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Environmental Update

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FWC Holding Workshops Regarding Wildlife Management Coordination with Local Governments

Contact: David Childs

The Florida Fish and Wildlife Conservation Commission (FWC) is presenting a series of regional workshops this August for local government personnel. These workshops, which are free and open to the public, will include overviews of the Gopher Tortoise Management Plan and permitting guidelines, the Florida Wildlife Conservation Guide, the Wildlife Legacy Initiative, and information on other FWC programs. FWC will be providing information regarding potential opportunities to coordinate with FWC to further conservation of gopher tortoises and other imperiled species.

Workshops are currently scheduled in Taylor, Clay, Bay and Citrus Counties. The Taylor County workshop will be held on August 20 at the Taylor County Extension Office (203 Forest Park Drive, Perry, FL 32348). The Clay County workshop will be held on August 13 at the Clay County Extension Office (2463 State Road 16 West, Green Cove Springs, FL 32043). The Bay County workshop will be held on August 19 at the Bay County Extension Office (2728 E. 14th Street, Panama City, FL 32401). The Citrus County workshop will be held on August 24 at the

Citrus County Extension Office (3650 West Sovereign Path, Suite 1 Lecanto, FL 34461). The four workshops will each run from 9:30 a.m. to 12:30 p.m.

DEP Initiates ERP Rule Update

Contact: Amelia Savage

On May 28, 2010, the Florida Department of Environmental Protection (DEP) published a Notice of Development of Rulemaking regarding its environmental resource permit procedures. The draft version of this proposed rule: (1) clarifies that a conceptual approval is a type of individual permit; (2) separates out a request for exemption from the regular permit application form and provides a list of information to be included in such a request; (3) updates which office certain applications are sent to (for example, some application are to be submitted to the DEP's Siting Coordination Office); (4) updates documents incorporated by reference, including the operating agreements between the DEP and the water management districts, and updating erosion control manuals; (5) provides new provisions regarding operation, maintenance, and inspections; (6) creates a new fee structure for major modifications; and (7) provides general and specific limiting conditions for permits. The draft documents are available at: <http://www.dep.state.fl.us/water/wetlands/erp/rules/rulestat.htm>

While most of DEP's proposed changes are procedural, some changes are substantive, such as provisions regarding operation, maintenance, and inspections. Most of the substantive changes, however, update DEP's current rules.

Recent Environmental Law Court Rulings

Contact: Ralph A.DeMeo

Curd v. Mosaic Fertilizer, LLC, 35 Fla. L. Weekly S341 (Fla. June 17, 2010).

In *Curd v. Mosaic Fertilizer, LLC*, the Florida Supreme Court recently addressed whether Florida Statutes or common law theories permit commercial fishermen to recover for economic losses resulting from the negligent discharge of pollutants, despite the fact that the fishermen do not own any property damaged by the pollution. *Curd v. Mosaic Fertilizer, LLC*, 35 Fla. L. Weekly S341 (Fla. June 17, 2010). The Florida Supreme Court held that that the fishermen carry both a common law and statutory cause of action sounding in negligence, referring to the Legislature's "far-reaching statutory scheme aimed at remedying, preventing, and removing the discharge of pollutants from Florida's waters and lands" as providing "private causes of action to any person who can demonstrate damages as defined under the statute." *Id.* at S343.

In *Curd*, commercial fishermen alleged that the owner of a fertilizer storage facility, including a pond of contaminated wastewater from the phosphate plant, was responsible for a spill in September 2004 that resulted in the loss of underwater plant life, fish, and other marine life. *Id.* at S341. The owner of the facility, Mosaic Fertilizer, had allegedly been warned in advance of the spill that the quantity of wastewater in the storage facility was dangerously close to exceeding the safe storage level. *Id.* The dike on the pond ultimately gave way, resulting in a spill of pollutants and

contaminated wastewater into Tampa Bay. *Id.* Consequently, the fishermen filed a class action lawsuit against Mosaic Fertilizer, alleging pollution from the facility reduced the supply of fish and resulted in damage to the reputation of the fishery products the fishermen were able to catch and sell. *Id.* While not claiming ownership in the damaged marine life, the fishermen sought economic damages for lost income and profits. *Id.*

The trial court, later affirmed by the Second District Court of Appeal, dismissed the class action suit for failing to state a cause of action under traditional principles of negligence, declining to recognize an independent duty of care for Mosaic to protect the fishermen's purely economic interests. *Curd*, 35 Fla. L. Weekly at S341. The court also concluded that section 376.313(3), Florida Statutes, did not permit a recovery for a party that does not own or have possessory interest in property damaged by pollution. *Id.* "Unconvinced that a special theory should be established under common law for a narrow subset of the people who are indirectly or remotely injured by pollution," the Second District certified questions of great public importance for review by the Florida Supreme Court. *Id.* at 342.

In evaluating the statutory cause of action under section 376.313(3), F.S., the Florida Supreme Court noted a parallel in the statutory factors it observed in *Aramark* that demonstrated a cause of action for strict liability regardless of causation. *Id.* at S343. The Court concluded that these factors, including the omission of property ownership as a defense, are relevant to the fishermen's claims and would allow recovery of lost income despite the fishermen not owning the property damaged by pollution. *Id.* Additionally, the Court rejected application of the economic loss rule, finding its narrow implications not consistent with the facts of the fishermen's case. *Id.* Instead, the Court resolved that the fishermen's causes of action are "controlled by traditional negligence law, which requires proof of duty, breach, and proximate cause, and by strict liability principles." *Id.*

Under common law, the Court found that Mosaic owed the fishermen a duty of care, "arising out of the nature of Mosaic's business and the special interests of the commercial fishermen in the use of the public waters." *Curd*, 35 Fla. L. Weekly at S345. Relying on Florida law's link of duty to the concept of foreseeability, the Court noted it was foreseeable that if pollutants stored by Mosaic were released into public waters, marine life and human activity would potentially be damaged. *Id.* With a commercial license, the fishermen were dependent on the public waters for earning a livelihood, a peculiar interest the Court concluded was within the zone of risk of Mosaic's operations. *Id.* Finding a common law cause of action where the discharge of pollutants constituted a breach of duty by Mosaic, the Court held that the fishermen could recover for loss of profits only if all elements of the action were proven, including damages. *Id.*

Gen. Elec. Co. v. Jackson, No. 09-5092, 2010 WL 2572955 (D.C. Cir. June 29, 2010).

In *Gen. Elec. Co. v. Jackson*, the Court of Appeals for the D.C. Circuit unanimously affirmed the District Court's decision that EPA's practice of issuing unilateral administrative orders (UAO) for clean-up under CERCLA does not violate constitutional rights to due process. General Electric (GE) had asserted that the statutory scheme and the way EPA administers it, issuing UAOs without a hearing before a neutral decisionmaker, violated the Due Process Clause.

Previously, GE has been subject to at least 68 UAOs, and at the time of the decision, was participating in at least 79 response actions at active CERCLA sites where UAOs may issue. Since

2000, the company has been engaged in an ongoing challenge to the constitutionality of the UAO process at EPA.

In challenging EPA's issuance of UAOs, GE based its argument on two claims. First, the company argued that the use of UAOs was facially unconstitutional. Suggesting the UAOs present a Hobson's choice – either pay for expensive site clean-up or be subjected to heavy fines for non-compliance, the company argued that the only real option is compliance before having any opportunity to be heard on the legality and rationality of the underlying order.

Second, GE claimed that even if the statute was considered facially constitutional, EPA's aggressive pattern and practice of issuing UAOs under the statute constitutes a due process violation. The pattern and practice claim was grounded in the assertion that EPA implements CERCLA's UAO provisions in a way that increases their frequency and decreases their accuracy, thus resulting in a process that is constitutionally defective.

The Court rejected both arguments. While the Court recognized the costs of compliance and the damages associated with non-compliance qualified as protected interests, the opinion nevertheless concluded that CERCLA affords sufficient constitutional safeguards for non-complying parties, particularly pre-deprivation judicial review that avoids a Hobson's choice. Further, the Court noted that even if EPA's pattern of issuing UAOs risked deprivation for a party, the deprivation must be connected to a harm that is sufficient to trigger due process protection. The alleged deprivations – damage to stock price, brand value and credit rating – were found by the Court to be consequential effects that do not qualify as constitutionally protected property interests. Accordingly, the argument failed. However, the Court continued to address the allegations by GE that EPA's process was so coercive that PRPs were intimidated from choosing not to comply. Citing recent data showing a rate of non-compliance of 4.6 percent, the Court emphasized there are sufficient instances of non-compliance to dispel suggestions of coercion. According to the Court, most parties are likely cooperating with UAOs in light of the extensive procedures CERCLA requires EPA to follow before issuing a UAO, a process parties feel could likely withstand judicial review.

With the constitutionality of the UAO process upheld, EPA retains authority to effect CERCLA provisions in a way that promotes prompt environmental clean-up and accountability among responsible parties. Parties, nevertheless, may still consider whether compliance with a UAO is justified, and in the event of a challenge, may be able to avoid penalties so long as its defense is rooted in reasonable grounds for contesting a UAO.