



AMERICAN
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Allocating Precious Resources in the Face of Disaster

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ALLOCATING PRECIOUS RESOURCES IN THE FACE OF DISASTER

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I. Define Disaster

Terrorism
Epidemic
Natural Disasters-earthquake, flood, tornado, hurricane, Extreme Weather
Workplace Violence
Fires
Explosion
Collapse of Structures
Oxycontin and Mass Tort cases

II. Role of a Receiver or Trustee

Fiduciary---for whom? Victims, creditors, owners, public interest
Owner of property
Plaintiff in litigation
Shoulder to Cry On
People look to you
Funnel for information
Focusing point for Anger and Recrimination

III. Pros and cons of Bankruptcy vs. Receiverships

A. Statutory authority for Receiverships and Receivers powers

Fla. Statute 607.1432—Receivership or Custodianship
Receiver has exclusive jurisdiction over Corporation and all its property
Receiver can be a natural person or an eligible entity which may be a domestic eligible entity, or a Foreign eligible entity authorized to transact business in the state
Receiver may dispose of assets and sue and be sued
Receivership order defines powers and responsibilities
Florida Statutes provides for receivers in specific areas such as Nursing Homes and Related Health Care Facilities Fla. St. 400.966 This statute is detailed as to receivers' powers

Mental Health Facilities FI Statute 394.903

Assisted Care Communities FI Statute 429.22

Insurance companies FI Statute 631.154

Phosphogypsum Management Program FI Statute 403.4154

Uniform Commercial Real Estate Receivership Act. Florida statutes 714

Scope of 714-- This chapter applies to a receivership initiated in a court of this state for an interest in real property and any incidental personal property related to or used in operating the real property.

B. Statutory authority for Trustee and Trustee powers

There must be a bankruptcy case filed.

Individual or Corporation may be a Trustee--Section 321

Role and Capacity under Section 323--Representative of Estate and has Capacity to sue and be sued.

Nationwide Jurisdiction

Specific duties under Sections 704, 721 and 1104, 1108

Trustees are appointed in a wide variety of situations

IV. Governmental Police Power vs. Civil Remedies like receiverships or bankruptcies

Receiver or Trustee does not exercise police powers

Do government authorities get in the Fiduciary's way?

Example of Records at Champlain Towers seized by OSHA

V. Putting together your Team—who do you employ?

Attorney

Accountant or Financial Advisor

Experts in Field related to Your Case

Insurance Coverage Counsel

Record managers

IT Company which has Disaster Experience

Appraisers

Damage Calculation Experts

VI. Public Relation issues—managing the story

How do you manage Press?
How do you get information out to the public?
How do you handle “Fake News?”

VII. Insurance issues

Need insurance professionals
Gathering the policies when they have been destroyed—identifying the coverage

VIII. Defining the Claims

Tort Claims and wrongful death
Contract Claims
Fraud Claims
Statutory Claims
Life vs. property claims
Sovereign Immunity Issues

IX. Setting up mechanisms to determine entitlement to compensation and amount of compensation

Claims process and claim deadlines
Communications to potential claimants
Noticing all potential claimants
Personal Service
Publication in Local and National Publications
Class litigation
Role of Jury Trials

X. Use of mediation or alternative dispute resolutions

Mediation of Damage Claims
How do you get the parties in front of the mediators and give the mediator the authority to have a meaningful mediation?
Stature of the Mediator—respect of the parties
Example of World Trade Center Mediation in “Worth”

XI. How do you allocate scarce resources?

Remember to define your role and act accordingly
Determining a Budget
War Chest
Looking for experienced help
Finding professionals who can wait for compensation
Contingency fees and reduced hourly fees
Low Hanging Fruit

XII. Be aware of the effects of Disaster on People

[Source: <https://www.ready.gov/coping-disaster>]

individual effects of a disaster.

- Everyone who sees or experiences a disaster is affected by it in some way.
- It is normal to feel anxious about your own safety and that of your family and close friends.
- Profound sadness, grief and anger are normal reactions to an abnormal event.
- Acknowledging your feelings helps you recover.
- Focusing on your strengths and abilities helps you heal.
- Accepting help from community programs and resources is healthy.
- Everyone has different needs and different ways of coping.
- It is common to want to strike back at people who have caused great pain.

Signs that a person needs counseling

- Difficulty communicating thoughts.
- Difficulty sleeping.
- Difficulty maintaining balance in their lives.
- Low threshold of frustration.
- Increased use of drugs/alcohol.
- Limited attention span.
- Poor work performance.
- Headaches/stomach problems.

- Tunnel vision/muffled hearing.
- Colds or flu-like symptoms.
- Disorientation or confusion.
- Difficulty concentrating.
- Reluctance to leave home.
- Depression, sadness.
- Feelings of hopelessness.
- Mood-swings and easy bouts of crying.
- Overwhelming guilt and self-doubt.
- Fear of crowds, strangers, or being alone.

Children

- For many children, reactions to disasters are brief and represent normal reactions to "abnormal events." A smaller number of children can be at risk for more enduring psychological distress as a function of three major risk factors:
- Direct exposure to the disaster, such as being evacuated, observing injuries or death of others, or experiencing injury along with fearing one's life is in danger.
- Loss/grief: This relates to the death or serious injury of family or friends.
- On-going stress from the secondary effects of disaster, such as temporarily living elsewhere, loss of friends and social networks, loss of personal property, parental unemployment, and costs incurred during recovery to return the family to pre-disaster life and living conditions.

THE PINEY POINT SAGA

The Piney Point plant (the “**Facility**” or “**Piney Point Site**”) is an industrial site in Manatee County, Florida, and the location of a former fertilizer plant. The Facility holds stacks of phosphogypsum, a byproduct of fertilizer production, and reservoirs of process water (the “**Stack System**”). Process water is contaminated wastewater leftover from the former operations at the plant and contains phosphorus, nitrogen, acid and heavy metal particulate. The Stack System contains four elevated ponds, holding approximately 420 million gallons of process water. The owner of the Facility is believed to be insolvent.



Courtesy Ardaman & Associates, Inc.

Legend:

NGS-N New Gyp Stack North
OGS-N Old Gyp Stack North
OGS-S Old Gyp Stack South
NGS-S New Gyp Stack South
LPWS Lined Process Waste Sump

In November 2020, Fortress 2020 Landco, LLC, the mortgage holder, initiated foreclosure proceedings on the Facility, seeking to recover portions of the property not directly associated with the Stack System. The owner of the Facility had effectively abandoned the Piney Point Site.

On March 25, 2021, leaks were discovered in the east wall of the New Gyp Stack South, a 72-acre pond that held nearly 400 million gallons of wastewater. The leak worsened over the following days, coming through the eastern wall. The volume of water coming through the leak quickly grew and within a few days, 3,000 gallons per minute were coming through the wall. It was feared that the wall would disintegrate, possibly resulting in a 20-foot wall of water cascading out of the Stack.

The possibility of a catastrophe prompted evacuation of the neighborhood on April 1 followed by the Governor of Florida issuing a state of emergency on April 3. To prevent the reservoir's collapse, 221 million gallons of contaminated water were discharged into the bay.

In May 2021, the Florida legislature appropriated a \$100,000,000 fund for the permanent closure of Piney Point. The Florida Department of Environmental Protection is administering the fund.

In August 2021, in the foreclosure case, the FDEP filed a motion to appoint a receiver for Piney Point. On August 24, 2021, all the active parties in the case entered into a stipulation to appoint a receiver and on August 25, 2021, the Manatee Circuit Court entered an order appointing Herbert R. Donica as a Receiver to take control of the Facility and oversee its closure. The purpose of the Receivership is to drain, maintain, repair, and close the Stack System so that it is no longer a threat to public safety and the environment.

To close the Facility, it must be reconfigured so that it no longer holds wastewater. To make the necessary changes, the Stack System must be drained to permit the deployment of equipment and start remediation activities.

How much water is 400,000,000 gallons? Here is picture of one of the Stacks, the New Gyp Stack South, holding about 240,000,000 gallons. For scale, note the vehicles parked at the bottom left corner of the picture. The NGS-S has a circumference of about three-fourths of a mile.



Picture of New Gyp Stack South (NGS-S) courtesy of Garner Environmental Services, Inc.

In April 2021, the Manatee County commissioners voted to file an application to construct a deep well injection facility on County owned land adjacent to the Piney Point facility. The application was approved by the FDEP in December 2021. The well is designed to inject Piney Point's water 3,500 feet down below the aquifer at the rate of 1,000,000 gallons per day. Construction of the well commenced in January 2022, and it is expected to be operational October 2022.

The well will be double walled with steel casings imbedded in a concrete sleeve. Within a few feet, a companion monitoring well will be drilled so that conditions can be continuously tested for safety. Here is a diagram of the well and the monitoring well:

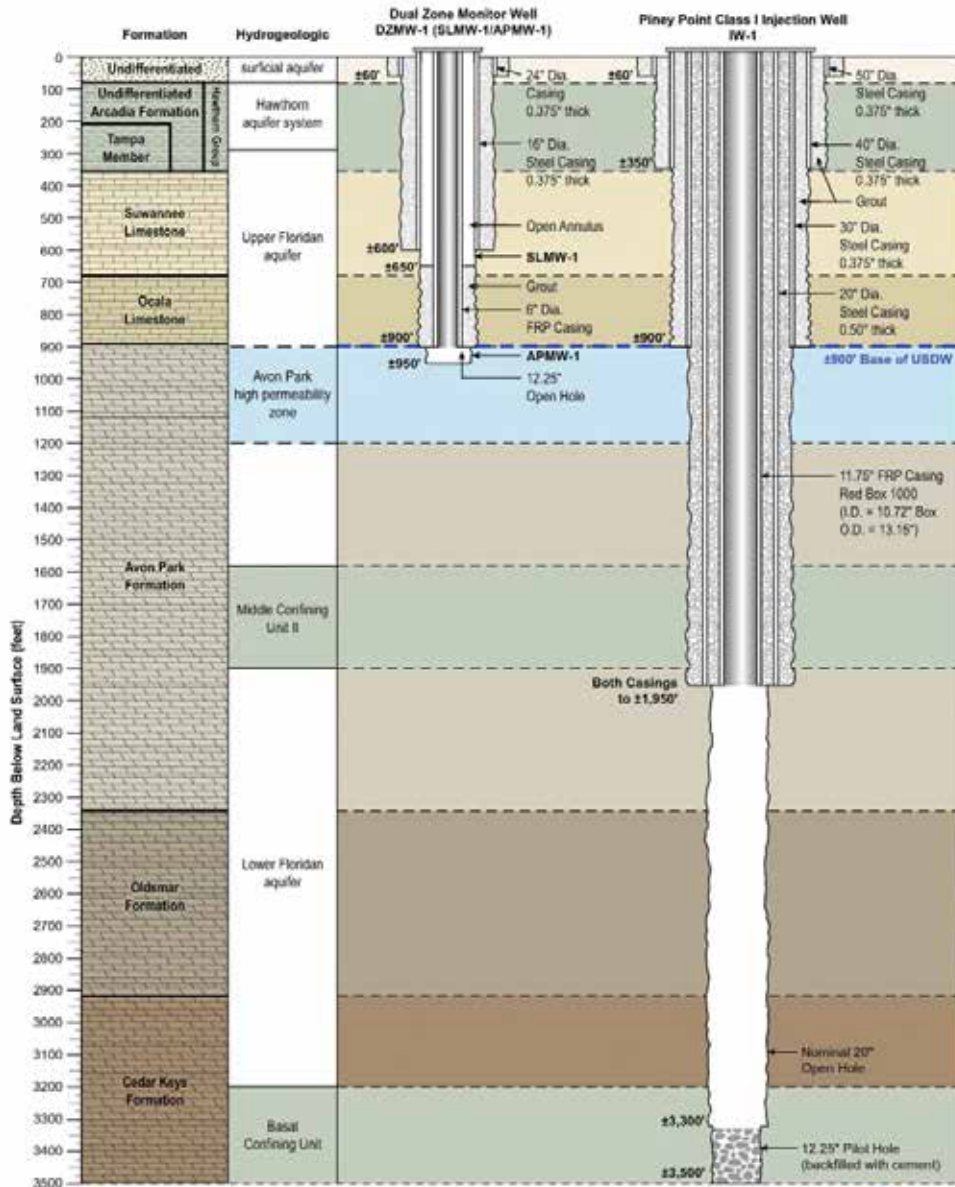
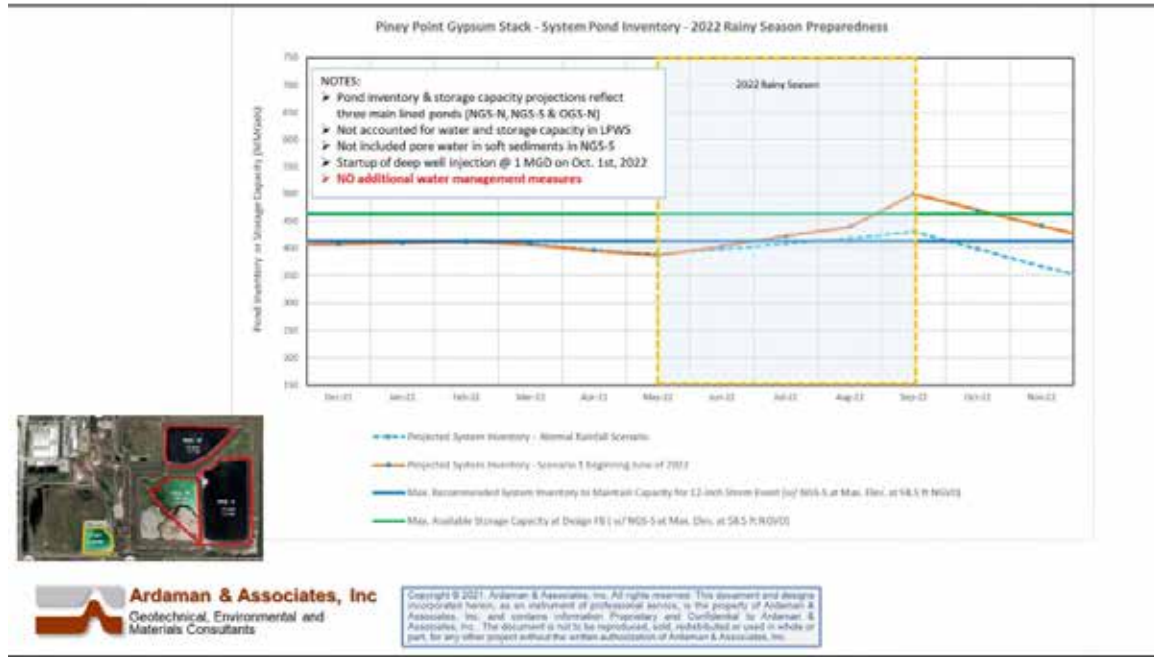


FIGURE 2-3
Conceptual Injection Well System Diagram
Piney Point Injection Well System Class I Permit Application



Courtesy of ASRUS, LLC

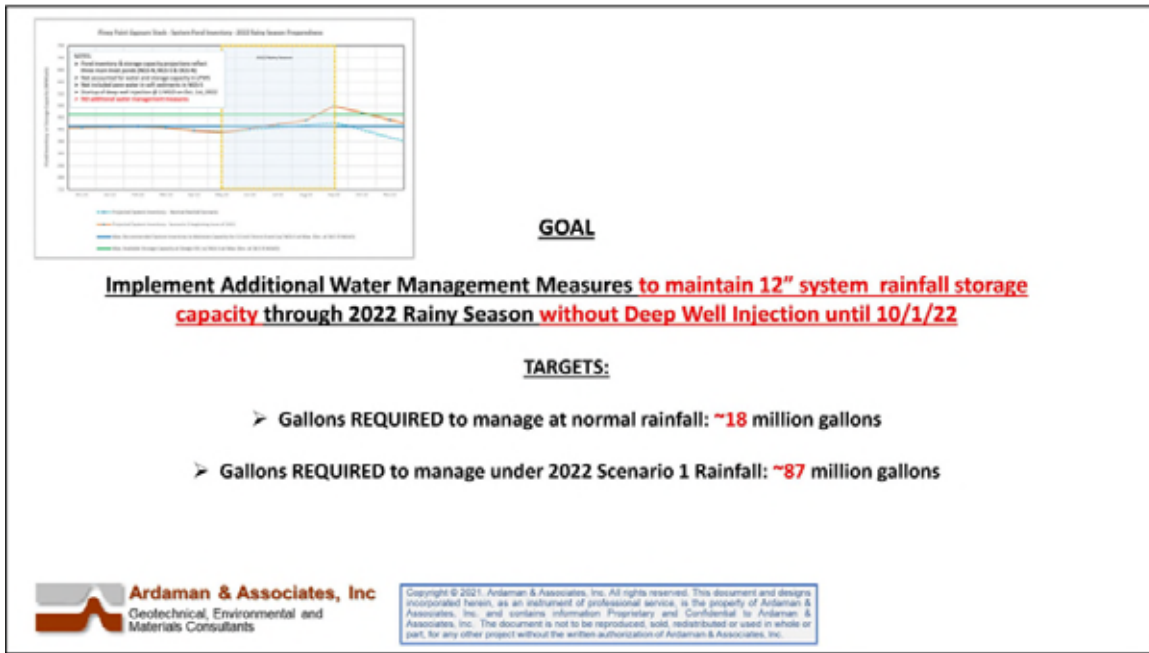
This chart illustrates the challenge presented by storm water retention. Storm water will accumulate and cause water levels in the stacks to exceed safe storage capacity. The weight of the water exerts tremendous hydraulic pressure on the side walls of the stack system creating a danger that the walls will leak or collapse.



Courtesy Ardaman & Associates, Inc.

The current storage capacity for additional rainfall at the site is approximately 22.8 inches. This graph shows the expected water volumes if the site experiences normal rain fall; about 54 inches per annum. The water level is projected to be above recommended storage capacity. If the site is exposed to a tropical storm, water levels will exceed maximum storage capacity.

To create a minimum margin of safety, at least 18,000,000 gallons must be removed from the stack system. Ideally, the water volume should be decreased by over 80,000,000 gallons.



Courtesy Ardaman & Associates, Inc.

Although the well should solve the water disposal problem once it is operational, it will not come online until October 2022. As a result, Piney Point will endure another rainy season (June – September) before the well can be used. Water levels are already dangerously high causing hydraulic pressure on the stack walls. Other methods must be used to reduce water levels before the rainy season.

To address the water level issue, four strategies have been employed:

- 1) Spray system is operating in the New Gyp Stack North. This system sprays water upwards to increase evaporation rates. This system evaporates approximately 160,000 gallons of water per day.
- 2) A pipeline has been installed from the New Gyp Stack North to Manatee County's North Regional Water Reclamation Facility to treat and dispose approximately 100,000 gallons of water per day.
- 3) A drip evaporation system was recently installed around the top of the New Gyp Stack South. Water is dispensed onto the exposed portion of the liner via a perforated 4" pipe. The liner, which is exposed to sunlight, generates heat during daylight hours, can get as hot as 188 degrees, accelerating evaporation. It is estimated that this system will evaporate

about 50,000 gallons per day.

- 4) On February 16, 2022, a contractor completed the installation of a demonstration unit of a new evaporation system produced by EcoVap, Inc. Pilot testing of the system has commenced, and testing will continue through the next few weeks to establish baseline data. The system dispenses the water over a series of panels that act to increase the surface area of the water exposed to the environment, accelerating evaporation. The panels are assembled in the form of a tower system that allows a pump to flow water across the top and through the EcoVap system. Here is a picture of the EcoVap system installed at the Piney Point site:



Photo by Janice Donica

If the testing data reflects the expected level of efficiency, several more units will be installed with a goal of evaporating 350,000 gallons of water per day. For more information go to: <https://www.ecovap.com/company>.

Other measures have been undertaken to improve safety. Innovative technology has been used for water treatment since April 2021. The innovative water treatment practice has reduced nutrients, including phosphorus and nitrogen. To date, approximately 265 tons of nitrogen and 240 tons of phosphorus have been removed from wastewater onsite. As the water is treated, it is recirculated back into the New Gyp Stack South, improving the quality of the water. The amounts of phosphorus and nitrogen in the pond have been reduced by over 90% since April 2021. If water had to be discharged into the bay to avoid a sidewall collapse, it is unlikely that the bay would experience adverse effects.

In January 2022, a small leak developed in the south side of the New Gyp Stack South. A dive team was engaged to locate the leak, map the floor of the pond, and design a repair. Meanwhile a large alligator took up residence in the north end of the pond. As the weather warmed, the alligator became active and expressed an interest in the dive team's boat. A professional trapper was engaged to capture the alligator or kill it, if necessary. On February 24, 2022, the trapper captured the alligator alive and relocated it to an alligator farm near Punta Gorda, Florida to live happily ever after. The alligator was 11 feet, 5 inches long:



EPILOGUE

Phosphogypsum is radioactive waste generated from processing phosphate ore into phosphoric acid which is used to manufacture fertilizer. Phosphogypsum is slightly radioactive, but the process water does not absorb radioactivity. In addition to radioactive materials, phosphogypsum and process wastewater can also contain toxic heavy metals. More than 1 billion tons of phosphogypsum are stored in 25 stack systems in Florida along with billions of gallons of process water. Eventually, these stack systems must be dewatered and then permanently closed. In some cases, the owner of a gyp stack property may not have sufficient financial resources to fund closure of a gyp stack. In those cases, the EPA or FDEP may be compelled to assume closure responsibilities.

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THE PINEY POINT TIMELINE

1965 - Borden Chemical Company acquires land and constructs Piney Point phosphate plant. Florida did not have much in the way of environmental regulations at the time.

1970 - Borden causes a massive fish kill by dumping waste into Bishop Harbor.

1980 - Borden sells the Piney Point plant to AMAX Phosphate.

1986 - AMAX sells the plant to FCS Energy.

1988 – FCS Energy sells the plant to Royster Phosphates, Inc.

1989 - 23,000-gallons of sulfuric acid leaked from a holding tank, forcing the evacuation of hundreds of people, including Port Manatee workers.

1991 - Two accidents resulted in the release of acid into the air. Three workers were killed, and the resulting acid cloud caused 30 people to become ill.

1993 - Royster Phosphates, Inc. filed bankruptcy and sold the Piney Point facility to Mulberry Corporation.

Jan. 30, 2001 - Mulberry Corp. notified the Florida Department of Environmental Protection that, due to financial difficulties, it could not assure environmental security. Two days later Mulberry abandoned the Piney Point facility.

Feb. 8, 2001- Mulberry Corporation and four subsidiaries filed for Chapter 11 bankruptcy. Piney Point Phosphates, Inc. was one of the four subsidiaries. All five cases were converted to Chapter 7 in August 2021.

Feb. 21, 2001 - FDEP takes over Piney Point with initial \$4 million in state emergency funds to keep water pumps and water treatment devices working.

Sep. 2001 - High winds and rain from Tropical Storm Gabrielle threatened structural damage to Piney Point. The FDEP authorized emergency discharge of 10 million gallons of partially treated wastewater into Bishop Harbor to prevent collapse of the dikes.

Sep. 2004 - High winds and rain from Hurricane Frances caused a hole in a dike, releasing 70 million gallons of contaminated waters into Bishop Harbor.

2005-2009 – FDEP undertakes a \$140 million project to modify the Piney Point stack system for "beneficial use." Gypsum stack dikes were lined with 80-millimeter high-density plastic so that Port Manatee could expand by dredging material to enlarge Berth 12 to accommodate larger vessels. The dredged material was dumped into the Piney Point stack system.

2006 – Piney Point's Chapter 7 Bankruptcy Trustee sells the Piney Point land to HRK Holdings, LLC.

May 11, 2011- Leaks from ruptures in the lined gypsum stack were discovered where the dredged material was placed. The ruptures leaked millions of gallons a day for weeks.

May 29, 2011 - The FDEP allowed discharges from the gypsum stack into Bishop Harbor to retain structural integrity of the Stack System.

Feb. 2012 –Piney Point's current owner, HRK Holdings, LLC filed a Chapter 11 bankruptcy. HRK emerged from bankruptcy by selling portions of the Piney Point facility that were not part of the stack system.

Nov. 2020 – Fortress 2020 Landco, LLC, the mortgage holder, filed a foreclosure lawsuit against HRK, FDEP, and other lien holders.

March 25, 2021 - Leaks were discovered in the south wall of the New Gyp Stack South, a 67-acre pond that held nearly 400 million gallons of wastewater. The leak worsened over the following days. Residents in the area were ordered to evacuate on April 1. Florida Governor Ron DeSantis declared a state of emergency for the entire county and wider evacuations were conducted on April 3. An estimated 316 households were within the evacuation zone. Water was being pumped from the reservoir and discharged into Bishop Harbor at the rate of 22,000 gallons per minute to prevent the collapse of the reservoir. Approximately 215 million gallons were discharged into the bay.

April 2021 - Manatee County commissioners voted to file an application to construct a deep well injection facility on County owned land adjacent to the Piney Point facility. The application was approved by the FDEP in December 2021. The well is designed to inject Piney Point's water 3,500 feet down below the aquifer at

the rate of 1,000,000 gallons per day. Construction of the well commenced in January 2022 and it is expected to be operational before the end of 2022.

In May 2021, the Florida legislature appropriated a \$100,000,000 fund for the permanent closure of Piney Point. The Florida Department of Environmental Protection is administering the fund.

August 2021 - FDEP filed a motion to appoint a receiver in the foreclosure proceeding. All parties stipulated to the relief requested and on August 25, 2021, the Court appointed Herb Donica as receiver for the Piney Point facility. The receivership activities are funded by the legislative appropriation.

Faculty

Herbert R. Donica, CPA is the founding shareholder of the Donica Law Firm, P.A. in Tampa, Fla., and has practiced bankruptcy law since 1990. He has represented clients, including bankruptcy trustees and receivers, in more than 2,000 bankruptcy and insolvency cases, many of which have involved the litigation of contested matters. Previously, Mr. Donica spent two years with the big-six accounting firm of Coopers and Lybrand as a tax specialist and two years in the business law department of the Calkins, Kramer, Grimshaw and Harring law firm in Denver. On Aug. 25, 2021, the Manatee Circuit Court entered an Order appointing Mr. Donica as a receiver to take control of the Piney Point Facility in Manatee County, Fla., a former phosphate fertilizer manufacturing complex, and oversee its permanent closure. The facility consists, in part, of a 466-acre phosphogypsum stack system including four elevated pond systems. The ponds are lined reservoir compartments that contain phosphogypsum process water and dredged materials. The stack system holds more than 400,000,000 gallons of water, much of which has levels of phosphorus and nitrogen as well of levels of heavy-metal particulate. In April 2021, the sidewall of one of the stacks developed a leak that resulted in the loss of more than 220,000,000 gallons of water into Bishops Harbor near Bradenton, Fla. The event prompted the State of Florida to investigate ways to implement a permanent solution to fix the Piney Point Facility. As receiver, Mr. Donica is charged with the responsibility to maintain, repair and close the Piney Point stack system as expeditiously as possible so that it is no longer a threat to public safety and the environment. The Florida legislature has set aside \$100,000,000 to fund closure activities. Mr. Donica received his B.S. in accounting in 1975 from Indiana University and his J.D. in 1979 from Washington and Lee University Law School.

Robert C. Furr is a partner with Furr & Cohen, P.A. in Boca Raton, Fla., and serves as a panel trustee for the U.S. Department of Justice in the Southern District of Florida. He is regularly appointed as a chapter 11 trustee and has been designated as the chapter 12 trustee in the Southern District. Mr. Furr has represented numerous businesses in chapter 7 liquidations and in chapter 11 reorganizations, as well as individuals in complex chapter 7 and chapter 11 proceedings. He lectures frequently on issues of bankruptcy, creditors' rights and remedies before national organizations. Mr. Furr served as editor of *NABTalk* from 2000-05 and sat on NABT's board of directors from 2000-11, serving as president during the 2008-09 term. He is currently president of the American Board of Certification. Mr. Furr is a contributor to the *ABI Journal* and is admitted to practice law in Georgia and Florida and in all federal courts in Florida and the Eleventh Circuit Court of Appeals. In 1983, Mr. Furr became a Board Certified Civil Trial Lawyer by the Florida Bar, and in 1994 he received an AV rating by Martindale-Hubbell. He is listed in *The Best Lawyers in America* and in *Florida Super Lawyers* and is a Fellow in the American College of Bankruptcy. Mr. Furr received his J.D. from Emory University in 1975.

Michael I. Goldberg chairs Akerman LLP's Fraud and Recovery Practice in Fort Lauderdale, Fla., and leads an experienced team of lawyers focused on unraveling high-profile investor fraud, including Ponzi schemes, receiverships and EB-5 Immigrant Investor Visa Program wrongdoing. He has managed some of the largest Ponzi scheme liquidation recoveries in U.S. history. More recently, Mr. Goldberg has developed a reputation for his work unraveling EB-5 fraud schemes. He previously chaired Akerman's Bankruptcy and Reorganization Practice Group. As a qualified expert witness on

Ponzi schemes, Mr. Goldberg is highly sought-after and routinely testifies in federal and state court cases throughout the country and internationally. He has served as court-appointed receiver in many of his cases over the past two decades, helping victims maximize potential returns by identifying, securing and monetizing potential assets as quickly and efficiently as possible. Regarded as a thought leader on fraud, Mr. Goldberg has appeared on CNN, CNBC, Fox News and National Public Radio to discuss Ponzi schemes and receiverships. He has also been quoted in Bloomberg, *Forbes*, *The Wall Street Journal*, *The New York Times*, *The American Lawyer*, *The Miami Herald*, *Sun Sentinel* and numerous other publications. Mr. Goldberg regularly lectures on receiverships, Ponzi schemes and EB-5 fraud to regulators and various legal groups throughout the country, and he is a Fellow of the American College of Bankruptcy. He received his B.A. in history in 1985 from Boston University, his M.B.A. in 1987 from New York University and his J.D. *magna cum laude* from Boston University School of Law.

Paul S. Singerman is co-chair of Berger Singerman LLP in Miami and leads the firm's Business Reorganization Team. His practice areas include complex bankruptcy and commercial litigation, representation of fiduciaries in fraud cases, corporate governance, and distressed business mergers and acquisitions. Prior to his legal career, Mr. Singerman was in business for eight years. He has been involved in some of the highest-profile and most significant restructuring matters in Florida for over three decades. Mr. Singerman represented Piper Aircraft Corp. in its extraordinarily successful chapter 11 case filed in 1991. Starting in 2000, he was lead counsel to the Official Committee of Unsecured Creditors in the CHS Electronics case, and post-confirmation, he was lead counsel to the liquidating trustee. Starting in 2009, he was lead counsel to the chapter 11 trustee in the \$1.3 billion Ponzi scheme case of the Rothstein, Rosenfeldt & Adler law firm, the only Ponzi scheme case in the U.S. in which unsubordinated unsecured creditors received full payment on their claims. In that same year, he commenced the representation of the Official Committee of Unsecured Creditors in the chapter 11 case of Taylor Bean & Whitaker, then the largest nonbank mortgage-originator in the country. That case involved more than \$11.5 billion in claims. Currently, he serves as lead counsel to the court-appointed receiver in the case involving the collapse of the Champlain Towers South condominium building, which resulted in 98 deaths. Mr. Singerman received his B.A. with highest honors from the University of Florida and his J.D. with honors from the University of Florida Fredric G. Levin College of Law, where he was a member of the Order of the Coif and Omicron Delta Kappa.

Jeffrey W. Warren is a founder and president emeritus of Bush Ross, PA in Tampa, Fla. He has nationally recognized legal practice in chapter 11 reorganization cases, both as a courtroom counsel and as an out-of-court negotiator and problem-solver. Mr. Warren is certified by the Supreme Court of Florida as a circuit mediator. He is admitted to practice in Florida, the U.S. District Courts for the Middle, Northern and Southern Districts of Florida, the U.S. Courts of Appeals for the Fourth, Fifth, Tenth and Eleventh Circuits, and the U.S. Supreme Court. Mr. Warren is a Fellow in the American College of Bankruptcy and was a contributing editor for the *ABI Journal*. He also is Board Certified in Business Bankruptcy Law by the American Board of Certification and has authored several chapters for publication with the Florida Bar, as well as numerous articles regarding creditors' rights issues. In 2008, the Tampa Bay Bankruptcy Bar Association presented Mr. Warren with its "Douglas P. McClurg Professionalism Award." He has been recognized in *The Best Lawyers in America* since 1995 and received its "Lawyer of the Year" designation in Bankruptcy Creditor Debtor Rights and Bankruptcy Litigation in 2011 and 2013, respectively. He has also been named to Florida's "Legal

Elite” by *Florida Trend Magazine* since 2005, and has been recognized as one of the top 10 *Florida Super Lawyers* for 2008, 2009, 2013, 2014 and 2015. Mr. Warren is rated AV-Preeminent by Martindale-Hubbell. He received both his B.S. in 1969 and his J.D. in 1972 from the University of Florida.