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ELULS

THE ENVIRONMENTAL AND LAND USE LAW SECTION

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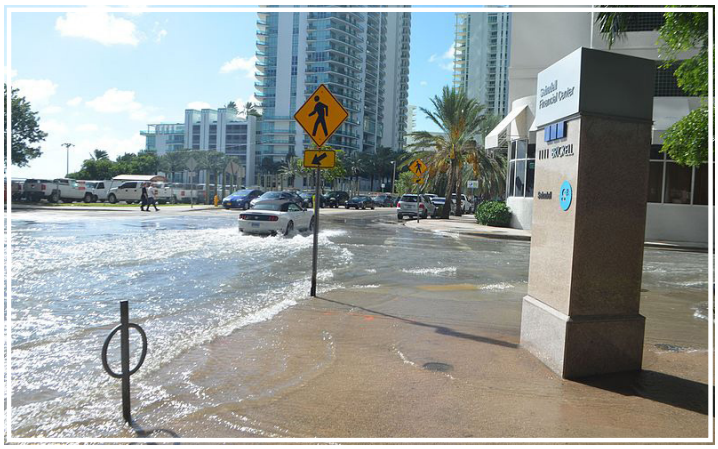
Statewide Flooding and Sea Level Rise Resilience: New Legislation and Opportunities to Implement and Fund Resiliency

By Erin L. Deady[1]

1. Introduction

On May 12, 2021, Governor DeSantis signed SB 1954 into law, "[a]n act relating to statewide flooding and sea level rise resilience" having several provisions catalyze resiliency planning and climate change adaptation response at the State, regional and local levels.[2] The legislation creates section 380.093, Florida Statutes, a new resiliency program with enhanced granting, policy and programming related to climate change response.



Tidal flooding has become a regular nuisance for coastal cities. Here, high tide floods Bricknell Bay Drive in Miami.

To date, local governments throughout the state have led in the resiliency planning space spurred by a myriad of motivating circumstances. This work has been commenced by individual counties and municipalities, regional bodies, and collaborations of local governments. Motivations for these efforts include each "King Tide," which often results in highly visible flooding in many communities, and comprehensive plan updates that trigger the need for compliance with legislative requirements related to "Peril of Flood."[3] Many local governments have also undertaken vulnerability assessments or started adaptation planning for capital improvements as a result of Resilience Planning Grants (RPGs) from the Department of Environmental Protection (DEP). Whatever the motivating factor, climate change and sea level rise planning and response have commenced in many communities.

But now, with the creation of section 380.093, Florida Statutes, the resiliency planning efforts within the state will have the benefit of funding, policy, and standards that have become so necessary. This article provides an overview of this new legislation, and how it integrates with existing law and policy on resiliency issues. This article will also explore some of the opportunities and challenges of implementing the statute, as well as provisions that would benefit from clarification during the rulemaking process or legislative amendments during the 2022 session.

2. Summary of Legislation

Section 380.093, Florida Statutes creates the new "Resilient Florida" program, among other obligations and initiatives related to resiliency and flooding. Each will be discussed in this section.

a. Intent and Definitions. In terms of the intent section, it is fairly obvious, "… that the state is particularly vulnerable to adverse impacts from flooding resulting from increases in frequency and duration of rainfall events, storm surge from more frequent and severe weather

See "Resilient Florida" page 13

INSIDE:

From the Chair

by Susan Roeder Martin, Nason Yeager Gerson Harris & Fumero, P.A.

As the Environmental and Land Use Law Section (ELULS) embarks on its 2021-2022 year, I am honored to serve as this year's Chair. The last year has been challenging for all of us, and unfortunately challenges remain. The Executive Council and I will work to meet the needs of the section despite the continuing health issues presented by COVID-19.

Thank you to our past chair, Rachael Santana for her hard work in 2020-2021. I would like to introduce our officers for 2021-2022:

Josh Coldiron, Chair-Elect
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Keeping health issues in mind, we have already had a series of online seminars and have several more planned for the remainder of 2021. Seminars which occurred since July 1, 2021 include *Regional Water Quality Treatment and Water Quality Banks* and *Resiliency in Practice: Where the Water Meets the Road.* Aftermarket versions of these programs are available for purchase online via The Florida Bar's CLE Course Catalog (for CDs and DVDs) and The Florida Bar's InReach Catalog for on-demand programs. Many of last year's CLE programs are also available for aftermarket sale for anyone looking for additional CLE credit. Currently planned upcoming seminars in 2021 include *Impact Fees: Core Concepts and Evolving Law*, scheduled for October 21, 2021 as well as several other programs currently in the works.

We are planning outdoor networking events for this coming year. Sponsorships will likely be available for these events. These may be outdoor "networking happy hours" or more active events, which allow us to do "Nature Networking". We are especially excited about a statewide "Conservation Day" which will be tentatively held at various locations throughout the state in the spring.

I hope that you will join me for future CLE webinars and outdoor networking activities.

ON APPEAL

by Larry Sellers, Holland & Knight LLP

Note: Status of cases is as of August 23, 2021. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Galleon Bay Corp. v. Board of County Commissioners of Monroe County, Case No. SC21-409. Petition to review decision by Third District Court of Appeals affirming the trial court's order rejecting a claim that inverse condemnation proceedings resulting in the May 2016 final judgment, as well as the final judgment itself, were null and void because the defendants did not, within twenty days after rendition of the May 2016 final judgment, deposit into the registry of the court the amounts set forth in that judgment, pursuant to Section 73.111, Florida Statutes. The trial court (and the appellate court) concluded that Section 73.111 does not apply to inverse condemnation proceeding or the Final Judgment. *Galleon Bay Corp. v. Board of County Commissioners of Monroe County*, 314 So. 3d 509 (Fla. 3d DCA 2020). Status: Review denied on August 9, 2021.

The City of West Palm Beach, Inc., v. Haver, et al., Case No. SC20-1284. Notice to invoke discretionary jurisdiction to review the Fourth District Court of Appeals decision in *Haver v. City of West Palm Beach*, 298 So. 3d 647 (Jun. 10, 2020), in which the court certified direct conflict with decisions of other district courts of appeal in *Detournay v. City of Coral Gables*, 127 So. 3d 869 (Fla. 3d DCA 2013), and *Chapman v. Town of Redington Beach,* 202 So. 3d 979 (Fla. 2d DCA 2019). The case presents the question of whether a private party may bring an equitable action against a municipality to compel a local government to enforce municipal zoning regulations. Status: Oral argument held on April 7, 2021.

FIRST DCA

Westshore Legacy LLC v. Alachua County, Florida, et al., Case No. 1D21-986. Appeal from final order rejecting challenge by Westshore Legacy and determining proposed amendment to Alachua County Comprehensive Plan to be in compliance. Status: Notice of appeal filed April 5, 2021.

Sierra Club, et al. v. Florida Department of Environmental Protection, Case No. 1D21-1667. Appeal from final order adopting recommended order rejecting challenge to five Basin Management Action Plans ("BMAPs")—the Suwannee River BMAP, Santa Fe River BMAP, Silver Springs, Upper Silver River and Rainbow Spring Group BMAP, Wekiwa Spring and Rock Springs BMAP, and Volusia Blue Springs BMAP). The final order determined these BMAPs were valid because they were designed to achieve the Total Maximum Daily Loads ("TMDLs") required by sections 373.807 and 403.067, Florida Statutes. Status: Notice of appeal filed June 4, 2021.

Erica Housend v. River Hills Condominium Association, Inc. and Florida Department of Environmental Protection, Case No. 1D20-3712. Appeal from DEP final order dismissing third amended petition as untimely. Status: Dismissed on July 27, 2021.

Erica Housend v. River Hills Condominium Association, Inc. and Florida Department of Environmental Protection, Case No. 1D21-0590. Appeal from Department of Environmental Protection ("DEP") final order dismissing an amended petition challenging a DEP letter stating the agency cannot determine whether the petitioner's structure

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is in compliance with DEP's rules, and that the outcome of that question must be determined by a circuit court or agreement of the parties. The petition also sought to challenge an unadopted rule, which is within the jurisdiction of the Division of Administrative Hearings. Status: Dismissed on July 27, 2021.

Florida Environmental Regulations Specialists, Inc. v. DEP, Case No. 1D21-0741. An appeal from a trial court order granting DEP's motion for summary judgment on a claim for breach of contract relating to the termination of an agency term contract for the cleanup of petroleum contaminated sites. Status: Notice of appeal filed March 12, 2021.

Jacqueline Lane v. International Paper Company and DEP, Case No. 1D21-0975. Appeal from DEP final order rejecting challenge to consent order between DEP and International Paper Company. Status: Notice of appeal filed April 1, 2021.

Suwannee River Water Management District v. Seven Springs Water Company, Case No. 1D21-888. The SRWMD appeals of its own final order adopting the Administrative Law Judge's recommended order and renewing the water use permit authorizing Seven Springs to withdraw water in Gilchrist County for bulk sale to an adjacent water bottling facility. Status: Dismissed pursuant to Rule 9.350(a), F.A.C. on June 8, 2021.

Merrillee Malwitz-Jipson v. SRWMD and Seven Springs Water Company, Case No. 1D21-1427. This appeal of a petition dismissal. The petition sought to challenge renewal of the water use permit that is the subject of the appeal in Case No. 1D21-888. The petitioner argues that an SRWMD rule authorizes the filing of the petition because the Governing Board took final action (granting the permit) that substantially differs from the written notice of the District's decision describing the intended action (which was to deny the permit). Status: Notice of appeal filed May 13, 2021.

City of Newberry, City of Archer and City of Alachua vs. Alachua County, Florida and the Alachua County Charter Review Commission, Case No. 1D21-640. Appeal from an order granting summary judgment and determining that the ballot title and summary of the County's Charter Amendment establishing a County Growth Management Area comply with the requirements of section 101.161, Florida Statutes, as well as the relevant case law. Status: Oral argument set for September 21, 2021.

Crum v. Florida Fish & Wildlife Conservation Commission, Case No. 1D21-367. Appeal from two orders granting motions to dismiss two successive amended complaints challenging the rulemaking authority of the Florida Fish and Wildlife Conservation Commission with respect to marine life pursuant to its constitutional authority in Article IV, Section 9 of the Florida Constitution. Status: Request for Oral Argument denied on June 18, 2021.

Palafox, LLC v. Carmen Diaz, Case No. 1D20-3415. Appeal from Administrative Law Judge's final order denying a motion for attorney's fees pursuant to section 120.569(2)(e), Florida Statutes. The Administrative Law Judge ("ALJ") concluded that Diaz and her attorney filed the amended petition for improper purposes, but the motion for fees and sanctions was not timely filed. Note: The ALJ also entered a supplemental recommended order granting the motion for attorney's fees pursuant to section 120.595, Florida Statutes, because Diaz participated in the proceeding for an improper purpose. See DOAH Case No. 19-5831 (Supplemental Recommended Order entered October 30, 2020). Status: Notice of appeal filed November 25, 2020.

John S. Donavan, et al., v. Florida Department of Environmental Protection and City of Destin, Case No. 1D19-4101. Appeal from a Department of Environmental Protection final order issuing a consolidated joint coastal permit and sovereign submerged land authorization to the City authorizing periodic maintenance dredging of the federally-authorized East Pass in Destin Harbor navigation channels. Status: Dismissed for lack of standing on July 16, 2021.

Wilson, Donovan, Sherry & Sherry v. U.S. Army Corps of Engineers, Florida Department of Environmental Protection, City of Destin and Okaloosa County, Case No. 1D20-1434. Appeal from a final order adopting a recommended order and approving the issuance of the proposed permit modification for maintenance dredging of East Pass. Status: Dismissed for lack of standing on July 16, 2021.

City of Destin v. Wilson, et al., Case No. 1D20-2585. Appeal from final order denying motion for attorney's fees pursuant to section 120.569(2)(e), Florida Statutes, related to litigation involving a challenge to the modification of a Department of Environmental Protection permit in connection with the dredging of East Pass in Destin, Florida. Status: Affirmed per curiam on July 16, 2021.

The Board of County Commissioners, Santa Rosa County, Florida and The School Board of Santa Rosa County, Florida v. Homebuilders Association of West Florida, Inc., et al., Case No. 1D20-2227. Appeal from an order granting plaintiffs' verified motion for temporary injunction and determining that challenged educational facilities impact fees are invalid and unenforceable as contrary to the requirements of section 163.31801, Florida Statutes, and the Florida Constitution. Collection of the impact fees was and enjoined. Status: Affirmed on July 28, 2021.

1000 Friends of Florida, Inc., et al., v. State of Florida, et al., Case No 1D20-2135a. Appeal from a final order dismissing an amended complaint challenging section 7, subsection (8)(c), Chapter 2019-165, *Laws of Florida,* that provides for prevailing party attorney's fees and costs in certain land development litigation, as unconstitutional. (This provision is now codified in section 163.3215(8)(c), Florida Statutes, 2020).) Status: Oral argument held on June 15, 2021.

Blue Water Holdings SRC, Inc. v. Santa Rosa County, Case No. 1D19-4387. Appeal from summary judgment dismissing a Bert J. Harris, Jr., Private Property Rights Protection Act claim related to a construction and demolition debris landfill. The circuit court found petitioner failed to comply with the Act's procedural

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requirement to submit a valid appraisal relating to the denial of a permit. Status: Oral argument held on September 15, 2020.

Vickery v. City of Pensacola, Case No. 1D19-4344. Appeal from a trial court order denying a motion to dissolve a temporary injunction preventing a property owner from removing a live oak tree in the Northern Hill Preservation District of Pensacola. The preservation district is governed by ordinances protecting Heritage trees, notwithstanding section 163.045(1), Florida Statutes. Status: Notice of appeal filed December 3, 2019.

GI Shavings, LLC v. Arlington Ridge Community Association, Inc. and Florida Department of Environmental Protection, Case No 1D19-3711. Petition for review of Department of Environmental Protection ("DEP") final order approving a consent order between GI Shavings and DEP, but denying the application for revisions to appellant's air permit for a wood chip dryer. Status: Dismissed as moot on August 2, 2021.

Imhof, et al. v. Walton County, et al., Case No. 1D19-980. Appeal from a final judgment in favor of the county in an action brought by the plaintiffs pursuant to section 163.3215, Florida Statutes, challenging the consistency of a development order with the county's comprehensive plan. The trial court followed the Second DCA's decision in *Heine v. Lee County,* 221 So.3d 1254 (Fla. 2d DCA 2017), which held that a consistency challenge is limited to whether the development order authorizes a use, intensity, or density of development that is in conflict with the comprehensive plan. Note: Regular readers will recall that the 3d DCA recently affirmed *per curiam* a similar ruling in *Cruz v City of Miami*, Case No. 3D17-2708. Status: Oral argument held January 15, 2020.

SECOND DCA

Conservancy of Southwest Florida, Inc. v. Collier County, Florida, and Collier Enterprises Management, Inc., Case No. 2D21-2094. Appeal from final judgment finding a development order for Rivergrass Village consistent with Collier County's comprehensive plan. Status: Notice of appeal filed July 1, 2021.

MW Horticultural Recycling Facility, Inc., et al., v. Florida Department of Environmental Protection, Case No 2D21-0032a. Appeal from Department of Environmental Protection final order denying renewal of a yard trash transfer station or solid waste organic recycling facility registration. Status: Order granting voluntary dismissal entered May 12, 2021.

Fetzer B R S, LLC v. Florida Department of Environmental Protection, Case No. 2D20-2457. Appeal from final order on a petition for declaratory statement seeking a determination whether the petitioner may apply for an environmental resource permit and sovereign submerged lands authorization for the reconstruction of the Quednau Ice House. The the petitioner maintains the ice house is "grandfathered-in to use sovereignty lands" under section 253.03(7)(c), Florida Statutes. The final order grants the request for a declaratory statement in part and dismisses it in part with leave to file an application for regulatory and proprietary authorization pursuant to sections 253.03 and 373.417, Florida Statutes, and Rule 18-21.004, F.A.C. Status: Affirmed per curiam on August 20, 2021.

Dean Wish, LLC v. Lee County, Florida, Case No. 2D19-4843. Appeal from final summary judgment rejecting claim under the Bert J. Harris, Jr., Private Property Rights Protection Act, based upon a finding that Dean Wish was no longer the "property owner" as defined under the Act. Status: Affirmed on April 7, 2021; question certified: May a plaintiff maintain an action under the Bert J. Harris Act where the plaintiff owned the property when the plaintiff commenced the action but had been divested of ownership prior to trial? On May 5, 2021, the Court directed the parties to file supplemental briefs addressing the effect, if any, of the recent enactment of HB 421 & HB 1101.

FIFTH DCA

Leiffer as Trustee of the C & K Family Trust, et al., v. St. Johns River Water Management District, Case No. 5D21-382. Appeal of St. Johns River Water Management District final order generally adopting the Administrative Law Judge's recommended order determining that (a) appellant commenced construction and operation of a borrow pit/sand mine and haul road on the property without the necessary Environmental Resource Pit; (b) appellants' construction and operation of a borrow pit/sand mine and haul road on the property are not exempt under subsection 373.406(3), F.S.; and (c) appellants are required to perform certain corrective actions within the timeframes specified. Status: Notice of appeal filed February 9, 2021.

11th CIRCUIT COURT OF APPEAL

Florida Defenders of the Environment, et al., v. U.S. Forest Service, Case No. 20-12046. Appeal from order granting the federal defendant's motion to dismiss a complaint alleging that the state has operated the Rodman Dam without a permit. Status: Notice of appeal filed June 3, 2020.

UNITED STATES SUPREME COURT

Mississippi v. Tennessee, Case No. 22O143. Issues: (1) whether the court will grant Mississippi leave to file an original action to seek relief from Respondent's use of a pumping operation to take approximately 252 billion gallons of high-quality groundwater; (2) whether Mississippi has sole sovereign authority over and control of groundwater naturally stored within its borders, including in sandstone within Mississippi's borders; and (3) whether Mississippi is entitled to damages, injunctive, and other equitable relief for the Mississippi intrastate groundwater intentionally and forcibly taken by Respondent. Status: Special Master recommends that Mississippi's complaint be dismissed; oral argument set for October 4, 2021.

PennEast Pipeline Co. LLC v. New Jersey, Case No. 19-1039. Petition to review decision by the Third Circuit ruling that developers of the $1 billion PennEast pipeline cannot seize land owned by the state of New Jersey because the Natural Gas Act does not trump the state's Eleventh Amendment immunity from condemnation suits by private companies. Status: Reversed and remanded on

Op-Ed: Is "Rights of Nature" Right for Florida's Waterways? Isn't the Status Quo Enough?

by Mel Martin[1]

Most would agree Florida has plenty of laws on the books to protect our environment. In addition to federal protections, we have assurance in the Florida Constitution that "adequate provision shall be made by law for the abatement of air and water pollution...and for the conservation and protection of natural resources." Emphasis added. We have mountains of statutory and regulatory standards and procedures managed by adept professionals, most with good-hearted intentions to effectively protect Florida's environment. And yet, as we look around and assess the results with our own eyes, it is clear there is a systemic flaw somewhere. The provision of law is inadequate. The status quo is not enough.

As we zoom into the regulatory weeds, we notice the "public interest test" is more window dressing than a clear, analytical mandate.[2] Ambiguity rules in the whether, when, and where environmental permits are suitable.[3] Our patience wait for Basin Management Action Plans to one day become something with teeth to enforce proper Total Maximum Daily Loads (TMDLs) -- has waned thin.[4] There is no certainty whether the Army Corps of Engineers' delegation of wetland "dredge and fill" responsibilities to the State of Florida was even legally sufficient.[5] And then there is the trust-and-hope policy with the agricultural industry. Legislative efforts[6] have grown in and around this jurisprudential flux, further expanding and gilding corporate property rights, suppressing environmental interests and democratic rights to resist, and going so far as preempting (or attempting to preempt[7]) local communities from better protecting the health, safety or well-being of their residents and visitors. Is this truly an unsolvable mystery?

There have been many ideas to address this shared environmental crisis, most of which have played out to some degree of ineffectiveness. Some suggest polluters should continue to pollute but pay another polluter to not pollute as much, or that taxpayers should continue to fund temporary land use promises and other purported "market-driven solutions." Decades of "great ideas" have proven (or rather disproven) fundamental presumptions: free market principles don't directly apply to the environment. Perhaps Mother Nature isn't a commodity, an inanimate thing to be used or abused up to her breaking point. Perhaps we should instead ask ourselves, "what would a legal system of effective stewardship look like -- and how would we build it?"

Square One

It is safe to say Floridians believe the state government should work for them.[8] It should also be an objective finding that the majority of Floridians, across party lines,[9] want clean waters and a healthy environment to live and thrive in, and that they treasure the natural environment for a host of reasons. So getting back to basics, let us consider these alternate but fundamental starting points in this line of logic. Either:

» **Posit 1**: The majority of Floridians prioritize clean water and environmental health over the private interests of those who profit off water pollution and environmental degradation,

or

» **Posit 2**: The majority of Floridians prioritize the private interests of some over their own interests in clean water and environmental health.[10]

If we take Posit 2 as true, then the status quo works very well, case closed, welcome to the new normal. If Posit 1 is true, however, we must have serious discussions about what needs to happen next, and soon. While this would normally take months or years to deliberate in open fora, for the purpose of this article, let us focus on addressing the immediate crisis of Florida waters as an applied example.

If Floridians prioritize clean water, we need to know what that means. The Clean Water Act[11] does not define "clean water," but focuses on "pollutants," "pollution," "toxic pollutant," and of course discharges and effluent limitations. Perhaps it would have been more accurate to entitle it, the "Pollution Permitting Act[12]." It is a similar construct in Florida,[13] as we define "pollution," to be:

> the presence in the outdoor atmosphere or waters of the state of any substances, contaminants, noise, or manmade or human-induced impairment of air or waters or alteration of the chemical, physical, biological, or radiological integrity of air or water ***in quantities or at levels which are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property or which unreasonably interfere with the enjoyment of life or property, including outdoor recreation*** unless authorized by applicable law.[14] (Emphasis added.)

It is certainly a wide net of how Florida law views pollution, to include the jurisdictional triggers of how such pollution may affect humans, plants or animals, or to what extent it interferes with our enjoyment of life or property. Again, all the necessary elements for sound environmental governance are in place to achieve "clean water," but the implementation has still proven to be, for whatever reason, dysfunctional.

So what do Florida's waters need? The integrity of science-based standards. They need the unbiased, methodical and peer-reviewed virtues of good science to establish, review and update what it means for waters to be healthy. Standards of health are measured against their historic, natural levels of water quality, water quantity, flow, the biodiversity of the ecosystem(s) they sustain (or once sustained), and so forth. Florida's

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waters deserve a holistic, comprehensive examination, well beyond the simple estimation of nitrogen or phosphorus amounts per day. These standards will vary from water body to water body and likely evolve as science and technology improves and climate change further takes effect. In this regard, regional and local findings and subject matter expertise are integral to account for differences of hydrogeology and biodiversity associated with each water-based ecosystem. But first must come first: before any stakeholder interest is considered, standards of intrinsic, sustainable health of the waterbody at issue must be identified and established by experts.

As these inherent standards function as enforceable protections on behalf of waters, it can be said that waters are subjects of certain enforceable rights; for example, to exist, flow, be free from harmful pollution and to maintain a healthy ecosystem. This leads us to the Rights of Nature concept. This rights-based approach aligns with and supports Posit 1 and draws a scientifically-attainable, legally-enforceable line in the sand. It benefits not only the intrinsic, sustainable health of Florida's waters, but every person, business, community, and local economy depending on them.

Implementation

In theory and in practice, the Florida Department of Environmental Protection (FDEP) should continue to lead, resource and host the science machine that produces standards of true, comprehensive environmental health in Florida. All policies and procedures should accordingly be reviewed and revised to align with, protect, and promote such standards. Even keeping an eye to the reality of politics, there must be some process to protect the integrity of this science with the fundamental right of clean, healthy waters. FDEP standards must be viewed as rebuttable presumptions. This is where the rights-based approach comes into play.

A right of, and to, clean water law carries three elements: 1) water (to be defined in the measure) has certain rights; 2) residents have legal standing to enforce such rights in a court of appropriate jurisdiction; and 3) courts can order the legal remedy of restoration.

Rights of, and to, clean water. Prepositions matter, but in this sense, "rights of" and "rights to" clean water can be seen as two sides of the same coin, respecting the paradigm from which one views this solution. For some, it is easy to see that we are a part of, not apart from, nature; that nature is alive and deserving of integral respect and effective stewardship. For others who are comfortable with natural, inalienable human rights, it is not a large leap to believe we have the fundamental right to clean water, or to protect our lives, liberties, and property (values and business interests) where nature is concerned. With fundamental rights come strict scrutiny and a determination of what process is due. There will be no immediate answer, no single court ruling that determines all aspects of such issues. Rights of nature jurisprudence will and should take time to develop, but in the end, legal doctrine should shift to account for the individual and shared societal need for (rights to) clean, healthy waters, as determined by good science and rules of best evidence.

Legal standing. Under the rights-based approach, Floridians would have the cause of action and legal standing to enforce these rights against rights-violations, either in their own name or on behalf of the water at issue. Recognizing legal standing to enforce sustainable standards of health does not supplant statutory or regulatory environmental protection. What it does is provide a safety net—"access to courts" for redress if and when decisions or actions fall below sustainable standards.

So when such a violation has been identified, how should a court manage the issue? Should this not be in the purview of Florida's legislative and executive branches? Apparently not. Such current doctrines as "personal harm first" (for legal standing), "primary jurisdiction" (of environmental protection agencies), and "first exhaust all administrative remedies" have run the course of their theoretical benefit, as they pertain to environmental health. Clean water advocates would also likely agree that exhausting every available form of civic participation seems just as ineffective, outside the occasional and often-temporary win. Keeping "fulcrum authority"[15] in the hands of those responsible for and arguably benefiting from the status quo would not align with the expectations of Floridians in Posit 1.

When an environmental rights violation occurs, it is proper to seek redress through the judicial system,[16] appropriately immunized from undue influence through rules of evidence and heightened rules of campaign finance and judicial conduct. With more stringent measures in place to guard against inappropriate motive or bias, courts may be able to determine the best way to resolve the situation based on practicable means available and, importantly, further develop doctrine regarding what process is due.[17] Ideally, such standards would "trickle up" into the regulatory structure to provide widespread, sound environmental governance -- a system that eventually would no longer need citizen suits to enforce rights of, and to, clean water.

Restoration as a legal remedy. In addition to traditional forms of legal and equitable relief, courts should have the option to order the rights-violator to pay for the cost of restoring the water (system) at issue to its prior condition. This "polluter pays" model is not novel, but it has not been embraced in environmental doctrine either. Perhaps fines or penalty fees were not set at the amount to deter bad acts, permit or no permit, but it is this new expectation that is critically important: If you damage what is protected under this rights-based regime, expect to pay for the costs of restoring it. Be responsible for your actions. Taxpayers should no longer foot the bill.[18]

Follow-Through

Paradigm shifts under the law, historically, take time to fully manifest. By empowering Floridians to enforce environmental rights on behalf of nature, or for their own sakes, laws and regulations will incrementally change over time to allow all stakeholders the ability to shift as necessary to preserve and promote their respective interests. Importantly, the new standard of environmental health will focus government agencies on

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reviewing and adjusting their policies and procedures and letting science lead the way in permitting activities. Clear, objective standards of sustainable health, not arbitrary regulatory enforcement, will enable free market principles to reign, encouraging business models and practices to align accordingly and thrive.[19]

There are examples of democratic nations across the globe embracing and applying the Rights of Nature concept. Ecuador enacted Rights of Nature provisions in its 2008 Constitution and has since developed the doctrine over time with case law. Similarly, high courts of Colombia, India, and Bangladesh have unambiguously recognized the rights of rivers, animals and other features of nature in their decisions, creating rippling effects across other functions and processes of government. Many other nations, tribes, states and local governments (to include Orange County, Florida) have codified various forms of this rights-based approach, legitimizing the movement and solidifying its traction in environmental jurisprudence.[20]

In conclusion, the Rights of Nature approach is a small, easy, no-cost legal fix with both immediate and rippling benefits to all concerned. It enshrines science as the leader in determining the intrinsic standards of health. Should an activity (permitted or otherwise) fall short of such standards, Floridians would have the legal standing to act—to rebut the presumption—to ensure the government is doing its job while making polluters pay for the damage they cause. It is an emerging field of law and a potential environmental solution we should at least consider and discuss.

Endnotes

1 Mel Martin is currently volunteering as lead for the Center for Democratic and Environmental Rights (CDER) Rights of Nature Campaign Team, helping communities explore and develop rights-based approaches to environmental protection.

2 Thomas T. Ankersen, Courtney Meyer and Philip Sliger, *Florida's Water Resources Act: "Consistent with the public interest?'*, The Reporter, Vol XLI, No. 4, June/July 2021.

3 *Id.*

4 Douglas H. MacLaughlin, *Will Basin Management Act Plans Restore Florida's Impaired Waters?*, Florida Bar Journal, Vol. 89, No. 2 February 2015, available at: https://www.floridabar.org/the-florida-bar-journal/will-basin-management-action-plans-restore-floridas-impaired-waters

5 Earthjustice et al. sues the U.S. EPA et. al for declaratory and injunctive relief for the unlawful approval of the State of Florida assuming jurisdiction of the Clean Water Act, Sect 404 permitting program. Complaint available at: https://earthjustice.org/sites/default/files/files/001_-_complaint.pdf

6 *See* Integrity Florida's Preemption Strategy 2.0 Report of February 2021, available at: https://www.integrityflorida.org/wp-content/uploads/2021/02/Preemption-2.0-Report_FINAL.pdf

7 *See* Fla. Stat. Sect. 403.412(9)(a) (referencing the "rights of nature preemption" in the 2020 Clean Waterways Act).

8 *See* Article I of the Florida Constitution (Declaration of Rights), Sections 1, 2, 9 and 21.

9 As evidenced through repeated voting results in favor of funding environmental protections and restoration efforts, throughout multiple state citizen initiatives and local initiatives. *See also* Stephen Neely, *On conservation and the environment, Florida Democrats and Republicans see common ground*, Tampa Times (August 8th, 2021), available at: https://www.tampabay.com/opinion/2021/08/08/on-conservation-and-the-environment-florida-democrats-and-republicans-see-common-ground-column/?fbclid=IwAR29y0NxSAfL5pvuxrA5lb5x2AIA2gIE54KtUL44tAgEiA1MiM4txD-G438

10 Note that the operative verb is "prioritize"; this exercise of logic acknowledges the fact that, for example, smart growth and low impact development, along with regenerative agriculture, would prove beneficial to the public interest.

11 *See* 33 U.S.C. §1251 et seq. (1972).

12 In fact, it was originally entitled, "Federal Water Pollution Control Amendments of 1972."

13 *See* Fla. Stat. Chapter 403, Environmental Control and relevant laws and regulations.

14 Fla. Stat. 403.031(7).

15 A term used to illustrate the true point of power to decide the health or harm of an intended beneficiary; here, the waters of Florida.

16 *See Massachusetts v EPA*, 549 US 495 (2007) (US Supreme Court finds legal standing for the State of Massachusetts in its suit to compel the US EPA to regulate carbon dioxide as a pollutant under the Clean Air Act; concrete harm was found in such greenhouse gases contributing to global warming, rising sea levels, etc.)

17 Potential due process issues: (a) Notice - registered agent receives notice of permitting applications / other official actions affecting the natural system(s) at issue; triggers the question of how registered agents would be 1) qualified and 2) approved; (b) Opportunity for (public) hearing - determining body hears and duly considers health interests (rights) of waters / ecosystems; (c) Ability to confront (potential) violator of rights - summoning property owner / permit holder to the hearing / court proceeding; (d) Discovery - subpoena power to gain a thorough understanding of interests, causes, effects, and processes; (e) Basis of decision - understanding grounds if / when rights have been deprived; for example: Drawing from a water body identified as the drinking water supply may be ruled a greater need, though mitigating measures could be implemented as required -- such as water conservation policies / mandates, etc.; (f) Availability of counsel - this would create a pool of certified "public nature defenders" with a separate list of rules of professional conduct, shifting the financial burden accordingly.

18 This too should move through "political capillary action" into heightened regulatory environmental protections, once voters realize poor permitting is a direct liability and waste of taxpayer funds.

19 Industries can then save substantial funds, no longer having to annually lobby politicians for favorable legislation or regulatory treatment.

20 For a timeline of Rights of Nature efforts, see https://www.centerforenvironmentalrights.org/timeline.

When Does CERCLA Give Rise to a Contribution Action Under § 113(f)?

by Dominick J Graziano[1]

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA" or "Superfund") was passed in the waning days of President Jimmy Carter's administration. Hastily passed with scant legislative history, CERCLA's statutory language and structure have often been referred to as "murky" and "contradictory."[2] Thus, there are legions of splits among the federal courts on CERCLA issues, and so decisions by the Supreme Court are welcomed by practitioners and potentially responsible parties.

On May 24, 2021, the Supreme Court issued its decision in Territory of Guam v. United States, 141 S. Ct. 1608 (2021). The Supreme Court unanimously held a settlement of an environmental liability must resolve a CERCLA-specific liability to give rise to a contribution action under § 113(f)(3)(B), resolving what had been a federal circuit split on the matter.

Factual Background

At issue in Territory of Guam was a dispute between Guam and the Navy over the Ordot Dump. During the 1940s, the Navy allegedly deposited toxic military waste at the dump. Later, the military returned control of the dump to Guam. Guam then used it as a public landfill. In the late 1990s, the U.S. Environmental Protection Agency (EPA) sued Guam under the Clean Water Act arguing that it was "discharging pollutants … into waters of the United States without obtaining a permit."

In 2004, Guam and EPA entered a consent decree that required Guam to pay a civil penalty and close the dump. Under its terms, Guam's compliance would "be in full settlement and satisfaction of the judicial claims of the United States ….", i.e., claims under the Clean Water Act. The agreement also stated that the United States did not waive any rights or remedies available to it for any violation by the government of Guam of federal and territorial laws and regulations except as provided in the decree.

In 2017, Guam sued the United States under two separate CERCLA provisions. Guam brought a cost recovery action under § 107(a) which allows a state or territory to recover "all costs of a removal or remedial action" from "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." The second claim was a CERCLA § 113(f) contribution action. This provision provides that a "person who has resolved its liability to the United States … for some or all of a response action or for some or all of the costs of such action in [a] settlement may seek contribution from any person who was not [already] party to a [qualifying] settlement."

Guam's complaint was dismissed. The D.C. Circuit found that a party cannot assert a cost recovery claim under CERCLA § 107(a) if it can assert a contribution claim under § 113(f).[3] While determining that Guam did indeed possess a contribution claim previously for its "liability" under the Clean Water Act consent decree, its claim had expired under the threeyear statute of limitations for contribution actions as provided in CERCLA § 113(g)(3).

Supreme Court Analysis

In its petition to the Supreme Court, Guam pleaded it never had a viable contribution claim under § 113(f), thereby allowing it to pursue a cost recovery action under § 107(a). Guam argued that a contribution claim only arises if a settlement resolves CERCLA liability and not some other environmental law. Guam also contended that "even if resolution of a non-CERLCA liability is enough, the decree did not adequately 'resolve' any sort of liability because Guam did not formally admit responsibility and because the agreement left Guam open to future enforcement action."

In deciding that a settlement "must resolve a CERCLA liability to trigger a contribution action under § 113(f)(3)(B), the Court undertook a detailed examination of Subsection 113(f) which "governs the scope of a contribution claim under CERCLA." The Court found that, read in its totality, § 113(f) only applies to liability under a CERCLA settlement. In reaching this conclusion the Court rejected the notion that a contribution action can exist outside of a specific statutory regime, stating that there is no "general

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federal right to contribution" whatsoever. The Court thus rejected the United States' argument that § 113(f)(3)(B) is a "free-roving contribution right for a host of environmental liabilities arising under other laws." In pertinent part the Court reasoned that:

> The interlocking language and structure of the relevant text confirm this understanding. The provision at issue here – 113(f)(3)(B) – recognizes a statutory right to contribution in the specific circumstance where a person both has resolved this liability" via "settlement" …. Its entitlement to post-settlement contribution does not stand alone. On the contrary, § 113(f)(3)(B) exists within the "specific context" of subsection (f), which outlines the broader workings of CERCLA contribution. *Citations omitted.*

The Court concluded that the "Section 113(f) family of contribution provisions" requires and anticipates a predicate CERCLA liability. The case was remanded to the D.C. Circuit for further proceedings consistent with the opinion.

Implications and Conclusion

This decision will encourage, if not demand, that parties to a CERCLA settlement decree be more specific when carving out future CERCLA liability, and not include broader language that could incorporate other environmental statutes and liabilities.

However, the Guam decision appears to leave undecided and untouched which actions can be brought under CERCLA § 107(a). The broad scope potential liability under § 107 has not been circumscribed by the Court's decision in Guam. Plus, Guam could now be in the position to pursue other claims against the United States because the Supreme Court found that its consent decree does not allow for a contribution claim under § 113(f)(3)(B).

This decision raises significant issues for practitioners under Florida environmental laws that are analogous to CERCLA, such as liability provisions in Florida Chapters 376 and 403. The open question is whether a consent decree that exclusively addresses a party's liability under either of those statutes would be necessary before bringing a contribution claim.

In any event, counsel entering a CERCLA-related consent decree will want to make a close reading of this decision to determine what, if any, future contribution claims or other actions could be affected. The Court's decision provides some clarity to an important section of CERCLA. As long-time practitioners of CERCLA know, however, the hastily drafted language and limited legislative history provide little guidance to many "murky" provisions in the statute. The Guam decision clarifies one small but important corner of this comprehensive environmental liability statute.

Endnotes

1 Dominick J. Graziano is of counsel with Bush Graziano Rice & Platter, P.A., in Tampa, where he practices environmental law. He can be reached at *www.bgrplaw.com* and email at *dgraz@bgrplaw.com*

2 See generally, Topol and Snow, *Superfund Law and Procedure* (West 1992), Sec. 1.1 at note 13.

3 *See* 950 F.3rd, at 111.

Florida State University College of Law Summer 2021 Update

by Erin Ryan, Associate Dean for Environmental Programs and Director of FSU Center for Environmental, Energy, and Land Use Law

The U.S. News and World Report (2022) ranked Florida State University as the nation's 18th best Environmental Law Program, tied with Tulane University, and ranked 7th among environmental law programs at all public universities nationwide. Below highlights the activities and events of FSU Environmental Law Certificate Program, and list recent faculty scholarships.

Recent Student Achievements and Activities

» We congratulate the following J.D. graduates who completed the Certificate Program during the Spring 2021 term: Holly Parker Curry (Highest Honors), Brooke Boinis (Honors), Abigail Boyd (Honors), Kathryn Fanning (Honors), Tyler Finello (Honors), Amelia Ulmer (Honors), Erin Carroll, Austin Gasiorek, Kelly Ann Kennedy, Jonathan McGowan, and Ryan Rensel.

» Savannah Wentley completed her Environmental LL.M. degree at the end of Fall 2020. The L.L.M. Program enriches the education experience of our L.L.M. students by enabling them to acquire post-graduate expertise in the areas of environmental, energy, and land use law that interest them most.

» Ten students also completed Pro Bono work in the area of environmental law.

- Florida Fish and Wildlife Commission – **Brooke Boines**
- Florida Department of Environmental Protection – **Nicolas Cardamone, Erin Carroll, Kelly Ann Kennedy, and Amelia Ulmer**
- Florida Department of Agriculture and Consumer Services – **Tyler Finello**
- Judicial Staff Attorneys Office for the 4th Judicial Circuit – **Abigail Boyd**
- 19th Circuit Public Defender's Office – **Austin Gasiorek**
- Clean Air Council – **Abigail Boyd**
- City of Jacksonville – **Jonathan McGowan**
- Cyan Planet Foundation – **Casey Melnik**

» The **FSU Environmental Law Society** (ELS) has concluded elections and finalized the new 2021-2022 Executive Board. The officers are as follows: **Cameron Polomski** (President); Salome Garcia (Vice President); **Margarent Zinsel** (Bookkeeper); and **Olivia Ingram** (Mentor Chair). If any readers would like to reach out to the new board, please email fsuenvironmentallawsociety@gmail.com.

» The Journal of Land Use & Environmental (JLUEL) also have a new Executive Board. The officers are as follows: **Natalie Macaire King** (Editor-in-Chief); **Kendelle Knapp** (Administrative Editor); **Caroline Dike** and Jacqueline Schlick (Executive Editors); Kalie Maniglia (Associate Editor); and **Jaelee Edmond** (Senior Articles Editor). **Lori Wingfield** continue to serve as Journal Manager and Professor **Erin Ryan** as the Faculty Advisor**.**

Student Spotlight

Catherine Awathi, a rising 3L will serve as pro bono director for the Student Animal Legal Defense Fund Chapter. Catherine was selected as a recipient of the 2021 Animal Legal Defense Fund's Advancement in Animal Law Scholarship and the 2021 Law Student Achievement Award from the Florida Bar Animal Law Section. She also co-authored an article with FSU Law Alumni **Ralph DeMeo** published in the Florida Bar Journal, entitled "*Marine Canary in the Coal Mine: The Latest Threats to Manatee Survival and Efforts to Save Them*." This summer, Catherine is serving as a litigation program law clerk for the Animal Legal Defense Fund.

Recent Alumni Accomplishments

Captain **Alan S. Richard** delivered a presentation on behalf of the Florida Bar's Admiralty Law Committee entitled "Florida Maritime Legislative and Regulatory Update, 2021". Captain Richard also testified at the Committee Chair's request before the Florida Senate Committee on Transportation on matters pertaining to Federal Preemption of State and Local Regulation of Seaports.

Susan L. Stephens is an adjunct professor at FSU College of Law teaching Florida Environmental Permitting.

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Jessica M. Icerman is an associate in the Tampa office of Stearns Weaver Miller. She is a member of the firm's Land Development Zoning and Environment Group, and is Florida Bar board certified in city, county, and local government law. Icerman represents clients before local and state governments, and in litigation on land use and land development issues. She has experience representing clients in matters involving rezonings, comprehensive plan amendments, and all aspects of land development permitting and litigation.

Icerman is also a volunteer with the Florida Guardian ad Litem Program.

Faculty Achievements

» Professor **Shi-Ling Hsu** published *Prices Versus Quantities*, in Policy Instruments in Environmental Law (Richards, K.R. & J. can Zeben eds., 2020). Forthcoming publications include the *Capitalism and the Environment*: *A Proposal to Save the Plant*, in Cambridge Univ. Press (2021), *Carbon Taxes and Economic Inequality*, in 15 Harv. L. & Pol'y Rev. __ (2021) and *Whither, Rationality*, in 120 Mich. L. Rev. __ (2021)

» Associate Dean **Erin Ryan** published the following articles: *Environmental Rights for the 21st Century: Comparing the Public Trust Doctrine and the Rights of Nature Movement*, in 43 Cardozo L. Rev. (2021) with Holly Curry & Hayes Rules, *The Twin Environmental Law Problems of Preemption and Political Scale*, in Environmental Law, Disrupted (Keith Hirokawa & Jessica Owley, eds., 2021), *A Short History of the Public Trust Doctrine and its Intersection with Private Water Law*, 39 Virginia Envtl. L.J. 135 (2020) and *Rationing the Constitution vs. Negotiating It: Coan, Mud, and Crystals in the Context of Dual Sovereignty*, 2020 Wisc, L. Rev. 165 (2020).

» Professor **Mark Seidenfeld** published a book review entitled *The Limits of Deliberation about the Public's Values: Reviewing Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy*, in 199 Mich. L. Rev. 1111 (2021), and *Textualism's Theoretical Bankruptcy and Its Implications for Statutory Interpretation*, in 100 B.U.L. Rev. 1817 (2020).

» Assistant Professor **Sarah Swan** published an article entitled *Constitutional Off-loading at the City Limits* in 135 Harv. L. Rev. (2021). Forthcoming publications include: Running Interference: Local Government, Tortious Interference with Contractual Relations, and the Constitutional Right to Petition, 36 J. Land Use & Envtl. L. __ (2021) and Exclusion Diffusion, 70 Emory L.J. __ (2021).

» Dean Emeritus **Don Weidner** published *LLC Default Rules Are Hazardous to Member Liquidity*, in 76 Bus. Lawyer 151 (2020) and *The Revised Uniform Partnership Act*, in Thomson Reuters (2020) with R. Hillman & A. Donn. Forthcoming publications include *The Unfortunate Role of Special Litigation Committees in LLCs* (2021).

Environmental Law Lectures

The FSU Environmental,Energy, and Land Use Law Program will be hosting a full slate of impressive environmental and administrative law events and activities this coming 2021-2022.

» Distinguished Environmental Lectures: Each year, the College of Law's nationally regarded Distinguished Environmental Lecture program features some of the profession's leading environmental scholar and policy makers. We have invited **Alexandra B. Klass**, Distinguished McKnight University Professor at the University of Minnesota Law School and **Michael P. Vanderbergh**, David Daniels Allen Distinguished Chair in Law, Director of Climate Change Research Network, and Co-Director of the Energy, Environment and Land Use Program of Vanderbilt University Law School to provide lectures for the coming academic school year.

» The Environmental Law Program will also be hosting a panel discussion, a number of enrichment seminars, and several field trips. Information on upcoming events will be available at https://law.fsu.edu/academics/academic-programs/juris-doctor-program/environmental-energy-land-use-law/environmental-program-recent-upcoming-events. We hope Section members will join us for one or more of these events.

systems, and sea level rise."[4] The intent section goes on to state, "[s]uch adverse impacts pose economic, social, environmental, and public health and safety challenges to the state. To most effectively address these challenges, funding should be allocated in a manner that prioritizes addressing the most significant risks."[5] Another key aspect of the intent section is the recognition, "…that the adverse impacts of flooding and sea level rise affect coastal and inland communities all across the state. Consequently, a coordinated approach is necessary to maximize the benefit of efforts to address such impacts and to improve the state's resilience to flooding and sea level rise."[6] An important take away here is the inclusion of inland communities in addition to the obvious coastal community element which has been the focus of existing efforts to increase the extent of resiliency responses across the state. This is important because its not just coastal communities that will benefit from flood related planning and adaptation.

In terms of definitions, there is one key definition in (2), "critical assets." It is important because it frames parameters for both planning and project funding and it is comprehensive and inclusive:

> "Critical assets": 1. Transportation assets and evacuation routes, including airports, bridges, bus terminals, ports, major roadways, marinas, rail facilities, and railroad bridges.
>
> 2. Critical infrastructure, including wastewater treatment facilities and lift stations, stormwater treatment facilities and pump stations, drinking water facilities, water utility conveyance systems, electric production and supply facilities, solid and hazardous waste facilities, military installations, communications facilities, and disaster debris management sites.
>
> 3. Critical community and emergency facilities, including schools, colleges, universities, community centers, correctional facilities, disaster recovery centers, emergency medical service facilities, emergency operation centers, fire stations, health care facilities, hospitals, law enforcement facilities, local government facilities, logistical staging areas, affordable public housing, risk shelter inventory, and state government facilities.
>
> 4. Natural, cultural, and historical resources, including conservation lands, parks, shorelines, surface waters, wetlands, and historical and cultural assets.7

b. *Resilient Florida Grant Program*. In (3), the Resilient Florida Grant Program (RFGP) is established as a new program within DEP. It updates and expands the existing Florida Resilient Coastlines Program's Resilience Planning and Implementation Grants (RPG and RIG). That said, many are referring to the entirety of section 380.093, Florida Statutes, as the "Resilient Florida" program which is technically a misnomer and is only one small portion of the legislation referring to this new grant program in (3) of section 380.093.

Counties and municipalities may pursue funds for the following initiatives: (1) the costs of community resilience planning and necessary data collection for such planning, including comprehensive plan amendments and necessary corresponding analyses that address the requirements of section 163.3178(2)(f); (2) vulnerability assessments that identify or address risks of flooding and sea level rise; (3) the development of projects, plans, and policies that allow communities to prepare for threats from flooding and sea level rise; and (4) projects to adapt critical assets to the effects of flooding and sea level rise.8 It is important to note that for funding purposes, there will be $20 million available for "planning grants," and a one-time infusion of $500 million available for "resilience projects." This is in addition to the Statewide Funding and Sea Level Rise Resilience Plan which includes up to $100 million annual subject to legislative approval.

It is important to note in section 380.093(3) there are now standards associated with development of vulnerability assessments.[9] This is important because while the state previously funded development of local government vulnerability assessments under the RPGs, the results varied significantly because of differences in scope of modeling, approaches, data collection, and the information that resulted from the planning effort. Additionally, RPG funding for vulnerability assessments was capped at $75,000, which was a welcome start to the planning process, but it limited the assessment scope because data collection and analysis is complicated in these planning efforts, and expensive. So, with the development of these new standards and lifting the RPG funding cap of $75,000, local governments can take a more comprehensive approach, consistent with the statutory requirements, for the development of the vulnerability assessments. Subject to approval, there may be some flexibility from DEP in meeting assessment requirements, but the mandatory components for vulnerability assessments[10] include:

» The analysis must include the entire geographic area and all critical assets using the most recent publicly available elevation data. A smaller geographic area can include only a portion of the assets with approval from DEP. A report must be submitted to DEP including:
  - Vulnerability and risk assessments of all critical assets owned by the local government.
  - All mapping data (geospatial and geographic information systems).
  - Metadata to support the process according to DEP standards.
  - Lists of critical assets impacted.
  - Peril of flood amendments for the comprehensive plan (section 163.3178) if not yet completed by the local government.
  - Tidal flooding data including future high tide flooding and the number of tidal flood days

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for each scenario and planning year horizon.

- National Oceanic and Atmospheric Administration (NOAA) or Federal Emergency Management Agency (FEMA) storm surge data which must equal or exceed the current 100-year flood event.
- To the extent practicable, rainfall induced flooding data including future conditions for sea level rise and high tides as well as compound flooding of tidal, storm surge and rainfall-induced flooding.

» The analysis must also include the following parameters:

- Use of North American Vertical Datum of 1988.
- At least two sea level rise scenarios (NOAA Intermediate Low and High)
- At least two planning horizons for 2040 and 2070
- Use of the two closest tide gauges to interpolate local sea level data; but one gauge may be used if it has a higher mean sea level and alternate tide gauges can be used as long as the rationale is submitted to DEP.

c. *Comprehensive Statewide Flood Vulnerability and Sea Level Rise Data Set and Assessment*. By July 1, 2022, DEP must develop a dataset to support a comprehensive statewide flood vulnerability and sea level rise assessment.[11] The goal is to use existing data and vulnerability assessments conducted by local governments—to the extent they exist—and provide output usable by the state for the development of the dataset. The Chief Science Officer must develop statewide sea level rise projections incorporating temporal and spatial variability across the state, to the extent practicable, for inclusion in the envisioned dataset.[12] The dataset must include information to determine risk to both inland and coastal communities including elevation, tidal levels and precipitation.[13]

By July 2, 2023, DEP must also complete a comprehensive statewide flood vulnerability and sea level rise assessment looking at inland and coastal infrastructure, geographic areas and vulnerable communities and their risk.[14] The referenced dataset must be used to conduct the assessment and it must include local and regional analysis related to vulnerability and risk such as local mitigation strategies and post disaster redevelopment plans. Critical assets must be inventoried "… essential for critical government and business functions, national security, public health and safety, the economy, flood and storm protection, water quality management, and wildlife habitat management, and must identify and analyze the vulnerability of and risks to such critical assets."[15] The critical assets of local governments to be submitted as part of the RFGP shall also be considered. The dataset and comprehensive statewide flood vulnerability and sea level rise assessment shall be updated every five (5) years or more frequently to address data needs.[16]

d. *Statewide Flooding and Sea Level Rise Resilience Plan*. Each December, starting December 1, 2021, DEP shall develop a Statewide Flooding and Sea Level Resilience Plan that includes a three-year planning horizon and shall be submitted to the Governor, President of the Senate and Speaker of the House.[17] It will compile and rank projects addressing risks of flooding and sea level rise to coastal and inland communities.[18] The first one submitted for this year, December 1, 2021, will be a "preliminary plan" to address risks already identified in existing local government vulnerability assessments. This is to be updated in 2022 and after 2023, the plan shall address risks identified in the Comprehensive Statewide Flood Vulnerability and Sea Level Rise Assessment.[19]

The Statewide Flooding and Sea Level Rise Resilience Plan must include certain information about each ranked project, including:

- Basic project information;
- Cost and cost share percentage available;
- Priority score assigned to the project; and
- Project sponsor.

By September 1 each year, counties and municipalities may submit to DEP a list of proposed projects that address risks of flooding or sea level rise identified in vulnerability assessments *that meet the requirements of subsection (3)*. This language is critical. The legislation requires projects be identified in assessments that meet the new requirements. Most local governments that have done vulnerability assessments, even recently completed ones, are not likely to fully comply with these requirements. Therefore, meeting the assessment requirements should be a priority for local governments as it will allow them to get their projects in the statewide plan. A regional resilience entity may also submit proposed projects to DEP on behalf of one or more member counties or municipalities.[20] Water management and flood control districts submit projects not identified in a vulnerability assessment.[21] There are also standards for project submittals, which are currently being accepted for the first year via a web portal established by DEP.[22]

To be eligible for inclusion in the Statewide Flooding and Sea Level Rise Resiliency Plan, each project must have a minimum 50 percent cost-share unless the project assists or is within a "financially disadvantaged small community."[23] Factors such as population size, and per capita annual income are used to determine which communities qualify as a "financially disadvantaged small community."[24]

There are two paths for projects to be eligible for inclusion in the Statewide Flooding and Resilience Plan: (1) a project must have been submitted by a county, municipality, regional resilience entity, water management district, or flood control district pursuant to paragraph (d) or (2) must have been identified in the comprehensive statewide flood vulnerability and sea level rise assessment, as applicable.[25] This provision is important because path (1) links back to paragraph (d) in this subsection which requires that projects address risks of flooding or sea level rise identified *in vulnerability assessments that meet the requirements of subsection (3)*. Again, this linkage underscores the importance of having a vulnerability assessment that meets the standards in the statute. Projects must flow

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through either process and, at least in the early years, a pivotal first step is having that vulnerability assessment meeting the data and modeling requirements outlined in the statute.

The following projects are ineligible for inclusion in the Statewide Flooding and Sea Level Rise Resiliency Plan:

1. Aesthetic vegetation.

2. Recreational structures such as piers, docks, and boardwalks.

3. Water quality components of stormwater and wastewater management systems, except for expenses to mitigate water quality impacts caused by the project or expenses related to water quality which are necessary to obtain a permit for the project.

4. Maintenance and repair of over-walks.

5. Park activities and facilities, except expenses to control flooding or erosion.

6. Navigation construction, operation, and maintenance activities.

7. Projects that provide only recreational benefits.

The total amount of funding for the Statewide Flooding and Sea Level Rise resiliency plan is not to exceed $100 million per year.[26] The Legislature approves the plan and multi-year projects must be built into subsequent funding cycles.[27] There is also a scoring system[28] for projects comprised of the following elements:

- Tier 1 (40%): the degree to which the project addresses the risks posed by flooding and sea level rise identified in the local government vulnerability assessments or the Comprehensive Statewide Flood Vulnerability and Sea Level Rise Assessment; the degree to which the project addresses risks to regionally significant assets; the degree to which the project reduces risks to areas with an overall higher percentage of vulnerable critical assets; and the degree to which the project contributes to existing flooding mitigation projects that reduce upland damage costs by incorporating new or enhanced structures or restoration and revegetation projects.
- Tier 2 (30%): the degree to which flooding and erosion currently affect the condition of the project area; the overall readiness of the project to proceed in a timely manner; the inclusion of environmental habitat enhancement or nature-based options for resilience, particularly as it pertains to critical habitat areas for threatened or endangered species; and cost-effectiveness of the project.
- Tier 3 (20%): the availability of local, state, and federal matching funds; previous state commitment and involvement in the project; and the exceedance of the flood-resistant construction requirements of the Florida Building Code and applicable flood plain management regulations.
- Tier 4 (10%): the proposed innovative technologies designed to reduce project costs and provide regional collaboration and the extent to which the project assists financially disadvantaged communities.

DEP has initiated rulemaking to implement this section.[29] This rulemaking will be critical to clarify the project evaluation process undertaken by DEP.

e. *Regional Resilience Entities*. DEP may provide funding to regional entities established by general purpose local governments to plan for the resilience needs of communities and coordinate intergovernmental solutions. The funding must: (a) provide technical assistance to counties and municipalities; (b) coordinate multijurisdictional vulnerability assessments; or (c) develop project proposals to be submitted for inclusion in the Statewide Flooding and Sea Level Rise Resilience Plan.[30]

f. *Florida Hub for Applied Research and Innovation*. The Florida Flood Hub for Applied Research and Innovation ("Hub") is established within the University of South Florida ("USF") College of Marine Science to coordinate efforts between the academic and research institutions of the state.[31] USF, or its successor entity, will serve as the lead institution and engage other academic and research institutions, private partners, and financial sponsors to coordinate and support applied research and innovation to address the flooding and sea level rise challenges.[32] The mission of the Hub includes data collection, model development, coordinating research funds, establishing monitoring programs, coordinating with various agencies, training, partnerships, and other interaction to advance research and share technology.[33] Annual reports on the Hub's activities shall be provided to the Governor, Senate President and House Speaker.[34]

g. *Annual assessment of Florida's water resources and conservation lands*. Section 403.928(4) was amended to expand the requirements of the existing annual assessment of Florida's water resources and conservation lands (conducted by the Office of Economic and Demographic Research) to now include flooding information.[35] Specifically, the assessment must analyze future expenditures by federal, state, regional, and local governments required to minimize the adverse economic effects of inland and coastal flooding and decrease the likelihood of severe dislocations or disruptions in the economy and preserve the value of real and natural assets to the extent economically feasible. To the extent possible, the analysis must evaluate the cost of the resilience efforts necessary to address inland and coastal flooding associated with sea level rise, high tide events, storm surge, flash flooding, stormwater runoff, and increased annual precipitation over a 50-year planning horizon. When dedicated revenues are provided in law for these purposes or that recurring expenditures are made, the analysis must also identify the gap, if any, between the estimated revenues and the projected expenditures.

3. Current Legislation Legal and Policy Initiatives for Resiliency

Currently, legislation related to resiliency, climate, and adaptation response has focused on initiatives within local government comprehensive plans[36] or initiatives related to the expenditure of funds for public projects.[37] There is consistency across these efforts on several levels.

First, if a local government has not completed its Peril of Flood amendments pursuant to section 163.3178,

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then that will need to be addressed in a vulnerability assessment conducted pursuant to section 380.093(3)(d). Second, if the local government is utilizing state funds for construction projects, pursuant to section 161.551, a sea level impact projection ("SLIP") study must be conducted either by the project applicant or utilizing DEP's new online tool. The standards for a SLIP are fairly consistent with standards for a vulnerability assessment in section 380.093.

While DEP has also been implementing its current RPG and RIG programs for four funding cycles, the length of time and previously discussed cost cap will be modified and expanded for the new planning and project grants. This is necessary to address the more complicated modeling requirements for vulnerability assessments outlined in the legislation. The expanded vulnerability assessment parameters will also result in more consistent work products across local governments and generate the data in a form that can be used in the Comprehensive Statewide Flood Vulnerability and Sea Level Rise Data Set and Assessment and Statewide Flooding and Sea Level Rise Resilience Plan.

Finally, a lesser utilized tool in existing state law, the establishment of adaptation action areas (AAAs)[38] in comprehensive plans, also can be considered in alignment with section 380.093. For local governments that have established AAAs in their comprehensive plans, these geographic areas can be used to bridge the gap between vulnerability and adaptation planning and facilitate further development of projects to respond to flood impacts. These are typically the most vulnerable areas of a community and are probably one of the initial priorities for flooding response.

4. Opportunities and Challenges for the New Program

With every new major program such as this statewide flooding and sea level rise resilience initiative, there are both opportunities and challenges. With upward of $620 million in these first early years supplemented with funds from the American Rescue Plan Act of 2021 ("ARPA"),[39] there will be desperately needed money flowing to the local and regional levels to start or further advance resilience planning and project implementation.

That said, one of the most important nuances of the legislation is the linkage between planning, projects, and the new requirements for vulnerability assessments. While these new requirements are more complicated and time consuming in terms of scope, the more comprehensive output from these efforts will be incredibly useful to local governments for identifying risk and prioritizing adaptation response. Moreover, there is funding through the planning grants ($20 million) to cover the costs of either a new vulnerability assessment that meets these requirements or expanding a previous vulnerability assessment to comply with the new modeling requirements.

Coastal cities are not alone in facing floods as a result of climate change. The Mississippi River in Davenport, Iowa, floods every spring, partially as a result of higher sea levels inhibiting drainage to the Gulf of Mexico.

Another key element that may not be apparent is the importance of the metadata requirements. This has a two-fold implication. First, it is time consuming to prepare the metadata to meet DEP's standards in conjunction with a vulnerability assessment. That said, the utility of doing so is that DEP may produce the Comprehensive Statewide Flood Vulnerability and Sea Level Rise Dataset and Assessment as well as the Statewide Flooding and Sea Level Rise Resilience Plan. Second, local governments should be cautioned that they need to include the preparation of this metadata in their scopes and budgets for these vulnerability assessment planning projects. It is not a trivial line item in time or budget.

A final issue to note is that DEP is currently engaged in rulemaking on the implementation of section 380.093. The purpose of the rulemaking is stated as, "[t]he Department creates this rule chapter to implement Section 380.093, F.S., relating to the Statewide Flooding and Sea Level Rise Resilience Plan and project submittal requirements. Entities for which this rule is relevant include coastal and inland communities including counties, municipalities, water management districts, flood control districts, and regional resilience entities."[40] Subject matters to be addressed by the rulemaking include sea level rise, flooding, infrastructure, planning, vulnerability, and resilience related to the development of the Statewide Flooding and Sea Level Rise Resilience Plan.

5. Clarifications in Rulemaking or Subsequent Legislation

As with any new large-scale program, there are clarifications and questions that arise regarding implementation. Section 380.093 is no exception. The following is a summary of potential issues that have arisen with initial roll out of the grant portal and project submittals. There are many other procedural questions, but the following includes some highlights:

a. Vulnerability Assessments v. Adaptation Plans. Currently, the way the legislation is structured, projects must flow from vulnerability assessments that meet certain technical standards. But is a vulnerability

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assessment the right vehicle to create that linkage? Vulnerability is defined as the propensity or predisposition of assets to be adversely affected by hazards. Vulnerability encompasses exposure, sensitivity, potential impacts, and adaptive capacity.41 And therefore, a vulnerability assessment is the process for identifying who or what is impacted by climate change. On the other hand, adaptation is the process of adjusting to new conditions in order to reduce risks to valued assets and adaptive capacity is the ability of a person, asset, or system to adjust to a hazard, take advantage of new opportunities, or cope with change.42 So technically, a vulnerability assessment would serve as the basis for an adaptation plan, where actual projects and response strategy would be identified. Of course, vulnerability planning and adaptation response can be combined into one process. Currently, however, section 380.093 considers these as two different concepts where vulnerability assessments identify or address risk and projects "adapt" critical assets. Section 380.093 could benefit from some clarification on these terms and what types of information vulnerability assessments as opposed to adaptation plans should contain.

Urban planners and others across the country are scrambling to find ways to protect against the effects of climate change – to become resilient.

b. <u>*Scope of Modeling for Vulnerability Assessments*</u>. Paragraph (3)(d) lists certain vulnerability assessment parameters to be used "if applicable." Its unclear if "if applicable" was intended to just apply to inclusion of the Peril of Flood amendments in (3)(d)1. or "if applicable" also applies to all of the technical standards listed in (3)(d)2. This is a critical clarification because it would undermine DEP's goal of standardizing information contained within vulnerability assessments if the inclusion of the information was "if applicable." Additionally, the tidal flooding requirements in (3)(d)2., including the number of tidal flood days expected for each scenario and planning horizon as well as rainfall induced flooding and compound flooding or combinations of tidal, storm surge and rainfall-induced flooding is to be conducted "to the extent practicable." It is unclear who will determine if this technical analysis is "practicable" and this could also undermine DEP's goal of consistent vulnerability assessments. It is also important to understand if the scenarios and standards section in (3)(d)3., is required "to the extent practicable" because this is a central provision standardizing the output of vulnerability assessments including the datum, sea level rise scenarios, planning horizons and tide gauges to be used in the vulnerability assessments.

c. <u>*Existing Vulnerability Assessments Do Not Currently Meet the Requirements In (3)*</u>. The reality is a significant amount of work has been done across the state at the regional and local level to identify sea level rise scenarios and conduct vulnerability assessments. As currently written in the statute, projects must be identified in vulnerability assessments that meet the parameters in section 380.093(3) to be included in the Statewide Flooding and Sea Level Rise Resilience Plan- where the projects get funded. The plain language interpretation is that if a local government has conducted a vulnerability assessment that does not meet all of these requirements and/or it has not identified projects meeting the requirements of subsection (3), then it should pursue a planning grant to do that. Assuming the policy debate about proper scope and terminology regarding vulnerability assessments versus adaptation plans is resolved, this would also relate to standards for plans that must now identify the projects to be included in the Statewide Flood and Sea Level Rise Resilience Plan. Key clarifications should include the scope of vulnerability assessments as opposed to adaptation plans, and where and how projects are identified.

d. <u>*Cost Share commitments and Calculations*</u>. Acknowledging that this is the first year of implementation for section 380.093 and there will be growing pains associated with that process, it is unclear how the 50% cost share is evidenced or when it is needed. The DEP project submittal portal currently asks for the total amount of the project and the 50% cost share, but local governments are left in the dark about how and when to budget for that cost share's availability. Another question is what funds can be used as part of the local government's cost share. DEP has been diligent about responding to clarifying questions about whether ARPA funds or other funding can be used as cost share, but whether or not in-kind services or staff time can be included in the calculation is unclear.

e. <u>*Ranking or scoring criteria for the Statewide Flooding and Sea Level Rise Resilience Plan*</u>. Again, understanding that this is the first year of program roll-out, DEP has its work cut out in determining how to apply the scoring criteria for project eligibility. There are broad categories defined within section 380.093(5)(h), but how to gauge certain elements such as cost effectiveness, the status of permits and regulatory approvals and simply the degree to which the project addresses the risks posed by flooding and sea level rise are all open to interpretation. Local governments will seek more certainty in the rulemaking process or statutory changes to clarify such questions in order to

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competitively position project submittals. Another issue of clarification will be how DEP evaluates the criteria for projects "exceeding the flood-resistant construction requirements of the Florida Building Code and applicable floodplain management regulations".[43] Some projects such as roads or stormwater, may not even be subject to the requirements of the Florida Building Code. Second, it is unclear if the exceedance of applicable floodplain management regulations means those of the local government or otherwise. Finally, it is unclear how this will even be evaluated by DEP. Tier 4 related to innovative technologies and providing regional collaboration is also vague.

6. Conclusions

It is clear Resilient Florida is a transformational program for the state. It is also clear that the state has put considerable funding commitments on the table to address the challenges of sea level rise and future flood risk through vulnerability assessments, adaptation, and project implementation. Local governments have been on the front lines of these challenges, in some instances assisted by other regional entities, and now with section 380.093, there will be funding to support this work at the state, regional and local levels. The ability to leverage additional grant funds is developing as the federal government is ramping up resiliency and flood risk programs and funding opportunities. However, the devil remains in the details on how these initiatives will be implemented. Rulemaking or legislative changes can potentially assist in streamlining project submittals and evaluation by DEP for consistency with the statute. But in the meantime, all eyes are on Florida and how "[a]n act relating to statewide flooding and sea level rise resilience" can help address vulnerabilities and achieve economic resilience by protecting people, assets and property.

Endnotes

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2 § 380.093, Fla Stat.

3 § 163.3178(2)(f), Fla. Stat.

4 § 380.093(1)(a), Fla Stat.

5 *Id.*

6 § 380.093(1)(b), Fla. Stat.

7 § 380.093(2)(a), Fla. Stat.

8 § 380.093(3)(b), Fla. Stat.

9 § 380.093(3)(c), Fla. Stat.

10 § 380.093(3)(c) & (d), Fla. Stat.

11 § 380.093(4), Fla. Stat.

12 § 380.093(4)(a)1, Fla. Stat.

13 § 380.0p93(4)(a)2, Fla. Stat.

14 § 3890.093(4)(b), Fla. Stat.

15 § 380.093(4)(b)3, Fla. Stat.

16 § 380.093(4)(c), Fla. Stat.

17 § 380.093(5), Fla. Stat.

18 *Id.*

19 § 380.093(5)(b), Fla. Stat.

20 § 380.093(5)(d)1, Fla. Stat.

21 §380.093(5)(d)2., Fla. Stat.

22 Protecting Together, *Resilient Florida*, https://protectingfloridatogether.gov/state-action/resilient-grant/form (last visited August 17, 2021).

23 §380.093(5)(e), Fla. Stat.

24 § 380.093(5)(e)1. & 2., Fla. Stat.

25 § 280.093(5)(f), Fla. Stat.

26 § 380.093(5)(i), Fla. Stat.

27 *Id.*

28 § 380.093(5)(h), Fla. Stat.

29 § 380.093)(5)(j), Fla. Stat.

30 § 380.093(6), Fla. Stat.

31 § 380.0933, Fla. Stat.

32 § 380.0933(1), Fla. Stat.

33 § 380.0933(2), Fla. Stat.

34 §380.0933(4), Fla. Stat.

35 § 403.928(4), Fla. Stat.

36 *See* §163.3178(2)(f), Fla. Stat. which states: (2) Each coastal management element required by § 163.3177(6)(g) shall be based on studies, surveys, and data; be consistent with coastal resource plans prepared and adopted pursuant to general or special law; and contain: (f) redevelopment component that outlines the principles that must be used to eliminate inappropriate and unsafe development in the coastal areas when opportunities arise. The component must:

1. Include development and redevelopment principles, strategies, and engineering solutions that reduce the flood risk in coastal areas which results from high-tide events, storm surge, flash floods, stormwater runoff, and the related impacts of sea-level rise.

2. Encourage the use of best practices development and redevelopment principles, strategies, and engineering solutions that will result in the removal of coastal real property from flood zone designations established by the Federal Emergency Management Agency.

3. Identify site development techniques and best practices that may reduce losses due to flooding and claims made under flood insurance policies issued in this state.

4. Be consistent with, or more stringent than, the flood-resistant construction requirements in the Florida Building Code and applicable flood plain management regulations set forth in 44 C.F.R. part 60.

5. Require that any construction activities seaward of the coastal construction control lines established pursuant to s. 161.053 be consistent with chapter 161.

6. Encourage local governments to participate in the National Flood Insurance Program Community Rating System administered by the Federal Emergency Management Agency to achieve flood insurance premium discounts for their residents.

37 § 161.551(2), Fla. Stat. which states: Beginning 1 year after the date the rule developed by the department pursuant to subsection (3) is finalized and is otherwise in effect, a state-financed constructor may not commence construction of a coastal structure without:

(a) Conducting a SLIP study that meets the requirements established by the department;

(b) Submitting the study to the department; and

(c) Receiving notification from the department that the study was received and that it has been published on the department's website pursuant to paragraph (6)(a) for at least 30 days. The state-financed constructor is solely responsible for ensuring that the study submitted to the department for publication meets the requirements under subsection (3).

A SLIP study is defined as: a sea level impact projection study pursuant to Section 161.551(1)(c), Florida Statutes.

38 § 163.3177(6)(g), Fla. Stat.: 10. At the option of the local government, develop an adaptation action area designation for those low-lying coastal zones that are experiencing coastal flooding due to extreme high tides and storm surge and are vulnerable to the impacts of rising sea level. Local governments that adopt an adaptation action area may consider policies within the coastal management element to improve resilience to coastal flooding resulting from high-tide events, storm surge, flash floods, stormwater runoff, and related impacts of sea-level rise. Criteria for the adaptation action area may include, but need not be limited to, areas for which the land elevations are below, at, or near mean higher high water, which have a hydrologic connection to coastal waters, or which are designated as evacuation zones for storm surge.

39 American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. §1 (2021)

40 Vol. 47, Fla. Admin. Reg., Page No. 148, August 2, 2021.

41 U.S. Climate Resilience Toolkit, *Glossary,* https://toolkit.climate.gov/content/glossary (last modified: 2 March 2021 – 10:44am)

42 *Id.*

43 § 380.093(5)(h)3. c., Fla. Stat.

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