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• Joseph D. Richards, Chair • Jeffrey A. Collier, Co-Editor • Anthony J. Cotter, Co-Editor

EPA and ACOE Release Draft Guidance Relating to Federal Wetland Regulations

by Anthony J. Cotter, GrayRobinson, P.A.

In late April of this year the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("ACOE") published proposed guidance to federal agency field staff in making determinations concerning whether waters are protected under the Clean Water Act ("CWA").[1,2] EPA and ACOE claim that the proposed guidance clarifies how the EPA and ACOE interpret existing requirements of the CWA and the federal regulations implementing the CWA following the Supreme Court decisions concerning the extent of waters covered by the CWA in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*[3] *("SWANCC")* and *Rapanos v. United States*[4] (*"Rapanos"*). EPA and ACOE also claim that the proposed guidance will provide clearer, more predictable guidelines for determining which waters are protected under the CWA.

For the ease of reference this proposed guidance document will be referred to as the 2011 Guidance. The draft 2011 Guidance may be obtained from the EPA at http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm. The EPA and ACOE have opened the draft 2011 Guidance to public comment for a 60-day period.[5] Upon conclusion of the 60-day period, the agencies anticipate finalizing the 2011 Guidance and then undertake rulemaking consistent with the federal Administrative Procedures Act. The draft explains

See "EPA and ACOE," page 26

From the Chair

by Joe Richards, Pasco County Attorney's Office

I am excited about a new initiative just now getting underway, the formation of an Energy Committee. This new substantive committee will provide a forum for interested practitioners across the full spectrum of energy law—from utilities regulation and facility siting to the intersection with climate change and greenhouse gas regulation—to network and generate opportunities of common interest. With this initiative, ELULS is hoping to create a niche for energy law attorneys who may have, up to this point, felt "homeless" within The Bar.

If this committee appeals to you, we encourage you to get involved. The committee's inaugural gathering will take place at the upcoming Annual Update during the substantive committee luncheon scheduled for Thursday, August 11. Information on the Energy Committee will be posted to the Section website and a committee-specific email list will be opened shortly after the Annual Update. Instructions for joining will be provided in the future via the Section email list. (If you are not currently subscribed to the Section email list, you can do so at http://www.eluls.org/list.html.) Until then, any questions regarding the Energy Committee can be fielded by committee co-chair Kelly Samek (kelly.samek@myfwc.com).

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CHAIR'S MESSAGE
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We continue to have a need for Bar Journal articles. If you have a recent brief you've worked on that could be turned into a Journal column, please let us know. Or if you know of a topic that you think should covered let us know. We will find someone to write it up.

For anyone interested in joining the Executive Council, I encourage you to become involved with one of our many committees. Please check the website for more details. There are many ways to become involved and I encourage you to do so. You can contact us through the website or Facebook or call me anytime. Thanks.

Editors Note: The article "The Governor' South Atlantic Alliance: Reginal Ocean & Coastal Governance" published in the last issue of the Reporter was authored by Veronica Saavedra and Sidney F. Ansbacher, shareholder with GrayRobinson, P.A., and past chair of the ELULS. We apologize to Sidney for the omission.

We Could Play This Game Much Better If We Knew The Rules – One Reason Why Land Use Quasi-Judicial Hearings Do Not Currently Work

by Laura Belflower, Laura B. Belflower, P.A.

Remember when you and your friends used to make up games on the playground? You could get this great idea and just start playing. It was lots of fun for about five minutes. Then the arguments would start – you can't do that, that's not the way you play, that's not fair. Games really don't work very well when they don't have rules. In many ways, it is the same for local government quasi-judicial land use hearings. We declare that we are holding a quasi-judicial hearing, swear in witnesses, and talk about the need for competent substantial evidence, but, in most cases, the hearings do not work very effectively for anyone. It is the intent of this article to suggest this is because it is unclear by what rules we are to be "playing."

Since *Board of County Commissioners of Brevard County v. Snyder*[1] declared that, in Florida, small scale rezoning actions join conditional use permits,[2] variances,[3] and other development orders[4] as quasi-judicial reviews, there have been issues about how to conduct quasi-judicial hearings (due process rights, cross-examining witnesses, findings of fact, etc.). But, as important as those issues are, it is suggested that the fundamental reason why quasi-judicial hearings are not much better than legislative type reviews in producing objective, fact supported decisions that implement the adopted regulations is because there are almost never sufficient rules (standards, requirements, criteria) against which the "evidence" that is presented can be weighed.

As laid out in *Irvine v. Duval County Planning Commission,*[5] in a quasi-judicial hearing, the applicant has the burden of demonstrating that the applicable standards have been met. Then the responsibility shifts to those seeking to deny the application to prove that the standards have not been met and that the request is adverse to the public interest.[6] Further, there must be competent substantial evidence in the record in front of the decision-maker to support the decision made.[7] Putting these together, there must be competent substantial evidence put in the record by the applicant that the applicable standards have been met and competent substantial evidence put in the record by those seeking the denial of the application that the applicable standards have not been met. The decision on the application must be made based on this evidence[8] and only this evidence.[9] But, in this dance of burden-shifting, objective, evidence-based decisions will consistently be produced only if the participants understand the applicable standards that have to be met.

When was the last time you saw all the standards that must be demonstrated clearly listed in a land development code? At most, it is usually a statement that the request has to be consistent with the Comprehensive Plan, be compatible, advance public purposes, or some similar, usually undefined phrases, which are often so vague as to not appear to be standards or criteria at all. The Florida courts have long held that, not only must there be specific criteria against which

an application is to be reviewed,[10] the criteria must also be clear enough to be consistently applied.[11]

There are, however, also several cases that have upheld what most would consider to be very general, if not vague, standards. There are good—if not legally sound, certainly politically sound—reasons why many jurisdictions might want the standards in their land development regulations kept vague. It does provide maximum flexibility in the decision-making, and certainly helps the local government attorneys defending their clients' decisions in court. But is that the correct goal for a quasi-judicial review? It may be politically expedient and easier to have greater flexibility and may seem advantageous to create an environment with an increased likelihood of winning in court, but would it not be a more appropriate goal to have decisions that fully and consistently implement the local government's adopted Comprehensive Plan and land development regulations?

Operating under the assumption that the goal is to have decisions that implement the adopted regulations, there should be clear standards that govern each application. These are the rules of the game; they are what must be followed. The creation of these standards must be done in the actual drafting and adoption process of the land development regulations, rather than during the review of individual applications on an ad-hoc, case-by-case basis. This is because not only do case-by-case decisions on the applicable rules make for arbitrary decisions,[12] but also because such decisions are policy decisions—a legislative function, which cannot legally be made in a quasi-judicial review, where the role is to implement the already established requirements.[13]

Having clear standards is, however, only the first part of the equation. They must also be applied; the rules have to be followed. It is very rare to see an application or an applicant's presentation at the hearing in which the applicant specifically addresses the criteria that do exist in the land development code. This is likely true at the hearings because experienced applicants' representatives have learned that the decision-makers do not necessarily want to hear an analysis of whether the application meets all of the criteria or not; many boards feel that is the planning staff's job and the application would not be before them with a recommendation of approval from staff if it did not meet the criteria.[14] But that is the problem; for most applications, whether the application meets the criteria is the *only* issue for consideration in the review.[15] If the application does not meet the standards, it must be denied.[16] Except rezonings, if the application does meet the standards, it must be approved.[17] It is only if this standards-proving threshold has been passed, and only for rezonings, that there is any additional consideration.[18] So, to get beyond that critical threshold, the standards are the only rules of the game; everything else is irrelevant.[19]

Because this threshold of standards compliance proof is so critical, an applicant must be required to specifically address them and to demonstrate by competent substantial evidence that the application meets them. Staff should not find an application complete for processing unless there is a specific statement of how the applicable standards are met by the application. This statement of compliance should be the applicant's major statement of the application; this is what is to be considered. At the hearing, this statement and the analysis of compliance with the standards should be the entire focus of the hearing.

Having standards, which are actually applied, also helps any opponents of an application to have a legitimate role in "playing the game." Having clear standards that have to be achieved and a specific statement from the applicant on how they are met not only answers many questions and may satisfy many neighbors' concerns, but it also clearly defines the universe of questions and issues that are relevant at the hearing. Without any standards, or any confidence that the discussion will be limited to the standards, opponents have no choice but to shotgun their approach; they must object to everything that may be a concern. This leads to hearings with busloads of opponents, wearing same color shirts, waving signs and handfuls of materials they downloaded from the internet, but it usually does not produce much relevant competent substantial evidence that the decision-makers can use. If the neighbors are told in their notices what the applicable requirements are and that their discussion must be limited to those issues, they know what they need to do—what their rules are—as well. Whether they want to support or oppose the application, they have what they need to contribute to the process in a meaningful way.

Perhaps most importantly, having clear standards that are required to be addressed, and are the only things that are addressed, makes a tremendous difference for the decision-maker(s). The final decision-makers are often elected officials. All decision-makers, but especially elected officials, should appreciate being able to fall back on clear standards as the justification for their decision; it is much easier to say "I'm sorry, I wanted to vote your way, but we are bound by the adopted standards in our decision." Without clear applied standards, the decision-makers are back to deciding based on whether they personally like the proposal or whether it is politically expedient for them to make a certain decision.

Having clear standards that are followed also makes for more consistent court decisions. Having clear applied standards allows the courts to reasonably assess the local government's decision, without improperly re-weighing the evidence, to determine whether there was sufficient competent substantial evidence in the record to support the decision made.[20] If there are clear standards and the "evidence" in the record does not relate to those clear standards, it is not competent substantial evidence because it is not relevant.[21]

Having clear rules for everyone also helps keep the hearings more manageable. If anyone starts to go too far afield in their comments, they can easily be brought back on track by limiting the discussion to the standards. If they want to object to the standards, they can be directed to a separate process to seek the amendment of the standards.

Having clear applied standards may also help resolve or, at least lessen, many of the other issues of quasi-judicial hearings. Presentations of evidence would be more focused and shorter when they do not have to address everything in the universe, which protects due process rights by freeing time to allow everyone to have a meaningful say. Whether or not the decision-maker provides written findings of fact, if the standards are properly presented and considered, the record should contain the appli-

continued...

QUASI-JUDICIAL HEARINGS
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cable standards and the competent substantial evidence to support both sides' arguments, as needed to support the decision. The issue of cross-examination would be unresolved, but at least the topics of examination and cross-examination would be more focused.

For almost twenty years, Florida cities and counties have been holding quasi-judicial hearings and trying to make them work. Most have tried to play a quasi-judicial game using rules suited to legislative procedures and expectations and, like the games we made up on the playground, it just does not work. It is suggested that before quasi-judicial hearings can work properly and our comprehensive plans and land development regulations can be properly implemented, we must reset the rules—adopt clear standards to guide the reviews and use them.

Laura B. Belflower *is a land planner and attorney practicing primarily in the area of land use law. She is the author of a new blog (Floridaldrs.com) focusing on Florida land development regulations.*

Endnotes:

[1] 627 So. 2d 469, 474 (Fla. 1993).

[2] *City of Melbourne v. Hess Realty Corp.*, 575 So.2d 774, 775 (Fla. 5th DCA 1991)(confirming that a conditional use permit is a quasi-judicial function).

[3] *Walgreen Co. v. Polk County*, 524 So.2d 1119, 1120 (Fla. 2d DCA 1988)(confirming that reviews of variances, even variances for alcoholic beverage sales, are quasi-judicial).

[4] *Park of Commerce Assoc. v. City of Delray Beach*, 636 So.2d 12, 15 (Fla. 1994) (holding "decisions of local governments on building permits, site plans, and other development orders … are quasi-judicial in nature").

[5] 495 So. 2d 167 (Fla. 1986).

[6] For rezonings, the shifted burden on the denying body is to demonstrate that maintaining the existing zoning classification accomplishes a legitimate public purpose and that the refusal to rezone the property is not arbitrary, discriminatory, or unreasonable. *Snyder*, 627 So. 2d at 476 (Fla. 1993).

[7] *Irvine,* 495 So. 2d at 167 and *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001).

[8] *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

[9] *See City of Naples v. Central Plaza of Naples, Inc.*, 303 So. 2d 423, 425 (Fla. 2d DCA 1974) (stating "as pertinent as [concerns presented at the hearing] may seem to be, the City Council did not have a right to consider them in making its determination. [citation omitted] The only criteria upon which the Council could legally base its decision were those set forth in the ordinance").

[10] *N. Bay Village v. Blackwell*, 88 So. 2d 524, 526 (Fla. 1956); *Drexel v. City of Miami Beach*, 64 So. 2d 317, 319 (Fla. 1953); and *Phillips Petroleum Co. v. Anderson*, 74 So.2d 544, 547 (Fla. 1954).

[11] *Drexel*, 64 So. 2d at 319; *Phillips Petroleum*, 74 So.2d at 547.

[12] *Drexel*, 64 So. 2d at 319; *City of Homestead v. Schild*, 227 So. 2d 540, 543 (Fla. 3d DCA 1969).

[13] *Snyder*, 627 So. 2d at 474 (finding that "[g]enerally speaking, legislative action results in the formulation of a general rule of policy, whereas [quasi-]judicial action results in the application of a general rule of policy").

[14] Whether an application that can be definitively shown to meet all of the applicable criteria should even have to go through a quasi-judicial hearing, rather than just an administrative staff review, is a whole different issue that should also be explored.

[15] *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 375, 377 (Fla. 3d DCA 2003) (finding that "quasi-judicial boards cannot make decisions based on anything but the local criteria enacted to govern their actions").

[16] *G.B.V.*, 787 So. 2d at 842.

[17] *Alachua County v. Eagle's Nest Farms, Inc.*, 473 So.2d 257, 259 (Fla. 1st DCA 1985); *Effie, Inc. v. City of Ocala*, 438 So.2d 506, 509 (Fla. 5th DCA 1983); *ABC Liquors, Inc. v. City of Ocala*, 366 So.2d 146, 149 (Fla. 1st DCA 1979).

[18] Before a rezoning application can be denied, there must also be evidence in the record that keeping the existing zoning category accomplishes a legitimate public purpose and is also consistent with the comprehensive plan. *Snyder*, 627 So. 2d at 476.

[19] *See Windward Marina, L.L.C. v. City of Destin*, 743 So. 2d 635, 638 (Fla. 1st DCA 1999) (finding that "a local government may not deny a development order based on criteria which are not specifically enumerated in its land use regulations").

[20] This is the relevant role of the court in a certiorari review. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 627 (Fla.1982); *G.B.V.*, 787 So.2d at 843.

[21] *De Groot*, 95 So. 2d at 916 (finding that "[s]ubstantial evidence [is] such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. [citations omitted] In employing the adjective 'competent' to modify the word 'substantial,' we are … of the view … that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial' evidence should also be 'competent'").

A Legal Analysis of DEP's New ERP Exemption for Small Scale Living Shorelines

by R. Benjamin Lingle, Student Associate, University of Florida Conservation Clinic and Thomas T. Ankersen, Director
January, 2011

Florida's Department of Environmental Protection and the Northwest Florida Water Management District recently enacted a new rule exempting small-scale "Living Shoreline" projects from the need for an Environmental Resource Permit. This geographically limited exemption is intended to incentivize riparian and littoral property-owners to pursue ecologically sound shoreline restoration rather than hardened armoring as a means to prevent property loss due to erosion. However, the exemption removes only one of three regulatory requirements; those engaging in ERP exempted shoreline restoration will likely still need state authorization to use state-owned submerged lands and federal authorization to dredge and fill in navigable waters. These continuing requirements could mute the intent of the rule's drafters to expand the use of Living Shorelines in Northwest Florida through streamlined permitting. At the same time, the new ERP exemption, by itself, lacks safeguards – notice and monitoring - to ensure the efficacy and accountability of privately constructed shorelines on state lands.

On November 1, 2010, the Florida Department of Environmental Protection (DEP) and the Northwest Florida Water Management District (NWFWMD) implemented Phase II of the Environmental Resource Permitting Program for Northwest Florida.[1] A new rule, codified by DEP in Florida Administrative Code Chapter 62-346, brings Northwest Florida into full reliance on the Environmental Resource Permits (ERPs) used in the state's four other water management districts.[2] Notably, the new rule makes Northwest Florida the state's first region to exempt so-called "Living Shorelines" from the permitting process.[3] So long as a Living Shoreline meets the specifications articulated in the new rule, the project will be exempted from the regulatory and financial requirements of an ERP.[4]

This is good news for advocates of ecologically sound alternatives to shoreline hardening, as well as for the state's riparian and littoral property-owners, who otherwise face great difficulty in controlling both natural and anthropogenic causes of erosion. However, those interested in pursuing a Living Shoreline alternative should be aware that the new exemption removes only one of the three regulatory requirements that must be met before a Living Shoreline project can go forward; property-owners must still obtain the state's authorization to use sovereign submerged lands and the Army Corps of Engineers' (Corps) permission to dredge and fill on waters of the United States.[5] The Board of Trustees of the Internal Improvement Trust Fund (Trustees) holds title to the state's sovereign submerged lands in trust for the people.[6] DEP's Division of State Lands (DSL) serves as staff for the Trustees and is typically the agency charged with reviewing applications for consent to use sovereign lands.[7]

Despite the regulatory and proprietary hurdles still remaining, the new Living Shoreline permitting exemption does provide substantial relief to property-owners wishing to construct projects with minimal impact on the state's waters. The rule exempts, "The restoration of an eroding shoreline of 150 feet or less by planting with native wetland vegetation no more than 10 feet waterward of the approximate mean high water line."[8] The rule further dictates that: [1] "Plantings shall consist of native vegetative species;"[9] [2] "Any invasive/exotic vegetative species . . . shall be removed;"[10] [3] "If wave attenuation is needed to protect and ensure survivability of the plantings, turbidity curtains shall be installed . . . , but must be removed within three months;"[11] and [4] "No filling by anything other than vegetative planting is authorized, except that if permanent wave attenuation is required . . . an oyster reef 'breakwater' is authorized."[12] The provisions on oyster reef breakwaters further provide that such breakwaters can be no more than ten feet waterward of the Mean High Water Line (MHWL),[13] must be primarily oyster shell,[14] must not be on or within three feet of submerged vegetation,[15] and must be constructed so that at least three feet of unobstructed waterway separates each twenty foot section of breakwater.[16] Though these limitations preclude large-scale projects from utilizing the exemption, many owners of single-family residential parcels will now have one less regulatory hurdle to navigate.

The opening provision of the permitting exemption states that exempted activities "may be conducted without notice to [DEP];" however, performing exempted activities "does not relieve the person or persons who are using the exemption . . . from meeting the permitting, authorization, or performance requirements of other rules of [DEP], the Board of Trustees, the water management districts, or other federal, state, or local governmental agencies."[17] This specific reference to "authorization" and "the Board of Trustees" conveys the drafter's intent that consent of the Trustees would still be a prerequisite to use of sovereign submerged lands.

Other provisions incorporated by the new rule further substantiate that exemption from permitting does not exempt a property-owner from the need for consent to use sovereign submerged lands. The new rule's section on Policy and Purposes provides that, "The requirements of this chapter are in addition to . . . the requirements specified in the 'Department of Environmental Protection and Northwest Florida Water Management District Environmental Resource Permit Applicant's [Handbook] Volume 1."[18] This handbook states that authorization to use sovereign submerged lands is distinct from and survives permitting exemptions: "[E]ven though an activity may be authorized by the noticed general permit or an exemption, construction, alteration, modification, maintenance, operation, abandonment, or removal of an activity should not commence until the required state-owned submerged lands authorization also has been granted."[19] In a later section, the handbook reemphasizes that, "[E]xemptions do not provide the authorization that may be required from other local, state, regional, or federal agencies. For example, exempt activities that occur on state-owned submerged land may require a separate letter of consent, easement, or lease . . . ."[20] Similar references to the need for Trustees approval are included in the Joint Application for Environmental Resource Permit/ Authorization to Use State-Owned Submerged Lands/ Federal Dredge and Fill Permit in Northwest Florida[21] and in the Request for Verification of an Exemption.[22]

Even if DEP had not explicitly emphasized the need for Trustees authorization, Florida law makes it clear that such authorization is needed. Through Florida Statutes Section 253.77, the legislature has stated that,

> A person may not commence any excavation, construction, or other activity involving the use of sovereign or other lands of the state, the title to which is vested in the board of trustees of the Internal Improvement Trust Fund under this chapter, until the person has received the required lease, license, easement, or other form of consent authorizing the proposed use.[23]

The Trustees are authorized to delegate and have delegated to DEP the power to grant authorization to use sovereign submerged lands.[24] The Florida Administrative Code contains numerous provisions outlining the factors to be considered when granting such consent.[25] Nothing intimates that DEP, when exercising this power, could ignore these factors and exempt the need for authorization to use sovereign submerged lands.

Certain activities affecting sovereign submerged lands have been given consent by rule.[26] However, "[c]onstruction, or replacement, of

continued...

bulkheads, seawalls, or other shoreline stabilization structures that extend no more than three feet waterward of the line of mean or ordinary high water" requires a letter of consent.[27] The same is required for "[p]lacement, replacement, or repair of riprap, groins, breakwaters, or intake and discharge structures no more than ten feet waterward of the line of mean or ordinary high water."[28] These latter two definitions encompass Living Shoreline projects.

The guidelines for obtaining authorization to use sovereign submerged lands are outlined in Chapters 18-21 and 18-20 of the Florida Administrative Code.[29] Chapter 18-21 regulates the management of sovereign submerged lands;[30] Chapter 18-20 contains the special rules that apply within the state's Aquatic Preserves.[31] Chapter 18-21 states that authorization to use sovereign submerged lands will be granted on a case by case basis[32] and that shoreline stabilization is a permissible reason to seek authorization.[33] Projects in Aquatic Preserves likewise will be weighed on a case by case basis; the authorizing agency will balance the benefits and harms of each project to determine whether or not authorization is appropriate.[34] As an example of a specific benefit, Chapter 18-20 lists: "Restoration/enhancement of altered habitat or natural functions, such as conversion of vertical bulkheads to riprap and/or vegetation for shoreline stabilization or reestablishment of shoreline or submerged vegetation."[35] Considering these and similar provisions, property-owners both within and outside of Aquatic Preserves should receive favorable consideration in their efforts to construct an ERP-exempted Living Shoreline on sovereign submerged lands.

The requisite federal permit for a Living Shoreline is the Corps-issued Clean Water Act Section 404 permit.[36] Certain dredge and fill activities may proceed without a Section 404 individual permit pursuant to a "nationwide permit."[37] Three nationwide permits could pertain to an ERP-exempted Living Shoreline project: Nationwide Permits 13, 18, and 27.[38] However, unlike the ERP exemption, the permit most likely to be applicable still requires pre-construction notification. Nationwide Permit 18 authorizes "[m]inor discharges of dredged or fill material" so long as the total discharge is less than twenty-five cubic yards of material deposited below the MHWL.[39] Further, the discharge cannot "cause loss of more than 1/10 acre of waters of the United States."[40] "Loss of waters of the United States" occurs when waters are "permanently adversely affected" by a regulated activity.[41] This includes activities that "increase the bottom elevation of a waterbody."[42] These limitations may preclude the use of this categorical permit for ERP-exempted Living Shoreline activities, at least when a porous breakwater is contemplated.

Nationwide Permit 13 authorizes bank stabilization to counter erosion.[43] However, for the project to be eligible, it must meet certain criteria: (a) the material placed must be no more than necessary; (b) the length of the project must be less than 500 feet; (c) the discharge must be less than a cubic yard per linear foot; (d) the discharge must not be in special aquatic sites; (e) the discharge must not disrupt the flow of surface water; (f) the discharge must not be easily erodible; and (g) the discharge must not be "a stream channelization activity."[44] The Code of Federal Regulations defines "special aquatic sites" as,

> [T]hose sites identified in subpart E. They are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region.[45]

Subpart E identifies special aquatic areas as sanctuaries and refuges,[46] wetlands,[47] mudflats,[48] vegetated shallows,[49] coral reefs,[50] and riffle and pool complexes.[51] This list encompasses some of the areas where a Living Shoreline might be constructed, thus precluding the use of this categorical permit in many situations. When the permit is applicable, the property-owner should note that subsection (f) precludes "material [] placed in a manner that will be eroded by normal or expected high flows."[52] The notes after the permit text state, "Bank stabilization projects involving the installation of plant materials on riprap may be authorized by this NWP, but erodible materials should be properly stabilized within the riprap or stabilized by other means."[53] So while breakwaters and vegetation are permissible, the addition of sediment stabilized only by plant material could be problematic. This limitation, however, is no greater than that in DEP's new permitting exemption for Living Shorelines, which also precludes the introduction of sediment.[54]

The final nationwide permit that could be applicable is Nationwide Permit 27.[55] Permit 27 applies to,

> [A]ctivities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas and the restoration and enhancement of non-tidal streams and other non-tidal open waters, provided those activities result in net increases in aquatic resource functions and services. To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: . . . the installation of current deflectors; the placement of in-stream habitat structures; . . . the construction of oyster habitat over unvegetated bottom in tidal waters; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.[56]

The permit further states that it does not authorize "the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., stream to wetland or vice versa) or uplands."[57] Therefore, a Living Shoreline project utilizing this permit may not convert a riparian area from open water habitat to a riparian wetland, which is precisely the beneficial intent of the Living Shoreline.

Nonetheless, Permit 27 does permit many of the activities engaged in during Living Shoreline construction. Except for a few select activities that

qualify for pre-construction reporting, however, all permittees must obtain pre-construction notification.[58] Most Living Shoreline projects fall into the pre-construction notification category, requirements for which are included in Section 330 of the Code of Federal Regulations.[59]

For property-owners in need of a Section 404 permit and a letter of consent to use Florida's sovereign submerged lands, the first step is to complete the Joint Application for Environmental Resource Permit/ Authorization to Use State-Owned Submerged Lands/ Federal Dredge and Fill Permit in Northwest Florida. The application should be forwarded to the Corps and to DEP's DSL. It is true that the property-owner will have to complete the same paperwork as he or she would have had to complete before the ERP exemption was enacted. However, the exemption has added a financial incentive to choosing a Living Shoreline over hardened armoring. Under the exemption, the property-owner will avoid the fee associated with an ERP.[60]

The exemption and streamlined authorizations described above should benefit Florida by fostering healthier ecosystems along the state's shorelines. However, absent the notification and reporting safeguards provided for by federal nationwide permitting and state sovereign submerged land authorization, the new exemption would result in the construction of Living Shorelines by private persons on public lands with no opportunity for quality assurance or ability to monitor success over time. Poorly constructed Living Shorelines could harm existing resources and adversely affect neighboring shorelines. For this reason, at least in its early stages, the Living Shoreline exemption should be treated as an experiment, and the state should, at the very least require notification of the activity and maintain a record its location for the purposes of monitoring success over time. By itself the exemption requires neither of these. As it stands, an ERP is no longer necessary for small Living Shoreline projects. However, property-owners and Living Shoreline advocates should be aware that the new exemption removes only one of the three hurdles that must be navigated before a Living Shoreline project can commence.

Endnotes:

[1] Environmental Resource Permits, N.W. Fla. Water Mgmt. Dist. (2010), http://www.nwfwmd.state.fl.us/permits/permits-ERP.html.

[2] *See* Fla. Admin. Code. r. 62-346 (2010).

[3] *Id*. r. 62-346.051(14)(e). Definitions vary, but according to one Florida source, "Living Shorelines use natural shoreline ecosystems to absorb wave energy without causing erosion. Living Shorelines extend from the upper bank of the property to below the water level. They typically include a variety of plants, including salt marsh grasses and/or mangroves as well as structural elements such as oyster shell, or even riprap." *See* http://www.flseagrant.org/index.php?option=com_content&view=article&id=201:living-shorelines-an-alternate-for-preventing-coastal-erosion&catid=51:research-summary&Itemid=101.

[4] *Id*.

[5] *See* Fla. Stat. § 253.77(1) (2010). *See also* 33 U.S.C. § 1344 (2006); *id*. § 403 (2006).

[6] The Florida Constitution dictates that "title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people." Fla. Const. art. X § 11. The Florida Statutes vest title to these lands in the Trustees. Fla. Stat. § 253.02-03 (2010).

[7] For information on the DSL and the lease, easement and consent of use of state-owned lands, see Use of State-Owned Lands, Fla. Dep't of Envtl. Prot. (2010), http://www.dep.state.fl.us/lands/use.htm.

[8] Fla. Admin. Code. r. 62-346.051(14)(e).

[9] *Id*. r. 62-346.051(14)(e)(1).

[10] *Id*. r. 62-346.051(14)(e)(2).

[11] *Id*. r. 62-346.051(14)(e)(3).

[12] *Id*. r. 62-346.051(14)(e)(4).

[13] *Id*. r. 62-346.051(14)(e)(4)(a).

[14] *Id*. r. 62-346.051(14)(e)(4)(b) ("The 'breakwater' shall be composed predominantly of natural oyster shell cultch such as clean oyster shell and fossilized oyster shell, although unconsolidated boulders, rocks, and clean concrete rubble can be associated with the oyster material.").

[15] *Id*. r. 62-346.051(14)(e)(4)(c).

[16] *Id*. r. 62-346.051(14)(e)(4)(d).

[17] *Id*. r. 62-346.051(1).

[18] *Id*. r. 62-346.010.

[19] Northwest Florida Water Management District Environmental Resource Permit Applicant's Handbook Volume 1 at 1-7 (2010), *available at* http://www.nwfwmd.state.fl.us/permits/erp/erp_downloads/AH_General.pdf.

[20] *Id*. at 3-6. The handbook also reiterates the point in § 4.2.3, stating, "Whether exempt from permitting or not, in accordance with Chapter 253, F.S., and Chapter 18-21, F.A.C. (April 14, 2008), activities conducted on state-owned submerged lands must be separately authorized by the Board of Trustees of the Internal Improvement Trust Fund (BOT)." *Id*. at 4-2.

[21] *Id*. at Appendix C, Form 1, Attachment 2 at 2.

[22] *Id*. at Appendix C, Form 11.

[23] Fla. Stat. § 253.77 (2010).

[24] *See id.* § 253.002(1), *see supra* note 6.

[25] *See generally* Fla. Admin. Code ch. 18-21 (2010).

[26] *Id*. ch. 18-21.005(1)(b).

[27] *Id*. ch. 18-21.005(1)(c)(5). Shoreline protection structures that are ineligible for letters of consent require an easement. *Id*. ch. 18-21.005(1)(e)(3).

[28] *Id*. ch. 18-21.005(1)(c)(6).

[29] *Id*. ch. 18-21, 18-20 (2010).

[30] *Id*. ch. 18-21.

[31] *Id*. ch. 18-20.

[32] *Id*. ch. 18-21.004(1)(g).

[33] *Id*. ch. 18-21.004(2)(e).

[34] *Id*. ch. 18-20.004(1)(a).

[35] *Id*. ch. 18-20.004(2)(d)(4).

[36] *See* 33 U.S.C. § 1344 (2006). The Corps' dredge and fill permitting authority is also governed by the Rivers and Harbors Appropriation Act of 1899. *See* 33 U.S.C. § 403 (2006).

[37] Nationwide permits are permits that authorize a category of activities viewed to have minimal impact on navigable waters when conducted in accordance with the conditions set forth by rule. For more information on the Corps Nationwide Regulatory Program *See* http://www.swl.usace.army.mil/regulatory/national.html.

[38] *See* U.S. Army Corps of Eng'rs, Nationwide Permit Information (2010), http://www.usace.army.mil/cecw/pages/nw_permits.aspx.

[39] U.S. Army Corps of Eng'rs, Decision Document Nationwide Permit 18 at 1 (2010), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/NWP_18_2007.pdf.

[40] *Id*. The Permit further precludes discharges that are "placed for the purpose of stream diversion." *Id.*

[41] U.S. Army Corps of Eng'rs, 2007 Nationwide Permits, Conditions, Further Information, and Definitions (with corrections) 35, *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/nwp2007_gen_conditions_def.pdf.

[42] *Id.*

[43] U.S. Army Corps of Eng'rs, Decision Document Nationwide Permit 13 at 1 (2010), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/NWP_13_2007.pdf.

[44] *Id*.

[45] 40 C.F.R. 230.3(q-1) (2010).

[46] *Id*. 230.40.

[47] *Id*. 230.41.

[48] *Id*. 230.42.

[49] *Id*. 230.43.

[50] *Id*. 230.44.

[51] *Id*. 230.45.

[52] *See supra* note 41.

[53] *Id*. at 7.

[54] *See* Fla. Admin. Code. r. 62-346.051(14)(e)(4) (2010).

[55] U.S. Army Corps of Eng'rs, Decision Document Nationwide Permit 27 at 1 (2010), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/NWP_27_2007.pdf.

[56] *Id*.

[57] *Id*.

[58] *Id*. at 2-3. The requirements for reporting are included in § 1.0 of the permit. *Id.*

[59] Section 1.1 of Permit 27 states that "[p]re-construction notification requirements, additional conditions, limitations, and restrictions are in 33 CFR part 330." *Id*. at 3. The requirements for notification are slightly more rigorous than the requirements for reporting, with the former stating that the district engineer "will review the notification and may add activity-specific conditions to ensure that the activity complies with the terms and conditions of the NWP and that the adverse impacts on the aquatic environment and other aspects of the public interest are individually and cumulatively minimal." 33 CFR § 330.1 (2010). The requirements for reporting do not mention the addition of activity-specific conditions. *See* Decision Document Nationwide Permit 27 *supra* note 55.

[60] The fees for individual permits range from $11,220 for activities affecting more than ten acres, Fla. Admin. Code. r. 62-346.071(1)(a)(1), to $710 for activities affecting less than one acre. *Id.* r. 62-346.071(1)(a)(5). However, subject to certain conditions, "permits solely for environmental restoration or enhancement" cost only $250. *Id.* r. 62-346.071(1)(d).