the burden on businesses to enter the biofuel crop production arena.

2. Florida Natural Systems and Everglades Region

If one word could be used to describe the Everglades 100 years ago, it would be "sawgrass." Before humans re-engineered the Everglades with its system of dikes, levees, dams and water control structures, a slow moving river over sixty miles wide, one hundred miles long, and seldom deeper than two feet existed. There are no other Everglades in the world.³⁴ But the Everglades ecosystem of a century ago, with its unique hydrological flow, has been lost forever. The Everglades has shrunk to half its original size, largely due to the Central and Southern Florida (C&SF) project, where the U.S. Army Corps of Engineers erected

1,400 miles of dikes, dams, levees and water control structures to assure water supply and flood control for Florida's ever expanding population.

a. Effects of Introduction of Exotic Species to an Ecosystem

Exotic species can cause a wide range of environmental, societal and economic impacts. Invasion by introduction of exotic species is the second greatest threat to biodiversity after habitat destruction. Exotics can out-compete native species and irreversibly alter the ecosystem functioning and hydrology. An exotic species is any species, including its seeds, eggs, spores, or other biological material capable of propagating that species, that is not native to the introduced habitat.³⁵ A native species is a species that, other than as a result of an introduction, historically occurs in that particular habitat.³⁶ An invasive species is an exotic species whose introduction into an ecosystem in which the species is not native causes or is likely to cause harm to an ecosystem, or environmental boundaries.³⁷ When non-native species are introduced into an ecosystem in which they did not evolve, their populations sometimes explode in numbers because there are no natural checks and balances to limit the population growth of any one species. These checks and balances include such things as predators, herbivores, diseases, parasites, other organisms competing for the same resources and limiting environmental factors.³⁸ The unnaturally large population numbers can then have severe impacts because they disrupt natural communities and ecological processes; causing harm to the native species in that ecosystem because they are suddenly competing with a new species for the same food, water and shelter.

b. Potentially Invasive Exotic Biofuel Crops Grown in Florida

The goal of bioenergy production is to create the greatest amount of energy with the least amount of fertilizer, agricultural chemicals, water, and other planting and farming operations. Therefore, the ultimate feedstock to accomplish the foregoing would be one that is fast growing, highly productive, highly competitive, self-propagating, able to regrow quickly, resistant to pest and insect outbreaks, and able to thrive in poor soil and drought conditions. Many invasive species exhibit

these qualities and would make good bioenergy candidates. However, these characteristics are the cornerstone of making a species more likely to become invasive. Great biofuel crops can make great invasive species, and certain exotic biofuel crops that are permitted and grown in Florida, are known to be invasive in different parts of the United States. For example: *Arundo donax*, also known as Giant Reed, of which the planting in Florida is opposed by the Florida Native Plant Society and FL EPPC for agricultural production. Giant Reed is also known as giant cane, e-grass and bamboo reed, and is a large, clumping, fast-growing grass species native to India. It is not native to the United States. A single clone can cover hundreds of acres. It is considered invasive in much of its introduced range including parts of the United States. It is considered extremely damaging in California and Hawaii; it is noted as invasive or a serious risk in Texas, New Mexico, Nevada, Oregon, Virginia, Alabama, South Carolina and Tennessee. Giant Reed is also listed as potentially invasive in Georgia, North Carolina and Mississippi. Over the last fifteen years, California has spent in excess of seventy million dollars to control Giant Reed. In April 2010, Florida issued its first biomass planting permit to White Technology, LLC to allow the planting of eighty acres of Giant Reed.

Napierrgrass, also known as elephant grass, is native to Africa. It is a tall, clump forming grass and was brought to Texas and Florida by the Bureau of Reclamation as a forage crop. It is no longer used for that purpose, due to its weedy character and has since become a weed problem. It is now naturalized in central and south Florida, with smaller populations in north and west Florida, most often in disturbed areas such as roadsides, canal banks, and fields, but also in scrub, pine rock-land, hammock, sink, lake shore, swamp, and prairie habitats. Napierrgrass has been subjected to weed risk assessment and has been consistently classified as a likely invasive species. In Florida, Napierrgrass has created problems in flood-control systems by blocking access to canals, reducing water flows and overgrowing pump stations. Napierrgrass is listed on the FL EPPC as a Category I invasive species, changing community structures or ecological functions, or hybridizing with natives.

Camelina is an old world oil seed crop, used primarily for oil. It is grown under semi-arid conditions and little is known about Camelina in Florida at the present time. It is a nonnative weedy, mustard plant and is dubbed the "Cinderella of the biofuel crops." Over 10,000 acres of Camelina is being grown in Florida.

Switchgrass, commonly associated with the North American tall-grass prairie, is also part of Florida's natural ecosystem, but little is known about it in Florida although considered native to Florida. While it appears to be the most benign of the biofuel crops, the United States Department of Agriculture has described it as weedy or invasive in some regions or habitat, and it may displace desirable vegetation.

c. The Law of Unintended Consequences and History Repeating Itself

There are stark similarities between the government's introduction of the Melaleuca tree to Florida in 1908 and the commercial introduction of the Brazilian pepper tree in the 1800s to Florida; and the government's permitting and mandates for large-scale plantings of non-native biofuel crops in Florida. Many lessons can be learned from these examples of invasive species that transformed the ecology of the Everglades, which was not the original intention when the plants were introduced to Florida.

During fiscal year 2011, the South Florida Water Management District (District) spent approximately \$19 million dollars for the overall invasive species prevention, control, and management in South Florida. The Melaleuca and Brazilian pepper continues to be a state wide priority, with FY2011 eradication cost of \$1,510,000 and \$1,795,000 respectively. The District has directed their contractors to control all invasive plants that are listed as Category 1 species on the FL EPPC List of Invasive Plant Species. By using the FL EPPC list as a guide for control of invasive species, the District has given the FL EPPC list relevance and importance in Florida. The biofuel crop planting permit program should follow the District's example and not permit any non-native plants listed on the FL EPPC List of Category 1 species to be planted in Florida, or alternatively, the bond and financial assurances should be in an amount that will cover the cost of eradication and control, should it

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escape cultivation. It is counterintuitive that on one hand, Florida is spending millions of dollars to control and eradicate nonnative plant, and on the other hand, they are issuing permits to plant these same plants, or plants with similar invasive and weedy characteristics as the ones identified above.

Invasive species have no jurisdictional boundaries. State and federal government manage invasive species through cooperative programs, which provides the federal government a vehicle to influence state actions. Sometimes, federal law will preempt state involvement in managing invasive species. Both state and federal government use “noxious weed” lists to regulate invasive weeds, but generally speaking, states have regulatory authority to manage invasive weeds within their territory. When a plant is placed on a noxious weed list, it can be regulated and restricted; however, each state uses different criterion to evaluate a weed, as weeds can be invasive in one state but not invasive in another state. Unfortunately, if a potentially invasive biofuel crop is not placed on the federal or Florida’s noxious weed list, it can be legally imported for cultivation. Florida has several lists of prohibited plants, three of which are the Florida Noxious Weed list, the Florida Prohibited Aquatic Plants and FL EPPC’s List of Invasive Plant Species. In Florida, anyone can petition to have a plant listed on the noxious weed list.

CONCLUSION

The biofuel industry presents both opportunities and challenges for sustainable development in Florida, and the tradeoffs between them must be weighed. The cultivation of exotic species and genetically modified biomass crops must be managed sustainably, as they have the potential to become ecologically damaging should they escape cultivation and become established in local and natural areas such as the Florida Everglades ecosystem. Despite this knowledge, few safeguards exist in Florida’s law to prevent the spread of invasive species through the cultivation of

non-native biofuel crops. Florida faces a balancing act and must follow the precautionary principle, so as not to unleash the next catastrophic invasion of exotic species that could further devastate the native Everglades and surrounding ecosystems; deplete and pollute scarce freshwater resources; and require significant financial resources to eradicate a new set of invasive species.

The views and opinions expressed in this article are the author’s, not that of her clients or the ELULS Section.

Endnotes:

¹ The Energy Policy Act of 2005 (EPAct) established the first renewable fuel volume mandate in the United States (RFS1). RFS1 required 7.5 billion gallons of renewable fuel to be blended into gasoline by 2012. RFS1 was further expanded by The Energy Independence and Security Act of 2007 (EISA), which require 36 billion gallons of renewable fuel to be blended into gasoline by 2022 (RFS2). ENVIRONMENTAL PROTECTION AGENCY, RENEWABLE FUEL STANDARD (RFS), available at <http://www.epa.gov/otaq/fuels/renewablefuels/index.htm> (last visited June 15, 2012).

² Prior to 2006, Florida produced very little energy using agriculture and other biomass resources. With a \$100 billion agriculture industry, with more than 40,000 farms and ranches, 15.9 acres of timberland, 10 million acres of cropland and 3.4 million acres of pastureland, Florida ranks as one of the top agriculture producing states in the nation. See generally, Jay Levenstein, *The DACS First Energy Summit*, XXXIII, 2 J. Land Use & Envtl. L., 1, 14 (2011) (discussing the energy summit), available at <http://www.eluls.org> (last visited June 30, 2012).

³ Barack Obama, U.S. President, Address to Joint Session of Congress (Feb. 24, 2009), transcript available at <http://www.nytimes.com/2009/02/24/us/politics/24obama-text.html> (last visited 03/24/2012). (“We have known for decades that our survival depends on finding new sources of energy. ... To transform our economy, to protect our security and save our planet from the ravages of climate change, we need to ultimately make clean, renewable energy ... to support those innovations; we will invest \$ 15 billion a year to develop technologies like ..., advanced biofuels, clean coal and more efficient cars and trucks”).

⁴ Biomass can be understood as regenerative (renewable) organic material that can be used to produce energy. Biomass is manufactured from crops, wood, manure, land fill gasses and alcohol fuels. See generally <http://www.biomass.net/> (last visited November 8, 2012).

⁵ U.S. Dep’t of Energy, Biomass Program: Growing America’s Energy Future (April 6, 2010), available at http://www.usda.gov/documents/morning_speaker_DOE.pdf (last visited June 30, 2012).

⁶ The American Recovery and Reinvestment Act of 2009, U.S. Pub. L. 111-5, 111th Cong. (Feb. 17, 2009), available at http://www.recovery.gov/About/Pages/the_act.aspx (last visited June 30, 2012). (The Act provided \$16.8 billion for energy efficiency and renewable energy, including \$ 800 million for biomass).

⁷ See, e.g., DATABASE OF STATE INCENTIVES FOR RENEWABLE (DSIRE), available at <http://www.dsireusa.org> (last visited June 30, 2012) (“DSIRE is a comprehensive source of information on state, local, utility and federal incentives and policies that promote renewable energy and energy efficiency.”).

⁸ The Energy Policy Act of 2005 (EPAct), Pub. L. No. 102-58, 119 Stat. 594 was enacted in response to growing concern over U.S. domestic energy security, climate change, high energy prices and the need for clean energy sources. EPAct added section 211(0) to the Clean Air Act (CAA), a section implementing the renewable fuel program (RFS1). See generally White House, Fact Sheet: Energy Independence and Security Act of 2007, available at <http://www.whitehouse.gov/news/releases/2007/12/20071219-1.html> (last visited March 23, 2012).

⁹ *Id.*

¹⁰ Environmental Protection Agency, *Supra* note 1, at 1.

¹¹ *Id.*

¹² MICHAEL B. GERRARD, THE LAW OF CLEAN ENERGY 455 (2011).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ GRAHAM NOYES, CLAYTON McMARTIN, America Advances to Performance-Based Biofuels (whitepaper 2/26/2010).

¹⁶ EPA Moderated Transaction System, at: <http://www.epa.gov/otaq/fuels/renewablefuels/epamts.htm>

¹⁷ Graham, *supra* note 15.

¹⁸ GERRARD, *supra* note 10, at 456.

¹⁹ *Id.*

²⁰ *Id.*

²¹ NOYES ET AL., *supra* note 15, at 14.

²² See 40 C.F.R. §80.1416 (for the process that parties must follow to request that EPA conduct new assessments and make future determinations).

²³ *Id.*

²⁴ For a list of approved fuels and fuel pathway, see 80 C.F.R. § 1426. Table 1.

²⁵ The National Invasive Counsel, Biofuels: cultivating Energy, not Invasive Species, August 11, 2009, available at http://www.invasivespecies.gov/home_documents/BiofuelWhitePaper.pdf (last visited, May 5, 2012).

²⁶ *Id.*

²⁷ Impact of the proposed energy tax legislation for Florida is available at www.freshfromflorida.com/newsroom/press/pdf/04132012_Florida_Energy_Bill_Economic_Impact_Analysis.pdf (last visited April 15, 2012).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Fla. Stat. § 581.083.

³¹ Fla. Stat. § 581.083(4).

³² See Florida Dep’t of Agriculture and Consumer Services, *Methods Development & Biological Control*, available at <http://www.freshfromflorida.com/onestop/plt/methods.html> (last visited April 15, 2012).

³³ 7 C. F. R. § 360.200.

³⁴ Thomas E Lodge, *The Everglades Handbook: Understanding The Ecosystem* 3 (3D ED. 2010).

³⁵ See generally U.S. Fish & Wildlife Services, *Invasive Species*, available at <http://www.fws.gov/invasives/faq.html#cies>, (last visited June 30, 2012).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

Florida Case Law Update

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In certiorari review a Circuit Court is not bound by a local Commission's longstanding interpretation of a local Code if that interpretation is unreasonable or erroneous. *Town of Longboat Key v. Islandside Property Owners Coalition, LLC*, 94 So.3d 1037 (Fla. 4th DCA 2012).

In 2009, the town of Longboat Key approved a \$400 million redevelopment plan for the Longboat Key Club over the objection of the planning, zoning and building director. Islandside Property Owners Coalition, LLC, and others challenged the redevelopment plan at the hearings before the Town's Planning and Zoning Board and the Town Commission, and petitioned the circuit court for a writ of certiorari to quash the development order citing conflicts with the Town's Zoning Code. *Id.* at *1039. The circuit court granted the writ, and the Town and Key Club petitioned for a second-tier certiorari review contending the circuit court (1) exceeded its jurisdiction by reweighing the evidence, and (2) erred in not deferring to the town's interpretation of the Code under *Rinker Materials Corp. v. City of North Miami*, 286 So.2d 552 (Fla. 1973). *Id.*

The Fourth District limited its review to whether the circuit court departed from the essential requirements of law, noting to overturn the circuit court the law requires more than a simple legal error or an erroneous conclusion based on misapplication of the correct law, and there must be a violation of a clearly established principle of law resulting in a miscarriage of justice. *Id.* The court held that the town failed to meet this exacting standard. *Id.*

The Town posited that the circuit court erroneously concluded that the redevelopment plan was in conflict with the Zoning Code because it relied too heavily on the objections of planning, zoning and building director, and failed to defer to the Commission's interpretation of its own Code. But, the Fourth District held the circuit court's references to the director's objection were not enough

to conclude it reweighed the evidence, and the circuit court correctly applied the rules of statutory interpretation. *Id.* At *1040-41.

Rinker requires that local ordinances are subject to the same rules of statutory interpretation as are state statutes, and a court interpreting local ordinances must first look to the plain and ordinary meaning of the words in the ordinances. *Rinker* at 553-54. Because the circuit court correctly concluded the local ordinances were not ambiguous, it correctly relied on their plain meaning to conclude they were in conflict with the development plan. A local agency is bound by the wording of its Code the same way a legislature is bound by the wording of its laws. *Id.*

Where a deed of sale violated a County Covenant requiring the deed to specify the number of units a buyer may build on the property, remaining development rights associated with the property were not forfeited because such a condition was not included in the contract. *19650 NE 18th Ave LLC v. Presidential Estates Homeowners Ass'n, Inc.*, - So.3d -, 2012 WL 4448792 (Fla. 3rd DCA 2012).

After a property owner voluntarily withdrew its claim against the property owners association seeking to determine its development rights under various restrictive covenants, the association amended its counterclaim seeking a determination that the property owner's successor had no further development rights associated with the property. *Id.* at *1. The circuit court awarded partial summary judgment to the association, finding the successor forfeited its development rights because the deed of sale was in violation of a county covenant requiring it to specify upon transfer the number of units a buyer may build on the property subsequently acquired. *Id.* at *2-3.

The Third District held that the circuit court erred in ruling for the association because it (1) violated the rules of contract interpretation

by effectively adding a forfeiture provision to the covenant, and (2) construed the provisions of the covenant against the free and unrestricted use of real property. *Id.* at *3. After analysis of the covenant's controlled densities provision, the court concluded the section was neither ambiguous nor contradictory, that it could be commonly understood, and that there was nothing to indicate an intention to include a forfeiture condition for failing to list the number of potentially developable units. *Id.* at *2. A court may not add language the parties did not contemplate at the time of the execution. *Id.* at *3. Additionally, the circuit court ruling was contrary to the general rule of covenant interpretation that requires courts to construe restrictions in favor of the free and unrestricted use of real property. *Id.* The Third District held the restriction should be enforced based on its clear and unambiguous terms which did not include a forfeiture condition. *Id.*

The homestead-exemption statute's provision requiring that a property owner reside on the property to be entitled to a homestead property tax exemption violated Florida's constitutional provision governing the homestead exemption. *Garcia v. Andonie*, - S. Ct. -, 2012 WL 4666458 (Fla. 2012).

Two Florida taxpayers who are citizens of Honduras – and Florida legal residents and property owners – applied for a homestead property tax exemption for the 2006 fiscal year for their condominium in Key Biscayne, Florida, as provided for in article VII, section 6(a), of the Florida Constitution. *Id.* at *6. The taxpayers averred that the property was being maintained as the permanent residence of their minor children, each of whom is a citizen of the United States and naturally and legally dependent on the taxpayers. *Id.* The property appraiser administratively denied the application, stating the taxpayers are not permanent residents of Florida and therefore cannot permanently

continued...

“reside” at the residence pursuant to subsection 196.031(1), Florida Statutes (2006). *Id.*

The taxpayers appealed the appraiser’s decision to the Miami-Dade Value Adjustment Board which granted the taxpayers’ ad valorem tax exemption. The appraiser appealed this decision to the circuit court, where he moved for summary judgment alleging the taxpayers were not entitled to the ad valorem tax exemption because they could not establish the Florida property was being used as the taxpayers’ permanent residence. *Id.* The circuit court denied the motion and entered an order granting the exemption based on a sworn affidavit affirming the property was being used as the permanent residence of the three dependent children who were citizens of the United States, had never lived anywhere else and who would continue to live at the residence until no longer dependent on the taxpayers. The appraiser offered no evidence to counter the affidavit and appealed.

The Third District, referring to the definition of “permanent residence” contained in subsection 196.012(18), Florida Statutes (2006), concluded that the affidavit sufficiently established the property was used as the children’s permanent residence. It also concluded that the language of subsection 196.031(1) requiring residency of the property owner was in conflict with article VII, section 6(a) of the Florida Constitution and therefore invalid and unenforceable. *Id.* at *8.

On appeal the Florida Supreme Court held that article VII, section 6(a) establishes in plain language two separate and independent means by which a property owner may establish entitlement to the homestead tax exemption. The property may be either (1) the permanent residence of the owner, or (2) the permanent residence of another legally or naturally dependent upon the owner. *Id.* at *3.

When a property owner establishes entitlement to the tax exemption by permanent residency of a legal or natural dependent, he is not additionally required to establish his own residency. *Id.*

The appraiser argued the evidence introduced at the circuit court (the affidavit) was insufficient to establish that the property was in fact being used as the minor children’s permanent residence. The Florida Supreme Court ruled the appraiser failed to preserve the challenge to the taxpayers’ evidence when he failed to offer contrary evidence at the circuit level. *Id.* at *9.

The statute permitting issuance of writ of execution against Florida departments for judgment in eminent domain actions does not permit issuances of writ of execution against Florida departments in inverse condemnation actions. Further, a constitutional challenge to section 11.066, Florida Statutes, is not ripe for adjudication prior to appropriation proceedings before the Legislature. Fla. Dept. of Agriculture and Consumer Services v. Mendez, - So.3d -, 2012 WL 3023214 (Fla. 4th DCA 2012).

Two parallel class action proceedings, one in Palm Beach County and another in Broward County, seeking compensation for the destruction of citrus trees by the Florida Department of Agriculture and Consumer Services in inverse condemnation were consolidated in the Fourth District. *Id.* The classes argue that section 74.011, Florida Statutes, which excludes eminent domain actions from the appropriations process expounded in section 11.066, Florida Statutes, applies to inverse condemnation cases also. Additionally, in the alternative, they argue section 11.066 is unconstitutional because it restricts the rights of homeowners to recover full and just compensation, and interferes with the power of the judiciary. *Id.* at *3. Section 11.066 prohibits payments of monetary judgments against state agencies except through appropriation by the

legislature. Fla. Stat. § 11.066 (2012).

The circuit court in Palm Beach County issued a writ of execution against the Department concluding that the section 74.091 exception for eminent domain cases also applied to inverse condemnation cases, and the class could seek a writ of execution against the Department without going through the section 11.066 appropriations process. *Id.* at *1.

The circuit court in Broward County declined to follow the ruling in Palm Beach County and granted the Department’s motion to preclude the issuance of a writ of execution against the Department. The court concluded the class’ remedy was the appropriations process provided by section 11.066. *Id.* at 2.

The Fourth District, relying on the principles of statutory interpretation, concluded that section 74.011 was plain and unambiguous and clearly applied only to eminent domain actions. *Id.* The court declined to consider the constitutional issues because the issue in the Palm Beach case was not preserved and the issue in the Brevard Case was not yet ripe. *Id.* at *3. Part of the preservation requirement is the securing of a ruling which the Palm Beach Court did not issue. *Id.* In regards to the Brevard class, the court noted the legislature may approve the full amounts of the awards after the 11.066 process, thus whether the statute restricts full and just compensation is not ripe for discussion.

In October 2012, the Fourth District submitted a certified question of great public importance to the Florida Supreme Court as a result of this case: “Are property owners who have recovered final judgments against the State of Florida in inverse condemnation proceedings constitutionally entitled to invoke the remedies provided in section 74.190, Florida Statutes, without first petitioning the legislature to appropriate such funds pursuant to section 11.066, Florida Statutes?” *Fla. Dept. of Agriculture and Consumer Services v. Mendez, - So.3d -, 2012 WL 4795722 (Fla. 4th DCA 2012).* As of publication of this update, the Florida Supreme Court has not considered the certified question.



On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of November 6, 2012. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Miami-Dade County v. Brodeur, Case No. SC12-822. Petition for review of 3rd DCA decision in *Brodeur v. Miami-Dade County*, Case No. 3D11-503, reversing the trial court's order dismissing a complaint filed by an elected member of the Miami-Dade County Community Zoning and Appeals Board for Area 12, Ms. Brodeur, for lack of subject matter jurisdiction, apparently based on the general rule that a public official lacks standing to challenge the rules and procedures applicable to his or her official acts. 81 So.3d 491 (Fla. 3rd DCA 2012). **Status:** Petition for review denied September 19, 2012.

Martin County Conservation Alliance, et al v. Martin County, et al, Case No. SC11-2455. Petition for review of 1st DCA decision in *Martin County Conservation Alliance, et al v. Martin County*, Case No. 1D09-4956, imposing a sanction of an award to appellees of all appellate fees and costs following an earlier decision of the district court that "the appellants have not demonstrated that their interests or the interests of a substantial number of members are 'adversely affected' by the challenged order, so as to give them standing to appeal." 73 So.3d 856 (Fla. 1st DCA 2011). **Status:** The Court accepted jurisdiction on May 11, 2012.

Board of Trustees of the Internal Improvement Trust Fund v. American Educational Enterprises, LLC., Case No. SC10-2251. Petition for review of 3rd DCA decision quashing the trial court's order compelling production of certain corporate financial documents. **Status:** Quashed. 37 Fla. L. Weekly 5589a (Fla. September 27, 2012).

FIRST DCA

FINR, II, Inc. v. CF Industries, Inc. and DEP, Case No. 1D12-3309. Petition for review of final DEP order granting CF's applications for various

approvals, including Environmental Resource Permit, conceptual reclamation plan, wetland resource permit modification and conceptual reclamation plan modification. **Status:** Notice of appeal filed July 9, 2012.

Sexton v. Board of Trustees of the Internal Improvement Trust Fund, Case No. 1D11-5988. Appeal from final order denying as untimely an amended petition for administrative hearing seeking to challenge the issuance of a 50-year sovereign submerged lands easement to FDOT for the reconstruction of the Little Lake Worth Bridge in Palm Beach County. **Status:** Notice of appeal filed November 4, 2011; all briefs have been filed.

MACLA Ltd II v Okaloosa County, et al, Case No. 1D11-4975. Petition to review DEP final order granting joint coastal permit and authorization to use sovereign submerged lands for the restoration of 1.7 miles of shoreline just east of East Pass, a project known as the West Destin Beach Restoration Beach Project. **Status:** Appeal and cross appeal voluntarily dismissed on August 16, 2012.

FOURTH DCA

DACS v. Mendez, et. al., Case No. 4D11-4644 and 4D12-196. **Status:** On October 10, 2012, the court certified the following question to be of great public importance: "Are property owners who have recovered final judgments against the State of Florida in inverse condemnation proceedings constitutionally entitled to invoke the remedies provided in section 74.091, Florida Statutes, without first petitioning the Legislature to appropriate such funds pursuant to section 11.066, Florida Statutes?"

FIFTH DCA

RLI Live Oak, LLC v. SFWMD, Case No. 5D11-2329. RLI appealed the Final Judgment finding that RLI participated in unauthorized dredging activity, culvert installation and filling of wetlands without and ERP awarding the District \$81,900 in civil penalties and requiring restoration. **Status:** On August 31, 2012, the court partially reversed and remanded,

determining that the trial court improperly assessed civil penalties based on a preponderance of the evidence standard and not on the clear and convincing evidence standard. 37 Fla. L. Weekly D2089a. Subsequently, the district court granted the District's request and certified the following question as a matter of great public importance: "Under the holding of *Department of Banking & Finance v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996), is a state governmental agency which brings a civil action in circuit court required to approve the alleged regulatory violation by clearing convincing evidence before the court may assess monetary penalties. 37 Fla. L. Weekly D2528a (Oct. 26, 2012).

U.S. SUPREME COURT

Koontz v. SJRWMD, Case No. 11-1447. Petition for writ of certiorari to review the decision by the Florida Supreme Court in *SJRWMD v. Koontz*, 36 Fla. L. Weekly S623a, in which the Court quashed the decision of the 5th DCA affirming the trial court order that SJRWMD had effected a taking of Koontz's property and awarding damages. **Status:** Petition granted October 5, 2012; oral argument set for January 15, 2013.



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Course No.1455R

8:00 a.m. – 8:30 a.m. **Registration**

8:30 a.m. – 8:45 a.m. **Welcome**

8:45 a.m. – 9:30 a.m.

Introduction to CDDs

Gary L. Moyer, District Management Services

9:30 a.m. – 10:45 a.m.

Implications of CDDs for Real Estate Transactions: Real Estate and Association Issues

Jason E. Merritt, Hopping Green & Sams, P.A.

Eleanor W. Taft, Eleanor W. Taft, P.A.

10:45 a.m. – 11:00 a.m. **Break**

11:00 a.m. – 12:00 noon

Current and Future Trends of Municipal Bond Markets

Brett Sealy, MBS Capital Markets, LLC

William D. "Danny" Tyler, Nabors, Giblin & Nickerson, P.A.

12:00 noon – 1:00 p.m. **Lunch (On Your Own)**

1:00 p.m. – 2:30 p.m.

Anatomy of a Real Estate Project Meltdown: District, Developer, Trustee and Conventional Lender Perspectives

Brian A. Crumbaker, Hopping Green & Sams, P.A.

Erin E. Banks, Carlton Fields, P.A.

Warren S. Bloom, Greenberg Traurig, P.A.

Erin R. McCormick, Fowler White Boggs, P.A.

2:30 p.m. – 2:45 p.m. **Break**

2:45 p.m. – 3:30 p.m.

Future Trends for CDDs

Brian A. Crumbaker, Hopping Green & Sams, P.A.

William J. Rizzetta, Rizzetta & Company

3:30 p.m. – 3:45 p.m. **Break**

3:45 p.m. – 4:30 p.m.

Ethical Considerations in CDD Transactions

Kenneth R. Artin, Bryant Miller Olive

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Law School Liaisons

Center for Earth Jurisprudence

by Jane Goddard

Center for Earth Jurisprudence Continues Springs Advocacy

Director Patricia Siemen and staff attorney Rob Williams of the Center for Earth Jurisprudence have met with representatives from the St. Johns River Water Management District regarding comments submitted to Hans G. Tanzler, III, executive director of the district, and the status of springs in the Wekiva River Basin. Barry University School of Law student Brock Turk also attended the meeting.

The meeting followed a letter from Siemen and Williams, where they requested that the district immediately implement a recovery strategy for the springs in the Wekiva River Basin. Siemen and Williams also requested a moratorium on the issuance of consumptive use permits within the Wekiva River Basin until a recovery plan and timetable are in place.

Siemen and Williams' letter highlighted statutory language that requires the district to act "expeditiously" and to restore flows "as soon as practicable," instead of proposing more studies, taking as long as possible to set minimum flows for the other springs in the district, and following a slow, multi-year process for creating spring basin management plans. They pressed the district to create a recovery plan for all the springs in the Wekiva River Basin by the end of 2012.

"The statutory requirements are clear," said Patricia Siemen. "We know enough to take action now, to preserve and restore the springs that support all parts of the ecosystem, including humans, before it's too late."

"Blue Water, Green World" Conference to Present a Vision of Florida's Future

The Center for Earth Jurisprudence will present its 4th Annual Future Generations Conference, "Blue



Center for Earth Jurisprudence staff (L-R) Traci Timmons, Sister Patricia Siemen, Jane Goddard and Lori Lovell welcomed artist and conservationist Jim Draper for his presentation, "Feast of Flowers."

Water, Green World," on February 8, 2013, at the Barry University School of Law in Orlando. The conference will focus on a vision of Florida's future in which water is more fairly allocated for the health and benefit of all, and examine the successes and failures of water policies in Florida and lessons to be learned from other jurisdictions. CLE credit will be offered.

For more information about this event and to register, contact jgoddard@barry.edu, call (321) 206-5788, or visit www.EarthJuris.org.

Florida Springs, History, Art, and Conservation

Award-winning Florida nature photographer John Moran and well-known painter Jim Draper recently displayed their work and showcased Florida springs, ecosystems, and history at the Center for Earth Jurisprudence.

John Moran presented "Our Water, Our Future" at the Barry University School of Law in Orlando on September 27, 2012. Moran's talk featured historical photographs and images from his 30-year career. Many of the photographs juxtaposed views of the same locations, taken years apart, to visually demonstrate the changed

reality of Florida's water-dependent landscape due to development, growth, and conservation policies.

Following Moran's presentation, a panel discussion on water policy included writer and documentary filmmaker Bill Belleville; landscape architect Nancy Prine, a board member of the Friends of the Wekiva River, and attorney Rob Williams of the Center for Earth Jurisprudence.

On October 25, 2012, landscape painter Jim Draper displayed his large-scale original paintings as part of a multimedia appetizer to his full-scale exhibit, "Feast of Flowers" at the Barry University School of Law in Orlando. Draper's perspective focused on the 500th anniversary of European arrival in Florida and how history and aesthetics intersect with environmental sustainability.

After the presentation, Draper joined writer and documentary filmmaker Bill Belleville and Sister Patricia Siemen, director of the Center for Earth Jurisprudence, in a lively discussion with the audience about the origins, challenges, and rewards of personal conservation activities.

Nature Journaling Workshops Encourage Observation, Skills

Two workshops offered by the



Nature journaling workshop participants followed a historic railway track to the bank of the St. Johns River.

Law School Liaisons continued....

Center for Earth Jurisprudence on October 21, 2012, and November 4, 2012, gave participants the opportunity to practice “the art of seeing” and recording their observations, guided by award-winning environmental writer and documentary filmmaker Bill Belleville. His latest book, *Salvaging the Real Florida: Lost & Found in the State of Dreams*, won the 2011 National Outdoor Book Award for natural history literature.

The workshops were held at the Lake Harney Wilderness Area in Geneva, Florida, a 300-acre preserve located on the banks of the St. Johns River. The property is part of the Seminole County Natural Lands program and contains historic sites and a variety of habitats.

Founded in 2006, the Center for Earth Jurisprudence is an initiative of the Barry University School of Law to

advance a transformative Earth-centered paradigm that advocates protecting the intrinsic value and legal rights of nature. The Center’s work includes research, education, publication, and policy advocacy. Learn more by visiting www.EarthJuris.org or by “liking” CEJ on Facebook at www.facebook.com/earthjuris.

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An Update on Developments at the Florida State University College of Law: Fall 2012

by Prof. David Markell



Fall 2012 Programming

The Florida State University College of Law hosted a series of timely programs this fall. Working closely with the Administrative Law Section of the Florida Bar, the College of Law hosted two sessions on conducting administrative law research that featured leading members of the Bar, including: **Francine Ffolkes**, Administrative Law Counsel/Senior Attorney, Florida Department of Environmental Protection (FDEP), **The Honorable Lynne Quimby-Pennock**, Division of Administrative Hearings, **Daniel Nordby**, General Counsel, Florida Department of State, **Jowanna Oates**, Senior Attorney, Joint Administrative Procedures Committee, **Brian Newman**, shareholder, Pennington, Moore, Wilkingson, Bell & Dunbar, P.A.,

and **Stephen Emmanuel**, shareholder, Ausley & McMullen, P.A. **Patricia Nelson**, Deputy Director of the State’s Office of Fiscal Accountability & Regulatory Reform.

The College also hosted *Prospects for a Revenue-Neutral Carbon Tax*, which explored adoption of a federal revenue-neutral carbon tax. Panelists included **Bob**

Inglis, former U.S. Representative for South Carolina’s 4th congressional district and founder of the Energy and Enterprise Initiative; **Professor Shi-Ling Hsu**; and **Randall Holcombe**, DeVoe Moore

Professor of Economics at Florida State University.

This fall the College of Law launched a new enrichment series for its Environmental Law Certificate students and Environmental LL.M. students. Fall lecturers were **Rich Budell**, Director of the Office of Agricultural Water Policy, Florida Department of Agriculture and Consumer Services; **Professor Hannah Wiseman**; **Professor Cinnamon Carlarne**, Ohio State University College of Law; and **Preston McLane** (’09), Oertel, Fernandez, Bryant and Atkinson, P.A. Twenty-four students are participating in the College of Law’s Environmental Certificate Program for the 2012-’13 academic year, and four new students have enrolled this year in the Environmental LL.M. program.



Bob Inglis



Professor Shi-Ling Hsu



Professor Randall Holcombe

Law School Liaisons continued...

LAW SCHOOL LIAISONS

from page 21

Visiting Professor

Prof. Emily Mezell, Wake Forest University School of Law, is a visiting professor for the 2012-13 academic year. Prof. Mezell is teaching Risk, Public Policy and Law in the fall and Water Law in the spring.



Professor Emily Mezell

Environmental Law Society

The student-run Environmental Law Society (ELS) has been extraordinarily active this semester. Activities include a regular lunch workshop series that has featured leading members of the Bar, including: **Cari Roth**, who chairs the Land Use and Governmental Consulting practices at Bryant Miller Olive, and **Pepper Uchino**,

current staff director for the Florida Senate Committee on Environmental Preservation and Conservation. In addition, the ELS organized a Supreme Court Preview for the several environmental cases the Court will hear this term; a mixer with the Environmental Law & Land Use Section of the Bar; and a panel discussion on practicing environmental and land use law with several College of Law alumni/ae practicing with Hopping Green & Sams, including **David Childs**, **Vinette Godelia**, **Tucker Mackie**, and **Michael Petrovich**.

Alumni Updates and Honors

Justin B. Green ('05) recently accepted a position as an Environmental Administrator with the FDEP. He works in the Division of Air Resource Management's Office of Permitting and Compliance in Tallahassee.

Eric Hinton ('12) serves as Legislative Attorney for the Senate Committee on Environmental Preservation and Conservation.

Thomas G. Pelham ('71) was inducted into the College of Fellows of the American Institute of Certified Planners, one of the highest honors

bestowed by the institute. Admission to the college is based on significant contributions to the planning profession, exceptional accomplishments and leadership in planning and related fields over an extended period of time, and a demonstrated legacy for the profession and community.

Samuel Farkas's ('12) article, "Third Party PPAs: Unleashing America's Solar Potential," will be published in the *Journal of Land Use & Environmental Law*.

Stephanie Dodson Dougherty's ('12) article, "Arctic Justice: Addressing Persistent Organic Pollutants," will be published in the University of Minnesota Law's *Law and Inequality: A Journal of Theory and Practice*.

We hope you will join us for one or more of our programs. For more information about our programs, please consult our web site at: <http://www.law.fsu.edu>, or please feel free to contact Prof. David Markell, at dmarkell@law.fsu.edu. For more information about our Environmental Law Program, please visit http://www.law.fsu.edu/academic_programs/environmental/index.html.

UF Law Update

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

PIEC Conference Scheduled Feb. 21-23

The 19th annual Public Interest Environmental Conference (PIEC) will be held on February 21-23, 2013, at the University of Florida Levin College of Law. The theme of this year's conference is "*The Endangered Species Act at 40*."

The 40th anniversary of the Endangered Species Act occurs in 2013. In honor of this occasion, the PIEC will focus on the evolution of endangered species protection over the past four decades. The conference will feature panels on a variety of topics discussing cross-cutting themes in endangered species protection, including whether the Endangered Species Act is accomplishing its purposes; new and continuing challenges to endangered species protection; and innovative approaches

to implementation of the Act.

Keynote speakers for this year's PIEC include Carl Safina, founding president of the Blue Ocean Institute, and award winning author of "Song for the Blue Ocean," and "Eye of the Albatross," and Zygmunt Plater and Patrick Parentau, attorneys in the landmark decision of *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) ("The Snail Darter Case").

As always, the Conference will include special events and activities, citizen and attorney skills training opportunities provided by the ELULS Public Interest Committee, and plenty of networking venues. This year's conference will feature a Saturday workshop on "Challenging Florida and Federal Permits Based on the Endangered Species Act," sponsored by the Public Interest Committee of the

Florida Bar Environmental and Land Use Law Section. For additional information, please contact the PIEC 2013 co-chairs: Chelsea J. Sims (csims925@ufl.edu) and Rachael M. Bruce (brucer88@ufl.edu).

Environmental Capstone Colloquium Scheduled for Spring

Professor Christine Klein has announced the schedule for the annual Spring 2013 Environmental Capstone Colloquium. The theme will be "*All About Endangered Species*" in honor of the 40th anniversary of the Endangered Species Act. Among the topics to be discussed are: "*Endangered Species and Climate Change*" and "*Putting the ESA Into Practice: The Ultimate Marriage of Science and Law*".

Speakers are: Jan. 25 -- Alejandro Camacho, Professor of Law and
Law School Liaisons continued...

Director, UCI Law Center for Land, Environment, and Natural Resources, University California School of Law, Irvine; Feb. 7 -- Kalyani Robbins, Associate Professor of Law, University of Akron School of Law; Feb. 14 -- Heather Halter Coll, Fishery Biologist, National Marine Fisheries Service; and Feb. 21 -- David A. Dana, Standord Clinton Sr. and Zylpha Kilbride Clinton Research Professor of Law, Northwestern University School of Law. The series was funded by contribution from Hopping Green & Sams and Jennifer Springfield, P.A. For additional information, please contact Lena Hinson (hinson@law.ufl.edu), Program Assistant.

Nelson Symposium to Discuss Preemption

The 12th Annual Richard E. Nelson Symposium will be held February 8, 2013, at the UF Hilton Hotel in Gainesville. The topic is "Preemption Puzzles: Firearms, Fracking, Foreigners, Fuels, and Farming." Speakers include John R. Nolon, Professor of Law, Pace University School of Law; Michael O'Shea, Professor of Law, Oklahoma City University School of Law; Rick Su, Associate Professor, SUNY Buffalo Law School; Hannah Wiseman, Assistant Professor, Florida State University College of Law; and Michael Allan Wolf, Richard E. Nelson Chair in Local Government Law, University of Florida Levin College of Law. Respondents are Evan D. George, Gainesville, Florida; and Amy T. Petrick, Senior Assistant County Attorney, Palm Beach County. Student presenters are Samantha Culp and Eric Fisher. Additional speakers will be announced at a later date.

UF Offers Spring Practice Courses

The UF College of Law Environmental and Land Use Law Program will offer the following conservation and development practice related courses for Spring 2013 Semester:

Contemporary International Development: Law, Policy and Practice (1 credit) (**SPRING SEMESTER ON CAMPUS**)

Sustainable Development Field Course: Law Policy and Practice (2 credits) (**SPRING BREAK IN BELIZE**)

Students are eligible to enroll in either or both. Course descriptions and further information are provided below.

Contemporary International Development: Law, Policy and Practice addresses the international and comparative law framework within which international development is carried out. The course explores models of international development and development assistance as these have evolved since the Post WW II Bretton Woods accords that created the World Bank Group and regional progeny. Topics will include, but are not limited to, free and fair trade, environmental security, human rights and global health. The course will be coordinated by UF law faculty and taught by law and policy practitioners from Costa Rica, Argentina and Jamaica. Course instructors include Otton Solis, a Costa Rican development economist, former minister of the economy and presidential candidate; Oscar Avalles, an Argentinean attorney and World Bank country director for Guatemala; and Danielle Andrade, a Jamaican environmental and human rights attorney with the Jamaica Environment Trust. The 1 credit course will meet for 1 hour on Tuesday and Wednesday at 9 am and conclude on February 27, before Spring Break.

SPRING BREAK FIELD COURSE IN BELIZE -- *Sustainable Development Field Course: Law Policy and Practice* will provide students with an on-site, interdisciplinary understanding of the law and policy challenges associated with "sustainable development" in a developing country. Students will travel to and within Belize over Spring Break and delve into international and domestic law issues concerning protected areas, indigenous land rights, intellectual property in biological diversity, water, mining and energy development, fisheries and coral reef conservation – all within the context of national pressures for human development. In addition to domestic Belizean law and international development policy, students will be exposed to the unique legal framework of the commonwealth Caribbean. The course will include skills exercises based around ongoing projects of the UF Law Conservation Clinic. The course includes a Program fee that will cover in-country expenses and students must make their own international travel arrangements. Enrollment is capped at 12 students. Preference is given to students enrolled in the College of Law's Environmental and Land Use

Law Program, but others may apply on a space-available basis.

Environmental Law LL.M. Class Impressive

UF law's 2013 class of LL.M. students in environmental and land use law offers diverse backgrounds and interests.

Becky Convery graduated from the University of Montana School of Law and also received a Masters Degree in Foreign Affairs from the University of Virginia. She brings eight years of practice experience, including extensive work as a City and County Attorney, with a focus on land use law. For her LL.M. project, she will study the long and complicated legal history of the reintroduction of endangered species, using the wolf as a case study.

Jay Fields graduated from Tulane University Law School, where he earned a certificate in environmental law. As a student, he argued *Atchafalaya Basinkeeper v. Thompson* before the U.S. Fifth Circuit Court of Appeals. He is a Florida native who graduated from UF as an undergraduate, and who volunteered for the American Red Cross ocean rescue service out of Jacksonville. His LL.M. project will focus on the relationship between sections 402 and 404 of the Clean Water Act, with a particular emphasis on the legal scope of the CWA's citizen suit provisions.

Jesse Reiblich, upon completion of his LL.M. degree, will become a triple Gator, having earned his bachelor's and J.D. degrees from the University of Florida. He has interned with the U.S. Environmental Protection Agency, Region 4, and with the Florida Fish and Wildlife Conservation Commission. As a student, he was also a member of the Oil Spill Working Group. His LL.M. project involves the potential impact of climate change on water supply, and includes a 50-state empirical survey of statutory provisions aimed at increasing water supply through such measures as water transfers, reuse, and conservation.

Alexis Segal earned her J.D. degree from Emory University School of Law. Her prior work experience includes working as a litigation staff attorney for firms in New York City and Washington, D.C., and as the Executive Director of the Biscayne Bay Waterkeeper. For her LL.M. project, she will study the effectiveness and operation of conservation banks for marine species.

UPDATE ON PACE

from page 1

pursuant to Florida law (Section 163.08, F.S.) wind resistance improvements are included. The use of the non-ad valorem assessment overcomes the largest hurdle to energy improvement financing by providing all of the funds upfront to complete the retrofits.

II. THE FOUNDATION OF PACE

California led the way in creating PACE programs and had the first such local government to do so (BerkleyFIRST launched in 2008).¹ According to PACENow, 28 states plus the District of Columbia have launched some form of a PACE program or have legislation providing the ability to create PACE programs. The features that distinguish the programs are the method of financing, the improvements that can be financed and whether or not the programs include residential, which continues to remain a murky proposition at best. The programs include specific criteria to ensure that the risk to the property owner and the property's existing mortgage holder is minimized. Originally, most of these program design considerations were found in the Department of Energy's (DOE) "Best Practice Guidelines," but new design considerations are developing as PACE programs continue to launch and more is learned to minimize risk.² The DOE remains interested in the creation of all types of energy financing programs for property owners, including various forms of PACE.

PACE enjoys great support from local governments because it creates an enhanced market for financing these types of improvements with resulting job creation benefits. It also increases local government revenue with increased permit fees to complete the projects. With PACE, property owners save money on their energy bills and increase property values (another tax revenue enhancement). PACE also provides a strategy to reduce communitywide greenhouse gas ("GHG") emissions and offers other environmental benefits such as those stemming from water conservation initiatives.

III. THE PACE LAW IN FLORIDA

Florida passed HB 7179 in the 2010 legislative session (amending Chapter 163, F.S.) and clarified supplemental authority for local governments to create the PACE programs. The law defines a "qualifying improvement" to include energy efficiency, renewable energy or wind resistance projects. The improvements must be affixed to the existing structure on a property. This authority is supplemental to Florida county and municipal home rule powers granted in the Florida constitution. Florida's law also generally:

- Clarifies the process and public purpose aspects of PACE programs,
- Makes a finding that property owners receive a "special benefit" reducing the property's energy consumption,³
- Finds a "a compelling state interest" in PACE programs,⁴
- Allows a local government to incur debt to provide financing⁵ and levy non-ad valorem assessments to fund the programs,⁶ and
- Allows local governments to partner with one another to form a program.

Pursuant to state law, PACE assessments take priority over all other obligations on a property, including mortgages, meaning they are considered a "senior lien" because they subordinate mortgage obligations. This is necessary to secure favorable financing rates because lenders want assurance that the financial obligations will be repaid. This is why FHFA, Fannie and Freddie have cried foul.⁷

Most recently in 2012, Florida's PACE law was amended by HB 7117 to provide explicit authority for interlocal entities (formed through interlocal agreement) to levy and collect assessments for PACE programs and execute financing agreements as a "local government." This change streamlines the formation and implementation of multi-jurisdictional PACE programs.

IV. STATUS OF THE PACE LAWSUITS

On September 18, 2009, Fannie Mae directed lenders to treat PACE assessments as any other tax assessments,⁸ but later FHFA, Fannie and Freddie made contrary determinations through "lender letters"

focusing on the seniority of PACE liens in relation to a mortgage.⁹ On May 5, 2010, Fannie and Freddie issued advice letters to lending institutions stating that PACE assessments acquiring a "priority lien" over existing mortgages pose risk and are key alterations to traditional mortgage lending practice.¹⁰ Additionally, they characterized the PACE assessments as "loans" rather than assessments.¹¹ These characterizations were repeated in an FHFA statement issued in July 2010.¹² Throughout the summer and fall of 2010 the FHFA, Fannie and Freddie continued to issue statements raising concerns about PACE programs.¹³

As a result of these actions, eight complaints involving 16 parties¹⁴ were filed in federal courts in California, Florida and New York. First to file was the State of California filing a complaint requesting declaratory and equitable relief and alleging unfair business practices and a violation of the National Environmental Policy Act against the FHFA, Fannie and Freddie.¹⁵ Other plaintiffs in these and other state actions included the Sierra Club; Sonoma County, California; Placer County; the City of Palm Desert, California; the Natural Resource Defense Council, Inc; Leon County, Florida (October 8, 2010); and the Town of Babylon, New York.

V. THE PLAINTIFFS' ARGUMENTS

The plaintiffs generally have argued that state and local governments have legitimate interests in: (1) not being denied the ability to preserve home rule and assessment powers; (2) pursuing energy conservation and greenhouse gas emissions reductions strategies; (3) protecting the health and welfare of their citizens; (4) protecting the economic interests of their residents in financing the improvements and being free from unfair trade practices or an unfair competitive advantage by Fannie and Freddie in prohibiting senior liens for assessments; and (5) receiving federal monies earmarked for these purposes. Other arguments are borne from the Tenth Amendment to the United States Constitution reserving to the states all powers except those limited powers granted to the federal government and ensuring the division of powers between the states and federal government.

The plaintiffs argue that by statute, Fannie and Freddie have purchased and guaranteed mortgages subject to government assessment liens which already have a statutory priority over any underlying mortgage obligation and they cannot now pick and choose which assessment liens have priority over mortgage obligations and which do not.

The plaintiffs also have argued that the actions of FHFA are arbitrary and capricious under the APA,¹⁶ and the “lender letters” from FHFA to Fannie and Freddie are rules subject to the typical rulemaking and notice and comment procedures for these types of agency statements.

Most plaintiffs have been seeking a finding that the assessments are liens, not loans; the assessments do not pose risk, and do not alter traditional lending practices; the assessments constitute a lien of equal dignity to county taxes and assessments; and the assessments do not contravene Fannie or Freddie’s Uniform Security Instruments prohibiting loans that have senior lien status to a mortgage. Injunctive relief has been sought to prevent adverse actions against any mortgagee who is participating in a program.

VI. THE DEFENDANTS’ ARGUMENTS

The defendants argue that senior lien PACE programs pose serious financial risk and that Fannie and Freddie must take “reasonable” and “prudential” actions to protect against that risk. FHFA argues that, in a conservatorship role¹⁷ over Fannie and Freddie, it has acted to preserve safe and sound financial practices dictated by the Housing and Economic Recovery Act of 2008.¹⁸

As a conservator, FHFA argues that its actions are not reviewable.¹⁹ FHFA also argues that it has acted within the scope of its authority; the plaintiffs’ claims are not in the zone of interests protected by the statute under which FHFA acted; and that FHFA has not issued any rule or regulation subject to notice and comment under the APA.

VIII. CASE STATUS AND FEDERAL RULEMAKING

In New York, on October 24th, the 2nd Circuit Court of Appeals upheld the dismissal of the cases from the Southern and Eastern Districts of

New York. After being dismissed at the District Court level,²⁰ the Florida case was appealed and argued before the 11th Circuit Court of Appeals on October 30, 2012. On November 9, 2012, the 11th Circuit upheld the dismissal by the Northern District of Florida. Both the New York and Florida appellate rulings chiefly found that FHFA was acting as a conservator (as opposed to regulator) and, under the Housing and Economic Recovery Act of 2008, its actions are insulated from judicial review.²¹

In the Northern District of California on August 9, 2012, the plaintiffs’ motion for summary judgment was granted with respect to their notice and comment claim under the APA.²² But the Court found it unnecessary to rule on the remaining claims under the APA and NEPA. The Court found that FHFA was acting as a regulator, finding that the FHFA’s PACE directives amounted to substantive rulemaking.²³ Similar to its PACE action, FHFA had utilized the notice and comment process before with respect to its proposed rule restricting Fannie and Freddie from purchasing mortgages on properties encumbered by private transfer fee covenants because such covenants were deemed to undermine the safety and soundness of their investments.²⁴ In that analogous instance, FHFA deemed it appropriate to comply with the APA notice and comment requirements, but did not undertake that process for the PACE directive. The Court also found that FHFA’s directive on PACE obligations amounted to substantive rule-making, not an interpretation of rules that would be exempt from the notice and comment requirement.

A final judgment was entered in the California case on October 16, 2012, dismissing all other claims, including the Tenth Amendment claims, but finding that FHFA failed to comply with required notice and comment procedures set forth in the APA. The Court declined to rule on the remaining NEPA and APA claims. Finally, the Court stated that FHFA must complete the notice and comment process already ordered (but appealed) concerning PACE and publish a final rule no later than 210 days from the date of entry of the Judgment (October 16, 2012). FHFA must submit a status report on the progress of its rulemaking by January 18, 2013. FHFA may seek a further

extension of the deadline if, for good cause shown, FHFA requires additional time to conduct its rulemaking, and FHFA reserves its right to seek a stay of the deadline if the 9th Circuit has not ruled on its pending appeal as the deadline approaches.

FHFA has begun the notice and comment process pursuant to the preliminary injunction that the Court granted earlier in this case. On January 26, 2012, FHFA issued an Advance Notice of Proposed Rulemaking seeking comment on whether the restriction set forth in the July 2010 statement should be maintained.²⁵ FHFA received 33,000 comments in response to the notice.²⁶ On June 15, 2012, FHFA issued a Notice of Proposed Rulemaking and Proposed Rule concerning underwriting standards for Fannie Mae and Freddie Mac related to PACE programs. Comments were due on the Proposed Rule on September 13, 2012. FHFA is now required to issue a regulation within a reasonable time (or 210 days from October 16, 2012, as previously stated).

VIII. PROGRAMS ACROSS THE NATION

As mentioned previously, despite these challenges, various types of PACE or PACE-like programs are developing across the U.S., including Florida. These programs may differ in terms of the financing strategy, seniority of the lien, and whether or not they include residential component.

Programs continue in operation, or are under development in California, Connecticut, Maine, Florida and other states. Many of the programs operating have either shut down their residential component, or they are working with non-senior liens, they use other types of financing outside of PACE models, or they disclose the risks to program participants and let them make the choice as to whether or not PACE financing risks are acceptable to them. Many PACE programs that underwrite commercial PACE projects will not do so unless the consent of any existing mortgage lender on the property is secured. Of those residential models that are currently operating or are about to operate, some require existing lender consent and some do not.

In California, programs are launching or operating in Sonoma County, San Francisco, Los Angeles, Sacramento, Riverside, Placer County and

continued....

UPDATE ON PACE

from page 25

other regions. CaliforniaFirst is a multi-jurisdictional program including over 100 local governments and financing for commercial, industrial and multifamily projects. The program uses multiple financing options through an “open market” approach allowing property owners to review offers from lenders and select the best option for their unique project. Lenders have committed hundreds of millions of dollars to finance projects through the CaliforniaFIRST program.

Organizations and stakeholders in Texas are focusing efforts on legislative initiatives to facilitate development of PACE based on various best practices from other states. Connecticut is launching a statewide platform that focuses on Commercial “C”-PACE run by the Clean Energy Finance and Investment Authority.²⁷ In this model, financing is provided by private investors. Investors are attracted to the security of the tax lien and work directly with property owners to negotiate rates and terms.

IX. FLORIDA PROGRAM STATUS

Notwithstanding the federal issues and litigation discussed above, there are several local governments around the state that are considering or finalizing a PACE program. One example is the Green Corridor District PACE Program (the “Green Corridor”) in Miami-Dade County. The Town of Cutler Bay along with seven local governments²⁸ within Miami-Dade County created the Green Corridor. The Green Corridor is a separate legal entity created pursuant to Section 163.01, Florida Statutes, and will be governed by a board consisting of one representative from each local government as well as an at large member.

All of the “qualifying improvements” provided for in Section 163.08, Florida Statutes, will be eligible for financing under the program. The Green Corridor will be a turnkey senior lien priority program that will include, at the option of the individual local government, both residential and nonresidential properties. Since this will be a turnkey program, there will be no cost to the

local governments to participate in the Green Corridor. Instead, the costs of the program will be borne by the administrator, which is a private entity that was selected through a competitively bid process.

In order to address the concerns raised by FHFA, Fannie and Freddie, the program will include consumer protection regulations to protect and educate the resident or business owner about their investment. In addition, the program will also include the necessary underwriting standards to ensure that the resident or business owner will have the ability to pay the special assessments. It should also be noted that, through successful negotiation with the administrator, the local governments within the Green Corridor are indemnified by the administrator from the federal concerns discussed in this article. Therefore, through the public/private partnership and the leadership of the local governments within the Green Corridor, hopefully this program will be successful and can serve as a model for other local programs around the state.

Another program, Florida Green Energy Works, is a similar multi-jurisdictional structure, but it only focuses on commercial properties until the issues related to residential PACE are either resolved or there is more certainty diminishing the risks. To date, the Florida Green Energy Works program includes the Town of Lantana, the Town of Mangonia Park, the City of West Palm Beach, the City of Boynton Beach, the City of Delray Beach and the Village of Tequesta. Two more municipalities are expected to enter into the program before the end of the 2012 calendar year. The program uses an open market financing approach working with multiple lending institutions and requires the consent of any existing lenders on the commercial properties. The program is open and is currently accepting applications as well as registering contractors and energy reviewers for property owners to use their services.

The final multi-jurisdictional program is the Florida PACE Funding Agency, which currently includes Flagler County and the City of Kissimmee. The program will underwrite both residential and commercial PACE projects and will rely upon a \$2 Billion bond issuance to fund the program.

Other Florida updates include Leon County, which is exploring the development of a commercially-focused PACE program. Currently there are five local governments in Florida that are doing some level of information collection to launch a PACE program or they are completing a competitive bid process. What is encouraging is that multiple program approaches will hopefully lead to some measure of success for PACE implementation in Florida.

X. THE LITIGATION & LEGISLATION TODAY

With the recent dismissal of the New York and Florida cases, and the limitation of the California cases to APA issues, the litigation remains focused on assuring a final rule is promulgated. Unfortunately, the Proposed Rule maintains the directives that are not supportive of residential PACE with a senior lien. While “mitigation measures” were outlined, it is unclear whether or not any of them will actually satisfy FHFA. With two failures for a federal legislative fix, it is unclear how soon a third attempt will be made. Until the Final Rule is adopted, the future remains unclear as to whether or not residential senior lien PACE programs will be acceptable to FHFA. A challenge to a Final Rule is possible under the APA, but forecasting the outcome is difficult at best. The PACE community and stakeholders continue to work toward compromise solutions that will develop best practices for consumer and lender protections. Hopefully 2013 will bring some positive movement on residential PACE.

Endnotes:

¹ California enacted Assembly Bill 811 and Assembly Bill 474 providing financial resources for property owners who lack financing to implement measures to be more responsible water users. Assemb. B. 811, 2009–2010 Cal. Assemb., Reg. Sess. (Cal. 2009) (amending CAL. STS. AND HIGHWAY CODE §§ 5898.12, 20, .22, .30 (West 2007) and creating CAL. STS. AND HIGHWAY CODE §§ 5898.14, .21 (West 2009)); Assemb. B. 474, 2009–2010 Cal. Assemb., Reg. Sess. (Cal. 2009); see also CAL. STS. AND HIGHWAY CODE §§ 5898.12(b), 14(b), .20(a)(1), for supporting text in statutes. Colorado enacted House Bill 08-1350 modifying chapters 29, 30, 31, and 40 of the *Colorado Revised Statutes*, permitting assessments to real property to fund energy projects. H.B. 08-1350, 66th Gen. Assemb., 2d Reg. Sess. (Colo. 2008); see also COLO. REV. STAT. §§ 30-20-601.5, 604 (2010), for language in statute permitting the assessments. Florida enacted House Bill 1719 creating section 163.08 of the *Florida Statutes*. H.B. 7179, 112th Leg., Reg.

Sess. (Fla. 2010) (creating FLA. STAT. § 163.08 (2009)). Illinois enacted Senate Bill 583 allowing contractual assessments to finance energy projects. S.B. 583, 96th Gen. Assemb., Reg. Sess. (Ill. 2009) (creating 65 ILL. COMP. STAT. 5/1-1-11 (2009)); *see also* 65 ILL. COMP. STAT. 5/1-1-11 (2010), for language in the statute. Louisiana enacted Senate Bill 224 creating special financing districts for solar and energy efficient projects. S.B. 224, 2009 Leg., Reg. Sess. (La. 2009) (created LA. REV. STAT. ANN. § 33:130.70–73 (2009), re-designated as LA. REV. STAT. ANN. § 33:130.811–814 (2009)); *see also* LA. REV. STAT. ANN. § 33:130.811(A)–(D) (2010), for language in the resulting statute. Maryland enacted House Bill 1567 creating the Clean Energy Loan statute. H.B. 1567, 2009 Md. Gen. Assemb., Reg. Sess. (Md. 2009) (creating MD. CODE ANN., Clean Energy Loans, §§ 9-1501–07 (West 2009)); *see also* MD. CODE ANN., Clean Energy Loans, § 9-1502(a)–(c) (West 2010), for language in the statute authorizing clean energy loans for real property. Nevada enacted Senate Bill 358 which granted authority to create clean energy financing projects. S.B. 358, 75th Leg., Reg. Sess. (Nev. 2009) (amending chapter 271, NEV. REV. STAT. (2009)); *see also* NEV. REV. STAT. § 271.265 (2010), for language in the resulting statute granting authority for creating clean energy financing projects. New Mexico enacted S.B. 647 permitting the establishment of special assessment districts for renewable energy projects. S.B. 647, 49th Leg., 1st Sess. (N.M. 2009) (creating chapter 5, article 18, N.M. STAT. ANN. (2009)); *see also* N.M. STAT. ANN. § 5-18-49A (2010), for language in the statute. New York enacted S.B. 66004, 232d Leg., 2d Special Sess. (N.Y. 2009) (creating N.Y. General Municipal Law §§ 119-EE–GG (McKinney 2009)). North Carolina enacted S.B. 97 allowing special assessments for renewable energy sources. S.B. 97, 2009 Gen. Assemb., Reg. Sess. (N.C. 2009) (amending chapters 153A, 160A N.C. GEN. STAT.); *see also* N.C. GEN. STAT. § 153A-210.2(a), (c) (2010), for language in the resulting statutes. Ohio enacted H.B. 1 permitting the financing of solar installations. H.B. 1, 128th Gen. Assemb., Reg. Sess. (Ohio 2009) (creating OHIO REV. CODE ANN. § 717.25 (West 2009)); *see also* OHIO REV. CODE ANN. § 717.25(B)(1) (West 2010), for language in the statute. Oklahoma enacted S.B. 668 enabling the creation of a county energy district. S.B. 668, 52d Leg., 1st Reg. Sess. (Okla. 2009) (creating OKLA. STAT. tit. 19, § 460.1–.7 (2009)); *see also* OKLA. STAT. tit. 19, § 460.2, .4–.5 (2010), for the statutory language. Oregon enacted H.B. 2626 creating an energy fund and permitting a property owner to obtain a loan that is secured by a first lien on his property. H.B. 2626, 75th Leg. Assemb., 1st Special Sess. (Or. 2009) (amending chapter 470 OR. REV. STAT. (2005)); *see also* OR. REV. STAT. § 470.130 (2010), for the resulting statutory language; *see also* OR. REV. STAT. § 460.150 (2010), for statement in statute that loan is secured by a first lien on the property. Texas enacted H.B. 1937 permitting assessments for energy efficient improvements at the consent of the property owner. H.B. 1937, 81st Leg., Reg. Sess. (Tex. 2009) (creating chapter 376 TEX. CONTRACTUAL ASSESSMENTS FOR ENERGY EFFICIENT IMPROVEMENTS CODE ANN. (West 2009)); *see also* TEX. CONTRACTUAL ASSESSMENTS FOR ENERGY EFFICIENT IMPROVEMENTS CODE ANN. §§ 376.001, .003 (West 2010), for language in statute indicating assessment is at consent of owner. Vermont enacted H.B. 446. H.B. 446, 2009–2010 Leg. Sess., Reg. Sess., (Vt. 2009)

(amending VT. STAT. ANN. tit. 24, §§ 1751, 2291 (2009) and creating VT. STAT. ANN. §§ 3261–69 (2009)). Virginia enacted S.B. 1212 permitting property assessments to fund clean energy projects. S.B. 1212, Gen. Assemb., Reg. Sess. (Va. 2009) (creating VA. CODE ANN. § 15.2-958.3 (West 2009)); *see also* VA. CODE ANN. § 15.2-958.3(A)–(C) (West 2010), for language in the resulting statute. Wisconsin enacted Assemb. B. 255 giving authority to local governments to lend money for energy efficient improvements. Assemb. B. 255, 99th Leg., Reg. Sess. (Wis. 2009) (amending Wis. STAT. §§ 66.0627 (2009)); *see also* Wis. Stat. § 66.0627(8) (2010), for language granting that authority.

² DEPARTMENT OF ENERGY, GUIDELINES FOR PILOT PACE FINANCING PROGRAMS 1 (May 7, 2010), available at http://www1.eere.energy.gov/wip/pdfs/arra_guidelines_for_pilot_pace_programs.pdf. The Department of Energy's Best Practices enacted underwriting standards that were significantly greater than the underwriting standards applied to land secured financing districts and other assessment programs *Id.* at 1. The Best Practices Guidelines included suggestions for state and local governments to implement including: (1) enacting expected saving to investment ratios greater than one; (2) assessments should not exceed the useful life of the improvement; (3) mortgage holder of record receives notice when PACE liens are placed; (4) non-acceleration clauses upon property owner default of a PACE lien; (5) appropriately sized assessments; (6) enact quality assurance and anti-fraud measures; (7) allow PACE financing to be the net of any expected direct cash for rebates and tax credits; (8) require education participation; (9) provide a debt service reserve fund; (10) engage in data collection. *Id.* at 1–5. Additionally, the Department of Energy Best Practices also included assessment underwriting requiring that (1) property ownership be verified; (2) property based debt and property valuation is appropriate; and (3) the obligation to repay the improvement is attached to the property; and (4) other evidence of the property owner's ability to pay, such as he is current on property taxes and has not been late paying property taxes in the past three years or since the purchase of the house. *Id.* at 5–7. Also, property owners that have declared bankruptcy in seven years will be prohibited from PACE liens. *Id.*

³ *See* FLA. STAT. § 163.08(1)(b) (2010).

⁴ H.B. 7179; *see also id.* § 163.08(1)(c) (stating “voluntary assessments are reasonable and necessary to serve and achieve a compelling state interest”).

⁵ H.B. 7179; *see also* FLA. STAT. 163.08(7).

⁶ H.B. 7179; *see also* FLA. STAT. 163.08(3).

⁷ *Id.* art. X, §§ 1-2.

⁸ Marianne E. Sullivan, *Energy Loan Tax Assessment Program*, in FANNIE MAE SINGLE FAMILY SELLING GUIDE, LENDER LETTER LL 07-2009 (Sept. 18, 2009), <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2009/ll0709.pdf>.

⁹ Marianne E. Sullivan, *Property Assessed Clean Energy Loans*, in FANNIE MAE SINGLE FAMILY SELLING GUIDE, LENDER LETTER LL 2010-06 (May 5, 2010), <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/ll1006.pdf>; *see also* John S. Forlines, *Options for Borrowers with a PACE Loan*, in FANNIE MAE SINGLE FAMILY SELLING GUIDE, ANN. SEL 2010-12 (Aug. 31, 2010), <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/sel1012.pdf>.

¹⁰ Letter from Patricia J. McClung, Vice President, Offerings Mgmt., Freddie Mac, to Freddie

Mac Seller/Services (May 5, 2010) (on file with Freddie Mac), <http://www.freddiemac.com/sell/guide/bulletins/pdf/iltr050510.pdf>; *see also*, Marianne E. Sullivan, *supra* note xv.

¹¹ *Id.*; Sullivan, *supra* note xv.

¹² Statement, Federal Housing Finance Agency, FHFA Statement on Certain Energy Retrofit Loan Programs (July 6, 2010) (on file with Federal Housing Finance Agency) <http://www.fhfa.gov/webfiles/15884/PACESTMT7610.pdf>.

¹³ On July 6, 2010, the FHFA issued a “Statement on Certain Energy Retrofit Loan Programs,” saying that PACE loans are “unlike routine tax assessments and pose unusual and difficult risk management challenges” and that they “do not have the traditional community benefits associated with taxing initiatives.” FHFA Statement on Certain Energy Retrofit Loan Programs, *supra* note xviii. On August 31, 2010, Freddie Mac issued Bulletin Number 2010-20, which provides that financing energy efficient and renewable energy home improvements can be achieved without altering the lien priority status of first mortgages or other underwriting requirements. *Mortgages Secured by Properties with an Outstanding Property Assessed Clean Energy (PACE) Obligation*, BULL. No. 2010-20 (Freddie Mac, McLean, VA), Aug. 31, 2010 [hereinafter *Freddie Mac Bulletin*], <http://www.freddiemac.com/sell/guide/bulletins/pdf/bll1020.pdf>. On the same date, Fannie Mae issued a similar announcement in its *Options for Borrowers with a PACE Loan*. John S. Forlines, *Options for Borrowers with a PACE Loan*, in FANNIE MAE SINGLE FAMILY SELLING GUIDE, ANN. SEL 2010-12 (Aug. 31, 2010), <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/sel1012.pdf>. Freddie Mac “reminded Seller/Services that an energy-related lien may not be senior to any Mortgage delivered to Freddie Mac.” *Freddie Mac Bulletin*, *supra* note xxi.

¹⁴ The Defendants include: the FHFA, Fannie, Freddie, Ed Demarco, Charles Haldeman, Michael Williams, the Office of the Comptroller of the Currency and John J. Walsh.

¹⁵ *See* California v. Fed. Housing Fin. Agency, No. C10-03084 (N.D. Cal. filed July 14, 2010).

¹⁶ Pub.L. 79-404, 60 Stat. 237, enacted June 11, 1946.

¹⁷ Distinct from its regulatory and supervisory authority, § 4617(a) authorizes the FHFA to appoint itself conservator or receiver of Fannie Mae, Freddie Mac, and/or the Federal Home Loan Banks “for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity.” *Id.* § 4617(a)(2).

¹⁸ As Conservator, FHFA is charged with taking any action “necessary to put the regulated entity into sound and solvent condition” and “appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.” 12 U.S.C. § 4617(b)(2)(D).

¹⁹ Defendants argue three specific statutory provisions — 12 U.S.C. § 4617(f), 12 U.S.C. § 4635(b), and 12 U.S.C. § 4623(d) — expressly preclude jurisdiction over Plaintiffs’ claims.

²⁰ The district court dismissed Leon County’s complaint on the grounds that, in issuing the directive to Fannie Mae and Freddie Mac, the FHFA was acting in its capacity as a “conservator” and, pursuant to § 4617(f), “no court may take any action to restrain or affect the exercise of powers or functions of the [FHFA] as a conservator or a receiver.” *Id.* § 4617(f).

²¹ Pub. L., No. 110–289, 122 Stat. 2654 (codified at 12 U.S.C. § 4501 et seq.) and § 4617(f),

continued...

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UPDATE ON PACE

from page 27

“no court may take any action to restrain or affect the exercise of powers or functions of the [FHFA] as a conservator or a receiver.” Id. § 4617(f).

²² 12 U.S.C. § 4526(b).

²³ Under subchapter I of HERA, the FHFA has “[g]eneral supervisory and regulatory authority” over Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. 12 U.S.C. § 4511(b).

²⁴ 75 Fed. Reg. 49932 (Aug. 16, 2010).

²⁵ 77 Fed. Reg. 3958.

²⁶ 77 Fed. Reg. 36086.

²⁷ CEFIA was established by Connecticut’s General Assembly on July 1, 2011 as a part of Public Act 11-80. This new quasi-public agency supersedes the former Connecticut Clean Energy Fund. CEFIA’s mission is to help ensure Connecticut’s energy security and community prosperity by realizing its environmental and economic opportunities through clean energy finance and investments. As the nation’s first full-scale clean energy finance authority, CEFIA will leverage public and private funds to drive investment and scale-up clean energy deployment in Connecticut.

²⁸ The local governments are: Town of Cutler Bay, Village of Palmetto Bay, Village of Pinecrest, City of South Miami, City of Coral Gables, City of Miami, and Miami Shores Village.

Erin L. Deady, Erin L. Deady, P.A.; Ed Steinmeyer, Lewis, Longman & Walker, P.A.; Herbert W.A. Thiele, County Attorney, Leon County. Chad Friedman, Weiss Serota Helfman Pastoriza Cole & Boniske. Lewis, Longman & Walker and Erin L. Deady, P.A. are representing Leon County in its action against FHFA, Fannie Mae and Freddie Mac. Weiss Serota Helfman Pastoriza Cole & Boniske is representing the Green Corridor PACE Program.