

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

By Erin Deady, AICP, Esq.¹ & Kendall Aumick²

1. Introduction

On May 12, 2021, Governor DeSantis signed Senate Bill (SB) 1954³ into law, “An act relating to statewide flooding and sea level rise resilience” which included new program elements for resiliency planning at the State and local levels creating § 380.093, Fla. Stat.⁴ This new legislation is enhancing resilience planning activities and funding at the regional and local levels.

Local governments around the state have traditionally led in the resiliency planning space, but those efforts are now being further benefitted by both planning and capital project funding that § 380.093, Fla. Stat., provides. Already, many local governments (primarily coastal communities) have also undertaken vulnerability assessments or started adaptation planning for capital improvements previously facilitated by the award of Resilience Planning Grants (RPGs) from the Department of Environmental Protection (DEP), the precursor to the “Always Ready” legislation as the § 380.093, Fla. Stat., has come to be known.

One year now into the implementation of § 380.093, Fla. Stat., Florida has taken further action to improve resilience against sea level rise and flooding through the passage of House Bill (HB) 7053 amending certain provisions in § 380.093, Fla. Stat. during the 2022 legislative session.⁵ Overall,

the original and new legislation aim to strengthen Florida’s response to increased future flood risk by expanding grant funding, establishing the duties of the State’s Chief Resilience Officer and requiring the creation of a resilience action plan for the State Highway system by the Department of Transportation. Rulemaking has also commenced on Rule 62S-8, F.A.C., related to the ranking for projects within the Statewide Flooding and Sea Level Rise Resilience Plan, the capital projects funded under the program. The rulemaking also addresses the underlying vulnerability assessments themselves, required after 2024 to pursue future capital projects, by including compliance with the statutory criteria in its scoring system.

Resiliency planning efforts, and projects to adapt to future flood risk, are expanding within the state with the infusion of funding. This article provides an overview of the resilience planning efforts within the State and recent updates to § 380.093, Fla. Stat.. This article will also explore some of the opportunities and challenges with implementation of these new program elements.

2. Summary of Section 380.093, F.S.

Section 380.093, Fla. Stat. creates the new Resilient Florida Grant Program area among other obligations and initiatives related to resiliency

and flooding. Each will be discussed in this section.

a. Intent and Definitions. The subsection states, “...that the state is particularly vulnerable to adverse impacts from flooding resulting from increases in frequency and duration of rainfall events, storm surge from more frequent and severe weather systems, and sea level rise.”⁶ Another key aspect of the intent section is the recognition, “...that the adverse impacts of flooding and sea level rise affect coastal and inland communities all across the state. Consequently, a coordinated approach is necessary to maximize the benefit of efforts to address such impacts and to improve the state’s resilience to flooding and sea level rise.”⁷

See “Statewide Flooding” page 13

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by Susan Roeder Martin



I have been honored to serve as the Chair of the Section over the last year. I have enjoyed working with many of you on Section activities. This year was a transitional year as we left a state of lock down and resumed more normal activities,

I am pleased to report that we are in the final stages of negotiation with Lexis to publish our Treatise. We will be the only section of the Florida Bar to have a Treatise broadly published. The Treatise articles are utilized in law schools and are the go-to source for many of us when we confront a new legal issue. We are very proud of this accomplishment, and thank Brendan Mackesey and Jacki Lopez for their leadership on this effort.

We also resumed in person networking activities and had many wonderful events throughout the state. I'm hopeful that we can offer even more networking events in

Each month we had several monthly continuing legal education seminars (CLE) on a wide variety of subjects. We had more CLEs than any other year in ELULS history. Thanks go out to Lauren Brooks for her leadership on CLEs.

I am now proud to turn over leadership to Josh Coldiron as Chair, and Robert Volpe as Chair-Elect. I am confident that our Section will have a wonderful year under their leadership. We also appreciate Cheri Wright, our fantastic Bar Administrator.

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ON APPEAL

by Larry Sellers, Holland & Knight LLP

Note: Status of cases as of May 7, 2022. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Dean Wish, LLC v. Lee County, Florida, Case No. SC21-1529. Petition to review the 2d DCA decision affirming the final summary judgment rejecting a 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. In granting a motion for clarification, the 2d DCA certified 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?” 46 Fla. L. Weekly D2173a. Status: Petition for review denied on March 23, 2022.

FIRST DCA

In re: Affirming Existence of Recreational Customary Use on 1,194 Private Properties Located in Walton

County, Florida, Case No. 1D21-3532. Appeal from Final Judgment as to Certain Parcels, determining that the County is unable to establish that customary use on certain defendants’ properties has been either “uninterrupted” or “ancient,” both of which elements must be proven under the judicially adopted customary use test. The final judgment also rejected an argument that the judicially created customary use doctrine is unconstitutional. Status: Notice of appeal filed November 19, 2021; notices of cross appeal filed December 2, 3 and 8, 2021.

Kenneth L. Williams v. FDEP, Case No. 1D21-2594. 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.

West Shore Legacy LLC v. Alachua County, Florida, et al., Case No. 1D21-986. Appeal from final order rejecting challenge by West Shore Legacy and determining proposed amendment to Alachua County Comprehensive Plan to be in compliance. Status: Affirmed *per curiam*

on January 21, 2022.

Sierra Club, et al. v. FDEP, Case No. 1D21-1667. Appeal from final order adopting recommended order rejecting challenge to five 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 TMDLs, as required by Sections 373.807 and 403.067, F.S., and implement the provisions of those laws. Status: Oral argument set for June 14, 2022.

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: Request for oral argument denied on August 24, 2021.

Suwannee River Water Management District v. Seven Springs Water

continued...

This newsletter is prepared and published by the Environmental and Land Use Law Section of The Florida Bar.

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ON APPEAL

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Company, Case No. 1D21-888. The SRWMD filed an appeal of its own final order adopting the ALJ's recommended order and renewing the water use permit authorizing Seven Springs to withdraw water in Gilchrist County for bulk sale to an adjacent water bottling facility. Status: Dismissed pursuant to Rule 9.350(a) on June 8, 2021.

Florida Springs Council v. SRWMD 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 was the subject of the appeal in Case No. 1D21-888. The petitioner argues that an SRWMD rule authorizes the filing of the petition because the Governing Board took final action (granting the permit) that substantially differs from the written notice of the District's decision describing the intended action (which was to deny the permit). Status: Notice of appeal filed May 14, 2021.

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

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: Affirmed *per curiam* on March 2, 2022; motion for rehearing and rehearing en banc and for certification filed March 17, 2022.

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 that the motion for fees and sanctions was not timely filed. Note: The ALJ also entered a supplemental recommended order granting the motion for attorney's fees pursuant to Section 120.595, F.S., because Diaz participated in the proceeding for an improper purpose. The agency entered a final order adopting the recommended order, and Diaz has appealed that order. See *Diaz* appeal listed below. Status: Notice of appeal filed November 25, 2020; oral argument held on January 12, 2022; reversed on February 9, 2022.

Diaz v. Northwest Florida Water Management District and Palafox, LLC, Case No. 1D21-2699. Appeal from final order adopting recommended order awarding fees and costs to Palafox and against Diaz in the underlying administrative matter as a sanction pursuant to s. 120.595, F.S. The ALJ found and recommended that the district enter a final order finding the respondent shall pay Palafox its reasonable attorney's fees and taxable costs in the amount of \$136,161. Status: Notice of appeal filed September 8, 2021.

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: Reversed and remanded on December 8, 2021; notice of intent to seek review filed February 8, 2022 and denied on May 5, 2022.

Vickery v. City of Pensacola, Case No. 1D19-4344. Appeal from trial court order denying motion to dissolve a temporary injunction to prevent a property owner from removing a live oak tree located in the Northern Hill Preservation District, part of Pensacola governed by specific ordinances to protect Heritage trees, notwithstanding s. 163.045(1), F.S. Status: Reversed on February 16, 2022; motion for rehearing, rehearing

en banc and for certification of question of great public importance filed on March 3, 2022.

SECOND DCA

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

THIRD DCA

Tropical Audubon Society, et al. v. Miami-Dade County, Florida et al., Case No. 3D21-2063. Appeal from final order of the Administration Commission determining comprehensive plan amendment for the construction of the Kendall Extension in Miami-Dade County to be in compliance. Status: Notice of appeal filed October 19, 2021.

Mattino v. City of Marathon, et al., Case No. 3D20-1921. Appeal from final order of the Department of Economic Opportunity determining that comprehensive plan amendments by the cities of Marathon, Islamorada, and Key West in the Florida Keys are "in compliance." The challenged plan amendments allow up to 1,300 new permanent residential units to be built. Status: Notice of appeal filed December 24, 2020; Oral argument held October 19, 2021.

FIFTH DCA

River Cross Land Company, LLC and Christopher Dorworth v. Seminole County, Florida, Case No. 5D22-293. Appeal from declaratory judgment in favor of Seminole County declaring that Article V, Section 5.2, of the Seminole County Home Rule Charter (relating to rural boundary and rural area) is constitutional and is not void for vagueness. Status: Notice of appeal filed February 2, 2022.

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

continued...

ON APPEAL

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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), F.S.; and appellants' are required to perform certain corrective actions within the timeframes specified. Status: Affirmed *per curiam* on December 28, 2021; motion for rehearing denied on January 31, 2022. Note: During the 2021 Regular Session, the Legislature enacted CS/CS/CS/SB 1194 to expressly provide that certain activities require a permit.

9th CIRCUIT COURT OF APPEAL

Pasqua Yaqui Tribe, et al v. Arizona Rock Products Association, et al, Case No. 21-16791. Interlocutory appeal from order vacating and remanding for reconsideration Navigable Waters Protection Rule to EPA and ACOE. Status: Notice of appeal filed October 26, 2021; final order for voluntary dismissal granted on February 3, 2022.

11th CIRCUIT COURT OF APPEAL

Lionel Alford, et al v. Walton County, Case No. 21-13999. Appeal from a federal judge's ruling in a dispute about whether waterfront property owners should receive compensation after Walton County temporarily closed beaches early in the COVID-19 pandemic. Status: Appeal filed November 15, 2021.

In Re: ACF Basin Water Litigation, Case No. 21-13104. Appeal from ruling that allows Atlanta-area cities to take more water from the Chattahoochee River upstream from Alabama and Florida's Apalachicola Bay. The order dismisses claims by

the National Wildlife Federation, the Florida Wildlife Federation and Apalachicola Riverkeeper that the Army Corps of Engineers is holding back too much water in federal reservoirs upstream from Florida's Apalachicola River. Status: Notice of appeal filed October 6, 2021.

UNITED STATES SUPREME COURT

Donald Burns v. Town of Palm Beach, Case No. 21-677. Petition for writ of certiorari presenting the following question: Did the Town of Palm Beach violate Burns' first amendment rights by denying his proposed home design based solely on aesthetics with a design that met all objective zoning criteria? Status: Petition denied March 21, 2022.

Sackett, v. EPA, Case No. 21-454. Petition to review the Ninth Circuit's decision. Issue presented: Whether Rapanos v. United States — in which the Supreme Court held that the Clean Water Act does not regulate all wetlands, but without a majority opinion explaining why that is so — should be revisited to adopt the plurality's test for wetlands jurisdiction under the Clean Water Act, in which only those wetlands that have a continuous surface water connection to regulated waters may themselves be regulated. Status: Certiorari granted on January 24, 2022; review limited to: Whether the Ninth Circuit Set Forth the Proper Test for Determining Whether Wetlands are "Waters of the United States" under the Clean Water Act, 33 U.S.C. §1362(7).

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 . . . Petition to review the D.C. Circuit's split decision 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 rule designed to replace it. Question presented: In 42 U.S.C. § 7411(d), an ancillary provision of the Clean Air Act, did Congress constitutionally authorize the Environmental Protection Agency to issue significant rules including those capable of reshaping the nation's electricity grids and unilaterally decarbonizing virtually any sector of the economy-without any limits on what the agency can require so long as it considers cost, non-air impacts, and energy requirements? Status: Petitions granted on October 29, 2021; oral argument held on February 22, 2022.

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: On November 22, 2021, the Court issued an opinion in which it held that the waters of the Middle Claiborne Aquifer are subject to the judicial remedy of equitable apportionment; however, Mississippi's complaint is dismissed without leave to amend.

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Golden Anniversary Letter to Readers

The Golden Anniversary of the Environmental and Land Use Law Section of the Florida Bar is upon us. This fall, ELULS will celebrate 50 years of serving our members and Florida at large by deepening and strengthening knowledge of this burgeoning field among members of the Bar.

The Section grew up alongside its topic. Born in 1972, a quick review of the environmental movement and environmental regulation shows how the Section was but a product of its age. In 1962, Rachel Carson set the world on fire with her book *Silent Spring* that looked at the effects of the pesticide DDT on birds. In 1963, Congress passed the first iteration of the Clean Air Act, which was amended in 1965 and 1970. In 1969, what was then the largest oil spill in United States history occurred near Santa Barbara, California, arguably propelling a new wave of environmental regulation. In 1970, the National Environmental Policy Act began requiring federal agencies to study and consider the economic impacts of their actions. In 1972 the modern Clean Water Act was born regulating dredge and fill activities and forever altering the course of development in swampy Florida. The evolution of environmental law did not stop after the Section was born. In 1973 the Endangered Species Act was passed; then the Resource Conservation and Recovery Act in 1976, and Comprehensive Environmental Response, Compensation and Liability Act (Superfund) in 1980.

Not to be outdone, in 1972 alone the Florida Legislature passed Florida Water Resources Act, which created regional water management districts and established a permitting system for allocating water use; the Environmental Land and Water Management Act, addressing areas of critical state concern; the Florida Comprehensive Planning Act; and the Land Conservation Act.

With this hail of statutory law came a full deluge of regulation promulgated by the young agencies created to administer these mandates. These changes turned the tugboat that was once the practice of environmental and land use law in Florida into an ocean liner navigating the turbulent waters of changing statutes, regulations, and case law.

ELULS became, and has remained, a lighthouse guiding that ocean liner.

Though we are officially a mature Section, ELULS has no intention of becoming routine or stogy. This year the Section hosted a series of regional events for members



Felicia Kitzmiller



Derek Howard

to network and explore wild Florida and is committed to continuing to find new ways for our members to engage with one another and our community. We are also working to reorganize our sponsorship program to grow relationships with law firms and affiliates. Earlier this year a revamped ELULS website launched at eluls.org. The Treatise is publishing an updated anniversary edition in hard copy this year and is working toward wider

distribution of the electronic product to spotlight the intense knowledge and talents of our contributing authors while sharing their wisdom and scholarship. All the while our CLE Committee produces consistent, high-quality learning opportunities on the most important issues of the day. We are constantly searching for ways to grow and innovate while refusing to relinquish the personal bonds and comradery that made our born-in-the-fire Section special 50 years ago when it won its place as an independent section of the Bar despite opposition from established sections.

In recognition of the many impressive accomplishments of ELULS, the titans who have led the Section, and the laughs and friendship that have cultivated its reputation as an accessible and egalitarian organization, the next edition of the Section Reporter, the Summer edition, will be a “throwback” edition. We are asking all readers to submit items they want to see in our time capsule! Is there an article that has been pinned to a bulletin board for the last 10 years? Send it in! A favorite photo from annual meetings past? We want to see it! Please send your submissions along with a short blurb about each to the email addresses below. We truly cannot wait to hear from you.

Best,

Felicia Kitzmiller & Derek Howard, Co-Editors

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Endnotes

1. The 1969 Santa Barbara oil spill is now the nation's third largest, behind the 2010 Deepwater Horizon explosion and 1989 crash of the Exxon Valdez.

An op-ed report on Florida's ocean and coasts and protecting the state's blue economy

Florida should be the leader in science-based fisheries management.

By Jon Paul "J.P." Brooker, Esq.

Florida is the sport-fishing capital of the world, and for good reason. From the Panhandle to the Keys to Jacksonville, fishing opportunities abound and drive millions of dollars of impacts to the state's gross domestic product and account for over 200,000 jobs. Healthy Florida fisheries depend upon clean water and robust well managed stocks – and the underpinning of every good management regime should be strong science. Without sound science-based management, the long-term health and resilience of Florida's fisheries is compromised, which means the coast-wide fishing heritage and a significant driver of the state's blue economy is put into jeopardy.

In Spring of 2022, the Florida Fish and Wildlife Conservation Commission (FWC) approved a rule to reopen Goliath grouper to a limited harvest. Goliath has been closed to fishing since the early 1990s, when the stock had been fished down to a fraction of its historic biomass. These fish can grow to be enormous, with the



Goliath Grouper spawning aggregation. Photo courtesy of the American Fisheries Society.

possibility of reaching 8 feet long and 800 pounds. Beyond catch and release recreational fishing, Goliath are popular for fishing charters, who can catch and release the same individual at the same spot time and time again, thrilling their clients. They are a treasured spectacle for dive tourism, who can take divers to spawning aggregations and show their clients huge numbers of massive Goliath at once. In 2018 a proposed rule to reopen Goliath to harvest was rejected by the FWC after considerable public opposition highlighting the lack of a scientific basis for reopening the stock.

The FWC's 2022 rule allows for up to 200 Goliath to be harvested using hook-and-line only in the 24-36" slot range under a tag system with some other specific restrictions (geographic, seasonal, and with reporting requirements).

The trouble of it is, reopening Goliath to harvest is not supported by the science, and the justification offered by the FWC is not science-based. In May, 2021

nearly 100 of the nation's top fisheries scientists sent a letter to the FWC underscoring the scientific reasons for not reopening Goliath, which included the fact that the stock assessment used by the FWC to justify a harvest has been rejected by scientific peer review three times.

Scientists have also highlighted that the number of juvenile Goliath growing to adult spawning age is limited – young Goliath grouper grow up in estuaries, which have been systematically compromised in Florida by habitat losses, deteriorating water quality, and by harmful algal blooms,

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FLORIDA'S OCEAN

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which means many of the juvenile Goliath cannot grow to maturity. Other concerns have been raised with respect to high mercury concentrations which present severe consequences to not just the Goliath themselves, but also to people who might try to eat them. Furthermore, the public perception that Goliath grouper are invasive and destroying habitat is fundamentally flawed and not based on science. These points have been made repeatedly by academics from Florida State University, University of Texas, University of South Florida, Florida Atlantic University, and University of Florida, as well as institutions such as the Guy Harvey Ocean Foundation, Mote Marine Laboratory, and the Shedd Aquarium and scientists from the National Marine Fisheries Service.

Beyond the lack of a scientific basis, there is so much about the rule that

is mystifying from the angler perspective. Why should the tag price be so high (\$150 for Florida residents) as to exclude huge portions of the fishing public who can't afford it? You almost have to be a boat owner to even try to participate. And why is gear limited to hook and line – should not those of us who like spearfishing be able to have a shot? And if there is putative concern with large Goliath predating lobster or other juvenile reef fish, why does the rule limit the slot to only the smaller 24-36" fish?

I was practically born in the water with a fishing rod in my hand, a regulator in my mouth, and a loaded speargun ready to go. I love nothing more than fishing with my family and friends. I am raising my two kids to be strong stewards of Florida's marine resources, including its iconic, world class fisheries. And while I often trust the FWC to do the right thing and I have great faith in FWC staff and scientists at the Fish and Wildlife Research Institute, I worry when I see such a callous disregard for

proper scientific management of such a legendary species such as Goliath grouper.

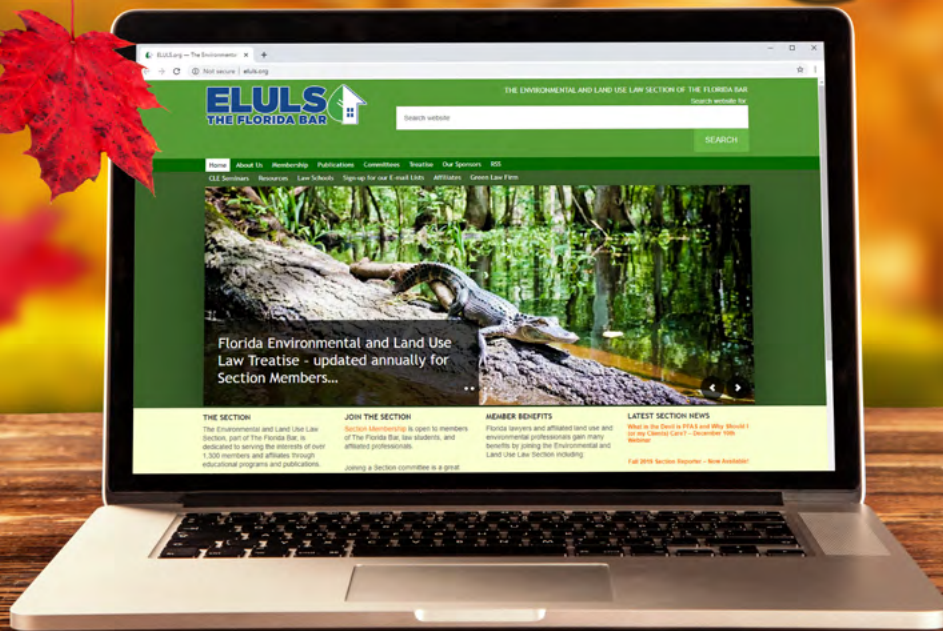
With proper management, we can have abundant and healthy fisheries for generations to come. But if we do not follow the science, we are risking the very cultural and economic substance that makes Florida the sportfishing capital of the world.



Jon Paul "J.P." Brooker is the Director of Florida Conservation and an attorney with Ocean Conservancy, 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. His opinions are his own.

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Florida State University College of Law Spring 2022 Update

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

The U.S. News and World Report (2023) has ranked **Florida State University** as the nation's **21st best Environmental Law Program**, tied with the University of Florida, University of California-Hastings, University of Denver, and University of Houston. Below highlights the activities and events of **FSU Environmental Law Certificate Program**, and lists recent faculty scholarships.

Tribute to Professor Dave Markell



"In the end, Dave simply wanted to make the world better by training better lawyers, helping us understand how environmental law could work even better than it does now, and participating in his career-long practice of thinking and acting both locally and globally to solve real environmental problems."

Certainly, he devoted himself professionally to the highest aspirations of the environmental field, and he succeeded in a career marked by both academic and real-world accomplishments. We will continue to rely on his six books and fifty some-odd articles on such critical topics as climate change, environmental enforcement and compliance, and international environmental cooperation. Yet the enduring theme of these remembrances was his utter nobility and sincerity as a human being."

An excerpt from Tribute to Professor David Markell: A Colleague Among Colleagues by Erin Ryan, FSU Elizabeth C. & Clyde W. Atkinson Professor, published in Journal of Land Use & Environmental Law, Vol. 36, 2021.



Markell's wife and daughters with his portrait.

The FSU Law community gathered last January 12, 2022, to honor and celebrate the life of Professor David Markell. Those who joined us to share wonderful memories and stories about Professor Markell included Jack Markell, his brother and former Governor of the State of Delaware; Steve Turner, a close friend and Tallahassee local attorney; FSU Law Professors Erin Ryan and Shi-Ling Hsu; and Professor Hannah Wiseman, formerly of FSU Law who now teaches at Penn State Law.

At the gathering, FSU Law Dean and McKenzie Professor Erin O'Hara O'Connor announced the establishment of the **Professor David L. Markell Memorial Scholarship**, which will provide support to FSU Law students who have demonstrated a commitment to environmental law. The scholarship is supported by private donors and administered by the FSU Law Student Advancement Office. The inaugural recipients are FSU students Katherine Hupp and Taylor Greenan.

The recording of the memorial is available through this link: <https://vimeo.com/665792052/d9b70127b2>

Faculty Achievements

- Professor **Shi-Ling Hsu** published a new book, *CAPITALISM AND THE ENVIRONMENT: A PROPOSAL TO SAVE THE PLANET* (Cambridge Univ. Press, 2021). He also guested on *Free Range* with Professor Michael Livermore of University of Virginia School of Law threshing out the link of capitalism and climate change. Professor Hsu have two forthcoming publications in 2022, *Whither, Rationality?* in 120 MICH. L. REV. __ (forthcoming, 2022), and *Carbon Taxation and Economic Inequality*, in 15 HARV. L. & POL'Y REV. 201 (forthcoming, 2022).

FSU COLLEGE OF LAW

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- Associate Dean **Erin Ryan** published *Environmental Rights for the 21st Century: Comparing the Public Trust Doctrine and the Rights of Nature Movement*, in 43 CARDOZO L. REV. 2447 (2021) with Holly Curry & Hayes Rules. Forthcoming publications include an article examining the use of property rights to entrench environmental deregulation entitled *Privatization, Public Commons, and Takingsification in Environmental Law*, in U. PENN. L. REV. (forthcoming, 2022), and a book chapter reviewing the origins and development of public trust entitled *The Public Trust Doctrine, Property, and Society*, in PROPERTY, LAW, AND SOCIETY (Nicole Graham, et al., eds., forthcoming, 2022).
- Professor **Mark Seidenfeld** published a book review entitled *The Limits of Deliberation about the Public's Values: Reviewing Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy*, in 199 MICH. L. REV. 1111 (2021).
- Assistant Professor **Sarah Swan** published an article entitled *Constitutional Off-loading at the City Limits* in 135 HARV. L. REV. 831 (2021).
- Dean Emeritus **Donald Weidner** have a forthcoming publication in BUS. LAWYER, Spring 2022, *The Unfortunate Role of Special Litigation Committees in LLCs*.

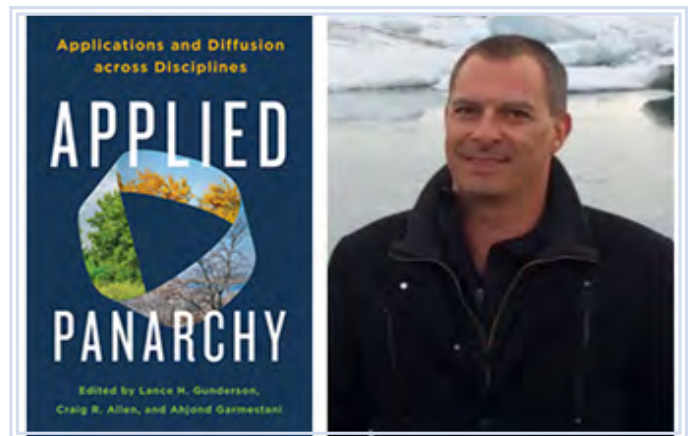
Recent Student Achievements and Activities



- **Katie Bauman** ('22) was accepted as an Environmental Law and Justice Fellow at Emory University's Turner Environmental Law Clinic in Atlanta, Georgia. Originally from Jacksonville, Florida, Katie received her Bachelor of Arts in Anthropology from Princeton University.
- The following students participated in environmental law externships this Spring:
 - » **Megan Clouden** – US DOJ Environment and Natural Resources Division
 - » **Jenna Thompson** – Florida Fish and Wildlife Conservation Commission
 - » **Salome Garcia** – Florida Fish and Wildlife Conservation Commission
 - » **Brian Camili** – Tallahassee City Attorney's Office, Land Use Division

- » **Macie Codina** – Pets Ad Litem
- » **Barclay Mitchell** – Earthjustice
- » **Andrew Herman** – NextEra
- » **Amanda Lowe** – Green Street Power Partners
- Six students also completed Pro Bono work in the area of environmental law.
 - » Pets Ad Litem – **Catherine Awasthi** (51 hours), **Macie Codina** (20.55 hours)
 - » Florida Fish and Wildlife Conservation Commission - **Megan Clouden** (60 hours), **Keirseey Carns** (20 hours), and **Jenna Thompson** (20 hours)
 - » Apalachicola Riverkeeper – **Anne Marie Macia** (2 hours)

Alumni Spotlight



Ahjond Garmestani ('01), research scientist at the U.S. Environmental Protection Agency's Office of Research and Development in Gulf Breeze, Florida, co-authors a new book, *APPLIED PANARCHY: APPLICATIONS AND DIFFUSION ACROSS DISCIPLINES* (Island Press, 2022). The book shows how panarchy theory intersects with other disciplines and documents the extraordinary advances in panarchy scholarship and applications over the past two decades.

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Environmental Law Lectures

The FSU Environmental, Energy, and Land Use Law Program hosted a full slate of environmental and administrative law events, with grant support from the Florida Bar Section on Environmental and Land Use Law. To access the recordings, please email us at jroxas@law.fsu.edu

Spring 2022 Distinguished Environmental Lecture

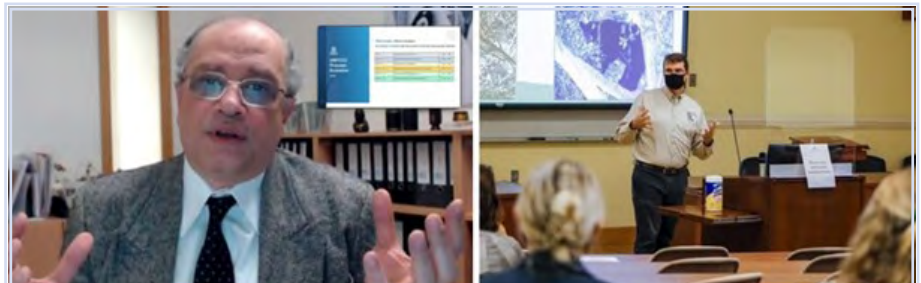
Environmental Law in a Polarized Era



Vanderbilt Law Professor **Michael Vandenbergh** delivered FSU Law's Spring 2022 Distinguished Environmental Lecture via Zoom on February 2, 2022. Vandenbergh is the David Daniels Allen Distinguished Chair in Law of the Vanderbilt Law School, Director of the Climate Change Research Network and the Co-director of the Energy, Environment, and Land Use Program. Vandenbergh's lecture, "Environmental Law in a Polarized Era" covered many important environmental topics, including the mental models that limit effective thinking on climate mitigation, constraints on government climate mitigation efforts, and the role polarization plays in shaping climate science acceptance and support for government policy.

Enrichment Lectures

This Spring, the FSU Environmental Law Program hosted **David Telesco** (*right*), coordinator of the Florida Fish and Wildlife Conservation Commission Bear Management Program and **Youssef Nassef** (*left*), Director of Adaptation at the United Nations Convention on Climate Change.



On January 19, Telesco discussed all things black bear, including where black bears are located in Florida, their behavior, and the laws in place that serve to protect the bear population and people.

On February 23, Nassef shared the positive results of the 2021 Conference of Parties (COP 26), the inter-governmental conference on climate change held last December 2021 at Glasgow, Scotland, reviewing the history and need for international mitigation efforts and the back-story of progress made at the conference.

2022 Carbon Tax Panel The Political Case For (and Against) Carbon Taxation



The FSU Environmental Law hosted its annual panel discussion on March 07, 2022, at the Law School Rotunda. The panel discussion presented the skepticism about the merits and the political feasibility of carbon taxation. The panel included **Danny Cullenward**, Policy Director at CarbonPlan,; **Marc Hafstead**, Director of Carbon Pricing Initiative; **Alice Kaswan**, Professor at the University of San Francisco School of Law; and **Catrina Rorke**, Vice President for Policy at the Climate Leadership Council. Carbon pricing has been aggressively promoted in the international community – from the Kyoto Protocol to the Paris Climate Accord.. Moderated by D'Alemberte Professor **Shi-Ling Hsu** of FSU College of Law, the panel debated the economic and political dimensions of ongoing carbon taxation efforts and what future proposals should entail.

Environmental Field Trip: Wakulla Springs State Park

On March 30, the FSU Environmental Law Program hosted an educational field trip to the Wakulla Springs State Park. Led by Associate Dean **Erin Ryan**, the students were guided by Dr. **Bob Deyle** of the FSU Marine and Coastal Research Institute, and Ranger **Maria Wilhelmy**, park services specialist at Wakulla Springs. After the boat tour, students engaged in small group discussions about water, environmental governance, and public lands management issues in Florida.



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An important take away is the inclusion of inland communities in addition to coastal community communities which have been the focus of previous efforts to undertake resiliency responses across the state. The key definition in subsection (2), critical assets, frames parameters for both planning and project funding and the individual components are known as “asset classes”:

“Critical assets”:

1. Transportation assets and evacuation routes, including airports, bridges, bus terminals, ports, major roadways, marinas, rail facilities, and railroad bridges.

2. Critical infrastructure, including wastewater treatment facilities and lift stations, stormwater treatment facilities and pump stations, drinking water facilities, water utility conveyance systems, electric production and supply facilities, solid and hazardous waste facilities, military installations, communications facilities, and disaster debris management sites.

3. Critical community and emergency facilities, including schools, colleges, universities, community centers, correctional facilities, disaster recovery centers, emergency medical service facilities, emergency operation centers, fire stations, health care facilities, hospitals, law enforcement facilities, local government facilities, logistical staging areas, affordable public housing, risk shelter inventory, and state government facilities.

4. Natural, cultural, and historical resources, including conservation lands, parks, shorelines, surface waters, wetlands, and historical and cultural assets.⁸

It should be noted that this definition is focused on publicly owned and maintained critical assets, but several of these assets can be privately owned and maintained such as health care facilities, hospitals, stormwater

or other utilities-related infrastructure and even transportation assets or natural resources. For the purpose of identifying these critical assets within a vulnerability assessment, it is important to understand this distinction because traditional publicly available mapping resources may not capture privately owned and maintained critical assets. A great example is a private health care clinic which may reflect as a commercial use on a land use map and could be missed in an inventory of critical assets due to this designation. But both public and private “critical assets” should be included within the scope of a vulnerability assessment because the definition of critical assets makes no distinction between ownership and control.

b. Resilient Florida Grant Program. In subsection (3), the Resilient Florida Grant Program (RFGP) is established as a new program within DEP. It updates and expands the previous Florida Resilient Coastlines Program’s Resilience Planning and Implementation Grants (RPG and RIG).

As originally written, counties and municipalities could pursue funds for the following initiatives: (1) the costs of community resilience planning and necessary data collection for such planning, including comprehensive plan amendments and necessary corresponding analyses that address the requirements of s. 163.3178(2)(f); (2) vulnerability assessments that identify or address risks of flooding and sea level rise; (3) the development of projects, plans, and policies that allow communities to prepare for threats from flooding and sea level rise; and (4) projects to adapt critical assets to the effects of flooding and sea level rise.⁹ It should be noted that this last provision was struck in HB 7053 this legislative session and no longer can the Resilient Florida Grant Program be used for projects to adapt critical assets to the effects of flooding a sea level rise. A new category of funding was added to subsection (3)(b) providing costs for preconstruction activities for projects to be submitted for inclusion into the Statewide Flooding and Sea Level Rise Resilience Plan for municipalities with a population less than 10,000 or a county less than 50,000.

Very important to note in §

380.093(3), Fla. Stat., is the fact that there are now standards associated with the development of vulnerability assessments.¹⁰ This is important because while the state had already been funding the development of local government vulnerability assessments under the previous RPGs (capped at \$75,000), the results of them varied significantly in terms of scope for modeling, approaches, data collection and the information that resulted from the planning efforts. With the development of new standards for vulnerability assessments and no funding cap of \$75,000, local governments can take a more comprehensive approach, to comply with the statutory requirements, for the development of the vulnerability assessments. There may be some flexibility from DEP with how some of the vulnerability assessment requirements are met subject to approval and with supporting documentation. DEP is also developing a standard scope of work that can help local governments tailor their approach for their own vulnerability assessment. The required components for vulnerability assessments¹¹ include:

- The entire geographic area and all critical assets using the most recent publicly available elevation data must be included in a vulnerability assessment. A smaller geographic area can include only a portion of the assets with approval from DEP. A report must be submitted to DEP including:
 - Vulnerability of and risks to critical assets owned by the local government.
 - All mapping data (geospatial and geographic information systems).
 - Metadata for the vulnerability assessments according to DEP standards.
 - List of critical assets impacted.
 - Peril of flood amendments for the comprehensive plan (§ 163.3178, Fla. Stat.) if not yet completed by the local government.
 - Tidal flooding including future high tide flooding, the number of tidal flood days for each sea level rise scenario

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and planning year horizon.

- Storm surge using National Oceanic and Atmospheric Administration (NOAA) or Federal Emergency Management Agency (FEMA) storm surge data which must equal or exceed the current 100-year flood event.
- To the extent practicable, rainfall induced flooding¹² including future conditions for sea level rise and high tides as well as compound flooding of tidal, storm surge and rainfall-induced flooding.
- The analysis must also include the following parameters:
 - Use of North American Vertical Datum of 1988.
 - At least two sea level rise scenarios (NOAA Intermediate Low and High)
 - At least two planning horizons for 2040 and 2070
 - Use of the two closest tide gauges to interpolate local sea level data; but one gauge may be used if it has a higher mean sea level and alternate tide gauges can be used as long as the rationale is submitted to DEP.

As of April 2022, the Resilient Florida Grant Program has been awarded \$404 million for capital projects. Examples of these projects include a \$28 million Tidal Flooding Mitigation and Shoreline Protection project for the City of Hollywood, a \$15 million Elevation of Roadway, Infrastructure, and Drainage Resilience Improvements project for Miami-Dade County, and a \$2.3 million Living Shoreline and Resiliency Project for the City of Treasure Island. The Resilient Florida Grant Program will be providing partial funding for some projects and full funding for others.¹³ Approximately \$20 million in planning grants for vulnerability assessments was awarded on May 11, 2022 for applications submitted in 2021. These planning grants were specifically prioritized for local governments that have not undertaken a vulnerability assessment to date or

for a local government that needs a new increment to bring it into compliance with the vulnerability assessment standards listed above in subsection (3). Examples of the planning grants included in the award list include Alachua County receiving \$338,435 to conduct their Critical Infrastructure and Land Use Vulnerability Analysis, Miami-Dade County receiving \$150,000 for Adaptation Action Area Planning in Areas Vulnerable to Sea Level Rise in Miami-Dade County, and the City of Delray Beach receiving \$100,000 for their Critical Infrastructure Vulnerability Assessment and Adaptation Plan.¹⁴

c. Comprehensive Statewide Flood Vulnerability and Sea Level Rise Data Set and Assessment. By July 1, 2022 (now 2023 per HB 7053), DEP must complete the development of a dataset to support a comprehensive statewide flood vulnerability and sea level rise assessment.¹⁵ The goal is to use existing data and vulnerability assessments conducted by local governments to the extent they exist and provide output for the development of the dataset. It is also the role of the Chief Science Officer to develop statewide sea level rise projections for inclusion in the dataset.¹⁶ The dataset must include information to determine risk to both inland and coastal communities including elevation, tidal levels and precipitation.¹⁷

By July 1, 2023 (now 2024 per HB 7053), DEP must also complete a comprehensive statewide flood vulnerability and sea level rise assessment analyzing inland and coastal infrastructure, geographic areas and vulnerable communities and their risk.¹⁸ The referenced dataset must be used to conduct the assessment and it must include local and regional analysis related to vulnerability and risk such as local mitigation strategies and post disaster redevelopment plans. Critical assets must be inventoried “... essential for critical government and business functions, national security, public health and safety, the economy, flood and storm protection, water quality management, and wildlife habitat management, and must identify and analyze the vulnerability of and risks to such critical assets.”¹⁹ The dataset and comprehensive statewide flood vulnerability and sea level rise assessment shall be updated every five (5)

years or more frequently to address data needs.²⁰

d. Statewide Flooding and Sea Level Rise Resilience Plan. Each December, starting December 1, 2021, DEP shall develop a Statewide Flooding and Sea Level Resilience Plan that includes a 3-year planning horizon which shall be submitted to the Governor, President of the Senate and Speaker of the House.²¹ It includes ranked projects that address risks of flooding and sea level rise to coastal and inland communities.²² The first one submitted December 1, 2021, is considered a “preliminary plan” to address risks already identified in existing local government vulnerability assessments and projects submitted by water management districts. This is to be updated in 2022 and 2023, but after that starting in 2024, the plan shall address risks identified in the Comprehensive Statewide Flood Vulnerability and Sea Level Rise Assessment.²³ Section 380.093(5)(c), Fla. Stat. outlines the submittal requirements for each recommended project.

Paragraph (5)d.1. provides that by September 1 each year, counties and municipalities may submit to DEP a list of proposed projects that address risks of flooding or sea level rise identified in vulnerability assessments *that meet the requirements of subsection (3)*. This language is critical in that as originally written, the legislation required that projects must be identified in vulnerability assessments that meet the new requirements for vulnerability assessments outlined in the statute. HB 7053 amends this requirement by allowing entities to submit projects that do not comply with subsection (3) requirements until December 1, 2023, but after that time, the projects will have to be identified in vulnerability assessments that meet these subsection (3) requirements. This change is important because most local governments that have completed vulnerability assessments already, even recently completed ones, are not likely to fully meet all of these subsection (3) requirements. Meeting these vulnerability assessment requirements should still be a priority for local governments because projects must be identified in subsection (3) compliant

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vulnerability assessments after 2024 for future funding. Completing a vulnerability assessment that complies with the statutory criteria is still important because it sets up the local government for project submittals in subsequent funding years after 2024. Regional resilience entities may also submit such proposed projects on behalf of one or more member counties or municipalities.²⁴ Water management and flood control districts can similarly submit projects, although they do not need to be identified in a vulnerability assessment.²⁵

For project submittals for the statewide flooding and sea level rise resiliency plan, subsection (5) states that each project must have a minimum 50 percent cost-share unless the project assists or is within a financially disadvantaged small community.²⁶ This determination on financially disadvantaged small communities is based on population size, population estimates posted on the Office of Economic and Demographic Research's website, and a per capita annual income that is less than the state's per capita annual income as shown in the most recent release from the Bureau of the Census of the United States Department of Commerce.²⁷ In 2022, it should be noted that some Federal COVID related money was utilized to fund projects under subsection (3) for the Resilient Florida element of the program, and match was not required for 16 projects. Applicants should be aware that projects are likely to be ranked higher the more committed their match is through budget line items or support letters attesting to match readiness.

There are two paths for projects to be eligible for inclusion in the Statewide Flooding and Resilience Plan: (1) a project must have been submitted by a county, municipality, regional resilience entity, water management district, or flood control district pursuant to subsection (5)(d) or (2) projects must have been identified in the comprehensive statewide flood vulnerability and sea level rise assessment, as applicable.²⁸ This provision is important because path (1) links back to paragraph (5)(d) in this subsection which requires that

projects address risks of flooding or sea level rise identified in *vulnerability assessments that meet the requirements of subsection (3)*. Again, this linkage underscores the importance of having a vulnerability assessment that meets the standards in the statute. Projects must flow through either process and, at least in the early years, a pivotal first step is having that vulnerability assessment meeting the data and modeling requirements outlined in the statute.

In § 380.093(5)(g), Fla. Stat., the following projects are *ineligible* for inclusion in the Statewide Flooding and Sea Level Rise Resiliency Plan:

1. Aesthetic vegetation.
2. Recreational structures such as piers, docks, and boardwalks.
3. Water quality components of stormwater and wastewater management systems, except for expenses to mitigate water quality impacts caused by the project or expenses related to water quality which are necessary to obtain a permit for the project.
4. Maintenance and repair of over-walks.
5. Park activities and facilities, except expenses to control flooding or erosion.
6. Navigation construction, operation, and maintenance activities.
7. Projects that provide only recreational benefits.

The total amount of funding available each year for the statewide flooding and sea level rise resiliency plan, now as authorized by HB 7053, may not be less than \$100 million per year where originally the funding amount was not to exceed \$100 million per year.²⁹ The legislature approves the Plan and multi-year projects must be built into subsequent funding cycles.³⁰ There is also a scoring system³¹ for projects comprised of the following elements:

- Tier 1 (40%): including the degree to which the project addresses the risks posed by flooding and sea level rise identified in the local government vulnerability assessments or the Comprehensive Statewide Flood Vulnerability and Sea Level Rise Assessment, as applicable; the degree to which the project addresses risks to regionally significant assets; the degree

to which the project reduces risks to areas with an overall higher percentage of vulnerable critical assets; and the degree to which the project contributes to existing flooding mitigation projects that reduce upland damage costs by incorporating new or enhanced structures or restoration and re-vegetation projects.

- Tier 2 (30%): including the degree to which flooding and erosion currently affect the condition of the project area; the overall readiness of the project to proceed in a timely manner, considering the project's readiness for the construction phase of development, the status of required permits, the status of any needed easement acquisition, and the availability of local funding sources; the environmental habitat enhancement or inclusion of nature-based options for resilience, with priority given to state or federal critical habitat areas for threatened or endangered species and the cost-effectiveness of the project.
- Tier 3 (20%): including the availability of local, state, and federal matching funds, considering the status of the funding award, and federal authorization, if applicable; previous state commitment and involvement in the project, considering previously funded phases, the total amount of previous state funding, and previous partial appropriations for the proposed project; and the exceedance of the flood-resistant construction requirements of the Florida Building Code and applicable flood plain management regulations.
- Tier 4 (10%): including the proposed innovative technologies designed to reduce project costs and provide regional collaboration and the extent to which the project assists financially disadvantaged communities.

DEP has initiated rulemaking to implement this scoring criteria section and published an initial version of the rule language on March 4, 2022.³² This rulemaking is critical to clarify overall program implementation relative to the project evaluation process undertaken by DEP.

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e. Regional Resilience Entities.

DEP may provide funding for the following purposes to regional entities that are established by general purpose local governments and whose responsibilities include planning for the resilience needs of communities and coordinating intergovernmental solutions to mitigate adverse impacts of flooding and sea level rise: (a) providing technical assistance to counties and municipalities, (b) coordinating multijurisdictional vulnerability assessments and (c) developing project proposals to be submitted for inclusion in the Statewide Flooding and Sea Level Rise Resilience Plan.³³

f. Florida Hub for Applied Research and Innovation. The Florida Flood Hub for Applied Research and Innovation is established within the University of South Florida College of Marine Science to coordinate efforts between the academic and research institutions of the state.³⁴ USF, or its successor entity, will serve as the lead institution and engage other academic and research institutions, private partners, and financial sponsors to coordinate efforts to support applied research and innovation to address the flooding and sea level rise challenges of the state.³⁵ The mission of the Hub includes data collection, model development, coordinating research funds, establishing monitoring programs to enhance research, coordinating with various agencies, training, partnerships and other interaction to advance research and share technology.³⁶ Annual reports on the Hub's activities shall be provided to the Governor, Senate President and House Speaker.³⁷

g. Annual assessment of Florida's water resources and conservation lands. Finally, § 403.928(4), Fla. Stat., was amended to expand the requirements of the existing annual assessment of Florida's water resources and conservation lands (conducted by the Office of Economic and Demographic Research) to now include flooding information.³⁸ The specific requirement includes an analysis of future expenditures by federal, state, regional, and local governments required to achieve minimizing the adverse economic effects of inland

and coastal flooding, thereby decreasing the likelihood of severe dislocations or disruptions in the economy and preserving the value of real and natural assets to the extent economically feasible. To the extent possible, the analysis must evaluate the cost of the resilience efforts necessary to address inland and coastal flooding associated with sea level rise, high tide events, storm surge, flash flooding, stormwater runoff, and increased annual precipitation over a 50-year planning horizon. When dedicated revenues are provided in law for these purposes or that recurring expenditures are made, the analysis must also identify the gap, if any, between the estimated revenues and the projected expenditures.

As of April 2022, \$276 million in grants have been awarded for implementation of the Statewide Flooding and Sea Level Rise Resilience Plan. This includes 3 years of funding based on project phasing. Example projects to be funded include \$7.25 million City of West Palm Beach Pilot Seawall Elevation Project, the \$31 million Design and Construction of Allapattah Flood Improvements (AFI) project for Miami, and the \$4.5 million Town of Surfside's Abbott Avenue Stormwater Improvements project³⁹.

3. Other Legislation Legal and Policy Initiatives for Resiliency

Currently, legislation related to resiliency, climate and adaptation response has focused on initiatives within local government comprehensive plans⁴⁰ or initiatives related to the expenditure of funds for public projects using state funds.⁴¹ And it should be noted that there is consistency across these efforts on a couple of different levels.

First, if a local government has not completed its Peril of Flood amendments pursuant to § 163.3178, Fla. Stat., then that will need to be addressed in a vulnerability assessment conducted pursuant to § 380.093(3) (d) Fla. Stat. Second, if the local government is utilizing state funds for construction projects, pursuant to § 161.551, Fla. Stat., a sea level impact projection (SLIP) study must be conducted either by the project applicant or utilizing DEP's new online tool to conduct the study. The parameters to conduct such a study are fairly consistent with standards for conducting vulnerability assessments in

§ 380.093, Fla. Stat., for instance the same sea level rise scenarios.

While DEP had also been implementing its RPG and RIG programs for four (4) funding cycles prior to 2021, the length of time, and previously discussed cost cap, are modified and expanded for the new planning and project grants. The expanded vulnerability assessment parameters will also result in more consistent work products across local governments and generate the data in a form that can be used in the Comprehensive Statewide Flood Vulnerability and Sea Level Rise Data Set and Assessment and Statewide Flooding and Sea Level Rise Resilience Plan.

Finally, a lesser utilized tool in existing state law, the establishment of adaptation action areas (AAAs)⁴² in comprehensive plans, also can be considered in alignment with § 380.093, Fla. Stat. For local governments that have established AAAs in their comprehensive plans, these geographic areas can be used to bridge the gap between vulnerability and adaptation planning and facilitate further development of projects to respond to flood impacts. These are typically the most vulnerable areas of a community and are probably one of the initial priorities for flooding response.

4. Opportunities and Challenges for the new program

With every new major program such as § 380.093, Fla. Stat., there are both opportunities and challenges. With over \$600 million in the first year of funding including funds from the American Rescue Plan Act of 2021,⁴³ clearly there has been a significant infusion of funding to advance resilience planning and adaptation project implementation.

That said, one of the most important nuances of the legislation is the linkage between planning, projects and the new requirements for vulnerability assessments. While these new requirements are more complicated and complex in terms of the scope of the vulnerability assessment, the more comprehensive output from these efforts will be incredibly useful to local governments for identifying risk and prioritizing adaptation response. Moreover, as stated, there is funding available for the planning

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grants (\$20 million in 2021 and another \$20 million in 2022) to cover the costs of either a new vulnerability assessment that meets these requirements or expanding a previous vulnerability assessment to comply with the new modeling requirements. In fact, these are the funding priorities for the subsection (3) planning grants.

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

A final issue to note is that DEP is currently engaged in rulemaking on the implementation of § 380.093, Fla. Stat.. The purpose of the rulemaking in the Notice of Development of Proposed Rules and Negotiated Rulemaking⁴⁴ is stated as, "The Department creates this rule chapter to implement § 380.093, Fla. Stat., *relating to the Statewide Flooding and Sea Level Rise Resilience Plan* and project submittal requirements. Entities for which this rule is relevant include coastal and inland communities including counties, municipalities, water management districts, flood control districts, and regional resilience entities." Additionally, the subject matters addressed by the rule include sea level rise, flooding, infrastructure, planning, vulnerability, and resilience *related to the development of the Statewide Flooding and Sea Level Rise Resilience Plan* focused on the interpretation of the ranking criteria previously outlined herein. This rule is critical both for applicants to formulate competitive grant applications, but also to instill transparency and predictability in the

grant evaluation process. The finer point the Rule will put on this evaluation criteria will include metrics and point apportionment that will greatly assist in preparing projects that can be as competitive as possible. DEP provided another rule draft on May 16, 2022 in advance of a workshop on May 26, 2022 seeking further input on the Rule language.⁴⁵

5. Clarifications in Rulemaking or Subsequent Legislation

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

a. Vulnerability Assessments v. Adaptation Plans. Currently, the way the legislation is structured, projects must flow from vulnerability assessments that meet certain technical standards. But is a vulnerability assessment the right vehicle to create that linkage? Vulnerability is defined as: The propensity or predisposition of assets to be adversely affected by hazards. Vulnerability encompasses exposure, sensitivity, potential impacts, and adaptive capacity.⁴⁶ And therefore, a vulnerability assessment is the process for identifying who or what is impacted by climate change. On the other hand, adaptation is the process of adjusting to new (climate) conditions in order to reduce risks to valued assets and adaptive capacity is the ability of a person, asset, or system to adjust to a hazard, take advantage of new opportunities, or cope with change.⁴⁷ So technically, a vulnerability assessment would serve as the basis for an actual adaptation plan, where actual projects and response strategy would be identified. Of course, vulnerability planning and adaptation response can be combined into one process. Interpreting § 380.093, Fla. Stat. could mean that vulnerability assessments and adaptation plans are two different things, but it should be noted that vulnerability assessments must identify projects to "adapt" critical assets. Section 380.093, Fla. Stat., and the new Rule 62S-8, F.A.C., could

benefit from some clarification on these terms and what types of information vulnerability assessments as opposed to adaptation plans should contain.

b. Scope of modeling for vulnerability assessments. Paragraph (3)(d) lists certain vulnerability assessment parameters, but the section notes that these are "to the extent practicable". It's unclear who will determine if this technical analysis is "practicable" and this could also somewhat run counter to DEP's goal of consistent vulnerability assessments because "practicable" is directly related to the level of funding and the scope of the vulnerability assessment itself. It should be noted that HB 7053 creates a duty of DEP and the State's Chief Resiliency Officer to create a list of local governments that have completed vulnerability assessments that comply with the requirements of § 380.093(3), Fla. Stat. The scope of that determination is unclear as to whether all listed criteria in subsection (3) must be met or just those that can be achieved to the extent practicable. The implication is that some of modeling requirements are complex and may cost several hundreds of thousands of dollars for things such as integrated hydrological modeling. Is this practicable or even preferable at this early stage for priority funding? That said Rule 62S-8, F.A.C., does include a definition for a "comprehensive vulnerability assessment" that is premised upon meeting the statutory requirements for vulnerability assessments, but it can include other supplemental plans, assessment, documents or reports that identify or address risks of flooding and sea level rise to critical or regionally significant assets.

c. Cost share commitments and calculations. The most recent version of Rule 62S-8, F.A.C. does provide some guidance on how the 50% cost share can be evidenced, but there is no clarification of when the cost share must be available. The DEP project submittal portal currently asks for the total amount of the project and the 50% cost share, but local governments are confused about how and specifically when to budget for that cost share's availability.

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Further rule guidance should better clarify this timing issue.

d. Ranking or scoring criteria for the Statewide Flooding and Sea Level Rise Resilience Plan.

There are broad categories of scoring criteria defined within § 380.093(5) (h), Fla. Stat., but how to evaluate the status of permits and regulatory approvals and simply the degree to which the project addresses the risks posed by flooding and sea level rise are all issues addressed in the Rule 62S-8, F.A.C., rulemaking process. Another issue of clarification in the rulemaking process is how DEP evaluates the criteria for projects “exceeding the flood-resistant construction requirements of the Florida Building Code and applicable floodplain management regulations”.⁴⁸ This analysis is a narrative that must be supplied by a grant applicant. Some projects such as roads or stormwater, may not even be subject to the requirements of the Florida Building Code (non-horizontal construction) and also it is unclear how to determine an exceedance of applicable floodplain management regulations or the Florida Building Code. This will be subject to some fairly broad interpretation based on the analysis provided by grantees. Finally, the new rule draft does expand the alternative ways a project can be deemed “cost effective” which is important to capture the different types of economic analyses that would be relevant to different project types. Rule 62S-8, F.A.C. continues to evolve with the most recent May 16th draft as DEP works to provide some guidance or clarification on some of these issues with the metrics for scoring projects.

6. HB 7053 – Statewide Flooding and Sea Level Rise Resilience

On May 3, 2022, Governor DeSantis signed HB 7053 – Statewide Flooding and Sea Level Rise Resilience into law amending § 380.093, Fla. Stat. The bill expands on Florida’s current legislation aimed at developing resilience to sea level rise and flooding, creating the Statewide Office of Resilience, the Chief Resiliency Officer position, new requirements for the Department of Transportation, and new funding opportunities.

Within the Executive Office of the Governor, the Statewide Office of Resilience has been established and a Chief Resilience Officer has been appointed to lead the state’s resilience efforts. The Chief Resiliency Officer is responsible for engaging and coordinating with governmental and nongovernmental entities to determine flood resilience and mitigation priorities for the state, incorporating future standards and projections for flooding into upcoming plans, and utilizing innovative techniques to support flood resilience and mitigation efforts.

The bill has also outlined new requirements for the Department of Transportation, including developing a resilience action plan for the State Highway System and submitting the plan to the Governor and Legislature by June 30, 2023. The action plan must incorporate certain components as outlined in the bill.

With HB 7053, the Resilient Florida Grant Program funds may also be used for preconstruction activities for certain projects to be included within the Statewide Flooding and Sea Level Rise Resilience Plan. Funding through the program for this component is only available for projects that are located in a municipality with a population of 10,000 or less or a county with a population of 50,000 or less. Additionally, HB 7053 revised the amount of funding proposed for each year of the Statewide Flooding and Sea Level Rise Resilience Plan to a **minimum** (as opposed to maximum) threshold of \$100 million.

The Statewide Flooding and Sea Level Rise Resilience now has an extended the deadline for the completion of the comprehensive statewide flood vulnerability and sea level rise data set and assessment by one year. The data set and assessment will now be due in 2024 instead of 2023. HB 7053 also revised the requirements

for vulnerability assessments for non-coastal communities.

7. Conclusions

Section 380.093, Fla. Stat., is clearly still a transformational program within the State of Florida creating a large carrot for local governments to begin planning for future flood risk, both inland and coastal. It is also clear that the state has put considerable funding commitments on the table to address the challenges of sea level rise and future flood risk through vulnerability assessments, adaptation and project implementation. Local governments have been on the front lines of these challenges, in some instances assisted by other regional entities, and now with Section 380.093, Florida Statutes, there is further funding to support this work at the state, regional and local levels. DEP continues to progress in developing Rule 62S-8, F.A.C., which will greatly assist project applicants in developing compliant vulnerability assessments and competitive capital project grants. Further rulemaking or legislative changes beyond HB 7053 and Rule 62S-8, F.A.C., can potentially assist in streamlining project submittals and evaluation by DEP for consistency with the statute. The “act relating to statewide flooding and sea level rise resilience” remains a critical program to achieve economic resilience by protecting people, assets and property in Florida. As DEP scales up its implementation, more staff and program resources are now available to assist local governments in developing their grant applications, budgets, materials and scopes of work. This has been a large benefit that will result in better applications and projects for local governments. The hard work of resiliency continues and expands within Florida and the “Always Ready” initiative remains a catalyst in achieving those objectives across the state.



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Endnotes

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2 Kendall Aumick is entering her first year of Law School in 2022 at the University of Miami.

3 Ch. 2021-28, Laws of Florida.

4 § 380.093, Fla. Stat. (2021).

5 HB 7053, 2022 Leg., Reg. Sess. (Fl. 2022).

6 § 380.093(1)(a), Fla. Stat. (2021).

7 § 380.093(1)(b), Fla. Stat. (2021).

8 § 380.093(2)(a), Fla. Stat. (2021).

9 § 380.093(3)(b), Fla. Stat. (2021).

10 § 380.093(3)(c), Fla. Stat. (2021).

11 § 380.093(3)(c) & (d), Fla. Stat. (2021).

12 Vulnerability assessments for rainfall-induced flooding must include the depth of rainfall-induced flooding for a 100-year storm and a 500-year storm, as defined by the applicable water management district or, if necessary, the appropriate federal agency. Future rainfall conditions should be used, if available. Noncoastal communities must perform a rainfall-induced flooding assessment.

13 *Timeline*, Protecting Florida Together, <https://protectingfloridatogether.gov/about/timeline> (last visited Apr. 20, 2022).

14 *Grants*, Protecting Florida Together, <https://protectingfloridatogether.gov/state-action/grants-submissions> (last visited May 11, 2022).

15 § 380.093(4), Fla. Stat. (2021).

16 § 380.093(4)(a)1, Fla. Stat. (2021).

17 § 380.093(4)(a)2, Fla. Stat. (2021).

18 § 380.093(4)(b), Fla. Stat. (2021).

19 § 380.093(4)(b)3, Fla. Stat. (2021).

20 § 380.093(4)(c), Fla. Stat. (2021).

21 § 380.093(5), Fla. Stat. (2021).

22 *Id.*

23 § 380.093(5)(b), Fla. Stat. (2021).

24 § 380.093(5)(d)1, Fla. Stat. (2021).

25 § 380.093(5)(d)2, Fla. Stat. (2021).

26 § 380.093(5)(e), Fla. Stat. (2021).

27 § 380.093(5)(e)1. & 2., Fla. Stat. (2021).

28 § 380.093(5)(f), Fla. Stat. (2021).

29 § 380.093(5)(i), Fla. Stat. (2021).

30 *Id.*

31 § 380.093(5)(h), Fla. Stat. (2021).

32 § 380.093(5)(j), Fla. Stat. (2021) and *Statewide Flooding and Sea Level Rise Resilience Plan 62S-8 Rule Language*, Florida Department of Environmental Protection (March 9, 2022, 2:13 PM), <https://floridadep.gov/rcp/resilient-florida-program/documents/statewide-flooding-and-sea-level-rise-resilience-plan-62s-8>.

33 § 380.093(6), Fla. Stat. (2021).

34 § 380.0933, Fla. Stat. (2021).

35 § 380.0933(1), Fla. Stat. (2021).

36 § 380.0933(2), Fla. Stat. (2021).

37 § 380.0933(4), Fla. Stat. (2021).

38 § 403.928(4), Fla. Stat. (2021).

39 *Timeline*, Protecting Florida Together, <https://protectingfloridatogether.gov/about/timeline> (last visited Apr. 20, 2022).

40 See § 163.3178(2)(f), Fla. Stat. (2021), which states: (2) Each coastal management element required by § 163.3177(6)(g) shall be based on studies, surveys, and data; be consistent with coastal resource plans prepared and adopted pursuant to general or special law; and contain: (f) redevelopment component that outlines the principles that must be used to eliminate inappropriate and unsafe development in the coastal areas when opportunities arise. The component must:

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

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

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

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

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

6. Encourage local governments to participate in the National Flood Insurance Program Community Rating System administered by

the Federal Emergency Management Agency to achieve flood insurance premium discounts for their residents.

41 § 161.551(2), Fla. Stat. (2020), which states: Beginning 1 year after the date the rule developed by the department pursuant to subsection (3) is finalized and is otherwise in effect, a state-financed constructor may not commence construction of a coastal structure without:

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

(b) Submitting the study to the department; and

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

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

42 § 163.3177(6)(g), Fla. Stat. (2010). At the option of the local government, develop an adaptation action area designation for those low-lying coastal zones that are experiencing coastal flooding due to extreme high tides and storm surge and are vulnerable to the impacts of rising sea level. Local governments that adopt an adaptation action area may consider policies within the coastal management element to improve resilience to coastal flooding resulting from high-tide events, storm surge, flash floods, stormwater runoff, and related impacts of sea-level rise. Criteria for the adaptation action area may include, but need not be limited to, areas for which the land elevations are below, at, or near mean higher high water, which have a hydrologic connection to coastal waters, or which are designated as evacuation zones for storm surge.

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

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

45 *Statewide Flooding and Sea Level Rise Resilience Plan 62S-8 Rule Language*, Florida Department of Environmental Protection (May 17, 2022, 3:42 PM), <https://floridadep.gov/rcp/resilient-florida-program/documents/draft-rule-language-chapter-62s-8-statewide-flooding-and-sea>.

46 *Glossary*, U.S. Climate Resilience Toolkit, <https://toolkit.climate.gov/content/glossary> (last modified March 2, 2021, 10:44 AM)

47 *Id.*

48 § 380.093(5)(h)3. c., Fla. Stat. (2021).



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