New Central Florida Water Initiative Rules: Keeping Central Florida’s Head Above Water

By Jennifer Brown, N. West Gregory, Jessica Quiggle, and Mary Ellen Winkler

I. Background

The Central Florida Water Initiative (CFWI) area includes all of Orange, Osceola, Polk, and Seminole counties, and part of southern Lake County. It covers about 5,300 square miles and includes 50 municipal and county governments. In 2015, the CFWI was home to 2.9 million people. That number is expected to grow to 4.4 million people by 2040. This makes public water supply the primary and largest water use in the CFWI. Further, agriculture is a significant economic sector in the CFWI. While it is the second largest water use, the irrigated agricultural acreage is projected to be relatively unchanged in 2040 at about 135,000 acres.

The Floridan aquifer is “composed of sequential layers of limestone and dolomite and is traditionally subdivided into the upper and lower aquifers...” The Upper Floridan aquifer (UFA) historically met many of the CFWI’s water needs.

The region is also home to large natural areas, including Econlockhatchee Swamp, Wekiva Swamp, Green Swamp, Reedy Creek Swamp, Davenport Creek Swamp, Big Bend Swamp, Cat Island Swamp, Boggy Creek Swamp, Shingle Creek Swamp, the Kissimmee Chain of Lakes (the headwaters to the Kissimmee River), the headwaters of the Peace River, and over 1 million acres of wetlands. Thirteen springs also are located within the CFWI, two of which have been designated as Outstanding Florida Springs (OFSs). These natural systems are highly dependent on the Floridan aquifer.

a. Early Water Supply Planning Efforts by the Water Management Districts

In 1996, Governor Chiles issued Executive Order No. 96-297. This executive order recognized that water resources in certain areas of the state have been harmed by consumptive use withdrawals. It directed the Florida Department of Environmental Protection (DEP) to work with the state’s five water management districts to help ensure comprehensive water supply planning for at least a 20-year planning horizon. The executive order required by that by July 1997, each water management district identify one or more water supply planning regions. By 1998, the executive order required the water management districts complete a water supply assessment to determine: 1) whether existing and reasonably anticipated future needs, water sources, and conservation efforts were sufficient; 2) whether the source of water and conservation efforts were adequate to supply “existing legal uses and reasonably anticipated future needs, and to sustain the natural systems;” and 3) whether harm to the water resources...
We have had an exciting start to 2022, as we prepare for our 50th year anniversary!

ELULS has opened affiliate membership to paralegals who practice in the environmental or land use law areas. Paralegals are welcome to join as affiliates in all section activities, including continuing education and networking events. Please encourage your paralegals to join ELULS and take part in our activities. The paralegal group is headed by Jan Sluth, a talented paralegal at the South Florida Water Management District.

As a public service, the section is working to make the Environmental and Land Use Law Treatise more widely accessible. Our Treatise Committee made up of Brendan Mackesey, Liz Eardley, and Jacki Lopez are working with WestLaw and LexisNexis to make the Treatise available online. Of course, it will always continue to be available to our members as a free resource.

We started 2022 with some great continuing legal education webinars, including Environmental and Land Use Law Section 2022 Florida Legislative Forecast, Local Code Enforcement and State Enforcement Procedures, and Short Term Rental of Residentially Zoned Properties in Florida. We also have additional webinars planned for the first half of 2022, including Environmental and Land Use Law Section 2022 Florida Legislative Wrap-Up and a program on derelict vessels, among others still in the planning stages at this time.

At the Florida Bar Convention in Orlando on June 24, we will have a half day seminar addressing the major environmental topics in 2022. That seminar will include a lunch and a multi-sectional networking event the night before. We hope you will join us.

In March, we will have statewide events at numerous environmental sites throughout the state. These events include a tour of Hickeye Creek Mitigation Park in Alva with happy hour following on March 4, a beach cleanup and planting of native plants co-hosted with Ideas for Us, Keep Pinellas Beautiful, and Ocean Conservancy at Bay Pines Stem Center at St. Petersburg College on March 12, a tour of Conservation Florida’s D Ranch Preserve in Sanford with happy hour following on March 24, presentations and a happy hour at Tall Timbers Research Station in Tallahassee on March 25, and presentations and a happy hour at Matheson Hammock Park in Coral Gables on March 25.

Look for more information coming soon regarding our 50th year anniversary events. Please encourage your colleagues to join us in our many great activities.
ON APPEAL

by Larry Sellers, Holland & Knight LLP

Note: Status of cases is as of November 17, 2021. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

The City of West Palm Beach, Inc., v. Haver, et al., Case No. SC20-1284. Notice to invoke discretionary jurisdiction to review the 4th DCA decision in Haver v. City of West Palm Beach, 45 Fla. L. Weekly D1406 (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: On September 30, 2021, the Court reversed and remanded the case to the Fourth District with instructions that the Havers’ claims against the City for injunctive and declaratory relief be dismissed. It also quashed the decision of the Fourth District in part. In addition, it approved the result in Detournay.

FIRST DCA

Kenneth L. Williams v. FDEP, Case No. 1D21-2504. Appeal from order granting DEP’s motion for contempt, for failure to comply with the terms of the final judgment requiring Williams to undertake certain corrective actions in regard to a solid waste storage facility. Status: Notice of appeal filed August 25, 2021.


Sierra Club, et al. v. FDEP, 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), and determining that these BMAPs were valid because they were designed to achieve the total maximum daily loads, as required by Sections 373.807 and 403.067, F.S., and implement the provisions of those laws. Status: Notice of appeal filed June 4, 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.


Merrillee Malwitz-Jipson v. SRWMD and Seven Springs Water Company, Case No. 1D21-1427. This appeal involves the dismissal of a petition seeking to challenge the final order renewing a 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

continued...
ON APPEAL
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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: Dismissed on October 7, 2021.

**Florida Springs Council v. SR-WMD and Seven Springs Water Company**, Case No. 1D21-1445. This appeal also involves the dismissal of a
petition seeking to challenge the final order renewing a 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

**City of Newberry, City of Archer and City of Alachua v. 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 held on 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 that challenge 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 ALJ’s final order denying motion for attorney’s fees pursuant to Section 120.569(2)(e), F.S. The ALJ concluded that Diaz and her attorney filed
the amended petition for an improper purpose, but Palafox’s 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, F.S., 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.


**Blue Water Holdings SRC, Inc. v. Santa Rosa County**, Case No. 1D19-4387. Appeal from final summary judgment denying Harris Act claim for failure to comply with the Act’s procedural requirements to submit a valid appraisal relating to the denial of a permit for a construction and demolition debris landfill. Status: Oral argument held on September 15, 2020.


**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, Fla. Stat., challenging the consistency of a development order with the county’s comprehensive plan. The trial court followed the 2d 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 in conflict with the comprehensive plan. Note: Regular readers may recall that the 3d DCA affirmed *per curiam* a similar ruling in *Cruz v City of Miami*, 259 So.3d 97 (Fla. 3d DCA 2018). Status: Reversed on September 15, 2021; conflict certified.

**SECOND DCA**


**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. On October 6, 2021, the court granted the motion for clarification and substituted a new opinion affirming the summary judgment and certifying the following question: Is the 2021 amendment to section 70.001(2) a clarification of existing law so that the plaintiff may maintain an action under the Bert Harris Act where the plaintiff owned the property when the plaintiff filed a claim under subsection (4) but was divested of ownership prior to the trial?

**THIRD DCA**

Tropical Audubon Society, et al v. Miami-Dade County, Florida et al., Case No. 3D21. Appeal from final order determining comprehensive plan amendment for the construction of the Kendall Extension in Miami-Dade County to be in compliance,

continued...
notwithstanding contrary recommendation by ALJ.  **Status:** Notice of appeal filed October 19, 2021.

**FIFTH DCA**

Leiffer as Trustee of the C & K Family Trust, et al., v. SJRWMD, Case No. 5D21-382.  Appeal of SJRWMD final order generally adopting the ALJ’s recommended order determining that: appellant commenced construction and operation of a borrow pit/sand mine and haul road on the property without the necessary ERP; appellants’ construction and operation of a borrow pit/sand mine and haul road on the property are not exempt under subsection 373.406(3), Fla. Stat.; and appellants are required to perform certain corrective actions within the timeframes specified.  **Status:** Notice of appeal filed February 9, 2021.  **Note:** During the 2021 Regular Session, the Legislature enacted CS/CS/CS/SB 1194 to expressly provide that certain activities require a permit.

**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:** Affirmed on October 25, 2021.

**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’s.  **Status:** Special Master recommends that Mississippi’s complaint be dismissed; oral argument held on October 4, 2021.

West Virginia, et al v. EPA, et al, Case No. 20-1530; North American Coal Corp. v. EPA, et al, Case No. 20-1531; West Moreland Mining Holdings v. EPA, et al, Case No. 20-1778; and North Dakota v. EPA, et al, Case No. 20-1780.  Petition to review an opinion from the U.S. Court of Appeals for the D.C. Circuit concluding that the EPA has broad authority to regulate greenhouse gas emissions from power plant under the Clean Air Act. The opinion invalidated the Trump Administration’s repeal of the Obama Administration’s Clean Power Plan and adoption of the Affordable Clean Energy.  **Status:** Petitions granted on October 29, 2021.

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The potential for private property rights liability is often put forth as a reason that local governments in the Keys should lift the development caps established in the existing Rate of Growth Ordinance (ROGO) or Building Permit Allocation System (BPAS). This concern typically focuses the judicial decisions holding that regulation categorically “takes” private property when it “denies all economically beneficial or productive use of land....” The stated concern is if the current development allocations are not increased in the coming years and the Keys have reached maximum build-out, then the Keys local governments will be required to pay “takings” penalties—full market value awards for each undeveloped lot in the Keys.

The law of property rights, however, is far more protective of the government’s ability to strictly regulate property than is commonly understood. This article analyzes the key aspects of property rights law as they apply to the unique circumstances of the Florida Keys. Overall, it is my opinion that (1) the governmental defenses against any such claims are numerous and strong; and (2) the number of privately-owned lots with a potentially valid “takings” claim is not as great as is often assumed.

Initially, the courts have emphasized that a “categorical taking” occurs only when regulation removes “all economically beneficial use” of property. As the Court explained in Lucas, the deprivation of economic value required for a facial takings claim is limited to “the extraordinary circumstance when no productive or economically beneficial use of the land is permitted.” Lucas, 505 U.S. at 1017. (emphasis added). The Lucas opinion emphasized that this categorical rule would not apply if the diminution in value were 95% instead of 100%. Id. at 1019, n. 8. Anything less than a “complete elimination of value,” or a “total loss,” is not a per se taking, and “takes” private property only if application of the Penn Central factors (discussed below) result in a judicial ruling that justice and fairness require taxpayer compensation to an individual landowner. Lucas, 505 U.S. at 1019–20, n. 8.

In Palazzolo v. Rhode Island (Palazzolo), the Supreme Court explained that to prove a total regulatory taking, a plaintiff must show the challenged regulation leaves “the property ‘economically idle’” and
the plaintiff retains no more than “a token interest.” The plaintiff in Palazzolo failed to prove a total taking where an eighteen-acre property appraised for $3,150,000 had been limited as a result of the challenged regulation allowing only one home to a value of $200,000. Id. at 616, 631, 121 S. Ct. 2448.

The courts have made clear that government is not liable for a “taking” just because regulations reduce, even substantially, the value of property. The US Supreme Court’s decision in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) reiterated that “we must remain cognizant that “government regulation—by definition—involves the adjustment of rights for the public good” and that ‘Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.’”

The Florida Keys case of Beyer v. City of Marathon, 197 So.3d 563 (Fla. 3d DCA 2016) and all “takings decisions hold that absent extreme circumstances, any remaining reasonable economic use of the property will preclude a ‘takings’ claim. In Beyer, the comprehensive plan prohibited all construction on the property; the only allowable use was camping, and the availability of Rate of Growth Ordinance (ROGO) dedication points, which gave the property a fair market value of $150,000. Since the property retained a reasonable economic value, there was no property rights violation.

In the Keys, even if a parcel cannot receive a permit for major construction, it may still retain value as a result of potential non-permanent or minor construction, a ROGO/Building Permit Allocation System (BPAS) aggregation or dedication point or other use. Some of the non-residential, commercial or industrial uses allowed by Keys local governments include passive recreation, mariculture and aquaculture, beekeeping, working waterfront, conservation land for which there is a local, state or federal land acquisition market. The value these potential uses provide for individual parcels will be a significant factor that militates against a successful takings claim.

Most takings cases are decided on the unique facts of each case— the Penn Central factors

Absent a complete prohibition of any valuable use, each potential “takings” claim is judged on its individual facts and merit. The property rights clause of the United States Constitution “bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005). In Pennsylvania Coal Co. v. Mahon, the U.S. Supreme Court ruled regulation will be deemed a taking if it “goes too far.” Such a finding depends on the particular circumstances of each case to determine whether, in that situation, “justness and fairness require the burden to be borne by the public at large...” and not the individual landowner. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

That is the legal standard, applied based on certain factors to be discussed below. There is no hard and fast rule that the prohibition of construction or a substantial reduction in uses and value is a property rights violation. Takings analysis considers the entire set of circumstances, both community-wide and specific to the individual parcel of land. A particularly relevant example for the Keys is the discussion in the Lingle decision indicating that stringent regulation that applies broadly, as opposed to “singing out” one or a few landowners may not be a “taking.” Among its reasons for reversing a lower court’s takings award was that “Chevron has not clearly argued—let alone established—that it has been singled out to bear any particularly severe regulatory burden.” 544 U.S. at 544. In the Keys, the broad application of the development limits, and the comprehensive regulatory scheme of which they are a part, supports the local governments in a takings challenge.

Regulatory takings cases involve the “essentially ad hoc factual inquiries” described in Penn Central. Under this analysis, there is no “set formula” or “mathematically precise variables” for evaluating whether a regulatory taking has occurred, but instead “important guideposts” and “careful examination ... of all the relevant circumstances.” The relevant factors include the “economic impact of the regulation” on the plaintiff; the extent to which the regulation “has interfered with” a landowner’s “distinct investment-backed expectations;” and the “character of the governmental action.” The more imperitive the governmental interest, the farther regulation can go without being labeled a “taking.” Regulations designed to prevent a public harm are less likely to be found to be a taking.

For this reason, The U.S. Supreme Court has upheld land use regulations intended to prevent flooding and protect public safety. See, eg., First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987).

The compelling reason for the strict development limits in the Keys is a strong factor in defense of property rights lawsuits

The “character of the government action”—the reasons for the strict development limits in the Keys—is a very strong defense to property rights “takings” claims. The Administration Commission’s 1995 Final Order made extensive findings about the Keys’ unique and extreme vulnerability to hurricanes - a chain of islands, barely above sea level, connected to the mainland evacuation destination by a single road and multiple bridges (all prone to heavy flooding), and the great peril of being trapped on the road or at home during a dangerous hurricane. The Commission found “[n]o local government in Florida faces a more unique and serious challenge to protecting its citizens from the impacts of hurricanes...” and ruled:

“the minimum evacuation goal necessary to protect lives in the ... Keys should be 24 hours.”

“nothing greater than a 24-hour evacuation clearance time is acceptable given the geographic and infrastructure constraints.”

“a hurricane evacuation time of more than 24 hours is not acceptable if the health, safety... continued...
“PROPERTY RIGHTS”
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...and welfare of the citizens and visitors ... is the goal.”

The Commission ruled that the amount of development allowed by the original 1992 ROGO exceeded the evacuation capability and ecological carrying capacity. It required all Keys local governments to:

“limit ... new residential development ... provided that the hurricane evacuation clearance time does not exceed 24 hours ...” (emphasis added)

Also, since the 1995 Governor and Cabinet Order also found “the near-shore waters cannot tolerate the impacts from sewage treatment and stormwater from additional development ...” and ordered that “additional development, if any, will be limited to that amount which may be accommodated while maintaining a hurricane evacuation time of 24 hours and ... meet environmental carrying capacity constraints.” It ruled:

“If the infrastructure cannot handle any additional inputs and, either the capacity cannot be increased or the cost of increasing the capacity ... is prohibitive, future development ... must be limited or even stopped.”

Section 380.0552(4)(e)2., Fla. Stat. was subsequently amended to limit the amount of permanent residential development to that which can be evacuated in no more than 24 hours, and the comprehensive plans of all local governments in the Keys include that development cap.21 As the Department of Economic Opportunity (DEO)explained in a 2017 report to the Governor and Cabinet, all local governments in the Keys:

“are united by the need to maintain a hurricane evacuation clearance time of 24 hours prior to the onset of hurricane-force winds. The ... Keys consist of a chain of islands that are connected by a narrow ribbon of U.S. Highway 1, stretching 112 miles and spanned by 19 miles of bridges. *** Access to and from the Keys is primarily by U.S. Highway 1. Evacuation of the ... population in advance of a hurricane strike is of paramount importance for public safety. No hurricane shelters are available ... for Category 3-5 hurricane storm events. A system of managed growth was developed in order to ensure the ability to evacuate within the 24-hour hurricane evacuation clearance time ...”

In 2012, each local government in the Keys and the DEO entered into a Memorandum of Understanding to determine the hurricane evacuation clearance times for the Keys’ population, and “the maximum build-out capacity for the [Keys], consistent with the requirement to maintain a 24-hour hurricane evacuation clearance time and [environmental] constraints.” That process resulted in a determination that the maximum “buildout” of the Keys which would maintain a 24-hour hurricane evacuation time was 3550 additional residential development units. Each local government amended its comprehensive plan to cap residential development based on its proportional share of the 3550 units. All landowners have had notice of that cap since then.

This is the stringent regulatory regime that has applied to all undeveloped lands in the Keys for many years beginning with the Area of Critical State Concern designations in the 1970’s, the Growth Management Act requirements of the mid-1980’s, the ROGO growth caps of the early 1990’s and the eventual establishment of a build-out cap in 2012. Theses strict rules are required by state law, applied comprehensively and consistently, and exist to protect lives during and after hurricanes. They are also necessary to protect the unique and extreme environmental fragility of the Keys, and the water quality essential the Keys economy and way of life. These factors weigh heavily in government’s favor in any “takings” analysis.

On this point, the Florida case of Lee County v Morales24 is illustrative. Morales rejected a claim that a sharp reduction in allowable uses was a taking where the purpose of the rezoning was to preserve archaeological resources, protect the environment and adjoining aquatic preserve, and guard against the threat of flooding to development. The Court emphasized that the downzoning was not arbitrary but was instead based upon an expert study and legitimate environmental, public safety, endangered species, and erosion concerns.

The strict development caps in the Keys are the product of extensive study and science about hurricane forecasting and evacuation, warming and rising seas, rapidly intensifying hurricanes, and water quality. They are further supported by a $6-million ecological carrying capacity study. The public safety imperative (hurricane evacuation and structural damage to adjoining properties and persons), and the ecological carrying capacity bases for the strict development limits in the Keys are strong defenses to ‘takings’ claims. The reality facing local governments in the Keys: the state of rising seas, more frequent and intense hurricanes, and the resulting financial liability for protecting buildings, infrastructure and people and for post-disaster relief are important considerations in any “takings” analysis. Restrictions designed to comply with statutory...
mandates to protect the loss of life and prevent catastrophic ecological damage are less likely to be seen as "going too far," "unjust," or "unfair." The Florida Supreme Court has ruled, "The degree of constitutionally protected property rights 'must be determined in the light of social and economic conditions which prevail at any given time.'" 27

The Court has also ruled, in a case from the Florida Keys, that private property rights and the public interest are to be balanced. 28 The conditions facing the Florida Keys--increasing evacuation challenges, rising seas, the prohibitive costs of massive infrastructure improvements, ecological loss--will weigh heavily in the favor of local governments in a "takings" case. The ROGO/ BPAS growth caps exist to prevent loss of life in face of major storms and hurricanes, the threat of which is exacerbated by global warming which has induced stronger and more unpredictable hurricanes; and to protect the water quality and environmental integrity that is the basis of the Keys economy and way of life. The paramount public purpose for these development limits, and that they are required to prevent a variety of public harms is a strong "takings" defense.

Of particular relevance in support of ROGO is City of Hollywood v. Hollywood, Inc., 432 So.2d 1332 (Fla. 4th DCA 1983), where a city had adopted an annual cap on density based on its concerns for water and sewage capacities, fire and police protection, hurricane evacuation, ecological and environmental protection, aesthetics, and public access to the ocean. Under the cap, the number of permits to be issued was expressly based on traffic capacity because no other existing method would yield a specific number to represent the limitations that existed relative to the other factors. The court upheld the density cap even though it found that the traffic study upon which the overall density cap was based was flawed. Id. at 1334. Despite this flaw, the Court found that the growth limitation was based upon and justified by multiple valid considerations of the public interest, and not solely upon traffic considerations. Id. 1334 -1336.

ROGO / BPAS strongly resembles the ordinance upheld in City of Hollywood. Moreover, the critical public safety reason for the 24-hour evacuation limit is a particularly strong governmental defense. It is not an arbitrary number. It is based on the widespread understanding of the unique low-lying geography of the Keys and the road infrastructure challenges of evacuating the population prior to a hurricane; the perils of being unable to evacuate; and the clear and consistent statements from the National Hurricane Center that it cannot reliably predict the onset of tropical storm winds beyond 24 hours in advance. 29

The BPAS and ROGO growth caps have been successfully defended in court.

In addition to Beyer v. City of Marathon, Dep’t. of Community Affairs v. Moorman, and Good v. United States, discussed below, other judicial decisions have shown the strength of the Keys’ growth restrictions and their ability to stand up in court. Monroe County’s annual growth caps were upheld against a property rights challenge in Burnham v. Monroe County, 738 So. 2d 471, 472 (Fla. 3d DCA 1999), where the court held ROGO was constitutional. The court ruled “the ROGO ordinance was constitutional, as it substantially advances the legitimate state interests of promoting water conservation, windstorm protection, energy efficiency, growth control, and habitat protection.” Id. This was reiterated in a “takings” case - Collins v. Monroe County, 118 So. 3d 872 (Fla. 3d DCA 2013) – in which the County prevailed.

The Collins case and other decisions and analyses are explained in the excellent legal analysis provided by Assistant Monroe County Attorney Derek Howard in his December 2017 article in the Environmental and Land Use Law Section Reporter, Derek Howard, Local Regulatory Taking Claims: Accounting for State and Federal Regulations to Minimize Liability and Damages Exposure, ELULS Reporter Vol. XXXIV, No. 10 Dec. 2017. This article explains that a property owner must prove a “reasonable investment-backed expectation” of development that has been substantially thwarted by regulation. The principles that defeat a takings claim include “buyer beware” and “cannot sleep on one’s rights”. He also describes land use cases which were won by Monroe County.

Because each case is considered on its own facts, and more takings claims fail than succeed, it should not be assumed government compensation will have to be made for every vacant lot that is unable to receive a residential ROGO/BPAS allocation. In fact, such an outcome is highly unlikely given the fact-specific nature of property rights legal analysis and the many long-standing legal defenses to compensation claims discussed above. 30

Landowners who purchased subject to ROGO/ BPAS have diminished “takings” claims

Federal takings law 31 and Florida’s Bert J. Harris, Jr., Private Property Rights Protection Act (Harris Act) protect a landowner’s “reasonable, investment-backed expectations.” 32

Thus, the increasing public awareness of the hurricane evacuation limitations facing the Keys, the growing impacts of sea level rise 33 and the combination thereof, will support the Keys’ growth restrictions in response to “takings” claims.

When determining the reasonableness of a landowner’s investment-backed expectations, courts consider, among other things, whether a discounted price indicated prior knowledge of a potential limitation to use or develop; and the overall riskiness of the investment. 34 Palazzolo ruled acquiring a property after a regulation had taken effect is a particularly relevant consideration. 35 Similarly, in Abraham-Youri v. United States, the Federal Court of Claims wrote that:

“...In assessing the reasonableness of investment-backed expectations, the question is whether plaintiffs reasonably could have anticipated that their property interests might be adversely affected by Government action. Where such intrusion is foreseeable, the commitment of private resources to the creation of property interests is deemed to have been undertaken with continued...
that risk in mind; hence, the
call for just compensation on
grounds of fairness and justice is
considerably diminished”.
36 Fed. Cl. 482, 486 (1996)

Landowners who purchased their
land after the rate of growth restric-
tions were enacted will have difficulty
winning a property rights suit. The
purchase of property with existing
zoning restrictions will likely pre-
clude a “takings” claim when those
restrictions prevent development;
owners are deemed to acquire their
land subject to existing regulations.
In Namon v DER, the Court rejected
a “takings” claim where the owner,
when he bought the land, had con-
structive knowledge of the need to
secure a state wetland permit prior to
development. 558 So. 2d 504 (Fla. 3d
DCA 1990). Even though no construc-
tion or economic use could be made
of the property, there was no taking
when the owner was validly denied
a permit when he had constructive
knowledge that he might not qualify
for a permit when he chose to buy
the land:

“A person who purchases
land with notice of statutory
impediments to the right
to develop that land can
justify few, if any, legitimate
investment-backed expectations
of development rights which rise
to the level of constitutionally
protected property rights.” ***

One who purchases property
while it is in a certain known
zoning classification, ordinarily
will not be heard to claim as
a hardship a factor or factors
which existed at the time he
acquired the property.”

Namon is a strong defense to ‘tak-
ings’ claims based on regulatory deci-
sions in effect at the time the property
is purchased.

In a Keys case, Good v. United
States, a federal court rejected a ‘tak-
ings’ claim, ruling “[w]hile plaintiff
was free to take the investment risks
he took in this regulated environ-
ment, he cannot look to the Fifth
Amendment for compensation when
such speculation proves ill-taken.”
39 Fed. Cl. 81, 112-14 (1997). As ex-
plained by Mr. Howard:

Based on Good, if regulation
of property is pervasive at
all levels of government,
the local government can
argue that it is unreasonable
for a developer to purchase
the property and continue
making an investment in
seeking local development
approval.

In determining if Mr. Good
had reasonable investment-
backed expectations, the court
noted that (a) his initial purchase
investment was predated by
‘pervasive federal and state
regulation’ of ‘ecologically
sensitive areas’ such as his
property (b) by the time he
chose to invest in development,
the complained of regulation
was already in place. These
facts proved fatal to [his] claim.
The court explained that '[t]he
reasonable investment-backed
expectations factor ... properly
limits recovery to property
owners who can demonstrate
that their investment was
made in reliance upon the non-
existence of the challenged
regulatory regime. In part, the
rationale for this rule is that one
who invests in property with
the knowledge of the restraint
assumes the risk of economic
loss.' Good stated that ‘state
and local restrictions must
be considered in determining
the presence or absence of
reasonable investment-backed
expectations to engage in the
proscribed use.’ The court
further stated that ‘in a case
where a developer could recoup
his initial investment in the
property, but nonetheless
chooses to continue to invest
in development in the face
of significant regulatory
limitations, no reasonable
expectations are upset when
development is restricted or
proscribed.’ The court concluded
that ‘the pervasiveness of the
regulatory regime at the time
plaintiff purchased Sugarloaf
Shores deprives him of a
reasonable expectation to
effect his development plans.'
(Internal citations omitted).

Thus, in the Keys, among the facts
that would distinguish some vacant
lot claims from others is whether the
property was acquired before or after
the enactment of ROGO in 1992. The
well-known strict regulatory regime
that governs development in the Keys
may preclude many owners from suc-
ceeding in a “takings” suit, particu-
larly those who purchased their land
after the 1992 adoption of the rate of
growth limits.

An April 2019 analysis of residential parcels conducted by the Monroe County Property Appraiser found:

<table>
<thead>
<tr>
<th>Local Government Entity</th>
<th>Total Residential Parcels</th>
<th>Number last purchased after ROGO was enacted</th>
<th>Percent purchased after ROGO was enacted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unincorporated Monroe County</td>
<td>5,685</td>
<td>4,291</td>
<td>75.5%</td>
</tr>
<tr>
<td>Key West</td>
<td>188</td>
<td>132</td>
<td>70%</td>
</tr>
<tr>
<td>Islamorada</td>
<td>736</td>
<td>598</td>
<td>81%</td>
</tr>
<tr>
<td>Marathon</td>
<td>1,183</td>
<td>988</td>
<td>84%</td>
</tr>
<tr>
<td>Key Colony Beach</td>
<td>77</td>
<td>64</td>
<td>83%</td>
</tr>
<tr>
<td>Layton</td>
<td>23</td>
<td>17</td>
<td>74%</td>
</tr>
</tbody>
</table>
“PROPERTY RIGHTS”
from previous page

Obviously, the overwhelming number of vacant lots were purchased with actual or constructive knowledge of the ROGO/BPAS limits.

Pre-ROGO purchasers are not immune from new regulations

Landowners who bought their parcels prior to ROGO are not necessarily due compensation as a result of strict regulation enacted after their purchase. Courts recognize the ability, indeed the responsibility, of government to respond to new information and science by changing regulations to respond accordingly. Landowners cannot hold vacant land for long periods of time while regulation increases in response to changed conditions and then expect courts to hold them harmless from those regulations. Among the clearest cases on this point is Beyer v. City of Marathon.

In Beyer, the owner had purchased an undeveloped nine-acre offshore island (Bamboo Key) in 1970, when it was under the jurisdiction of the County and zoned for General Use, which allowed one home per acre. In 1986, a zoning change to Conservation Offshore Island reduced the allowable density to one unit per 10 acres. In 1996, the County Plan was adopted and identified the island as a bird rookery and prohibited any development. The Beyers submitted a beneficial use application in 1997 but the County had taken no action by 1999 when Marathon incorporated. After a Beneficial Use hearing, a Special Master found, as discussed above, the only allowable use of the property was camping, and that the assignment of ROGO points constituted reasonable economic use – creating a total value of $150,000. The Special Master found the owners’ inactivity over 35 years, despite increasingly strict land use regulations, precluded any reasonable expectation of greater development value.

The owner sued Marathon for a “taking” and lost. The Third District Court of Appeals ruled the existence or extent of Beyers’ investment-backed expectations to develop Bamboo Key was a fact-intensive question, and there was no evidence that the Beyers “had any specific plan for developing, dating from time of purchase in 1970, up to the present.” It ruled that if the owners did not start development prior to the land use regulations, “they acted at their own peril in relying on the absence of zoning ordinances…” and that a “subjective expectation that land can be developed is no more than an expectancy [it] does not translate into a vested right to develop the property.”

A lack of legally protected, investment-backed expectations resulted in a successful defense of a “takings” case by the County in Collins v. Monroe County, which emphasized that government is not required to compensate owners for land which remained undeveloped for many years, while regulation increased in response to government responsibilities to protect the public. As put succinctly by the decision in Monroe County, et al. v. Ambrose, where Monroe County, several municipalities and the state successfully defended a broad claim of vested rights, “It would be unconscionable to allow the Landowners to ignore evolving and existing land use regulations under circumstances when they have not taken any steps in furtherance of developing their land.” 866 So. 2d. 703, 711 (Fla 3rd DCA 2003).

Smyth v. Conservation Commission of Falmouth, recently rejected a federal constitutional “takings” claim on the same basis. 119 N.E.3d 1188 (Mass. App. Ct. 2019). In Smyth the Plaintiff owned an unimproved lot which had been purchased in 1975 for $49,000 with the intention of building a retirement home. The first steps taken to develop the lot occurred in 2006, but the development plans for 2006 for a single-family house did not comply with the current development standards for wetlands and stormwater. The value of the property plummeted from about $700,000 with the planned home to $60,000 based on the ability to use the lot strictly for recreational purposes.

Applying the Penn Central test to determine liability, the court found no taking because: (a) the $60,000 value as regulated exceeded the $49,000 purchase price; (b) the opportunity to develop the property existed for more than 30 years before the plaintiff first sought to build; and (c) the regulations at issue applied generally to all wetland property in the town.

This is a crucially important point in the Keys, where landowners are aware of the very unique ecological sensitivity of virtually every piece of land (the development of even scarified or disturbed lands has secondary impacts on higher quality habitats and nearshore water quality). They have also witnessed a steady increase in environmental and hurricane-related development restrictions starting with the Area of Critical State Concern designations in the 1970’s, the significantly increased restrictions resulting from the 1985 Growth Management Act, the ROGO/BPAS development caps in the early 1990’s and the establishment of a final “build-out” development allocation in 2012. At the same time, the local governments and the state have expanded and maintained opportunities for owners to realize value from their land in the form of land acquisition programs, ROGO/ BPAS lot aggregation and donation incentives, and transferrable development rights programs. Given these facts, a Keys landowner that took no concrete steps to apply for development approvals or avail themselves of those other options would bear a strong burden to convince a court that justice and fairness require a ruling that government has “taken” their property. This is particularly true given the unique, severe and paramount public safety other reasons for the strict regulatory regime in the Keys.

Single ownership of multiple lots reduces “takings” liability

The final key aspect of property rights law that can reduce, perhaps substantially, the “takings” liability of Keys’ local governments is the judicial approval of lot aggregation/combination requirements. A meaningful assessment of potential “takings” liability would require the identification of how many vacant lots in the Keys are in single ownership.

The regulatory approach of aggregating lots to allow only minimal reasonable development on one of several adjoining lots received strong endorsement in 2017 when the US
Supreme Court ruled that lot merger requirements did not violate the private property rights of a family that was allowed to build only one house on two adjoining lots. In *Murr v. Wisconsin*, 137 S. Ct. 1933 (US 2017), the Court observed that a central dynamic of property rights law is its flexibility to reconcile the individual’s right to private property with government’s power to adjust rights for the public good. The decision strongly supports the practice of treating multiple subdivided adjoining lots as one parcel to determine whether the owner has been allowed a reasonable economic use of the “property as a whole.” The Court recognized strict regulation can have positive impacts on the value of heavily regulated property by increasing privacy and recreational space or preserving surrounding natural beauty. “[I]f the landowner’s other property is adjacent to the lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part.”

The Court also noted where the ability to build is severely limited, the enforcement of lot aggregation requirements can harm and benefit a single owner, also militating against finding a property rights violation.

The *Murr* Court made clear lot aggregation requirements are more likely to be upheld when enacted to protect highly sensitive and regulated resources. The factors to be considered are, “the physical relationship of any distinguishable tracts, the parcel’s topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or is likely to become subject to, environmental or other regulations.”

In reasoning clearly applicable to the Keys, the Court upheld the regulation, finding it to be “reasonable ... enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land.” The Court wrote, “Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.”

*Murr* enunciates a particularly strong defense available to the state and local governments in the Keys, where lot aggregation and a highly restrictive regulatory regime designed to preserve a unique and fragile coastal ecosystem and way of life are key facts in a ‘takings’ case.37

Any analysis of potential “taking” liability should include a consideration of the number of adjacent lots in single ownership, and not assume that compensation would need to be given for the value of every individual lot for which a development permit is not issued. Based on the *Murr* analysis, it is also important to know whether a parcel is undevelopable for environmental or other reasons -- for example, the inability to acquire a federal wetland permit-- not attributable to the local ROGO/ BPAS limits.38

**Florida’s Harris Act**

Since its enactment in the 1995, Florida’s Harris Act has been mentioned frequently by lawyers for landowners and even some local officials as an impediment to strict regulation. That claim relies on the fact that the Harris Act “provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution.” §70.001(9), Fla. Stat.

But the Harris Act only applies to new regulations enacted after its adoption in 1995, establishes a high bar for the granting of compensation by requiring a documented “inordinate burden,” and discourages frivolous claims by allowing local governments to collect attorney fees from unsuccessful litigants. These are significant limitations on the ability of landowners in the Keys to force the taxpayers to compensate them for the inability to build under the ROGO/ BPAS growth caps. The ROGO/ BPAS restrictions are generally not subject to the Harris Act, because they were enacted prior to its adoption.

The Harris Act only applies “when a new law, rule, regulation, or ordinance ... unfairly affects real property.” § 70.001(1), Fla. Stat. (emphasis added). It does not apply to the application of any law, rule, or ordinance adopted, or formally noticed for adoption, *on or before May 11, 1995*. § 70.001(12), Fla. Stat. (emphasis added). It applies to a subsequent amendment to any such law, rule, regulation, or ordinance only to the extent the regulatory change imposes an inordinate burden apart from the pre-existing law, rule or ordinance being amended, § 70.001(12), Fla. Stat. Because the ROGO/ BPAS growth caps were enacted in 1992, they cannot be challenged under the Harris Act. This is a very broad limitation on any liability local governments in the Key might have under the Harris Act.

Another important limitation on the applicability of the Harris Act to the Keys is the exclusion from liability for “any actions taken by a county with respect to the adoption of a Federal Emergency Management Agency Flood Insurance Rate Map issued for the purpose of participating in the National Flood Insurance Program. § 70.001 (1)(b), Fla. Stat. Properties that are unable to be built upon due to their flood-prone character may be unable to invoke the Harris Act for that reason.

Even if the Harris Act could apply to the ROGO/ BPAS restrictions (for example if a change to the point scoring system adopted after May 11, 1995 was the difference between receiving a building permit allocation or being denied an allocation, that change would itself have to constitute an “inordinate burden.” In all cases, that standard is an exacting one.

The “takings” standard under the Harris Act is a difficult one to prove. The Harris Act entitles landowners to compensation only where they can prove a regulation “has inordinately burdened an existing use of real property or a vested right to a specific use of real property....” § 70.001 (2), Fla. Stat. The existence of a “vested right” is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this state. § 70.001(3) (a), Fla. Stat. The term “existing use” means:

1. An actual, present use or activity on the real property,
including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use; or

2. Activity or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property. § 70.001(3)(b), Fla. Stat.

A landowner who can prove the existence of such a vested right or use, must then also prove that government has “inordinately burdened” that use. The terms “inordinate burden” and “inordinately burdened” mean:

an action ...[which] has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.

§ 70.001(3)(e)(1), Fla. Stat. (emphasis added)

This is very similar to the ultimate standard courts have consistently applied to “takings” claims brought under the Florida or US Constitution. It does not appreciably lower the threshold for government liability. The same defenses available to a local government defending a constitutional takings claim are available when defending a Harris Act claim.

Moreover, the Harris Act requires a landowner to specifically document the evidence of an alleged “inordinate burden” with “a bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property.” § 70.001(4)(a), Fla. Stat.

In addition, landowners must strongly consider the merit of the claim before suing a local government under the Harris Act. If a landowner sues under the Harris Act and ultimately fails to prove that the challenged regulation constitutes an inordinate burden, the owner must pay the local government’s attorney fees. §70.001(6)(c)2., Fla. Stat.

Over 25 years, the Florida appellate courts have only confirmed one Harris Act violation, but overturned several lower court rulings finding it was violated. The lone case where an appeals court found a violation involved an unusual set of facts – a set of actions by the local government that clearly trampled on a landowner’s vested rights. In Ocean Concrete, Inc. v. Indian River Cty., Bd. of Cty. Comm’rs, the court affirmed a final judgment under the Harris Act in favor of a landowner who had purchased a parcel of land to build a concrete batch plant only after meeting with county staff to confirm that the plant was permitted by the county code. 241 So. 3d 181, 183 (Fla. 4th DCA 2018). After the owner filed multiple applications, acquired several permits, installed wells, cleared and graded the property, planted a landscape buffer, began to install a rail spur, and made other substantial expenditures in reliance on the zoning code, public opposition to the plant caused the County to accede and amend the code to prohibit the plant. Unsurprisingly, the Court found this to be just the type of retroactive, “unfair” preclusion of a “reasonable, investment-backed expectation for the existing use” of land the Harris Act was written to address.

Even in those rare situations where a landowner could prove that the ROGO/ BPAS or other land use or environmental restriction in the Keys is an inordinate burden, an owner “is entitled to relief, which may include compensation for the actual loss to the fair market value ...” §70.001(2), Fla. Stat. The law is intended to provide relief to owners who suffer inordinate burdens – not to require the taxpayers to buy their land at fair market value. The law is set up to give landowners the opportunity to present a valid claim to the government and authorize the agency to grant a variance or other relief from the burdensome restriction. The owner cannot bring suit under the Harris Act unless it has first given the agency formal notice of its claim and the opportunity to either grant a variance or purchase the property.

At least 150 days prior to filing an action, the owner must present the claim, and the supporting evidence, in writing to agency. § 70.001(4)(a), Fla. Stat. During the notice, the governmental entity then makes a written settlement offer of its choosing from any of the following options, which the Act authorizes it to effectuate:

1. An adjustment of development or permit standards.
2. Increases or modifications in the density, intensity, or use of areas of development.
3. The transfer of development rights.
4. Land swaps or exchanges.
5. Mitigation, including payments in lieu of onsite mitigation.
6. Location on the least sensitive portion of the property.
7. Conditioning the amount of development or use permitted.
8. A requirement issues be addressed on a more comprehensive basis than a single proposed use or development.
9. Issuance of the development order, a variance, special exception, or other extraordinary relief.
10. Purchase of the real property, or an interest therein, by an appropriate governmental entity or payment of compensation. § 70.001(4)(c), Fla. Stat.

While several of these options would not be available if the property is inordinately burdened as a result of ROGO/ BPAS allocation limits, in all cases, the ability exists to grant a waiver or to purchase the land (or coordinate with other local, state or federal agencies to do so) to avoid liability and a compensation judgment. § 70.001(4)(d), Fla. Stat.
If the owner rejects the settlement offer, the court will consider the settlement offer and statement of allowable uses when determining whether the agency inordinately burdened the property. § 70.001(6)(a), Fla. Stat.

The key implication of this procedure is clear. Local governments need not anticipatorily loosen necessary, valid restrictions out of fear of Harris Act liability. They can do so only on a case-by-case basis, where a specific landowner, based on specific circumstances, has proven they would otherwise suffer the type of unfair burden the Harris Act was enacted to prevent.

The Harris Act’s emphasizes requiring proof of, and creates the opportunity to avoid, a bona fide claim prior to the filing of a lawsuit. No liability accrues prior to local government staff and lawyers having the full opportunity to assess the actual evidence supporting a claim and advise the entity on how to proceed. Local governments need not loosen their rules across the board based on a generalized theoretical or threatened potential for Harris Act claims, but should, as stewards of the public trust, maximize the substantive and procedural defenses available to them under the Harris Act.

Increased Allocations Could, Ironically, Undermine the Legal Support for Comprehensive Development Limits in the Keys

Increasing ROGO or BPAS allocations could actually hurt the ability of the local governments in the Keys to defend property rights suits by undermining the factual bases and legal integrity of the development limits that were enacted more than 25 years ago. These regulations are the result of litigation and binding legal findings that the ability of the Keys ecological and evacuation carrying capacity to accommodate development had already been exceeded. These findings and rulings remain binding and critical to the survival of the Florida Keys.

Given this context, increasing the amount of residential development that can be built in the Keys would eviscerate this meticulous, hard-won, necessary, and sustainable planning by the state and local governments. It would violate the key requirements of both the Community Planning Act and the Florida Keys Area of Critical Concern laws that required and resulted in the current County and City comprehensive plans that are based on limited growth as determined by the carrying capacity analysis. The overwhelming amount of planning and study that led to the inescapable conclusion that the current development limits were required to save lives and property and protect the ecology that is the very basis for the Keys way of life and economy cannot now just be disregarded. The law requires rigorous data and analysis to demonstrate that any increases in development in the Keys can be accommodated within these legally required human safety and environmental constraints.

Any increase in the number of development permits outside of the current framework runs the great risk of completely undermining the legal basis for all of the comprehensive plans in the Keys. The compelling and rigorous evacuation and ecological science-based determinations have supported the annual development caps in the Keys all these years in the face of legal challenges. If the state and local governments simply start increasing those numbers outside of that careful framework, the integrity and comprehensive nature of those plans may lose their defensibility and become arbitrary in the eyes of a court.

On June 6, 2018, Monroe County planning staff wrote a letter to Dept. of Economic Opportunity Executive Director Cissy Proctor, raising this very issue relative to the then-proposed 1300-unit ROGO increase: “The issuance of an additional 1300 allocations for rental workforce housing appears to undermine the whole process under which Monroe County has been regulating growth since the implementation of the Rate of Growth Ordinance (ROGO). Please explain how this is consistent with our current policy structure.” (emphasis added)

The strongest and most successful property rights defense available to the Keys’ local governments has been that the development allocation limits were necessary to maintain a safe evacuation time and prevent a collapse of the environment upon which the Keys economy and way of life is based. Considering both the fairness to those who have been denied allocations in the past, and the inability to credibly rely on this defense in the future given the unanswered questions raised above, increasing the development allocations now could have devastating long-term implications for the land use framework for the entire Florida Keys.

Conclusion

Local governments enjoy much greater ability and responsibility under constitutional and statutory property rights doctrines to protect the public than is commonly understood. The law of property rights, for a variety of reasons, has tended to take on a role in public discussions that exceeds its actual legal impact. It is a nuanced body of law to be applied carefully in individual situations to prevent unfair and overly burdensome applications of regulation to individual landowners – not a broad, categorical yoke of financial liability for all strict regulation. The defenses available to local and state agencies in the Florida Keys are particularly strong. In my view, no community in the country has a stronger set of defenses to “takings” claims than those in the Keys, where the development caps are necessary not only to protect the function of a coastal ecosystem that is the very basis of the economy and unique character of the Keys, but also to protect human life itself.

“Takings law” does not diminish the responsibility and ability to enact and maintain the land use regulations necessary to protect the public from the fiscal, social, safety, ecological and other impacts of development of private property. Nor does it insulate landowners from the application of laws that apply fairly and evenly to similarly situated landowners on a highly regulated, ecologically fragile chain of low-lying islands hampered with vulnerable infrastructure and threatened with hurricanes and sea level rise.

This analysis of property rights law counsels strongly against an assumption the local governments in the Keys will be required to pay “takings” judgments for every vacant lot...

continued...
in the Keys that ultimately cannot be built upon because of the ROGO/ BPAS development limitations. Given the strength of the law on the side of the governments' interests, the true extent of property rights liability, and the reasonably expected compensation amounts, is likely to be far lower than many assume. The number of vacant lots, collective ownership, puchase dates, the current value, the natural and environmental character of the land, and other unique facts about each situation must be known before it can be assumed compensation would be due for the inability to build on the lot. On top of those considerations, there are likely a significant number of vacant lots in the Keys that could not develop as a result of federal or state regulatory restrictions, even if they could be developed under local government comprehensive plans and codes.

What's more, any liability on the “takings” side of the ledger must be considered in the context of the enormous price tag that governments in the Keys face to support development. As has become increasingly clear, the costs of maintain and elevating roads in face of sea level rise in the Keys is exorbitant. So must the costs of maintaining adequate sewage and stormwater treatment, storm and hurricane damage clean-up, and other public services be considered. The reality that each new major structure built in the Keys creates a public fiscal demand must be considered as the contra-consideration to theoretical takings liability.

Endnotes

1 Due to his employment as an Assistant County Attorney with Monroe County, Co-Editor Derek Howard had no involvement in reviewing or editing this article.


5 Id. at 631 (quoting Lucas, supra n. 2 at 1019).

6 260 U.S. 393 (1922).

7 Id. at 415. (emphasis added).


9 See Palazzolo, supra n. 4 at 633, 634, 636 (O’Connor, J., concurring).

10 Lingle, supra n. 3 at 2081–2082 (quoting Penn Central, supra n. 2 at 124); see also Tahoe–Sierra Preservation Council, Inc., supra n. 8 at 520; Leonard v. Brinfield, 423 Mass. 152, 154 (Mass. 1996), cert. denied, 519 U.S. 1028 (1996).

11 Penn Centra, supra n. 2 at 124.


13 Id. at *293 (emphasis added).

14 Id. at *461.

15 Id. at *43–44.

16 Id. at *321.

17 Id. at *74.

18 Id. at *204 (emphasis added).

19 Id. at 309.

20 Id. at 138,930 (emphasis added).

21 § 163.3178, Fla. Stat. (applying to the comprehensive plans in the Keys and requiring comprehensive plans “protect human life ... in areas that are subject to destruction by natural disaster” and “protect[] human life against the effects of natural disaster, including population evacuation...”).

22 DEO 2017 Annual Report, p. 3. (emphasis added)

23 July 2012 Memorandum of Understanding.

24 The state’s approval of comprehensive plan amendments adopted to lift that build-out limit is currently on appeal.

25 Lee County v Morales, 557 So. 2d 652 (Fla. 2d DCA 1990).

26 Id. at 653 – 656.


28 Dep’t. of Comm. Affairs. v. Moorman, 664 So. 2d 930, 933 (Fla. 1995) (“Landowners do not have an untrammeled right to use their property regardless of the legitimate environmental interests of the State.”)

29 “[t]he ... Keys consist of a chain of islands that are connected by a narrow ribbon of U.S. Highway 1, stretching 112 miles and spanned by 19 miles of bridges. The ... Keys are isolated from the rest of the state and receive electricity and potable water from ... the ... mainland. Access to and from the Keys is primarily by U.S. Highway 1. Evacuation of the ... population in advance of a hurricane strike is of paramount importance for public safety. No hurricane shelters are available in the ... Keys for Category 3-5 hurricane storm events. A system of managed growth was developed in order to ensure the ability to evacuate within the 24-hour evacuation clearance time ...” DEO 2017 Area of Critical State Concern Annual Report, at pp. 3 & 4.

30 The notable exception, Galleon Bay Corp. v. Bd. of County Commissioners of Monroe County, 327 So. 3d 396 (Fla. 3d DCA 2018) where the plaintiff succeeded partially in its claim, involved a pre-ROGO approved development which both the Beneficial Use Hearing Officer and, ultimately, the Court, found had been diligently pursued. For more history, see Galleon Bay Corp., 105 So. 3d at 558.


34 Supra n. 4

35 Id. at 626.

36 The Bert Harris Act also requires proof of a reasonable investment backed expectation. “In determining whether reasonable, investment-backed expectations are inordinately burdened, consideration may be given to the factual circumstances leading to the time elapsed between enactment of the law or regulation and its first application to the subject property.”

37 Marr reiterated the rule that knowledge of restrictions in place at the time of purchase weighs strongly against a “taking” claim.

38 Similarly, in situations where a property is “unduly burdened” by the combined effect of multiple restrictions maintained by more than one agency, Florida’s Harris Act makes government entities liable only for the percentage of responsibility each such governmental entity bears for that burden. § 70.001(6)(a), Fla. Stat.

39 Town of Ponce Inlet v. Piacetta, LLC, et al, 120 So. 3d 27 (Fla. 5th DCA 2013). See also, M&H Profit, Inc. v. Panama City, 28 So.3d 71(Fla. 1st DCA 2009); Holmes v. Marion County, 960 So.2d 828 (Fla. 5th DCA 2007); Jacksonville v. Coffield, 18 So.3d 899 (Fla. 1st DCA 2009).

40 The agency may also choose to offer no changes to its action, which it would presumably do if it believes the claim to lack merit. §70.001 (4)(c)(1), Fla. Stat.
2021 marked the deadliest year on record for the iconic Florida manatee. What is killing these gentle sea giants? Starvation.

Manatees feed on seagrasses, which require clean and abundant water to thrive. Like any plant, seagrass needs sunlight to filter through the water column to photosynthesize and grow. Excessive harmful algal blooms driven by warming water temperatures, elevated salinity, and a huge influx of nutrients from a variety of human-borne sources, block out the sunlight and the seagrasses die off, leading manatees to simply starve to death.

To be sure, boat strikes are a historic problem for manatees in Florida, but only about one-tenth of manatee deaths were attributed to boats in 2021.

2021 has seen tragedies like the Piney Point disaster dumping hundreds of millions of gallons of toxic, nutrient rich, radioactive wastewater into Tampa Bay and the Gulf of Mexico. While scientists are still trying to draw explicit connections, it is clear to those of us who work on the water that this spill was a major contributing factor exacerbating the ongoing Red Tide event in the region, which has been the most severe event in Tampa Bay since 1971. We have had continued Blue Green Algal events in the St. Johns, Caloosahatchee, and St. Lucie Rivers, and in Lake Okeechobee. We have hundreds of thousands of uninspected domestic septic systems leaching nutrients into waterbodies around the state, including the Indian River Lagoon and Biscayne Bay. Across the board we have residential, municipal, commercial, and agricultural sources of nitrogen and phosphorus leaking into Florida waterways, which coupled with a warming climate is creating a water quality disaster – and the manatee is just the canary in the coalmine for our economically and ecologically significant coastal resources.

Conservationists and lawmakers are responding to the manatee issue with a suite of enforcement provisions and capacity building legislation.

At the federal level, environmental groups have issued action alerts demanding to the Department of Interior have the U.S. Fish and Wildlife Service use its emergency powers to relist the manatee as endangered under the Endangered Species Act. Manatees were lowered to threatened in 2017 after several years of perceived rebuilding success in the population, but the current mortality event indicates a significant emergency is under way. A relisting of the manatees as endangered is not a silver bullet that will guarantee their protection, but it will help protect critical habitat and will underscore the paramount importance of the water quality problem the state is facing.

While direct action from the Department of the Interior is likely the most expedient immediate reaction, federal lawmakers have introduced multiple pieces of bipartisan legislation to relist the manatee as endangered and enhance funding for mortality response. Representatives Vern Buchanan (R-FL-16) and Darren Soto (D-FL-09) filed the Manatee Protection Act to list manatees as endangered, while Brian Mast (R-FL-18) and Stephanie Murphy (D-FL-07) filed the Marine Mammal Research and Response Act to enhance funding for necropsies and recoveries and to fund research for the underlying issues threatening sea grass and water quality.

On the federal litigation front, the Center for Biological Diversity, Defenders of Wildlife, and Save the Manatee Club have filed their notice of intent to sue the U.S. Fish and Wildlife Service to compel listing the manatee as endangered.
At the state legislative level, the focus for manatees has been on capacity building to increase regional ability to handle the recovery of starving and stressed individuals. The Florida Fish and Wildlife Research Institute is requesting additional funding from the Legislature to help with manatee recovery and construction of manatee recovery facilities at the Clearwater Marine Aquarium, the Florida Aquarium, and the Bishop Museum in Bradenton.

Any or all of these potential manatee solutions will be helpful and are a net positive. But the sad reality is we will not be able to properly protect manatees, or any of Florida’s ocean or coastal wildlife, without making dramatic progress to address the state’s water quality woes. We need to do everything we can to stop dumping phosphorus and nitrogen into our waterways, regardless of the source of those nutrients. That is not an overnight fix, but if we do not act on water quality, our manatees, not to mention our fisheries, coral reefs, and countless animals and ecosystems, are facing a grave future.

Jon Paul “J.P.” Brooker is the Director of Florida Conservation and an attorney with Ocean Conservation, the world’s oldest marine conservation non-profit. He is a sixth generation Floridian from Brevard County, currently based in St. Petersburg, and sits on the Executive Council of ELULS.

Environmental and Land Use Case Law Update
by Gary Hunter, Holtzman Vogel, PLLC

Mojito Splash, LLC v. City of Holmes Beach, 46 Fla. L. Weekly 1725 (2d DCA 2021)

Mojito Splash, LLC, sued the city of Holmes Beach (“City”) under the Bert J. Harris Jr. Private Property Protection Act, §§ 70.001-.80, Fla. Stat. (“the Act”). In 2009, the City adopted Ordinance 08-05 amending the land use element of its comprehensive plan, allowing vacation rentals in a particular zoning district. This ordinance restricted occupancy in such rentals to two persons per bedroom, or 6 persons, whichever is greater.

With notice of this ordinance in 2013, Mojito purchased a 5-bedroom property in this district for the purposes of a vacation rental and marketed it as “capable of hosting 12 overnight guests.” This property generated significant rental income and the property value increased.

In 2015, the city enacted Ordinance 15-12, which amended the Land Development Code to conform with the earlier amendment to the comprehensive plan, and enacted 16-02 to enforce compliance with the established occupancy limits.

In 2017, Mojito presented the city with a claim under the Act and submitted an appraisal concluding that the property’s value diminished due to ordinance 15-12. The City denied this claim and Mojito sued. The trial court rendered final summary judgment in favor of the City concluding that Mojito failed to cite an inordinate burden despite having, at the time of purchase, an ability to rent vacation units to unlimited occupants.

The Second District examined the trial court’s decision, ultimately affirming, but on different grounds. At the time Mojito purchased the property, use of the home as “capable of hosting 12 overnight guests” was inconsistent with, and unauthorized by the City’s comprehensive plan. The Court concluded that Mojito, at no time, had a lawful right to use the property as a vacation rental for twelve people, nor an unlimited number of occupants.

The crux of the Second District’s opinion is that while Mojito argues the comprehensive plan constrains the City not the developer, they ignored that the legislature command that “no…private development shall be permitted except in conformity with comprehensive plans.” Florida law therefore requires that all developments, (public and private) be consistent with a local government’s comprehensive plan and no non-conforming use may constitute an “existing use” under the Act.

Visit the Environmental and Land Use Law Section’s website at: http://eluls.org
The U.S. News and World Report (2022) has 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 are highlights of the activities and events of FSU Environmental Law Certificate Program, and recent faculty scholarships.

We are delighted to report our FSU Law’s Student Animal Legal Defense Fund (SALDF) has been named 2021 Student Chapter of the Year by the national Animal Legal Defense Fund. The award recognizes an Animal Legal Defense Fund chapter that has shown incredible efforts in advancing the field of animal law and advocating for animals through original projects and initiatives. SALDF had an extremely successful 2020-2021 year, creating an advanced animal law course, a skills-based training schedule, hosting guest speakers, and more.

**Student Spotlight**

Catherine Awasthi, 3L won first place in the Ninth Annual Animal Law Writing Competition with her article, “Ecological Emergency: Mass Manatee Mortalities and the Race to Save Florida’s Marine Mammal.” The competition was organized by FSU Student Animal Legal Defense Fund, The Florida Bar Animal Law Section, and Pets Ad Litem. Catherine was also selected as a recipient of the 2021 Law Student Achievement Award from the Florida Bar Animal Law Section.

Macie Codina, 3L is externing as a CLI with the Florida Department of Environmental Protection. “Being an extern at the Florida Department of Environmental Protection has been an amazing learning experience! It is hard to think of a better opportunity to learn and apply environmental and administrative law than being on the front lines of the DEP. In my time at the DEP, I have been fortunate enough to deal with a broad array of cases including air and water quality, hazardous water, and challenges to various permits. There is always something exciting happening in the office and they are extremely flexible with my schedule. 10/10 would recommend!”

**Alumni Highlight**

Legal Writing Professor Tricia Matthews teaches Legal Writing and Research I and II, as well as Animal Law. She is the faculty advisor for the Animal Legal Defense Fund, FSU College of Law Chapter, which was named the national Chapter of the Year Award in 2014, 2018, and 2021. She is also active as a member of The Florida Bar Animal Law Section, and previously served as its law school liaison.

Adjunct Professor Gary Perko taught Land Use Regulation at FSU College of Law 2021 Fall Semester. Perko spend the last 30 years practicing with Florida’s premiere environmental and land use law firm. In his class, students learned about the substantive and procedural requirements land use lawyers must follow to help clients obtain or challenge approvals of development projects, including revisions to comprehensive plans, re-zonings, development orders and agreements, special use permits, variances, and exceptions.

**Faculty Achievements**


**Fall 2021 Distinguished Lecture**

Alexandra Klass, Distinguished McKnight University Professor of the University of Minnesota will be presented the Fall 2021 Distinguished Environmental Lecture entitled “The Role of Private and Public Lands in the U.S. Clean Energy Transition” on October 27, 2021 via Zoom. Professor Klass teaches and writes in the areas of energy law, environmental law, natural resources law, tort law, and property law. She is a Member Scholar at the Center for Progressive Reform, a Fellow at the University of Minnesota’s Institute of the Environment, and in 2020 was named to the Governor’s Advisory Council on Climate Change.

Erica Lyman, Clinical Professor of Law and Director of the Global Alliance for Animals and the Environment at Lewis & Clark Law School, gave a virtual lecture titled “Wildlife Trade and Zoonotic Disease Risk,” which covered regulatory options and pandemic-related policy regarding the relationship between humans and animals. Please see link for the recording: [https://vimeo.com/619149673/80b41001fd](https://vimeo.com/619149673/80b41001fd)

Jeff Chanton, Robert O. Lawson Distinguished Professor at Florida State University and an acclaimed climate scientist gave an in-person lecture entitled “The History of Earth’s Climate”. Professor Chanton has done extensive work examining the causes of increased methane gas in the atmosphere and investigated the effects of the BP oil spill, including how methane-derived carbon from the spill entered the food web. Please see link for the recording: [https://vimeo.com/631352530/6eee279066](https://vimeo.com/631352530/6eee279066)

**Fall 2021 Enrichment Lectures**

Jeff Chanton, Robert O. Lawson Distinguished Professor at Florida State University and an acclaimed climate scientist gave an in-person lecture entitled “The History of Earth’s Climate”. Professor Chanton has done extensive work examining the causes of increased methane gas in the atmosphere and investigated the effects of the BP oil spill, including how methane-derived carbon from the spill entered the food web. Please see link for the recording: [https://vimeo.com/631352530/6eee279066](https://vimeo.com/631352530/6eee279066)
Tisha Holmes, an Assistant Professor at the Department of Urban and Regional Planning – Florida State University, delivered an in-person enrichment lecture on November 10 at FSU College of Law. Her research focuses on climate change and adaptation strategies in coastal zones and committed in promoting grassroots level capacities through community outreach and participatory engagement.

The Environmental Law Program will also be hosting a Carbon Tax Panel in Spring 2022, Distinguished Environmental Lecture by Michael Vandenbergh, the David Daniels Allen Distinguished Chair of Law at Vanderbilt Law School, a series of enrichment lectures (in-person and remote), and an education trip at the Edward Ball Wakulla Springs State Park. Information on upcoming events will be available at https://rb.gy/jyvrzd or reach out to Jella Roxas for more information (jroxas@law.fsu.edu). We hope Section members will join us for one or more of these events.

Calling ALL PARALEGALS

- To join the Environmental and Land Use Law Section.
- Benefits of section membership for paralegals include educational and networking opportunities.
  Jan Sluth will head our paralegal group within ELULS.
  Contact her at jsluth@sfwmd.gov or at 561-682 6299.

Please help us get the word out to paralegals who do environmental or land use law work.

Save the Date!

Join Us As We Celebrate 50 Years of ELULS!

THE ENVIRONMENTAL AND LAND USE LAW SECTION’S 50th YEAR UPDATE

September 22-25, 2022

Omni Amelia Island Resort

CLE, Receptions, Networking Events, and Much More

Additional event information including registration, group hotel block, events schedule, and sponsorship opportunities coming soon!
and related natural systems was occurring or reasonably expected to occur due wholly, or in part, to water use.\textsuperscript{19} If water sources were not sufficient to meet the needs of the region, the executive order required the water management districts to undertake regional water supply planning efforts.\textsuperscript{17}

The state’s water supply planning statutes, sections 373.036 and 373.0361, \textit{Florida Statutes}, were passed in 1997.\textsuperscript{18} The legislation codified many of the requirements in the 1996 Executive Order: 1) the designation of one or more water supply planning regions within each water management district;\textsuperscript{19} 2) performance of a districtwide water supply assessment;\textsuperscript{20} and 3) preparation of a regional water supply plan if the water supply assessment showed that existing and reasonably anticipated sources of water were not sufficient to meet future demand.\textsuperscript{21} The statute required the water management districts to engage local governments, water suppliers, and water users within the planning region to cooperatively develop the Regional Water Supply Plans (RWSPs).\textsuperscript{22}

The water management districts had been engaging in some form of water supply planning even before the Governor’s Executive Order or the passage of section 373.0361, \textit{Florida Statutes}. The Southwest Florida Water Management District (SWFWMD) had been undertaking water resource assessment projects, technical investigations, and planning efforts since the late 1980s.\textsuperscript{23} SWFWMD developed management plans for the Highlands Ridge area\textsuperscript{24} since 1989.\textsuperscript{25} In 1992, SWFWMD created the Southern Water Use Caution Area (SWUCA) and incorporated the Highlands Ridge area into SWUCA.\textsuperscript{26} More comprehensive management plans for SWUCA were developed in 1994 and revised in 1998.

Pursuant to section 373.0361, \textit{Florida Statutes}, SWFWMD approved a water supply assessment of its entire district in June 1998.\textsuperscript{27} It divided its jurisdiction into four planning areas. Of importance to this article are the west-central, southern, and east-central regions. SWFWMD determined that water sources for these regions were insufficient.\textsuperscript{28} SWFWMD then prepared its 2001 districtwide RWSP.\textsuperscript{29} SWFWMD determined that additional water supplies were needed for SWUCA to address water resource issues, including saline water intrusion and the lowering of lake levels in Highland and Polk counties.\textsuperscript{30}

The South Florida Water Management District’s (SFWMD) water supply planning effort for the Kissimmee Basin started in 1994 with the collection of field data and a public process to gather information, identify issues, and develop solutions. Its early water supply planning analyses\textsuperscript{31} determined that portions of Orange and Osceola counties were at “risk for harm to wetlands, significant saline water movement and sinkhole formation” due to increased groundwater withdrawals.\textsuperscript{32} The SFWMD’s 2000 RWSP determined that future consumptive use withdrawals in its jurisdiction might contribute to a reduction of spring flows in Orange and Seminole counties.\textsuperscript{33} To address these concerns, SFWMD recommended the following strategies: recharging the Floridan aquifer, reducing water use though water conservation, optimizing the use of the Floridan aquifer, and development of alternative water sources.\textsuperscript{34}

The St. Johns River Water Management District (SJRWMD) completed its first regional water supply plan in 2000.\textsuperscript{35} SJRWMD’s water supply planning and assessment investigations have documented that the rate of withdrawal of groundwater in certain areas of SJRWMD is approaching the maximum sustainable rate that will cause unacceptable adverse impacts to the water resources and related natural systems.\textsuperscript{36} Like the other water management districts, SJRWMD designated its portion of the CFWI area as a water resource caution area.\textsuperscript{37}

Realizing that water resources were becoming more limited, the SFWMD, SWFWMD, and SJRWMD executed a memorandum of understanding to increase cooperation and coordination at their boundaries.\textsuperscript{38} The three water management districts agreed to share the collection and management of hydrologic data and data modeling and to meet at least twice per year to review progress on specific modeling efforts and to seek each other’s input.\textsuperscript{39} In coordinating their water supply planning efforts, the three water management districts agreed to share their water use projections, work together to identify water supply options, jointly delineate any area requiring closer coordination, and consider water supply funding decisions.\textsuperscript{40} Even more significant, the three water management districts...
agreed to increased coordination in consumptive use permitting. For uses greater than 1 million gallons per day (mgd), the water management districts agreed to provide a copy of all applications received within 5 miles of the shared boundary and any other applications of significant interest to the neighboring district.\textsuperscript{31} The neighboring water management district could provide comments on the application to the permitting district, which were then to be incorporated into any requests for additional information or the staff report on the application.\textsuperscript{42}

b. Rising Concerns

In the early- to mid-2000s it became clear that the status quo for planning and permitting needed to change. In 2003, Orlando Utilities Commission (OUC), a public water supplier with a service area that crosses the boundaries of SJRWMD and SFWMD, submitted a water use permit application to SJRWMD. In its application, OUC sought 109 mgd from the UFA and the use of reclaimed water for groundwater recharge. SFWMD and SJRWMD executed an interagency agreement pursuant to section 373.046(6), \textit{Florida Statutes}, designating SJRWMD as the permitting agency to allow the issuance of a single consumptive use permit (CUP) to OUC.

Orange County challenged SJRWMD’s decision to issue the permit. Among the allegations contained in its petition, Orange County claimed the proposed permit would cause harm to existing legal users, domestic uses, wetlands, and the UFA.\textsuperscript{43} The case was consolidated with another challenge brought by Lake County. The City of Kissimmee and Osceola County intervened. The case was ultimately settled before the final hearing was held. The OUC permit was eventually issued, requiring OUC to diversify its sources and authorizing 109 mgd of water from the Lower Floridan aquifer.

The Settlement Agreement between SJRWMD, SPFWMD, OUC, and Orange County required the development of one or more alternative water supply (AWS) project(s) to “supplement current and future groundwater withdrawals.”\textsuperscript{44} By 2013, the AWS projects were to provide at least 10 mgd for Orange County and at least 5 mgd to OUC, with a plan to provide additional AWS volumes to meet 2023 demands. The OUC and Orange County recognized regional cooperation would be needed and agreed to offer the City of Kissimmee, Osceola County, and other public water suppliers in Orange County and neighboring counties, the opportunity to participate in joint AWS projects.\textsuperscript{45}

In 2006, concerns regarding competition for limited resources arose again. This time SJRWMD proposed to issue a water use permit to Orange County. SFWMD and existing legal users within its jurisdiction, like Tohopekaliga Water Authority, were concerned about cross-boundary resource impacts. To avoid competition for limited resources, the three water management districts developed the Central Florida Coordination Area (CFCA) Action Plan.

c. CFCA Recommended Action Plan\textsuperscript{46}

In the CFCA Recommended Action Plan, the three water management districts jointly determined that “sustainable quantities of groundwater in central Florida are insufficient on a regional basis to meet future demands.” AWS projects were immediately needed as well as aggressive conservation and reclaimed water projects.\textsuperscript{47} They also agreed short and long-term strategies would be required to ensure “sustainable water supplies to meet growing demands.” The remaining volume of water from the UFA would need to be equitably allocated.\textsuperscript{48} To do that, the CFCA was not limited to Seminole, Orange, and Osceola counties. The area of concern was broadened to include the City of Cocoa’s service area in Brevard County, all of Polk County, and part of southern Lake County.

The CFCA Action Plan was visionary at the time. The path forward would be developed through three subgroups – regulatory, planning, and computer modeling and tools.

The objective of the Regulatory Group was to “avoid competition and prevent harm to the water resources in the CFCA, permitting of PWS [public water supply] should result in a consistent and equitable outcome and create incentives for the expedited development of required AWS.”\textsuperscript{49} The three water management districts would accomplish this by limiting allocations and condition public water supply permits to identify and develop alternative water supply projects while the longer-term plan for public water supply permit allocations was being developed. They also agreed to develop consistent impact evaluation permit criteria.\textsuperscript{50} As part of the long-term strategy, the water management districts were to develop a “detailed method for equitable allocation of the remaining groundwater or a plan for cutting back if harm is determined to occur from permitted withdrawals.”\textsuperscript{51} That strategy would be presented to the public at rulemaking workshops, as appropriate.\textsuperscript{52}

The Planning Group’s goal was to identify AWS projects and implementation strategies that would assure sustainable water supplies to meet public water supply needs through 2025.\textsuperscript{53} The three water management districts proposed the development of a memorandum of understanding to continue the coordination begun in the CFCA Action Plan.

The purpose of the Computer Modeling and Tools group was to ensure the best available hydrologic modeling, statistical, and analytical tools are available for use to quantify sustainable groundwater and surface water availability in the CFCA in support of regulatory actions, regional water supply planning, and implementation of [AWS] projects; and to assist in developing data-sharing strategy to ensure these tools will be updated in a consistent manner.\textsuperscript{54}

This group was to assess the various hydrologic conditions in the CFCA and develop tools to address water resource issues that cross “regional-scale model boundaries” for use in future decision-making.\textsuperscript{55}

i. CFCA Phase I

The three water management districts immediately executed Phase I of the CFCA Action Plan. In September 2007, SFWMD, SFWM, and SJRWMD published Notices of Proposed Rules in the Florida Administrative Register. The three water management districts adopted identical rules...
in their respective Applicant’s Handbooks. The CFCA rules were a short-term “time out.” The focus of the CFCA was expanded to include public water supply applicants and other “similar applicants.” A “similar applicant” was defined as “an applicant, other than a public supply utility, whose projected water demand after 2013 will exceed its demonstrated 2013 demand.”56

Generally, the CFCA Rules capped groundwater allocations at an applicant’s Demonstrated 2013 Demands.37 The “Demonstrated 2013 Demand” was defined at the “quantity of water that an applicant established it would need to meet demands in 2013.”58 The CFCA Rules also required applicants to develop an AWS plan for demands beyond 2013. The AWS Plan was to include a project development schedule that would result in the applicant using the AWS by the end of 2013. As an incentive, permittees were given 20-year permits if they proposed an AWS project to meet demands beyond 2013, and otherwise met the conditions for permit issuance.59 Those that did not propose an AWS project received a shorter duration, with their permit expiring in 2013.60 Temporary allocations of groundwater were available to those that exercised due diligence.61 Finally, the rules included an automatic sunset date of December 31, 2012.62

With the certainty that the CFCA Rules provided, concerns about equitably allocating water from the UFA were tempered. The SFWMD renewed the public water supply permits for St. Cloud, Toho Water Authority, Orange County, Polk County, and Reedy Creek Improvement District concurrently. The SFWMD required mitigation for past wetland harm. Even with the Demonstrated 2013 Demand cap, future wetland harm was predicted and the SFWMD required additional mitigation.

**ii. CFCA Phase II**

The three water management districts and stakeholders began Phase II of the CFCA Action Plan in 2009.63 The plan was to develop and complete the necessary rulemaking before the CFCA Rules sunset in 2012. The three water management districts developed a Draft Phase II Work Plan.64 Key components of the Phase II Work Plan included model calibration and simulations, evaluation of statistical trends in hydrological data, additional wetland assessments, rulemaking to implement the long-term strategy, and integration into the three water management districts’ respective RWSPs. In late 2010, the three water management districts presented the initial results of groundwater availability to the public.

However, like much of the United States, central Florida did not escape the housing crisis and resulting economic slowdown.65 Water use rates dropped throughout the region. Permittees were no longer projected to bump up against their 2013 allocations. Thus, the need to develop the long-term rules by 2012 was not as pressing. To ensure the planning and regulatory decisions were made using accurate information, the “water management district, in consultation with the public water suppliers, suspended the Phase II process until a more collaborative approach to resolving technical issues could be achieved.”66

**d. Creation of the CFWI**

The Central Florida Water Initiative was formed in 2011. The CFWI was created, in part, to continue and expand the CFCA process. Additional stakeholders, including the Florida Department of Agriculture and Consumer Services (FDACS) and agricultural, industrial, and mining stakeholders were asked to participate in the collaborative effort.67 Its adopted Guiding Principles are to: a) identify sustainable quantities of traditional groundwater; b) develop strategies to meet demands beyond the sustainable limit of traditional groundwater sources; and, c) establish consistent water management district rules and regulations for the area.68 These Guiding Principles were to act as the polestar in meeting the CFWI’s six goals: a) development of a single model for the area; b) development of a single definition of harm; c) identification of a reference condition; d) development of one process for reviewing CUP applications; e) development of a consistent process to set minimum flows and levels (MFLs) and water reservations; and f) drafting a coordinated RWSP.69

The principal agencies carried forward the public collaboration through the creation of a Steering Committee, which was subject to the Sunshine Laws.70 Eight technical teams – Hydrologic Analysis; Environmental Measures; MFLs and Reservations; Data, Monitoring, and Investigations; Groundwater Availability; CFWI Regional Water Supply Plan, Solutions Planning; and Regulatory – were set up to engage in fact finding and technical analysis.71 A Technical Oversight Committee and Management Oversight Committee were also created to provide coordination across the teams and resolve consistency and policy issues.72 Tasks were identified for each technical team as well as a schedule for completion of those tasks.73

**i. 2015 CFWI Regional Water Supply Plan**

The CFWI’s RWSP team delivered its first joint RWSP in 2015. The 2015 CFWI RWSP evaluated demands to the water resources with a planning horizon of 2035.74 The 2015 CFWI RWSP determined traditional groundwater resources could not meet future demands “without additional unacceptable impacts to the water resources and related natural systems.” The RWSP noted adverse impacts from withdrawals were already occurring in several areas.75 It also noted traditional groundwater use had “already reached, exceeded, or [was] near the sustainable limits” in some areas.76 The 2015 CFWI RWSP determined only another 50 mgd from the UFA might be available using coordinated management strategies.77 About 250 mgd of unmet demand would need to come from alternative water sources.78 A separate solutions document was generated by the Solutions Planning Team.79 It estimated an additional 42 mgd of water could be saved through conservation.80 The Solutions Document identified 150 water supply project options that could generate 334 mgd of water that could be implemented to serve unmet demand or provide water resource benefits.81

**ii. Passage of Section 373.0465, Florida Statutes**

In 2016, the Florida Legislature adopted section 373.0465, Florida Statutes. The statute codified many of the efforts the three water management districts, DEP, FDACS, and various stakeholders had been
engaged in. The Legislature noted that CFWI, as described in the CFWI Guiding Document, “developed an initial framework” and directed the DEP and the three water management districts to “build upon the guiding principles and goals set forth in the [CFWI] Guiding Document ... and the work that has already been accomplished by the [CFWI] participants.” The Legislature directed water supply planning actions as well as regulatory actions.

The water supply planning program for the CFWI was to consider limitations on groundwater as well as new, increased, or redistributed uses provided they were consistent with the three-prong test set forth in section 373.223, Florida Statutes. The new statute incorporated the CFWI planning goal of identifying a reference condition by including the requirement to “establish a coordinated process for the identification of water resources requiring new or revised conditions” consistent with section 373.223, Florida Statutes. As with all RWSPs, the CFWI regional water supply plan was to consider existing MFL recovery and prevention strategies, and include a list of water resource and water supply development projects. If needed, the agencies were also to identify preferred water supply sources as described in section 373.2234, Florida Statutes.

However, rather than task the three water management districts to conduct simultaneous rulemaking, like they did for the CFCA rules, the statute directed DEP to undertake rulemaking. The rulemaking would cover three of the goals described in the CFWI Guiding Document, plus three additional subjects related to conservation. The legislative topics were: a single, uniform definition of MFL, a single, consistent process, as appropriate, to set MFLs and water reservations; a goal for residential per capita water use for each CUP; and, an annual conservation goal for each CUP consistent with the RWSP. In undertaking the rulemaking effort, DEP was to consult with SFWMD, SJRWMD, SWFWMD, and FDACS.

The statute directed the water management districts to implement the uniform rules, without the need for further rulemaking. On December 30, 2016, DEP published its Notice of Rule Development in compliance with the legislative directive.

iii. 2020 CFWI Regional Water Supply Plan

The water management districts developed the 2020 CFWI RWSP Update in accordance with the 2016 legislative directives. The Update examined water supply demands and resources through 2040. Like the 2015 CFRI RWSP, the 2020 Update determined traditional water sources alone could not meet future demands. The 2020 CFRI RWSP estimated the 2040 public water supply demands at 592.28 mgd, continuing as the largest use sector. Agricultural water use demands were estimated at 163.49 mgd, only up 3% from the 2015 RWSP. Commercial/industrial/power generation had the third largest water need at 69 mgd, a 29% increase from 2015.

During the intervening planning efforts, the three water management districts “invested approximately $44.62 million in 39 AWS projects that have been completed or are under construction or investigation in the CFWI Planning Area, making available 94.30 mgd of AWS.” The water management districts also provided about $4.89 million for 39 water conservation projects, achieving about 4.35 mgd in water savings. Even with an increase in AWS, an updated regional model technical analysis determined that the UFA could only sustain up to 760 mgd with local management strategies.

Further, during the water supply planning process, the agencies updated the East Central Florida Transient (ECFT) model and created the East Central Florida Transient Expanded (ECFTX) model. The model served as the primary tool used for the 2020 RWSP and the CFWI groundwater assessment. Through a system of mathematical equations, and using water resource data gathered from 47 wetland monitoring sites and 96 monitoring wells, along with input from groundwater modeling experts, the ECFTX model simulates transient groundwater flow and provides outputs showing estimated water levels and water budgets. The ECFTX model was used to predict potential impacts to the Florida Aquifer System, surficial aquifer system, lake water levels, spring flows, and wetland water levels caused by current and projected future groundwater withdrawals. Using 2040 demands, the ECFTX model predicted that 15 MFL and MFL-related environmental criteria would not be met, including two Outstanding Florida Springs waterbodies. Many other MFLs and MFL-related criteria were predicted to experience a decline in freeboard.

In summary, the 2020 CFRI RWSP identified a 95 mgd shortfall in 2040. The 2020 CFRI RWSP estimated that water conservation by public water supply users could save 42-44 mgd. It also estimated the agricultural use sector could achieve 4 mgd in water savings. However, alternative water supply projects were still needed to bridge the shortfall. The 2020 CFRI RWSP identified 85 water supply and water resource development projects capable of generating 514 mgd of water supply or water resource benefit to satisfy that shortfall.

II. Rulemaking Process

a. Workshops

From the time DEP published the Notice of Rule Development on December 30, 2016, through publication of the proposed CFRI rules on November 19, 2020, DEP and the three water management districts held a series of rule development workshops, CFRI steering committee meetings, water supply planning meetings, joint public workshops, and peer review meetings. The agencies also held workshops in different regions of the CFWI area, with SFWMD holding public workshops involving the Kissimmee River and Chain of Lakes, and SJRWMD holding peer review modeling workshops for Sylvan and Red Bug Lakes. This collaborative effort allowed stakeholders to become involved in the rulemaking process.

b. Notice of Proposed Rule

On November 19, 2020, in accordance with section 120.54, Florida Statutes, DEP published a Notice of Proposed Rule for rules 62-41.300 through 62-41.305, including the continued...
proposed Supplemental Applicant’s Handbook (S.A.H.) incorporated by reference in rule 62-41.302, in the Florida Administrative Register.113 As required by section 373.0465, Florida Statutes, the new rules provided for uniform conditions for issuance of a CUP, a variance process and a uniform process for setting MFLs.114 The S.A.H. provided additional technical detail and requirements regarding the review of CUPs.115 Sections 2.1 through 2.6 addressed water use demands and allocations for the various water use classes (e.g., public supply, agricultural, industrial, commercial, institutional).116

Section 2.7 provided for the development and implementation of annual conservation goals for each permit.117 For public supply greater than 100,000 gallons per day, permittees could select between meeting a Gross Per Capita Goal of 115 gallons per capita per day (gpcd) or a Functional Per Capita Goal of 100 gpcd. A phase-in period was also provided. If the public supply permittee could not achieve the goal by December 31, 2023, a plan to achieve the goal must be provided.118 The permittee would then have 10 years (December 2033) to reach the midpoint target and 20 years (December 2043) to ultimately meet the goal. Other use classes could meet the conservation goal through the development and implementation of an Annual Conservation Goal Implementation Plan (ACGIP). Section 2.8 of the S.A.H. (discussed in more detail below) limited allocations from the UFA.119 Section 3.0 provides a consistent definition of harm to water resources.120 This new section provided greater detail regarding the supporting information required to be submitted to assist in the water resource impact evaluation. Section 4.0 addressed the prevention of harm to existing offsite land uses.121 Finally, Section 5.0 provided new special conditions for the implementation of the annual conservation goal and agricultural allocation compliance.122

c. Lower Cost Regulatory Alternatives (LCRAs)

Section 120.541(1), Florida Statutes, allows substantially affected persons to submit a “good faith written proposal for a lower cost regulatory alternative to a proposed rule which substantially accomplishes the objectives of the law being implemented.”123 If the LCRA explains how the lower costs and objectives of the law will be achieved by not adopting the rule, the proposal can include the alternative of not adopting the rule.124 LCRA s are timely if filed within 21 days after publication of the notice of proposed agency action.125

In December 2020, several stakeholders submitted LCRA s, including the OUC, the Florida Cattlemen’s Association, Polk County, Seminole County, and the City of Lakeland, among others.126 DEP held a final public hearing on December 11, 2020, where community members, stakeholders, and their representatives attended and gave opinions on the proposed rules.127

Polk and Seminole counties, and the City of Lakeland, among others, proposed to entirely remove the proposed Section 2.8 of the S.A.H., which limited UFA withdrawals by permittees to their demonstrated 2025 demand.128 As an alternative, these LCRA s suggested continuation of current CUP rules, along with the expedited adoption of MFLs in the CFWI area.129 DEP referred to this as LCRA 1.130

The restriction found in S.A.H Section 2.8 was based on findings in the 2020 CFWI RWSP that water use projections through 2040 would cause established MFLs in the CFWI area to be violated.131 Specifically, total water demands in the CFWI area were projected to be 908 mgd by 2040, under average rainfall conditions.132 For the Public Supply use type alone, projected water demands increase by 53% through 2040, representing 85% of the increase in total water demands projected in the CFWI area through 2040.133 At a withdrawal volume of 760 mgd, which is projected to occur in 2025, the MFLs for Wekiowa Springs and Rock Springs,134 which are both declared to be OFSs pursuant to the Florida Springs and Aquifer Protection Act, would be violated.135 Additionally, many other MFLs and MFL-related criteria were predicted to experience a decline in freeboard.136 The ECFTX model also predicted the number of stressed ridge and plains wetlands to increase.137 For these reasons, DEP and the Districts utilized the total projected water demands through 2025, which are estimated to be approximately 760 mgd to guide the rulemaking effort.138

DEP rejected LCRA 1 because it did not substantially accomplish the objectives of the law being implemented.139 DEP gave three main reasons for rejecting LCRA 1. First, while MFLs play an important role in protecting the waterbodies to which they are assigned, DEP and the Districts are charged with protecting all water resources in the area, including streams, lakes, and wetlands.140 Wetlands are of specific concern due to findings that up to 19,000 acres of ridge wetlands and 17,000 acres of plains wetlands are “stressed” under the 2014 pumping conditions found in the 2020 RWSP, and that acreage is expected to increase through 2025.141

Second, DEP noted that water users in the CFWI area were on notice groundwater in the area was limited, and alternative water supply projects were necessary, at least as early as adoption of the CFCA, which began a decade earlier.142 The CFWI area needs unique protection due to the overallocation of resources: groundwater modeling shows 760 mgd is the withdrawal limit with the implementation of local management strategies, but 1,064 mgd has been permitted in the area.143

Finally, DEP and the water management districts now have the ability to more fully analyze cumulative impacts to water resources in the CFWI area. Prior to the CFWI process, each water management district had its own groundwater flow model.144 With the development of the ECFTX model, the water management districts can better analyze drawdown impacts across district boundaries. DEP and the water management districts felt it necessary to proceed with rulemaking now, rather than wait until existing CUPs are modified or renewed, which could be up to 20 years in the future.145

DEP also rejected two additional LCRA s, one proposing a reduction in Annual Conservation Goals for Public Supply (LCRA 3), and one proposing to exempt applicants in the Southern Water Use Caution Area (SWUCA) and Dover/Plant continued...
City Water Use Caution Area (Dover/Plant City WUCA) from the new CFWI rules (LCRA 4). 146

DEP first explained that the Annual Conservation Goals were both feasible and consistent with the 2020 CFWI RWSP, based on data showing that per capita water use rates in the CFWI area had declined by approximately 40 gpcd over a 20-year period (from 182 gpcd in 1995 to 140 gpcd in 2015). DEP also wants to encourage the development of further water conservation measures. For users unable to meet their goals, the S.A.H. allows for documentation of unusual water needs and allows users to apply for a variance. 147

DEP rejected LCRA 4 based on the Legislature’s directive to “include existing recovery strategies within the CFWI area adopted before July 1, 2016.” 148 SFWWMD declared approximately 5,100 square miles (including portions of Polk County) as the SWUCA in 1992 in response to water resource issues, including saltwater intrusion and reduced flows in the upper Peace River. 149 The Dover/Plant City WUCA was implemented in 2011 following a freeze event in eastern Hillsboro and western Polk counties where agricultural users pumped large quantities of groundwater to protect freezing crops, which resulted in sinkholes and dry wells. 150 DEP explained that the SWUCA and Dover/Plant City WUCA recovery strategies are not currently being met, so cannot substantially accomplish the objectives of the law being implemented. 151

Three of the proposed LCRA were partially accepted. LCRA 2 proposed to allow “enhanced opportunities for new, increased or redistributed allocations from the UFA” in excess of the Demonstrated 2025 Demand for Public Supply. LCRA 5 proposed to amend agricultural users reporting and compliance requirements, and LCRA 6 proposed to amend the calculations for averaging annual allocation amounts for self-serviced agricultural, recreational, or landscape irrigation. 152

In response to LCRA 2, DEP filed a Notice of Change on February 9, 2021, including a new definition for “Redistributed uses” in Section 1.1 of the S.A.H. and several revisions to Section 2.8. 153 Finding that LCRA 2, submitted by Polk and Seminole counties and the City of Winter Haven, was consistent with Section 2.8 of the S.A.H. to encourage projects that offset impacts to the UFA, DEP incorporated “impact offsets, substitution credits, land use transitions, redistributed uses, or other reclaimed water or aquifer recharge” for public supply users into Section 2.8.3 of the S.A.H. In accordance with section 120.54(3)(c), Florida Statutes, DEP published the Notice of Change in the Florida Administrative Register. 154

d. Litigation

Section 120.56, Florida Statutes, provides the procedure for substantially affected persons to challenge proposed rules “on the ground that the rule is an invalid exercise of delegated legislative authority,” by filing a petition with the Division of Administrative Hearings (DOAH). 155 A rule challenge petition is timely if filed within 21 days of the publication of the notice of proposed rule (November 19, 2020); within 10 days after the final public hearing (December 11, 2020); or within 20 days after publication of the notice of change (February 9, 2020). 156

On March 1, 2021, DEP received ten petitions challenging the proposed CFWI rules. 157 The OUC, Seminole County, Alafia Preserve (Mulberry) LLC, Eagle Ridge (Mulberry) LLC, LDS Donaldson Knoll Investments, LLC, and the cities of Lakeland, St. Cloud, Winter Haven, Eagle Lake, Polk City, Mulberry, Bartow, Sanford, and Fort Mead challenged the proposed CFWI rules. 158 The City of Casselberry, Polk County, Tohopekaliga Water Authority, Tavistock East Holdings, LLC, Tavistock East Services, LLC, and Suburban Land Reserve, Inc., sought intervention aligned with petitioners, while the Florida Cattlemen’s Association sought intervention aligned with the agency respondents.

A central theme among the rule challenges was the allegation that the agencies exceeded their rulemaking authority by creating an irrebuttable presumption of fact in proposed rule 62-41.301(4) and the Foreword section of the S.A.H. 159 As originally drafted, the challenged language stated:

Across the CFWI Area, cumulative harm to the water resources exists and is expected to increase because of groundwater withdrawals from the Upper Floridan aquifer. The cumulative uses of the Upper Floridan aquifer across the CFWI Area has caused detrimental effects to other users and the water resources of the state. 160

The rule challengers argued that this presumption of fact exceeded the grant of rulemaking authority provided by the Legislature in section 373.0465(2)(d), Florida Statutes. 161

The City of Lakeland and OUC also invoked section 373.171(3), Florida Statutes, which provides that water management districts cannot modify existing uses of water “unless it is shown that the use or disposition proposed to be modified is detrimental to other water users or to the water resources of the state.” 162 They argued that the agencies included the challenged language in the proposed CFWI rules in order to justify the modification of existing permits to bring all users within their Demonstrated 2025 Demand. 163 The rule challengers argued by placing this presumption of fact within the rule, the agencies were effectively shifting the burden from the agency to the applicant to show the water use would not be detrimental to the water resources of the state. 164

Another common position among rule challengers was that DEP’s statement of estimated regulatory cost (SERC) and revised SERC failed to consider the proposed LCRA and did not meet the requirements of section 120.541, Florida Statutes. 165 Seminole County and OUC argued the agencies did not consider “accelerated and higher water rates to utility customers” caused by the implementation of AWS projects. 166 The City of Lakeland, OUC, and Seminole County alleged DEP ignored the utilities’ “stranded capacity,” in other words, the infrastructure assets lost or underused due to the Demonstrated 2025 Demand limitation, in DEP’s revised SERC. 167

Rather than proceed with litigation, all parties recognized the importance of the CFWI effort and the continued...
need to protect the water resources of the region. On March 19, 2021, a tentative settlement agreement was reached. On March 26, 2021, DEP published its second Notice of Change to the proposed CFWI rules, reflecting the agreed-upon settlement.

To resolve the first argument raised above, DEP and water management districts struck the challenged language from the Foreward and section 1.2 of the S.A.H., and added language stating, “Nothing in this Supplemental Applicant’s Handbook shall create a presumption with regards to the modification of any applicable existing consumptive use or water use permit within the CFWI Area through the process described in this section.”

The limitation to the users’ Demonstrated 2025 Demand remained, with the added caveat that the water management districts cannot limit public use type permits to this allocation “unless the District demonstrates the permittee’s allocation is detrimental, individually or cumulatively with other permitted allocations, to other water users or to the water resources of the state,” in accordance with section 373.171, Florida Statutes. In summary, there would not be an automatic cutting of allocations for the public supply use class. However, significant limitations on water use in the area remained. For industrial, commercial and institutional water uses (ICI) and mining and dewatering uses, the rule provides that allocations would be limited to the permittee’s current allocation. Landscape irrigation and recreational uses would be limited to an average allocation (5-in-10) and a drought allocation (2-in-10). For certain new uses within the CFWI area, water needs are required to be met through impact offsets, substitution credits, land use transitions or other means.

In response to concerns regarding stranded assets and the time it takes to implement AWS projects, language was added to expand the circumstances for when a temporary allocation of UFA groundwater could be granted. For example, temporary allocations can be granted to facilitate implementation of offsets, substitution credits, land use transitions, alternative water supply projects, and projects and measures approved as part of MFL prevention or recovery strategy. The duration of a temporary allocation is limited to five years unless specifically approved by the Governing Board.

**e. CFWI Rule Ratification**

If a proposed rule has an adverse impact or regulatory cost that exceeds the criteria listed below, then the agency must submit the proposed rule to the President of the Senate and Speaker of the House of Representatives no later than 30 days prior to the next legislative session. Further, such rules may not take effect until they are ratified by the Legislature.

Proposed rules must be submitted to the Legislature for ratification if the rule is likely:

1. To have an adverse impact on economic growth, private sector job creation or employment, or private sector investment in excess of $1 million in the aggregate within five years after the implementation of the rule;
2. To have an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of $1 million in the aggregate within five years after the implementation of the rule; or
3. To increase regulatory costs, including any transactional costs, in excess of $1 million in the aggregate within five years after the implementation of the rule.

Ratification often takes the form of a stand-alone bill that creates an unnumbered section of law for the sole purpose of ratifying the proposed rule as it appeared in the Florida Administrative Register. Ratification bills often state they do not codify the rule, are not a form of legislative preemption, and do not cure any rulemaking defect or preempt any challenge based on a violation of the legal requirements governing the adoption of any rule.

During the CFWI rulemaking process, DEP and the three water management districts prepared a SERC and Revised SERC to determine the adverse impact and regulatory costs. The agencies determined the proposed rules would likely directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate in this state within one year after the implementation of the rule. The agencies also determined the estimated transactional costs of the proposed CFWI rule are not expected to be large enough to cause more than $1 million in total economic impact over the five-year period after the rule is implemented. The CFWI rules’ greatest negative transactional cost impact is due to the prohibition of additional permitted water withdrawals from the UFA after 2025 for public supply and industrial/commercial/institutional water use permits and applicants. Therefore, applicants and permitees must supply additional water demands with water from more expensive alternative water sources.

The agencies estimated the transactional cost of the proposed rule by the year 2040 to be $190 million per year. The estimated transactional cost of the CFWI rule over the next five years was estimated to be $18.8 million. Therefore, the agencies stated the proposed rule required legislative ratification in the Notice of Proposed Rule.

On January 29, 2021, DEP sent letters to the President of the Florida Senate and the Speaker of the Florida House of Representatives requesting the Legislature ratify the rule it anticipated adopting during the legislative session.

The Florida Senate filed a Senate Proposed Bill to ratify the proposed CFWI rule on March 10, 2021. In addition to the typical ratification language, this bill draft included substantive changes to the CFWI statute (Fla. Stat. § 373.0465) to address issues raised during the rulemaking process as well as establish a grant program to promote AWS within the CFWI area. At the March 15, 2021, Senate Environmental and Natural Resources Committee meeting, many individuals representing the regulated community spoke in opposition to the bill as it related to the substantive changes to the CFWI statute. In response to these comments, the

*continued...*
committee chair temporarily postponed the proposed bill to give the agencies and regulated communities time to resolve their differences.\textsuperscript{176}

The Senate Environmental and Natural Resources Committee again heard the proposed senate bill on March 22, 2021. At the meeting, the committee favorably adopted an amendment that removed many of the concerns of the regulated community and inserted rulemaking requirements related to water allocations for agricultural users.\textsuperscript{177} The Senate committee favorably reported the bill at the same meeting.\textsuperscript{178}

The Senate Appropriations Committee next heard the bill on April 15, 2021. The committee amended the bill to:

- revise the rule publication date to reflect the Notice of Change published on March 26, 2021;
- delete the report to the Legislature required in the underlying bill which addressed practical and economic barriers to implementation of the CFWI rules;
- revise the supplemental irrigation requirement allocation for agricultural uses and the process for examining an agricultural user’s supplemental irrigation water use required to be included in the uniform rules for the CFWI area,
- authorize the applicable water management district to condition and modify consumptive use permits under specified circumstances;
- and revise the grant program to include and prioritize certain projects.\textsuperscript{179} The senate committee favorably reported the bill at the same meeting.\textsuperscript{180}

The Florida House of Representatives did not have a similar bill; however, it did have House Bill 1309 ratifying DEP’s Biosolid Rule (Chapter 62-640, F.A.C.). The House approved HB 1309 on April 1, 2021 and sent it to the Senate for consideration.\textsuperscript{181} The Senate took up HB 1309 on April 21, 2021, amended the bill to include all of the provisions of the CFWI ratification bill in SB 7062, and passed the bill unanimously.\textsuperscript{182} The Senate sent HB 1309 back to the House to consider the amendments. The House unanimously accepted the amendments and passed the bill on April 29, 2021.\textsuperscript{183} The Governor signed the bill on June 21, 2021, and it became effective in July, 2021.\textsuperscript{184}

\textbf{Endnotes}

1  Jennifer Brown is a Senior Specialist Attorney at SFWMDF. N. West Gregory works for DEP. Jessica Quiggle is an Assistant General Counsel at SJRWMD. Mary Ellen Winkler is General Counsel of SJRWMD.


4  Id.

5  Id.

6  Id. at ii.

7  Id.

8  2020 RWSP at 4.

9  2015 CFWI RWSP, Planning Document, Vol. 1 at p. 9. The 2015 CFWI RWSP was approved by the SFWMDF in Order No.: 2015-DAO-075-US, the SFWMFD in Order No.: 15-025, and the SJRWMD in Order No.: 2015-44.

10  2020 RWSP at iii.

11  Rock Springs and Wekiwa Springs were designated as Outstanding Florida Springs. CFWI 2020 RWSP at iii. See also Fla. Stat. § 373.801 (2016).


13  Id. at 1.

14  Id. at 5.

15  Id.

16  Id. at 6.

17  Id.

18  Ch. 97-160, Laws of Florida. During the 2010 legislative session, various provisions of Chapter 373, Florida Statutes, were reorganized to create Part VII, consolidating the water supply planning statutes.


20  Id.


22  Id.


24  The Highlands Ridge planning area was located along the eastern portion of SFWMDF’s boundary.

25  Id.

26  Id. at 9.


28  Id. at 1.

29  Id. at 2.

30  Id. at 72.


32  Id. at vi.

33  Id.

34  Id. at vii.


36  Id.

37  Id.

38  Memorandum of Understanding between SJRWMD and SFWMDF and SWFWMD dated October 24, 2000. SFWMDF’s governing Board approved the MOU in Order No. 2000-135-DAO-WU.

39  Id. at 3.

40  Id. at 4.

41  Id. at 5-6.

42  Id. at 6.

43  Orange County’s Am. Pet. for Formal Admin. Hr’g, at ¶¶ 24-37. DOAH Case No. 03-004036.

44  Settlement Agreement between the SJRWMD, SFWMDF, OUC, and Orange County, dated Apr. 14, 2004, 1.

45  Id. at 2.


47  CFCA Recommended Action Plan at 2.

48  Id.

49  CFCA Recommended Action Plan at 3.

50  Id. at 12.

51  Id. at 13.

52  Id.

53  Id. at 3.

54  Id. at 4.

55  Id.

56  Section 1.8 of SFWMDF’s Basis of Review. For the sake of brevity, CFCA rule components are cited to the SFWMDF’s Basis of Review for Water Use Permit Applications within the SFWMDF, dated February 13, 2008.

57  Section 3.2.1.F.2. of the SFWMDF’s Basis of Review.

58  Section 1.8 of the SFWMDF’s Basis of Review.

59  See e.g. Section 1.7.2.2.C.4 of the Basis of Review for Water Use Permit Applications within the SFWMDF (February 13, 2008).

60  Section 1.7.2.2.D.6 of the SFWMDF’s Basis of Review.

61  Section 3.2.1.F.4 of the SFWMDF’s Basis of Review.

62  Section 3.2.1.F.1 of the SFWMDF’s Basis of Review.


64  SFWMDF, SWFWMD, & SJRWMD, CFCA Work Plan: Phase II (Draft), Apr. 2010, 3-9.

65  CFWI Guiding Document, supra n. 63 at 3.

66  Id.


68  CFWI Guiding Document supra n. 63 at 4.

69  Id.
WATER INITIATIVE
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70 Id. at 5; § 286.011, Fla. Stat., commonly referred to as the Sunshine Law, requires meetings to be publicly noticed.
71 Id. at 7-8. A complete description of each technical team can be found in the CFWI Guiding Document.
72 Id. at 6.
74 2015 Final CFWI RWSP at 14.
75 Id. at ES-v.
76 Id. at 161.
77 Id. at 70.
78 Id. at ES-vi.
80 Id. at vii.
81 Id. at viii.
97 § 120.541(1), Fla. Stat.
98 Id. at 120.
99 Id. at 121.
100 Id. at 122.
101 § 120.541(1)(a), Fla. Stat.
102 § 120.541(3), Fla. Stat.
103 § 120.541(5), Fla. Stat.
104 § 120.541(6), Fla. Stat.
105 Id. at 123.
108 Id. at 125.
109 Id. at 126.
110 Id. at 127.
111 Id. at 128.
112 Id. at 129.
117 Id.
118 Id.
119 Id.
120 Id.
121 Id.
122 Id.
123 § 120.541(1), Fla. Stat.
124 Id.
125 § 120.541(1)(a), Fla. Stat.
128 Id.
129 Id.
130 Id.
133 Id.
134 Id.
135 § 373.801, Fla. Stat. (2016). The Act recognizes that “water flows in springs may reflect regional aquifer conditions,” with the water quality of springs being “an indicator of local conditions of the Floridan Aquifer, which is a source of drinking water for many residents of this state.” Id. Further, “the hydrologic and environmental conditions of a spring or spring run are directly influenced by activities and land uses within a springshed and by water withdrawals from the Floridan Aquifer.” Id.
136 Id. at 45.
137 Id. at 48.
140 Id.
141 Id.
142 Id.
143 Id.
144 Id.
145 Id.
146 Id.
147 Id.
148 Id. (citing § 373.0465(2)(a), Fla. Stat.).
149 Id.
150 Id.
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