Seaport Environmental Management Committee

Wednesday, August 25, 2021
9:00 a.m.-12:00 p.m.
Sheraton Panama City Beach Resort
Panama City, Florida

Seaport Environmental Management Committee
AGENDA

Wednesday, August 25, 2021
9:00 a.m.-12:00 p.m.
Sheraton Panama City Beach Resort
Panama City

1. Call to Order, Welcome

2. Roll Call

3. Approval of the March 30, 2021 SEMC Meeting Minutes

4. Legislative Update (2021 Recap and 2022 Preview)

5. Agency Updates
    a. Florida Department of Environmental Protection (FDEP)
    b. Florida Department of Economic Opportunity (DEO)
    c. U.S. Army Corps of Engineers-Civil Works and Regulatory Division
    d. Florida Fish & Wildlife Conservation Commission
    e. Florida Inland Navigation District (FIND)

6. Open Discussion
    a. PFAS and Policy Changes on Closures of Contaminated Property
    b. FDEP – Turbidity Rule Update
    c. FDEP Rule 62S-7 Sea Level Impact Projection (SLIP) Studies
    d. Florida Ocean Alliance Update
    e. Diesel Emission Reduction Program (DERA) and VW Mitigation Grants
    f. Federal Update: National Environmental Policy Act (NEPA), 404, WOTUS
    g. Other Issues

7. Adjourn

TAB 2
Roll Call

Seaport Environmental Management Committee
Roll Call

Wednesday, August 25, 2021
9:00 a.m.-12:00 p.m.
Sheraton Panama City Beach Resort
Panama City

Representative	Organization	Designee
John Murray	Port Canaveral	Bob Musser
Randy Oliver	Port Citrus	
Jonathan Daniels	Port Everglades	Erik Neugaard
Chris Ragucci	Port Fernandina	
Stanley Payne	Port of Fort Pierce	
Eric Green	Jacksonville Port Authority	Nick Primrose
Doug Bradshaw	Port of Key West	
Carlos Buqueras	Manatee County Port Authority	George Isiminger
Juan Kuryla	PortMiami	Becky Hope
Manuel Almira	Port of Palm Beach	
Alex King	Panama City Port Authority	
Clark Merritt	Port of Pensacola	
David Wirth	Port St. Pete	
Guerry Magidson	Port of Port St. Joe	
Chris Cooley (Chair)	Tampa Port Authority	
Lanie Edwards	Florida Department of Environmental Protection	
James Stansbury	Florida Department of Economic Opportunity	
Tim Murphy Shawn Zinszer	U.S. Army Corps of Engineers	
Mark Crosley	Florida Inland Navigation District	
Jennifer Goff	Florida Fish and Wildlife Conservation Commission	

TAB 3
Approval of March 30, 2021 Meeting Minutes

MEETING SUMMARY
SEAPORT ENVIRONMENTAL MANAGEMENT COMMITTEE

March 30, 2021
9:00 AM – 12:00 PM
Meeting

The Seaport Environmental Management Committee (SEMC) meeting was called to order at approximately 9:00 a.m. by Chairman Chris Cooley. Casey Grigsby called roll. Attending via zoom and/or teleconference were the following members and guests:

Chris Cooley, Chair – Tampa
Becky Hope – Miami
Nick Primrose – JAXPORT
James Bennett - JAXPORT
George Isiminger – Port Manatee
Eric Neugaard – Port Everglades
David Wirth – Port St. Pete
Clark Merritt – Port Pensacola
Lainey Edwards – FDEP
Jason Height – FWC (phone)
Doug Wheeler – FPC
Casey Grigsby – FPC
Basil Binns - Miami
Frederick Wong - JAXPORT
Alex King – Port Panama City
Bob Musser – Canaveral (phone)
Mike Cole – Fernandina
Guerry Magidson – Port St. Joe
Alex Reed - FDEP
James Stansbury - FDEO
Paul Lim – FDEO
Mike Rubin – FPC
Jessie Werner – FPC
Jeff Littlejohn – LMA, Consultant to FPC
Matt McDonald – LMA, Consultant to FPC
Fred Aschauer – Lewis, Longman and Walker

After welcoming the members and guests to the meeting, Chair Cooley introduced **Tab 3, Approval of the Minutes, September 2, 2020**, and asked for comments or revisions. Hearing none, the meeting summary was approved by a vote of the Committee.

Chair Cooley introduced **Tab 4, Legislative Updates.**

Matt McDonald and Jeff Littlejohn from LMA provided an update on the following legislation:

- SB 1054/HB 705 – PFAS Legislation
- SB 1668/HB 1335 - Seagrass Mitigation Banks
- HB 729/SB 1364 - Transportation Projects

Doug Wheeler provided an update on the Seaport Preemption legislation HB 267/SB 426.

Chair Cooley introduced **Tab 5, Agency Updates**

The first agency to present was FDEP, represented by Lainey Edwards, Deputy Director of Office of Resilience and Coastal Protection:

- First, Ms. Edwards discussed some of the pending applications in-house for ports, just for beaches, inlets and ports:
    - Port Manatee Berth Expansion Application – permit recently received
    - Port Tampa Maintenance Dredging within a month
- Beaches, Inlets and Ports staff created fillable pdf report to directly upload turbidity data into FDEPs database. It is being piloted over a couple USACE projects but hopes to have it in use for all projects by November 2020. Tampa Harbor - Conceptual Permit for peninsula and 7 berths as well as phase I construction. The application was deemed incomplete and issued an RAI with response due end of October.
- Triennial Review of Water Quality Standards (turbidity criterion). The implementation document that was going to be incorporated by reference will no longer be incorporated. It is just going to update the language specific to the turbidity criterion but not have an implementation document attached to it. That means it will be up to the permitting entities to make sure that applicants are meeting that turbidity rule – which should not be increased above background conditions in areas where coral reefs or hardbottom communities are found or were demonstrated to exist since 1975. Tentative scheduled public workshop for May 5, 2021.
    - Briefly discussed some of the Florida Ports Council's comments on the draft criterion and stated that backup documentation was available on FDEP's website. But because the decision was made to go to background levels, FDEP felt that there was enough data to justify background levels rather than a specific numeric criterion.
    - FDEP does not evaluate cost but does create a Statement of Estimated Regulatory Cost (SERC) for the Environmental Regulation Commission (ERC) to review in approving the rule. The rule update would also likely require legislative ratification.
- Rule 62S-7 SLIP Study Rule (Sea Level Impact Projection). FDEP responsible for implementation of this, which applies to major construction within the Coastal Construction Zone (15 ft landward of CCL) and uses funds appropriated from the state. So not private, but major construction funded by the state. Entity doesn't have to take the recommendations but must at least submit the study to receive them.
    - Notice of proposed rule is about to be published on the F.A.R. on April 2, 2021.
- 404 Assumption Update – It is going in the Districts and it has been an increase in the workloads in those districts.
- Coastal Resilience Forum – quarterly webinar to allow folks to engage with each other and ask for recommendations as to what is working and what is not. Next scheduled update is on May 5, 2021.

James Stansbury provided an updated on FDEO

- DEO does have a funding announcement for community planning technical assistance grants that they hope to release in the next few weeks. DEO works with local governments and regional planning councils for innovative planning in

communities. There will be an emphasis this year for resiliency planning on sea level rise. Ports can work with their local governments to plan for resiliency. That plan may then be used to go after other grants for actual construction projects addressing resiliency.

Jason Heights provided an update on FWC

- Participating in FWCs part in 404 assumption program. FWC's role is to cooperate with Federal Fish and Wildlife Services for Endangered Species. They are in their third month and things are starting to smooth out.
- Discussed the unfortunate manatee mortality rates this year.

Chair Cooley then opened the discussion to ongoing events/projects at each member port.

Port Canaveral – Bob Musser

- Spoke about cruise terminal 3 for Carnival LNG and they just met with Gov. DeSantis on how to get the cruise industry back. Had a big impact on Port Canaveral as about 80 percent of their budget is from cruise. Had a very successful meeting with Governor and FDOT Secretary. Hopeful CDC will get the message and open the cruise industry by July 4.
- Just finished upgrades to cruise terminals 8 and 10 for Disney Cruise Lines is ongoing.
- Currently conducting a beach renourishment project currently and working with the Corps on their jetties and coastal resiliency initiatives.
- PFAS issues with LNG bunkering barge

Port Everglades - Eric Neugaard

- Had a schedule conflict and was unable to provide an update.

Port Fernandina – Mike Cole

- There are a lot of positive things happening. They just hired a new port attorney and administrative assistant. They are also meeting to discuss bringing new/additional cranes into the port. Tonnage is up at the Port.
- Recently finished their dredging, which went well, and they do not currently have any environmental issues to discuss.

Jaxport – Nick Primrose

- Thanked FDEP for working with them to update their DMMA sites.
- In the process of appealing a FEMA decision of berth maintenance dredging after Hurricane Dorian and hazard mitigation as it relates to berth maintenance. Seeking any advice working with FEMA.

Port Manatee - George Isiminger

- Main environmental concern is seagrass mitigation. Still working on permitting for Berth 4 extension (north berth). Will be watching the seagrass mitigation legislation.

Port Miami – Becky Hope

- Submitted application for shore power. They are bringing shore power to Miami and have been working with the Mayor and utility companies.

Port Ft. Pierce – no update

Port of Panama City – Alex King

- Just finished deepening of East Channel for their East Terminal.
- Also working on maintenance dredging for West Terminal for berth 3. One thing they are working on long term is dredge disposal management plan. They are working with a coastal engineering group to evaluate alternatives.
    - Casey Grigsby mentioned contacting FDOT to see if they could beneficially reuse some of the dredge disposal material.

Port Pensacola – Clark Merritt

- Still doing hurricane rework projects.
- Small project with Audubon society for rooftop nesting projects.

Port Tampa Bay – Chris Cooley

- A lot of new facilities coming into the Port. Bird nesting starts soon so they have active nesting on their spoil islands. This year the Corps is going to dredge into the bird season.
- New recycling project approved by Board and brought in recycling material and export out of the Port.
- First annual great port cleanup coming up partnering with Keep Tampa Beautiful and Keep America Beautiful.

Port St. Pete – David Werth

- No update provided.

Port St. Joe – Guerry Magidson

- Received a letter from FDEP giving consent to ship offshore wood chips and aggregate.

Chairman Cooley, then introduced **Tab 6, Open Discussion.** Several topics were discussed, including:

- FDEP Turbidity Rule Revision – Jeff Littlejohn asked whether FDEP had reviewed the existing turbidity data provided to FDEP through JCP permits and inlet navigation projects over the last decade. Ms. Edwards from FDEP said some effort had been made to review that data, specifically around inlets, but it was difficult to tie it into specific coral impacts to support a specific numeric criterion.
- Florida Oceans Alliance Strategic Plan – FPC staff has been working closely with FOA. March 15 was Florida Oceans Day in the capital. The group is looking for

additional funding moving forward. FOA is also doing a member drive so any interested port should contact Ms. Grigsby.
    - Bob Musser asked whether FOA submitted additional legislative funding this year. Ms. Grigsby said they did submit a legislative request but does not know whether they are going to receive the grant. They are hopeful that FDEP will extend the grant timeframes.
- DERA Grant Program – FPC staff working with EPA to know when these grants are available at the state and federal level. The federal grant is currently open. EPA Region 4 said they have not had many port applicants in the last couple of years.
    - Bob Musser indicated that Port Canaveral does not typically pursue DERA grant funding because Florida Ports are generally within attainment and thus they are not able to obtain the points to make it worth the effort to pursue the grant.
- NEPA – Council on Environmental Quality (CEQ) for the White House published the final rule in September 2020. Introduces two new limits for production of NEPA documents. For EIS 2 years 300 pages, for an EAA or supplemental EIS it will be 1 year and 75 pages. In January, with the new incoming administration, the White House CEQ memo instructing agencies to update their internal policies was revoked. This will likely affect the Corps of Engineers the most and to date they have received no guidance.

Chair Cooley asked for any other open discussion, hearing none, the meeting was adjourned.

TAB 4
Legislative Update
(2021 Recap and 2022 Preview)

2021 LEGISLATIVE SESSION WRAP-UP

Mark Thomasson, P.E. & Jeff Littlejohn, P.E.

Friday, April 30th marked the end of the 2021 regular session without much fanfare. The session ended on-time, with a balanced budget, and without much last minute issues or back-room deals. The session will be remembered though as one of the strangest sessions in memory. Blame COVID (why not, everybody else does). Seriously though, the session was strange because of the COVID protocols put in place by Senate and House leadership, and it was strange because the protocols were different for the Senate and the House, and, finally, it was strange because a forecasted anemic budget ended up being the largest budget, by far, in history. The good news is, because of the large budget, projects and programs to protect and improve the environment are well funded.

A normal session will see the capital abuzz with legislators, staff, and lobbyist moving around with an energy akin to a beehive. This year, the Senate closed its offices and meetings to visitors (which included lobbyist). All meetings (other than unofficial off-site meetings) were scheduled and held virtually so there was no hallway meetings or dropping in to talk to staff. The Senate also did not allow attendance at committee meeting unless invited to present, however, the public was afforded the opportunity to testify on proposed bills remotely from a meeting room at the Civic Center.

The House, on the other hand, allowed in-person testimony in committee meetings, but, because of social distancing requirements, the number of people in the committee room was severely limited. Though likely not intended, this essentially had the effect of limiting public input.

On the budget side, when agency budget requests were submitted, there was forecasted as much as a $5.5 billion revenue deficit for the current and next fiscal years. When the governor submitted his budget recommendations, those numbers had improved to an estimated $3.4 billion revenue deficit. When the Senate and House budgets were released and ultimately passed, those projections were again improved to only a $1.3 billion estimated revenue deficit. If that trend continues, there won't be a projected revenue deficit when the next quarterly estimates are released. In addition, the state anticipates to receive approximately $10 billion from the federal American Rescue Plan Act. The budget passed this year proposes to appropriate approximately $6.6 billion of that money. All combine, the legislature passed a $101.5 billion budget for 2021-2022, which is about $9 billion more than the 2020-2021 budget.

In addition to a record budget, this was a very active session with the most general bills filed since 2013 (1,839 general bills filed) and the most bills passed since 2016 (248 bills passed). Including resolutions, local bills, and appropriation projects, 3,096 bills were filed and only 275 bills passed both chambers.

Below is a summary of several bills of interest to the engineering community that passed this year, followed by the bills that did not pass. It is likely that some of these may emerge in discussions over the summer and get filed again in the 2022 Legislative Session.

After the bills is a summary of budget line items that are of interest to the environmental community with a list of significant environmental programs funded by the federal stimulus funds. These programs are funded by what is called "back-of-the-bill" funding and are non-recurring.

Summary of Relevant Bills that Passed:

HB 53/SB 1076 – Public Works (Brodeur/DiCeglie)

HB 53/SB 1076 started off as bills aimed at changing the definition of a "public works project" and changing the trigger of when localities could no longer use local preferences if accepting state dollars for such public works projects. However, an amendment was added that created a wastewater and stormwater reporting requirement by counties and municipalities, even to rural areas of opportunity, as defined in 288.0656 F.S., unless such reporting requirements would create an undue economic hardship for the governmental entity.

The wastewater and stormwater amendment requires that counties, municipalities, and special districts create a 20-year needs analysis, due June 30, 2022 and every five-years thereafter, to include: the number of facilities, population served, current and projected service area, current and project costs of service, estimate remaining useful life of infrastructure, 5-year history of capital contributions to system maintenance or expansion, and the local governments plan to fund maintenance and expansion.

SB 64/HB 263 – Reclaimed Water (Albritton/Maggard)

SB 64 creates a timeline and plan to eliminate nonbeneficial surface water discharge and contains a series of conditions authorizing discharges that are being beneficially used or are otherwise regulated. The bill requires domestic wastewater utilities that dispose of effluent, reclaimed water, or reuse water by surface water discharge to submit a 5-year plan by November 1, 2021 to eliminate nonbeneficial surface water discharge to FDEP and the plan must be implemented by January 1, 2032. The bill also specifies that potable reuse is an alternative water supply, for purposes of making reuse projects eligible for alternative water supply funding. The bills incentivize the development of potable reuse projects and incentivize residential developments that use greywater technologies.

SB 64/HB 263 were clear leadership priority from the beginning of session and their movement through the process proved that out as they moved swiftly with very little debate or amending.

HB 337/SB 750 – Impact Fees (DiCeglie/Gruters)

This The bill defines the terms "infrastructure" and "public facilities" and clarifies existing statutory text. In addition to local governments, the bill requires special districts to credit against the collection of impact fees any contribution related to public facilities towards impacts on the same type of public facilities for which the contribution was made. The bill also sets maximum increments for impact fee increases subject to exceptions. Finally, the bill requires a local government, school district, or special district to submit an affidavit signed by its chief financial officer attesting that all impact fees were collected and expended in compliance with the statute.

HB 1309/SB 7060– Biosolids Rule Ratification (ENR/Payne)

FDEP's proposed revisions to rules on permitting requirements for biosolids disposal facilities would normally first be approved by the Environmental Regulation Commission and then receive legislative ratification due to their economic impact. The legislation exempts the biosolids rule from ERC approval and ratifies the rule.

SB 1954/HB 7019 – Flooding/Sea Level Rise Resilience (Rodrigues/EAFS)
This bill establishes several statewide resiliency programs that assess and address inland and coastal flooding and sea level rise. The bill creates the "Resilient Florida Grant Program" within the Department of Environmental Protection (DEP) which provides funding to local governments for the costs of resilience planning and projects to adapt critical assets. The bill defines "critical assets" as transportation assets and evacuation routes, critical infrastructure, critical community and emergency facilities, and natural, cultural, and historical resources.

Additionally, the bill creates the "Comprehensive Statewide Flood Vulnerability and Sea Level Rise Data Set and Assessment" in which the DEP must develop a statewide data set necessary to determine the risks of inland and coastal communities. This includes statewide sea level rise projections and develop statewide assessment identifying vulnerable areas, infrastructure, and critical assets. DEP must update the assessment every 5 years. Lastly, the bill creates the "Statewide Flooding and Sea Level Resilience Plan" in which DEP must annually submit a plan proposing up to $100 million in funding for projects that address risks from flooding and sea level rise. The bill authorizes local governments, regional resilience entities, and water management districts to submit lists of proposed projects to DEP for inclusion in the plan.

SB 2514/HB 7021 – Resiliency Trust Fund (Appropriations/EAFS)
SB 2514/HB 7021 creates the Resilient Florida Trust Fund within the Department of Environmental Protection and provides that the trust fund is established as a depository for the documentary stamp revenues dedicated to resiliency projects as provided for in SB 2512 (Documentary Stamp Tax Distributions). The funds deposited in this trust fund are available as a funding source for DEP for the Resilient Florida Grant Program and the Statewide Flooding and Sea-Level Rise Resilience Plan. These bills were linked with the Doc Stamp bills and the above Sea Level Rise Resilience bills (all passed and enrolled).

SB 2516 – Water Storage North of Lake Okeechobee (Appropriations)
The bill requires the South Florida Water Management District (SFWMD), in partnership with the U.S. Army Corps of Engineers (Corps), to expedite the implementation of the Lake Okeechobee Watershed Restoration Project (LOWRP). It includes expedited implementation of the watershed ASR features and wetland restoration features with a 2027 deadline to implement all feasible ASR systems. The bill appropriates $50 million to SFWMD for the LOWRP.

Bills of interest that did not Pass:

- SB 136 – Energy 2040 Task Force (Brandes)
- SB 514/HB 315 – Resiliency (Rodrigues/LaMarca)
- SB 652/HB 1237 – Bottled Water Excise Tax (Taddeo/Casello)
- SB 1054/HB 705 – Soil and Groundwater Contamination (Broxson/Andrade)
- SB 1058/HB 773 – Sanitary Sewer Laterals (Burgess/ McClure, Overdorf)

- SB 1668/HB 1335 – Seagrass Mitigation Banks (Rodriguez/Overdorf, Sirois)
- SB 1522/HB 1225 – Implementation of the Recommendations of the Blue-Green Algae Task Force (Stewart/Goff-Marcil)

Adopted FY 2021-2022 Budget Summary

SB 2500 2021-2022 PROPOSED FUNDING FOR SELECT ENVIRONMENTAL ISSUES

Category	Amount
Ag NPS BMP Implementation	$35,367,019
Lake Okeechobee Agricultural Projects	$5,000,000
Land Acquisition, Environmental/Unique, Statewide	$100,000,000
Water Management Districts - MFLs	$3,446,000
Water Quality Enhancement and Accountability (BGATF Recc's)	$10,800,000
Dispersed Water Storage	$5,000,000
Innovative Technologies to address algal blooms	$10,000,000
Everglades Restoration	$283,728,918
Northern Everglades	$71,386,306
Water Quality Improvements - Everglades	$50,000,000
Springs Coast Watershed & Peace River WQ	$20,000,000
Hazardous Waste/Site Cleanup	$6,812,720
NRDR/Final-Deepwater Horizon	$37,750,000
Springs Restoration	$50,000,000
Water Projects (stormwater, wastewater & water supply)	$116,611,262
Nonpoint Source Management Planning	$17,000,000
Drinking Water State Revolving Fund	$136,644,558
Clean Water State Revolving Fund	$211,249,325
Florida Keys Area of Critical State Concern	$20,000,000
Small County Wastewater Treatment Grants	$11,000,000
Septic Upgrade Incentive Program	$10,000,000
Wastewater Grant Program	$116,000,000
Groundwater Quality Monitoring Network	$2,358,059
Water Quality Management/Planning Grants	$3,837,515
Total Maximum Daily Load Projects	$25,000,000
Beach Projects	$100,000,000
Underground Storage Tank Cleanup	$7,817,008
Dry Cleaning/Site Cleanup	$6,000,000
Petroleum Tanks Cleanup	$75,000,000
Solid Waste Management	$3,000,000
UF PFAS Contaminated Material Treatment Pilot	$1,000,000
Reef Protection/Tire Abatement	$2,500,000

Regional Resilience Coalitions	$2,000,000
Florida Resilient Coastline Initiative	$10,001,563
Resilient Florida	$200,000
Resilient Florida Planning Grants	$20,000,000
Clean Marina Program	$500,000
Water Quality Improvements - Biscayne Bay	$10,000,000
Volkswagen Settlement	$30,000,000
Ag NPS BMP Implementation	$35,367,019
Lake Okeechobee Agricultural Projects	$5,000,000

Total FDEP Positions:	2,989.5 (+2.47% from 2020)
Total FDEP Budget:	$2,218,194,022 (+0.56% from 2020)
Total Budget:	$101,543,642,583 (+10.12% from 2020)

Additional Back-of-the-Bill Funding
(contingent upon receiving federal relief funds):

Category	**Amount**
Resilient Florida Trust Fund	$500,000,000
Water Protection and Sustainability Trust Fund	$500,000,000
Land Acquisition	$300,000,000
Coastal Mapping	$100,000,000
Piney Point Closure	$100,000,000
Everglades Restoration	$58,993,065
Beach and Inlet Management Projects	$50,000,000
Petroleum Tanks Cleanup	$50,000,000
C-51 Reservoir - Phase II	$48,000,000
Water Supply and Water Resource Development Grant Program	$40,000,000
Springs Restoration	$25,000,000
Derelict Vessel Removal Program	$25,000,000
Small Community Wastewater Grant Program	$25,000,000
TMDL Monitoring and Implementation	$20,000,000

TAB 5
Agency Updates

TAB 6
Open Discussion

TAB 6a
PFAS and Policy Changes on Closures of Contaminated Property

A bill to be entitled

An act relating to soil and groundwater contamination; creating s. 376.3061, F.S.; providing legislative findings; providing that certain airports are not liable for costs, damages, or penalties relating to certain contamination, discharge, evaluation, assessment, or remediation of per- and polyfluoroalkyl substances; directing the Office of Program Policy Analysis and Government Accountability to conduct a specified analysis of the assessment and cleanup of soil and groundwater contamination in other states and submit a report to the Governor and Legislature by a specified date; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 376.3061, Florida Statutes, is created to read:

376.3061 Per- and polyfluoroalkyl substances.—

(1) The Legislature finds that:

(a) Addressing the protection of aquifers and drinking water supplies impacted by per- and polyfluoroalkyl substances used to prevent, extinguish, and control fires is a matter of the highest urgency and priority.

(b) Per- and polyfluoroalkyl substances are a large group

of related, human-made fluorinated organic chemicals exhibiting high degrees of chemical and thermal stability that improve the firefighting performance of aqueous film-forming foam.

(c) Aqueous film-forming foam containing per- and polyfluoroalkyl substances has been used at airports in this state to prevent, extinguish, and control Class B fires and to train firefighters in compliance with federal requirements and procedures.

(d) Federal requirements and procedures obligate airport firefighters to discharge aqueous film-forming foam containing per- and polyfluoroalkyl substances periodically to test the performance of airport systems and equipment.

(e) Discharges of per- and polyfluoroalkyl substances into aquifers and drinking water supplies have occurred as result of such federal requirements and procedures.

(2) An airport that reports detections of per- and polyfluoroalkyl substances on or within the airport property or surrounding areas is not liable for any costs, damages, or penalties for contamination resulting the discharge of aqueous film-forming foam containing per- and polyfluoroalkyl substances.

(3) An airport that dispenses aqueous film-forming foam in compliance with federal requirements and procedures is not liable to the state under any general law, or to any other person seeking to enforce any general law, for any costs,

damages, or penalties relating to the discharge, evaluation, contamination, assessment, or remediation of per- and polyfluoroalkyl substances.

Section 2. (1) The Office of Program Policy Analysis and Government Accountability shall conduct an analysis of programs in other states for the assessment and cleanup of soil and groundwater contamination, including programs for brownfields, petroleum, drycleaning solvents, and other chemical contamination. Based on its analysis, the office shall recommend any changes to Florida's current programs that would improve the state's ability to effectively address environmental contamination assessment and cleanup, including the efficacy of consolidating the state's programs into a single remediation program. The analysis shall include, at a minimum:

(a) Funding mechanisms and sources of funding.

(b) Funding eligibility requirements.

(c) Current levels of funding.

(d) An evaluation of best practices for successful cleanup programs and single remediation programs in other states and how such practices and programs address the needs of investigation and remediation stakeholders.

(e) A comparison of best practices for successful cleanup programs and single remediation programs in other states and cleanup and remediation programs in this state.

(2) The office shall submit a report of its findings and

any recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives by January 1, 2022.

Section 3. This act shall take effect July 1, 2021.

By the Committee on Environment and Natural Resources; and Senator Broxson

592-03168-21 20211054c1

A bill to be entitled

An act relating to soil and groundwater contamination; creating s. 376.91, F.S.; defining terms; requiring the Department of Environmental Protection to adopt statewide rules for cleanup target levels for PFAS in soils and groundwater; prohibiting such rules from taking effect until ratified by the Legislature; providing that certain parties may not be subjected to administrative or judicial action under certain circumstances; providing that certain statutes of limitations are tolled until a specified time; providing construction; requiring the Office of Program Policy Analysis and Government Accountability to conduct an analysis and submit a report to the Governor and the Legislature by a specified date; providing a directive to the Division of Law Revision; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 376.91, Florida Statutes, is created to read:

376.91 Statewide cleanup of PFAS.—

(1) DEFINITIONS.—As used in this section, the term:

(a) "Department" means the Department of Environmental Protection.

(b) "PFAS" means perfluoroalkyl and polyfluoroalkyl substances, including perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS).

(2) CLEANUP TARGET LEVELS.—

(a) The department shall adopt by rule statewide cleanup target levels for PFAS in soils and groundwater using criteria set forth in s. 376.30701, with priority given to PFOA and PFOS. Cleanup target levels adopted by department rule pursuant to this section may not take effect until ratified by the Legislature.

(b) Until the department's rule for a particular PFAS constituent has been ratified by the Legislature, a person may not be subject to any administrative or judicial action brought by or on behalf of any state or local governmental entity to compel or enjoin site rehabilitation, to require payment for the cost of rehabilitation of environmental contamination, or to require payment of any fines or penalties regarding rehabilitation based on the presence of that particular PFAS constituent.

(c) Until site rehabilitation is completed or cleanup target levels are ratified by the Legislature, any statute of limitations that would bar a state or local governmental entity from pursuing relief in accordance with its existing authority is tolled from the effective date of this act.

(d) This section does not affect the ability or authority to seek contribution from any person who may have liability with respect to a contaminated site and who did not receive protection under paragraph (b).

Section 2. (1) The Office of Program Policy Analysis and Government Accountability shall conduct an analysis of programs in other states for the assessment and cleanup of soil and groundwater contamination, including programs for brownfields,

petroleum, drycleaning solvents, and other chemical contamination. Based on its analysis, the office shall recommend any changes to Florida's current programs which would improve the state's ability to effectively address environmental contamination assessment and cleanup, including the efficacy of consolidating the state's programs into a single remediation program. The analysis must include, at a minimum:

(a) Funding mechanisms and sources of funding.

(b) Funding eligibility requirements.

(c) Current levels of funding.

(d) An evaluation of best practices for successful cleanup programs and single remediation programs in other states and how such practices and programs address the needs of investigation and remediation stakeholders.

(e) A comparison of best practices for successful cleanup programs and single remediation programs in other states and cleanup and remediation programs in this state.

(2) The office shall submit a report of its findings and any recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives by January 1, 2022.

Section 3. The Division of Law Revision is directed to replace the phrase "the effective date of this act" wherever it occurs in this act with the date this act becomes a law.

Section 4. This act shall take effect upon becoming a law.

TO: Florida Department of Environmental Protection
Division of Waste Management

FROM: Florida Brownfields Association
Technical & Policy Committee

DATE: July 10, 2021

RE: Supplemental Information: Local Ordinances and Comprehensive Plan Provisions Requiring Mandatory Connection to Municipal/Public Water System as Sufficient "Institutional Controls" Pursuant to Section 376.301(22), F.S. to address Potential Drinking Water Exposure Pathway

In the FBA's prior meeting and conference calls with the Department on March 5, 2020, October 9, 2020 and December 17, 2020, and the FBA's letter to the Department dated October 7, 2020, a copy of which is attached, the FBA has provided the Department with a compelling legal analysis in support of the FBA's position that the Department should reinstate prior Departmental policy acknowledging that mandatory municipal water connection requirements ("Connection Requirements") may constitute "institutional controls" within the meaning of Sections 76.301(21) and 376.79(11), Fla. Stat., upon which the Department may rely in order to close a contaminated site with conditions. We will not repeat those arguments again here, but ask that they be reconsidered, along with the following additional information and analysis. While we strongly believe that the arguments presented previously are dispositive, we are responding further to the specific objections raised by the Department during our last call.

Additional Information in Support of Sufficiency of Connection Requirement ICs.

Comparative "Protectiveness" of a DRC versus Mandatory Connection Requirement.

In our last meeting, the Department advised that it was "uncomfortable" with relying upon an IC that did not "guarantee" that a well could be installed on an identified property as would be provided by the Water Management District Shape File and Permit Procedure IC ("WMD Procedure") currently available within SWFWMD. The Department advised that it "could not connect the dots" to demonstrate that a Connection Requirement would provide the Department with equivalent assurance to prevent well installation than the WMD Procedure -- notwithstanding that to do so would require illegal acts by the property owner. While we disagree that such a requirement is necessary to provide reasonable assurances of protection as to the potable water pathway, we note that in most of the State, (outside SWFWMD and certain counties within the SJRMWD where the WMD Procedure is or will be available shortly), implementation of a DRC alone would not prevent the property owner from pulling a permit and installing a well in violation of the DRC. Thus, the Department's position on the need for the WMD Procedure to "guarantee" that a well cannot be installed is, on its face, inconsistent

with Department's long standing practice of closure in reliance on a DRC. In addition, the Department has relied on other NRICs, such as memoranda of agreement with a variety of entities, none of which would prevent any party from pulling a permit to install a well within the affected groundwater area.

Upon further consideration, the FBA believes that in the vast majority of the state that is outside an area where the WMD Procedure is available, where a Connection Requirement exists, it provides greater assurance to Department that a potable well will not be installed on an affected property than does a DRC. Outside of the areas where the WMD Procedure has been implemented, although a DRC may be recorded ostensibly prohibiting well installation, the Department is relying solely upon its 5 year ICECAP review process to determine whether there has been a violation of the provisions of the DRC. Where a Connection Requirement is in place, the municipal entity has an existing system in place: 1) to manage the permitting of improvements and to ensure connection of such improvements to the municipal water supply, and 2) to provide immediate enforcement mechanisms to ensure that improvements are not constructed and connected to a well in violation of the Connection Requirement and the Florida Building Code. Such enforcement mechanisms generally include daily penalties. In addition, where a Connection Requirement exists, the municipal "eyes and ears" and enforcement mechanism exists and is in place without any further action by the Department, and thus provides a greater likelihood that such a situation would be identified and notice is provided to the municipality. Enforcement of the DRC would require discovery by FDEP – which might be years after the fact via ICECAP, and would only then give rise to civil remedies (enforcement of the DRC by FDEP) and potential rescission of the CSRCO. Reliance on a Connection Requirement, where present, is likely to result in quicker discovery and more immediate enforcement by the municipal entity, which has both the obligation to enforce Connection Requirements and the FBC.

Supplemental Information Regarding Interpretation of FBC Requirements

In our prior submittals we demonstrated that, as required by Chapter 553, F.S., local governments must comply with the Florida Building Code (FBC) which requires all property owners to obtain a permit from the building official if they intend "to construct, enlarge, alter, repair, move, demolish or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any impact-resistant coverings, electrical, gas, mechanical or plumbing system…" [Sect. 105, FBC (Building)] Additional sections governing electrical and plumbing connections that would be required in order to effectuate the operation and connection of a well were provided.

Regarding plumbing connections, Section 602.2 of the FBC (Building) entitled "Potable water required" provides: "Only potable water shall be supplied to plumbing fixtures that provide water for drinking, bathing or culinary purposes, or for the processing of food, medical or pharmaceutical products. Unless otherwise provided in this code, potable water shall be supplied to all plumbing fixtures." Section 602.3 states: "[w]here a potable public water supply is not available, individual sources of potable water supply meeting the requirements of Florida Statute 373 shall be utilized." From the above, we concluded that improvements must be connected to the public water supply system, and only if a public water supply system is unavailable can improvements be connected to "individual sources of potable water supply meeting the requirements of Florida Statute 373" (such as a well).

We have since obtained further confirmation of our conclusion that the FBC requires connection to a municipal supply, where one is available. The Department of Business and Professional Regulation (DBPR) website provides additional information and supporting guidance and documentation regarding the FBC, including "Available Commentaries That Are Relevant To The Florida Building Code," a copy of which is attached (FBC Guidance). The Guidance identifies three sources of additional information regarding the cited sections of the FBC: the 1997 International Plumbing Code (IPC) Commentary, Building Association of Florida (BOAF) Non-Binding Interpretations and Florida Building Commission Declaratory Statements.

No FBC Declaratory Statements were found on point, but both the IPC Commentary and BOAF have issued relevant guidance regarding Section 602.3. The 1997 IPC Commentary states: "an individual private potable water supply is only permitted where a public supply is unavailable, and when the individual source conforms to the

requirements of this section." (copy attached) In addition, the BOAF has issued an informal interpretation (#3291, Oct. 27, 2004), confirming the IPC Commentary: "an individual private potable water supply is only permitted where a public supply is unavailable." (copy attached).

When the local government requires any improvement to connect to the municipal water supply, when taken together with all other statutory, regulatory and code provisions, the combined effect is essentially the same. While it is theoretically possible that a permit might be pulled from the water management district (or delegated agency) to install a well in an any of mandatory public water supply connection – that well could not be legally connected to any plumbing facilities/or improvement (or electrical service necessary to run a well pump) for potable water use without violating numerous provisions of applicable law. As we understand that the Department agrees that providing "reasonable assurances" does not require that the Department guard against violations of law, we believe that this concern regarding connection of a potable water well within an area of mandatory connection to public supply is more than adequately addressed.

As noted in our prior submission, Florida case law is clear that the Department cannot reject a proffer of what would otherwise constitute "reasonable assurances" because the Department would prefer an alternative approach or the addition of other measures beyond those proposed by the applicant to be taken. As a result, we believe that it is inappropriate for the Department to reject reliance on a Connection Requirement, the applicable provisions of the FBC, (as well as the Departments' ICECAP) because the Department would prefer use a WMD Procedure. We do agree, however, that if and when the Department and other WMDs are able to implement the WMD Procedure, nothing would prevent the Department from adding that "additional assurance" for the Department's "comfort" -- but that does not diminish the sufficiency of the Connection Requirement and FBC with inherent policing and enforcement mechanisms, as well as the Department's ICECAP, as an IC sufficient to support site closure.

Accordingly, we request that the Department immediately reinstate prior Departmental policy acknowledging the sufficiency of Connection Requirements, such that closure of with Connection Requirements in place me proceed. Given the need to reinvigorate the State's economy post-COVID, the need is even more urgent. We firmly believe that sound policy, as well as applicable law supports this request. While we acknowledge that some progress has been made with bringing portions of the SJRWMD on line with the WMD Procedure, we have been advised by SJRWMD that critical portions of that District (portions of Alachua and Bradford, and the entirety of Okeechobee, Osceola, Seminole and St. Johns County), will not be brought on line soon, and that due to cost, legislative approval may be required.

Possible Path Forward

At the FBA's last call with the Department regarding this matter, the Department requested that the FBA provide proposed revisions to the Department's template Conditional SRCO language that could be inserted when, as a backstop to reliance on a Connection Requirement, where the Department intends to implement and rely on of the WMD Procedure when it becomes available with the subject WMD.

The following paragraph was taken from the CSRCO dated August 3, 2020, Former Cavalier Packaging, 6316 Anderson Road, Tampa, FL 33634, Hillsborough County, FDEP Project Number: 65894/ Site ID: COM_65079/ ERIC_7602, Petroleum Facility ID #8627293, OGC Case # 85-1307, and was used a starting point for suggested revisions where the Department could rely, in the interim, on mandatory municipal connection requirements, but advise the PRSR in the SRCO that the WMD Shape File and Permit Procedure would be implemented in the near future. Suggested revisions to the Department's text appears in track changes:

> Sections 602.02 and 602.03 of the Florida Building Code specify that only potable water shall be supplied to plumbing fixtures that provide water for drinking, bathing or culinary purposes, or for the processing of food, medical or pharmaceutical products, and that where a when a potable public water supply is available, connection to the public supply is required.

[Insert description of specific applicable municipal Connection Requirement]:

The Persons Responsible for Site Rehabilitation (PRSR) must notify the Department if the PRSR becomes aware of a repeal or amendment of the Connection Requirement institutional control, or that a violation of the Connection Requirement occurs at the properties subject to the Connection Requirement described here, such that the potential for exposure to contaminants resulting in risk to human health, public safety, and/or the environment is increased. Repeal, amendment or violation of the Connection Requirement institutional control or failure to notify the Department of such violation, amendment or repeal may, in addition to other remedies available at law, result in proceedings to revoke this Order and require the immediate resumption of active cleanup or require that other approved institutional controls be implemented, unless it is demonstrated that the cleanup criteria under Subsection 62-780.680(1), F.A.C., have been achieved.

[Insert District] ~~Southwest Florida~~ Water Management District (WMD) non-recorded Water Management District Shape File and Permit Procedure IC (for the source property, *[insert address of source parcel(s)]* ~~6316 Anderson Road - Former Cavalier Packaging,~~ and the offsite property located at *[insert address of off-site parcel(s)]*~~5109 West Knox Street~~): The Department will rely upon the delegation pursuant to Chapter 373.308 F.S., and the governing board of the applicable water management district (and delegated local permitting authority, if applicable) to implement a program for the issuance of permits for the location, construction, repair and abandonment of water wells, to be collectively referred to as the ~~SWF~~WMD Shape File and Permit Procedure institutional control (WMD Procedure) to ensure that no contaminant exposure from using the groundwater as a potable drinking water source or using it for irrigation or other non-potable water uses resulting in risk to human health, public safety or the environment will occur due to this contaminated site. [*Insert the following text if the Site is in an area where the WMD Procedure is not yet operable:* The Department and the WMD are in the process of implementing the WMD Procedure for the above referenced address(es).] As such, the Persons Responsible for Site Rehabilitation (PRSR) must notify the Department if the PRSR becomes aware of ~~the repeal or amendment of the SWFWMD Shape File and Permit Procedure institutional control, or if~~ a violation of the WMD Procedure ~~-~~occurs at the properties subject to the ~~SWF~~WMD Shape File and Permit Procedure institutional control such that the potential for exposure to contaminants resulting in risk to human health, public safety, and/or the environment is increased. Repeal, amendment or violation of the ~~SWF~~WMD Shape File and Permit Procedure institutional control or failure to notify the Department of such violation, amendment or repeal may, in addition to other remedies available at law, result in proceedings to revoke this Order and require the immediate resumption of active cleanup or require that other approved institutional controls be implemented, unless it is demonstrated that the cleanup criteria under Subsection 62-780.680(1), F.A.C., have been achieved.

Commented [A1]: We note that the Department would know before any third party whether or not there had been a repeal or amendment of the WMD Shape File Procedure. We understand that this comes from the prior model SRCO language relating to a violation of restrictive covenant provisions, but it is not appropriate in the context of a WMD permitting control.

In addition, we note that given the Department's stated "preference" for use of the WMD Procedure, consideration should be given to addition of the above language in all C-SRCOs, even where a DRC is employed.

We would like to set up a call with you at your earliest convenience to discuss these recommendations. Thank you for your consideration.

Sincerely,
Melissa Schick
President, Florida Brownfields Association

MEMORANDUM

TO: Florida Department of Environmental Protection
Division of Waste Management

FROM: Florida Brownfields Association
Technical Committee & Legislative & Policy Committee

DATE: October 7, 2020

RE: Local Ordinances and Comprehensive Plan Provisions Requiring Mandatory Connection to Municipal/Public Water System as Sufficient "Institutional Controls" Pursuant to Sections 376.301(22) and 376.79(11), F.S., to address Potential Drinking Water Exposure Pathway

Background

In 2013, the Florida Department of Environmental Protection ("FDEP" or "Department") issued guidance that acknowledged that a mandatory public water connection requirement could constitute an "institutional control"[1] providing a sufficient "restriction on use or access to a site to eliminate or minimize exposure" to pollutants or contaminants, which would allow conditional closure of groundwater impacts otherwise meeting conditions for contaminated site closure. Subsequent to that guidance, the FDEP issued numerous Conditional Site Rehabilitation Completion Orders ("CSRCO") relying upon the existence of a local government ordinance[2] or comprehensive plan provision[3] that requires that any building improvements (redevelopment or new development of any kind) must connect to the public water system, if available, to address

[1] Under Section 376.301(22), F.S., "Institutional controls" mean the restriction on use or access to a site to eliminate or minimize exposure to petroleum products' chemicals of concern, drycleaning solvents, or other contaminants. Such restrictions may include, but are not limited to, deed restrictions, restrictive covenants, or conservation easements. [Emphasis added]. A nearly identical definition is found in Section 376.79(11), F.S., in the statutes governing the Florida Brownfields Program. Thus, we note that nothing in the statute on its face would prevent a mandatory municipal connection requirement from qualifying as a sufficient "institutional control."

[2] *See* (i) Hydraulic Hose CSRCO, Sept. 19, 2016, FDEP Facility ID 29/8735902, relying on City of Plant City Hookup Ordinance; (ii) Former Boca-Mizner Cleaners CSRCO, Apr. 27, 2018, FDEP Facility ID #COM_342304, relying on Palm Beach County Hookup Ordinance, (iii) Brysen Optical CSRCO, July 15, 2016, FDEP Facility ID #COM_123743, relying on City of Safety Harbor Hookup Ordinance, (iv) American Plastic Works CSRCO, Aug. 31, 2016, FDEP Facility ID #COM_313625, relying on City of Bradenton Ordinances, (v) Nortel CSRCO, Apr. 10, 2017, FDEP Facility ID #COM_66275, relying on Palm Beach County Land Development Code, (vi) South Shore CSRCO, Feb. 23, 2018, FDEP Facility ID #COM_322085, relying on Hillsborough County Hookup Ordinance, (vii) New England / Shields Marine / Former Concepts, Inc. CSRCO, June 20, 2018, FDEP Facility ID #COM_75928, relying on City of Pinellas Park Hookup Ordinance, (viii) A&S Oil Recovery of Florida, Inc. CSRCO, Oct. 28, 2016, FDEP Facility ID #529201304 / FLD 991 275 314, relying on City of St. Petersburg Hookup Ordinance, (ix) Former Swann Cleaners CSRCO, Sept. 8, 2014, FDEP Facility ID #COM_275663, relying on City of Casselberry Hookup Ordinance, (x) Amoco #171 CSRCO, Aug. 7, 2017, FDEP Facility ID # 51/8519737, relying on City of Zephyrhills Hookup Ordinance, (xi) SILCO Realty Exchange, Inc. CSRCO, Sept. 12, 2018, FDEP Facility ID #COM_301778, relying on City of Lakeland Hookup Ordinance, (xii) Appolonia Property Owners Association CSRCO, Jan. 10, 2014, FDEP Facility ID #COM_293589, relying on Palm Beach County Planned Unit Development Approvals.

[3] See Tropitone Furniture Facility CSRCO, June 22, 2017, FDEP Facility #COM_266439, relying on provisions of the Manatee County Comprehensive Plan.

the risk of use of impacted groundwater as a potable supply. The policy was further documented in the Department's Institutional Controls Procedures Guidance ("ICPG") Document.[4]

In 2019, members of the Florida Brownfields Association ("FBA") and the regulated community noted an apparent change in Department policy, subsequently confirmed by the FDEP staff, that the Department no longer determined or believed that local ordinances were "sufficiently enforceable" – either by the local government or by the Department -- to provide a reliable "restriction on use or access to eliminate or minimize exposure" to groundwater contamination. Department counsel have indicated that in the case of off-site groundwater contamination that the Department prefers that the off-site property owner enter into a Declaration of Restrictive Covenant ("DRC") with the Department restricting future use of groundwater.[5]

In the absence of a recorded DRC, we understand that the Department now will only rely upon a GIS-layer based control in connection with a "well restriction area" imposed by the applicable water management district (or delegated local agency) in the area of contamination and that meets other related Department criteria. However, at this time, this process appears to have limited availability in the state – including within the Southwest Florida Water Management District, with exception of a portion of Marion County that is within the St. Johns River Water Management District, and in the Palm Beach County delegated program. The timeline and ability to implement the necessary software, training, and transactional requirements in other water management districts and delegated local agencies is unknown, due to COVID and other impediments.

Thus, the Department's current policy has had a chilling effect on the ability of FBA members (and the regulated community generally) to close certain contaminated sites, particularly those involving multiple parcels with low level groundwater contamination that otherwise pose little or no risk to human health, safety, or the environment and that often provide opportunities for site redevelopment and beneficial reuse.

This memorandum provides an analysis of the enforceability of municipal mandatory connection requirements (whether in an ordinance or a comprehensive plan) and demonstrates that such requirements provide a sufficient institutional control upon which the Department can base risk-based corrective action site closure under the provisions of Chapter 62-780, Florida Administrative Code ("FAC") to address the potable water exposure pathway. Accordingly, the FBA requests and recommends that the Department implement and maintain a policy permitting appropriate reliance on mandatory municipal connection requirements in support of regulatory closure decisions.

Local Government Authority to Implement Mandatory Connection

Municipalities are created by legislative enactment and have broad statutory authority to enact ordinances under their home rule powers (see s. 166.021(3), F.S.). There is no statute where the Legislature has explicitly or implicitly prohibited or preempted any local government for exercising its authority or power to protect human health (emphasis added) since protection of human health by the Legislature applies to all Florida residents and political bodies.

[4] We understand that this policy was reviewed and vetted by Department management and the FDEP General Counsel at the time.

[5] Of course, without compensation, there may be little incentive for such an owner to agree to impose a recorded restriction on its property.

Under their broad home rule powers, counties and municipalities may legislate concurrently with the Legislature on any subject which has not been expressly preempted to the state. County and municipal ordinances "are inferior to laws of the state and must not conflict with any controlling provision of a statute." Local government cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden.

We are not aware of any statute, case law, or ruling that expressly preempts or forbids a municipality from enforcing an ordinance designed to protect human health. In fact, case law and rulings affirming the power of municipal enforcement for the protection of human health are numerous.

Local Government Mandatory Connection Requirements

In order to protect the public health, welfare, safety, and to promote water resources conservation, local governments often mandate that any building improvement or land development activity be connected to a public potable water supply, if available. Availability is often defined in terms of a suitable water main located within a defined distance of the property. If connection to a public supply system is not available, alternative means of water supply (such as a properly permitted well under Chapter 373, F.S., are available). Obviously, the availability of a public supply is more likely in in urban setting, where the majority of sites with historic groundwater contamination are located.

Local Ordinance Connection Requirements

The following provisions of the Hillsborough County Code of Ordinances are typical of the ordinances found across the state that require mandatory connection to the municipal potable water supply, if available:

> Sec. 102-21. - Policy for land development.
> No subdivision of real property or any act of development within the unincorporated area of the County that falls within the jurisdiction of this article (pursuant to Section 102-26) shall occur without first requesting utility service for potable water, wastewater, and reclaimed water from the County, a municipality, or a franchisee. Each such request shall be made to the public utility in whose service area such development is proposed. All such developments must be connected to public utility facilities, in accordance with the County's Comprehensive Plan, and the owners of such properties shall pay all fees and charges prescribed for the services provided.
> (Ord. No. 00-4, § 1.3, 2-10-2000) [Emphasis added]
>
> Sec. 102-44. - Purpose. The requirement for mandatory connection to a public facility is:
> (1) To protect the public health, welfare, safety, and environment; to promote water resources conservation;
> (2) To eliminate inferior treatment processes; and
> (3) To create economies of scale for treatment processes and conveyance operations.
> (Ord. No. 00-4, § 2.1, 2-10-2000)
>
> Sec. 102-45. - Proposed development.
> Pursuant to Section 102-21, it shall be mandatory for all proposed developments to request public utility services, and for all proposed developments within the urban

service area to connect to public utility facilities in accordance with the County's Comprehensive Plan.

(Ord. No. 00-4, § 2.2, 2-10-2000) [Emphasis added]

These types of connection requirement provisions are implemented and enforced through several procedural mechanisms in the local government's approval process for development activities including: (1) at the site plan submission stage, where the applicant's site plan will be circulated to all departments for review and comment, which will include review of water and sewer connection plans; (2) at the building permit application stage – when permits are pulled for actual construction activities; and (3) when the improvements are inspected prior to issuance of a certificate of occupancy. Water supply is often part of a concurrency evaluation of a project, and local governments have an interest in protecting their access to groundwater pursuant to their consumptive use permits, as well as an economic interest in maximizing revenue from the sale of water and sewer services.

Because well permitting is exclusively within the authority of the State's water management districts, local governments cannot prohibit well permitting as a means of further insuring connection to the municipal supply, unless that authority has been delegated by the water management district. For example, in the St. Johns River Water Management District, much of well permitting authority has been delegated to 15 of the 18 counties within the district. Where connection to a public supply is not mandatory, a local code may make specific reference to the requirement for the permitting of an on-site well by the local permitting authority.[6]

Comprehensive Plan Connection Requirements

In some instances, a local government mandatory connection ordinance may not exist, may not be dispositive, or may provide reference to the local government's comprehensive plan – which contains provisions requiring such mandatory connection. For the reasons outlined below, mandatory connection requirements contained in a comprehensive plan are equally enforceable as those set forth in the local governmental ordinances (i.e., Land Development Regulations, "LDRs"). The Department has previously issued a CSRCO in reliance on connection provisions in a local comprehensive plan.[7]

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[6] For example, the Broward County Code of Ordinances provides in relevant part: "*Sec. 34-47. - Regulation of on-site private water systems.*

a) It shall be unlawful to install any on-site water supply well without first obtaining a well construction permit from the Broward County Health Department.
b) Prior to the issuance of a construction permit for an on-site potable water system, a plot plan shall be submitted to the Broward County Health Department showing location of the proposed well."

Note that Broward County does not prohibit an individual homeowner from accessing groundwater for consumptive purposes using any well, however, the County relies on a well-established legal and regulatory framework to mandate that access to groundwater via any well be done through a permit and that verification will be performed by a competent authority. The local government requires a citizen to obtain a permit to access groundwater without exception or exemption and any violation of this requirement constitutes, therefore, not only an enforceable violation but also a violation of F.S. 162.02. This requirement would exist in place at the time of site closure. The enforceability of this type of requirement does not appear to be in question; however, the Department appears to require a specific mechanism be in place by the well permitting authority in order to regulate well construction details relative to existing contamination.

[7] See footnote 3.

First, we note that comprehensive plans are adopted by the local government by ordinance and may only be amended through adoption of a new ordinance and by following the requirements of Chapter 163, F.S., for amending the comprehensive plan -- a process that is more involved and takes longer, due to the local planning agency involvement, than would a comparable ordinance change to a provision in the local land development code.

Second, we understand that the Department may have expressed concern that comprehensive plans are "aspirational" planning documents and that compliance with comprehensive plan requirements is not mandatory. This is not the case. According to the Florida Supreme Court, *Bd. of County Com'rs of Brevard County v. Snyder*, 627 So. 2d 469, 473 (Fla. 1993):

> The local [comprehensive] plan must be implemented through the adoption of land development regulations that are consistent with the plan. In addition, all development, both public and private, and all development orders approved by local governments must be consistent with the adopted local plan. [Internal citations omitted].

In fact, Florida courts have routinely referred to a comprehensive plan as a "constitution" governing land development within the local government's jurisdiction. *See, e.g., Lee City v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1008 (Fla. 2d DCA 1993), stating:

> "In Florida, all zoning and development permitting must now be consistent with the comprehensive plan of the city or county in question. The comprehensive plan has been likened to a 'constitution' and has been described as 'a limitation on local government's otherwise broad zoning powers.'" [Internal citations omitted].

Further, according to the *Sunbelt Equities, II* case, "[w]here a zoning action is challenged as violative of the comprehensive land use plan, the burden of proof is on the one seeking a change to show by competent substantial evidence that the proposed development conforms strictly to the comprehensive plan and its elements." *Id.*

Where mandatory connection requirements are set forth in the comprehensive plan, the express requirements and provisions of the comprehensive plan are enforceable as a matter of law. Pursuant to Section 163.3194(1)(a), F.S., "[a]fter a comprehensive plan, or element or portion thereof, has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted." As noted by the Third District Court of Appeal, "[i]t is in all cases the applicant's task to demonstrate such plan consistency" when a request is made of the legislative body, such as for a site plan approval. *Baker v. Metropolitan Dade County*, 774 So.2d 14, 17 (Fla. 3d Dist. Ct. App. 2000).

Under Section 163.3194(1)(b), F.S., "[a]ll land development regulations enacted or amended shall be consistent with the adopted comprehensive plan, or element or portion thereof, and any land development regulations existing at the time of adoption which are not consistent with the adopted comprehensive plan, or element or portion thereof, shall be amended so as to be consistent." "[A]fter a comprehensive plan for the area, or element or portion thereof, is adopted by the governing body, no land development regulation, land development code, or amendment

thereto shall be adopted by the governing body until such regulation, code, or amendment has been referred either to the local planning agency or to a separate land development regulation commission created pursuant to local ordinance, or to both, for review and recommendation as to the relationship of such proposal to the adopted comprehensive plan, or element or portion thereof." Section 163.3194(2), F.S.

"Land development regulations" are broadly defined in Section 163.3213 to mean any "ordinance enacted by a local governing body for the regulation of any aspect of development, including a subdivision, building construction, landscaping, tree protection, or sign regulation or any other regulation concerning the development of land. This term shall include a general zoning code, but shall not include a zoning map, an action which results in zoning or rezoning of land, or any building construction standard adopted pursuant to and in compliance with the provisions of chapter 553." (Emphasis added). This broad definition ensures that no ordinances or development regulations are adopted that are inconsistent with an approved Comprehensive Plan.

The term "development order" is defined at Section 163.3164(15), F.S., as:

> "any order granting, denying, or granting with conditions an application for a development permit." [Emphasis added].

The term "development permit" is defined at Section 163.3164(16), F.S., as:

> "any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land." [Emphasis added].

Once a comprehensive plan (or amendment thereto) has been properly adopted, neither any development, nor any ordinance, land development regulation, or development approval or order, including the issuance of a building permit or other construction or development approval, may be made that is inconsistent with or violates the provisions of that plan.

As noted above with respect to ordinances, typically, there will be several points in the development review process where the comprehensive plan connection requirement would be implemented and enforced (for example, on an application for site plan approval or the issuance of a building permit). A 1985 Florida Attorney General opinion further reinforces this concept and provides:

> "In conclusion, it is my opinion that all land development regulations and actions including permits for the construction and use of property issued by a municipality must be in accordance with the local government's comprehensive plan."

See http://www.myfloridalegal.com/ago.nsf/Opinions/0388698F724623C385256576005E4E39.

Therefore, under applicable law, the FBA believes that the Department can reasonably rely on provisions of either a local ordinance or a comprehensive plan that require mandatory connection to a municipal water supply as an "institutional control" under Sections 376.301(22) or 376.79(11), F.S., as sufficient to prevent exposure through the potable water pathway.

Protections Provided by the Florida Building Code

More recently, we have understood that Department's focus may have shifted from the enforceability of mandatory hookup provisions in municipal code or comprehensive plans to the ability of such provisions to prevent installation of a well within the area of groundwater impact. As noted above, the FBA acknowledges that unless the local government has been delegated authority for well permitting pursuant to Chapter 373, F.S., a local government is preempted from well permitting, and thus could not prohibit the installation of a well. However, the FBA believes that provisions of the Florida Building Code, which is universally implemented across the state, provide yet an additional layer of protection that further significantly reduces the possibility of inadvertent potable use of contaminated groundwater. Historically, the Department's technical staff and its Office of General Counsel have been willing to accept a layered approach to institutional controls as being sufficiently protective pursuant to its risk-based corrective action principles.

When the local government requires any improvement to connect to the municipal water supply, when taken together with all other statutory, regulatory, and code provisions, the combined effect is essentially the same. While it is theoretically possible that a permit might be pulled from the water management district (or delegated agency) to install a well in an area of mandatory public water supply connection – that well could not be legally connected to any plumbing facilities/or improvement (or electrical service necessary to run a well pump) for potable water use without violating numerous provisions of applicable law. As we understand that the Department agrees that providing "reasonable assurances" does not require that the Department guard against violations of law, we believe that this concern regarding connection of a potable water well within an area of mandatory connection to public supply is more than adequately addressed.

As required by Chapter 553, F.S., local governments are required to comply with the Florida Building Code ("FBC") which requires all property owners to obtain a permit from the building official if they intend "to construct, enlarge, alter, repair, move, demolish or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any impact-resistant coverings, electrical, gas, mechanical or plumbing system…" [Sect. 105, FBC (Building)].

Water connections (or changes to them) are governed by building and plumbing permits, as a building or structure would be built or altered, and the associated plumbing would be altered or installed. Similarly, connection of electrical service to a well/well pump would require a permit. [Sect. 105, FBC (Building)].

Specifically, Section 602.2 of the FBC (Building) entitled "Potable water required" provides: "Only potable water shall be supplied to plumbing fixtures that provide water for drinking, bathing or culinary purposes, or for the processing of food, medical or pharmaceutical products. Unless otherwise provided in this code, potable water shall be supplied to all plumbing fixtures." Section 602.3 states: "[w]here a potable public water supply is not available, individual sources of potable water supply meeting the requirements of Florida Statute 373 shall be utilized." In other words, improvements must be connected to the public water supply system, and only if a public water supply system is unavailable can improvements be connected to "individual sources of potable water supply meeting the requirements of Florida Statute 373" (such as a well).

We note further that Section 553.84, F.S.,[8] provides a cause of action for a violation of the FBC, and Section 553.781, F.S., requires that a violation of the FBC must be corrected within a reasonable time frame. A continued violation must be reported to the Florida Department of Business and Professional Regulation ("DBPR") which begins a disciplinary investigation which may result in the loss of a license for a PE, architect, or a licensed building contractor. This is exactly what has happened when the FBC Code has been enforced in the past for serious violations.

FDEP's IC/EC Audit Program Provides Another Layer of Assurance and Protection

FDEP's IC/EC Audit Program ("ICECAP") provides another layer of protection to ensure that a well has not been installed in an area of contamination and then illegally connected to plumbing facilities. As described in the Department's Institutional Controls Procedure Guidance:

> "To provide a level of assurance that the PRSRs are fulfilling their obligations under their ICs, the Waste Cleanup Program has established a program to independently verify both ICs and ECs on a five-year cycle. This effort is called ICECAP (IC/EC Audit Program). State contractors are tasked to review the county property records to verify that the restrictions are currently recorded on the deed, interview property owners to determine if they are aware of the property use restrictions, and inspect the property for any signs that the restrictions are not being maintained (e.g., wells installed where they are prohibited, breaches in an impermeable cap, etc.). The results of the inspections are sent to DEP site managers and the Office of General Counsel for further action." [Emphasis added].

The ICECAP physical inspection of the property could be used to confirm whether a well had been installed on the property and whether it had been connected to plumbing facilities in violation of the local government's mandatory connection requirements. If such connection was discovered, the Department would have the ability to enforce through a variety of means or could provide notice to the responsible party that the CSRCO would be rescinded if the well connection was not eliminated, unless it was demonstrated that potable use of groundwater no longer posed any risk.

Therefore, under several lines of regulatory and statutory authority, connection of improvements to a well for potable water supply, when an applicable ordinance or comprehensive plan provision requires connection to a public water supply, if available, would be contrary to law and impermissible (could not legally be permitted). Further, the Department's existing audit program will ensure that any illegal connection is discovered and can be addressed by the Department and/or the responsible party.

Additional Considerations

The statutory definition of "institutional control" under Sections 376.301(22) and 376.79(11), F.S., does not require complete elimination of all risk posed by a contaminant through the proposed control. Similarly, a Person Responsible for Site Rehabilitation ("PRSR") has the burden to provide "reasonable assurances" regarding the sufficiency of an institutional control

[8] Section 554.84, F.S., provides in relevant part: "**553.84 Statutory civil action.**—Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of a violation of this part or the Florida Building Code, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation…"

proposed under Subsections 62-780.680(2) or (3), FAC, but this does not include the obligation to provide an *absolute guarantee* that all possible worst case or unlikely scenarios have been eliminated,[9] including protection against scenarios to ensure against the unlawful acts of others.[10] With respect to a PRSR's demonstration to the Department that the potable water exposure pathway will not be completed at a contaminated site based upon the presence of a mandatory connection requirement layered with the FBC and the ICECAP, the FBA believes that the PRSR has met its burden.

The FBA understands that the Department may prefer to rely upon a GIS-layer based control against well installation implemented by the water management districts (or delegated program authority) to protect against completion of the potable water exposure pathway. However, Florida caselaw is clear that the Department cannot reject a proffer of what would otherwise constitute "reasonable assurances" because the Department would prefer an alternative approach or the addition of other measures beyond those proposed by the applicant to be taken.[11] As a result, we believe that it is inappropriate for the Department to reject reliance on a mandatory potable connection requirement (which is logically coupled with provisions of the Florida Building Code as well as the Departments' ICECAP) because the Department would prefer use of a GIS-layer based restriction imposed by the water management district. If and when the Department and additional water management districts are able to implement this system, nothing will prevent the Department from adding that "additional assurance" but that does not diminish the sufficiency of the mandatory connection requirement layered with the FBC and ICECAP.

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[9] *Ginnie Springs, Inc. v. Watson*, DOAH Case No. 98-0945 (DOAH Apr. 8, 1999) (holding that the reasonable assurance standard only requires the applicant to "deal with reasonably foreseeable contingencies" and does not require disproving "all the 'worst case scenarios' or 'theoretical impacts'" of the proposed project); *Save our Suwannee v. Piechocki*, 1996 WL 534059 (DOAH 1996) (holding that the reasonable assurances standard does not require the applicant to provide an "absolute guarantee" that its project will comply with applicable standards); *Manasota-88, Inc. v. Agrico Chemical, Inc.*, 1990 WL 128587 (DOAH 1990) (holding that the applicant's burden with regard to the feasibility of its mitigation plan is one of reasonable assurance, not absolute guarantees); *Rudloe v. Dickerson Bayshore, Inc.*, 1988 WL 618068 (DOAH 1988); (holding that in order for a permit applicant to give reasonable assurance it must demonstrate that a violation would not be likely, under the worst, reasonably foreseeable conditions); (holding that an applicant need not demonstrate that a violation would be a scientific impossibility, only that its nonoccurrence is reasonably assured); *Lake Brooklyn Civic Ass'n, Inc. v. St. Johns River Water Mgmt. Dist.*, 1993 WL 943540 (DOAH 1993). (holding that an applicant is not required to show that a violation of the applicable rules is a scientific impossibility in order to provide reasonable assurance, but only that non-occurrence of such violation is reasonably assured by the preponderance of the evidence).

[10] *Hoffert v. St. Joe Paper Co.*, 1990 WL 282370 (DOAH 1990) (holding that an applicant is not required to "provide an absolute insurance policy, in effect, that persons using its facility will never violate the law prevailing or the restrictive conditions imposed upon the grant of its permit and the operation of its facility which is charged in that permit with enforcing"); *McMillan v. Dax and Trin Dev't Corp.*, 1985 WL 306449 (DOAH 1985) (denying petitioner's challenge to permit issuance based on possibility that boaters will violate the law because "[i]t is presumed that people will observe and abide by the law"); *Atlantic Coast Line R. Co. v. Mack*, 57 So. 2d 447 (Fla. 1952) ("It is presumed that persons will observe the law and we cannot assume that they will violate the law, or the terms of the certificate); *Retreat House, LLC, v. Damico*, 2012 WL 168934 (DOAH 2012) (holding that it was error to consider the potential impact of boaters who may operate their vessels in violation of the law or who may be unskilled or otherwise unqualified to operate their vessels in a responsible manner).

[11] *Charlotte Cnty. v. IMC Phosphates Co.*, 2003 WL 22273803 (DEP 2003) (holding that agency was without authority to impose additional permit conditions providing "additional assurances" once the applicant had provided the requisite reasonable assurances); *Ginnie Springs, Inc. v. Watson*, DOAH Case No. 98-0945 (DOAH Apr. 8, 1999) (holding that the possibility of providing additional measures above those proposed by applicant does not prevent a finding that the proposed measures constitute the required reasonable assurance); *Laniger Enters. of Am., Inc., v. Dep't of Enviro. Prot.*, 2006 WL 2710971 (DOAH 2006) (holding that the Department did not have authority to require the applicant to "provide assurance over and above the reasonable assurance generally required" for the applicant's project).

Notification Requirements Arising Out of Reliance on Pre-existing Legal Requirements

In relevant part, Rule 62-780.220(7), FAC, requires that prior to the Department's approval of use of an institutional or engineering control, the PRSR shall mail notice to real property owner(s) of any property subject to the control and to "any party holding a materially affected encumbrance in the area subject to the control." When the Department relies upon a pre-existing legal requirement such as an existing mandatory connection to a public potable supply, then by definition no "encumbrance in the area subject to the control" is or can be "materially affected." An existing legal requirement to connect building improvements to a public water supply does not impose any new requirement or obligation on the holder of a recorded encumbrance on a property, and thus cannot "affect" much less "materially affect" any such interest. This is the case with respect to reliance upon mandatory connection requirements, and applies equally to other pre-existing permitting requirements (for example, for dewatering or storm water permitting). In all such cases, the PRSR should only be required to provide notice to the property owner as reflected by the property appraiser's office records, rather than to spend additional time and expense obtaining and analyzing title work.[12]

Conclusion

Local ordinances and comprehensive plan provisions mandating that improvements be connected to a municipal water supply, if available, are enforceable under Florida law. The local government permitting process for building improvements and development provide a number of procedural points of entry where such requirements are implemented, including at the site plan review and building permit application stages. The Florida Building Code provides yet an additional layer of protection – specifying that connection to the municipal supply is required for potable water and requiring a permit for virtually all activities that would be required to make lawful use of a well in an area of mandatory connection – including connection of any plumbing facilities or electrical service (such as required to connect a well pump to such a well). Where such a mandatory connection is required, no means of use of such a well for potable water would be legally possible (without associated plumbing or electric service). The Department's existing ICECAP program provides a further "layer" of protection. Thus, mandatory public supply requirements implicitly contain multiple "layers" that provide reasonable assurance that the potable water pathway will not be completed.

The authority of local governments to implement and enforce their own laws to protect human health is extensive and well established. Further, such provisions are enforceable not only by the local government but also by the State of Florida, as a legitimate exercise of police power when human health is threatened. Overwhelmingly, such enforcement has its basis on human health protection. Finally, we find no basis to conclude that the State lacks a judicial remedy to undertake a specific action against a City or other entity to fulfill the State's statutory duty to protect human health.

Recommendation

Based on the above, consistent with prior Department policy, the FBA recommends that the Department issue and maintain a written policy acknowledging that municipal ordinances or comprehensive plan provisions mandating connection to the municipal potable water supply, in combination with the applicable provisions of the Florida Building Code and the Department's

[12] The PRSR would, of course, still comply with the notice requirements for local governments and any residents or business tenants of properties with remaining contamination.

ICECAP, are sufficient institutional controls under Sections 376.301(22) and 376.79(11), F.S., to ensure that the potable water pathway will not be completed on a contaminated site, in order to effectuate regulatory site closure with conditions. We believe that this will advance and facilitate the redevelopment and beneficial reuse of sites in Florida following their regulatory closure. Particularly through Florida's Brownfields Program, the significant benefits -- including job creation, improved access to affordable housing and health care, and their positive economic outcomes -- have been well documented in FDEPs Annual Brownfields Report.

The FBA appreciates the opportunity to prepare and submit this memorandum to the Department. FBA looks forward to discussion of these important issues with the Department to facilitate regulatory site closure and site redevelopment and reuse.

Florida Building Code
Informal Interpretation

Date: Wed Oct 27 2004

Report #: 3291

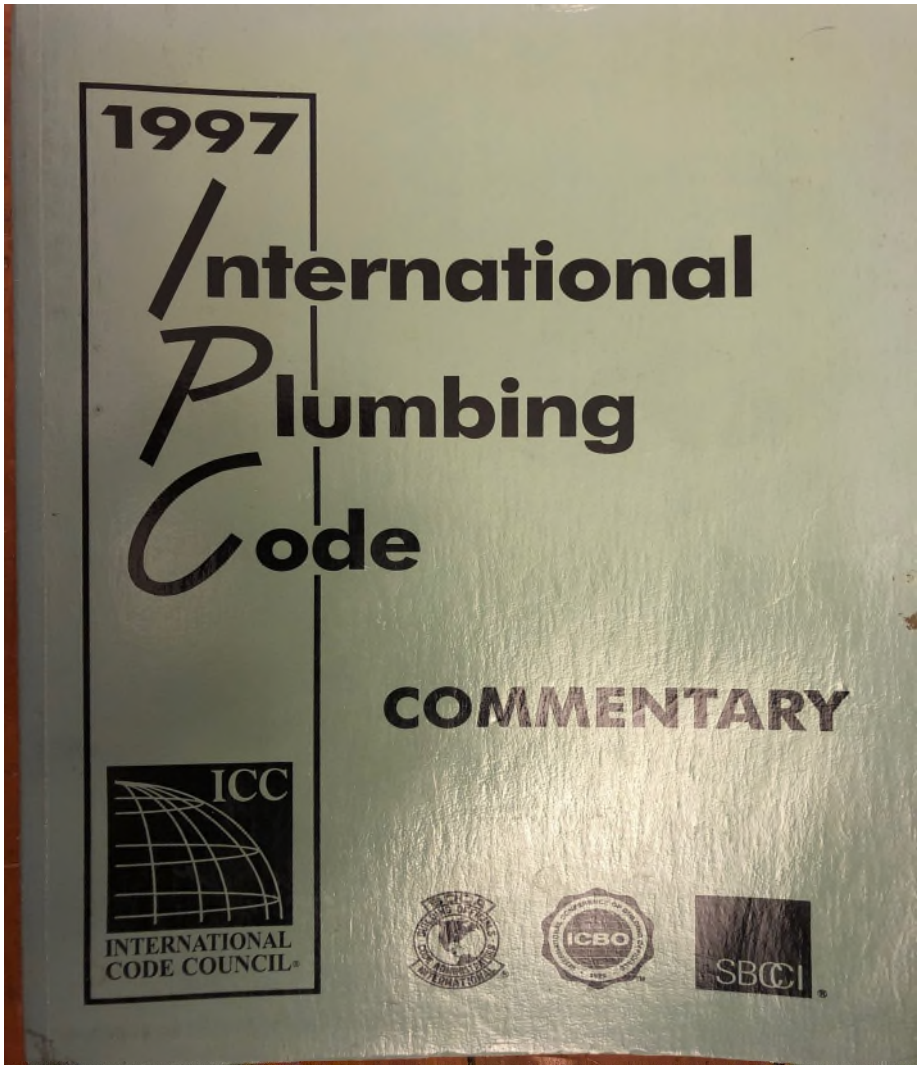
Code: Plumbing

Section: 602.3

Question:
Is it the intent of Section 602.3 to mandate the connection of a potable public water supply even though the property owner prefers an individual water supply?

Answer:
Yes, an individual private potable water supply is only permitted where a public system is unavailable.

Commentary:
None.



602.3 Individual water supply. Where a potable public water supply is not available, individual sources of potable water supply shall be utilized.

❖ An individual water supply is only permitted where a public system is unavailable, and when the individual source conforms to the requirements of this section.

TAB 6b
Turbidity Rule Update

Jeff Littlejohn

From: Joyner, Daryll <Daryll.Joyner@dep.state.fl.us>
Sent: Thursday, August 12, 2021 1:54 PM
To: Jeff Littlejohn
Cc: Sutton, Kaitlyn
Subject: RE: Coral Reef Turbidity Criterion

Jeff,

We are still planning to adopt the turbidity criterion for the protection of corals and hardbottom communities as part of the overall Triennial Review (TR), and the next step is to take the rules to the ERC. Unfortunately, we still don't have enough ERC members for a quorum so we are somewhat on hold until we get the green light from the Secretary's office that we have enough ERC members. In case you are wondering, we completed a Statement of Environmental Regulatory Costs (SERC) for the turbidity criterion, and we concluded the criterion will require legislative ratification because the costs well exceed $1 M over 5 years. In fact, we concluded the costs will range between $13,397,800 and $25,765,000 over the next 5 years. The range is so large because, based on feedback from permitting staff, the number of potential projects that could be impacted ranges between 13 and 25, and the cost per project is ~$1 M.

Regarding a couple of specific issues, I want to note that we have revised the definition of "hardbottom" to exclude "manmade substrate not intended for environmental enhancement or restoration." As for the TSD, that is a separate document from the Implementation Document, and the implementation document is the document that is going "away." We are not adopting the TSD into the rule, but it provides a good summary of the scientific literature that we relied on for our decision that a new criterion is needed to better protect corals, and we have it posted on our website to make it available to the public.

And while I'm thinking about it, I thought I should mention that I retire from the Department on August 31. The Division hasn't named my replacement yet, but I've cc'd Kaitlyn Sutton, the Env. Administrator of the Standards Development Section, as you can certainly coordinate with her on Triennial Review issues until (and after) my position is filled. I'm thinking about taking a position with an engineering/environmental consulting company, and perhaps our paths will cross in the future.

Daryll

From: Jeff Littlejohn <Jeff.Littlejohn@arlaw.com>
Sent: Thursday, August 12, 2021 11:24 AM
To: Joyner, Daryll <Daryll.Joyner@dep.state.fl.us>
Cc: Jeff Littlejohn <jeff@littlejohnmann.com>
Subject: Coral Reef Turbidity Criterion

Daryll,

I hope you're doing well!

I'm looking for any updates on the turbidity criterion. The Triennial Review website still shows the March Technical Support Document, but I thought that went away? I'd appreciate anything you could share with me to pass along to the Ports Council in a couple of weeks (8/25). FYI, Shawn Hamilton will be joining us at the meeting. (Don't worry! We're not going to blast you!) You're welcome to call if that would be easier.

Thank you,
Jeff

TAB 6c
Rule 62S-7 Sea Level Impact Projection (SLIP) Studies

CHAPTER 62S-7
PUBLIC FINANCING OF COASTAL CONSTRUCTION "SLIP STUDY RULE"

62S-7.010 Definitions.

(1) "Coastal building zone" means

(a) The land area from the seasonal high-water line landward to a line 1,500 feet landward from the coastal construction control line as established pursuant to Section 161.053, F.S., and, for those coastal areas fronting on the Gulf of Mexico, Atlantic Ocean, Florida Bay, or Straits of Florida and not included under Section 161.053, F.S., the land area seaward of the most landward velocity zone (V-zone) line as established by the Federal Emergency Management Agency (FEMA) and shown on flood insurance rate maps;

(b) On coastal barrier islands, it shall be the land area from the seasonal high-water line to a line 5,000 feet landward from the coastal construction control line established pursuant to Section 161.053, F.S. or the entire island, whichever is less; and

(c) All land area in the Florida Keys located within Monroe County shall be included in the coastal building zone.

(2) "Expected life" means the time when an element is supposed to function within its specified parameters; in other words, the life expectancy of the structure or project.

(3) "Flood depth" is the water level measured in feet above the ground at the project location.

(4) "Horizontal construction" means new construction of surface parking lots, highways, roads, streets, bridges, utilities, water supply projects, water plants, wastewater plants, water and wastewater distribution or conveyance facilities, wharves, docks, airport runways and taxiways, drainage projects, or related types of projects associated with civil engineering construction.

(5) "New coastal structure" means a major or nonhabitable major structure for which construction has not yet commenced beginning July 1, 2022 (one year after effective date of this rule). Projects that are rehabilitation or maintenance of existing structures, including related minor improvements shall not be considered new.

(a) "Major Structures" are defined in Section 161.54(6)(a), F.S.

(b) "Nonhabitable Major Structures" are defined in Section 161.54(6)(c), F.S.

(6) "Vertical construction" means the new construction of any building, structure or other improvement that is predominantly vertical, including, without limitation, a building, structure or improvement for the support, shelter and enclosure of persons, animals, chattels or movable property of any kind, and any improvement appurtenant thereto.

Rulemaking Authority 161.551(6) FS. Law Implemented 161.551 FS History–New 7-1-21.

62S-7.011 Requirements of The State-Financed Constructor.

(1) Beginning July 1, 2022 (one year after effective date of this rule) a state-financed constructor, as defined in Section 161.551, F.S., must conduct a SLIP study that meets the standards and criteria in Rule 62S-7.012, F.A.C., prior to construction of a new coastal structure. A state-financed constructor may comply with this requirement by using the Department's web-based tool, which was designed to meet the criteria in Rule 62S-7.012, F.A.C., for performing and submitting a SLIP study or conduct and submit a SLIP study by their own method that otherwise meets the standards and criteria established in Rule 62S-7.012, F.A.C.

(2) The state-financed constructor may not commence construction of a new coastal structure until a SLIP study meeting the criteria in Rule 62S-7.012, F.A.C., has been submitted to the Department and has received notification from the Department via the web-based tool or email that the SLIP study has been published on the Department's website for 30 days. The department encourages submission of the SLIP study during planning and design phases of the project.

(3) All SLIP studies will be maintained on the Department's website for a minimum of 10 years.

Rulemaking Authority 161.551(6) FS. Law Implemented 161.551 FS. History–New 7-1-21.

62S-7.012 SLIP Study Standards.

A SLIP study required under Section 161.551, F.S., shall meet the following standards and criteria, and the Department's web-based tool has been designed to meet these standards and criteria:

(1) Show the amount of sea level rise expected over 50 years or the expected life of the structure, whichever is less. When there are multiple project features that function as one combined project, as contemplated by Section 161.551(3), F.S., one SLIP study may be submitted, but the expected life shall be that of the highest Risk Category for all project features contemplated. The amount of sea level rise expected must be calculated using the following criteria:

(a) The sea level rise scenarios used for analysis must, at a minimum, include the NOAA Intermediate-High sea level rise scenario from the National Oceanic and Atmospheric Administration (NOAA) report, "2017 NOAA Technical Report National Ocean Service Center for Operational Oceanographic Products and Services (NOS CO-OPS) 083, Global and Regional Sea Level Rise Scenarios for the United States," hereby incorporated by reference http://www.flrules.org/Gateway/reference.asp?No=Ref-13153. Copies of these documents may be obtained by writing to the National Oceanic and Atmospheric Administration, National Ocean Service, Center for Operational Oceanographic Products and Services, Silver Spring, Maryland 20910.

(b) The local sea level rise at the project's location must be interpolated (using the project's distance away from the gauges as the independent variable) between the two closest coastal tide gauges with NOAA sea level rise projections listed below.

1. 8670870 Fort Pulaski, GA
2. 8720030 Fernandina Beach, Florida
3. 8720218 Mayport, Florida
4. 8721604 Trident Pier, Florida
5. 8723214 Virginia Key, Florida
6. 8723970 Vaca Key, Florida
7. 8724580 Key West, Florida
8. 8725110 Naples, Florida
9. 8725520 Fort Myers, Florida
10. 8726520 St. Petersburg, Florida
11. 8726724 Clearwater Beach, Florida
12. 8727520 Cedar Key, Florida
13. 8728690 Apalachicola, Florida
14. 8729108 Panama City, Florida
15. 8729840 Pensacola, Florida
16. 8735180 Dauphin Island, AL

(c) Flood depth must be calculated in North American Vertical Datum of 1988 (NAVD88) over the entirety of the project location out 50 years or the structure's expected life, whichever is less, for the NOAA Intermediate high sea level rise scenario, at a minimum.

(d) The contribution of land subsidence to relative local sea level rise must be included. The land subsidence contribution is calculated by NOAA for each local tide gauge and is included in each of the NOAA sea level projections. This data (labeled VLM for Vertical Land Movement) is presented in the U.S. Army Corps of Engineers (USACE) sea level change calculator (Version 2019.21) found at https://cwbi-app.sec.usace.army.mil/rccslc/slcc_calc.html, hereby incorporated by reference http://www.flrules.org/Gateway/reference.asp?No=Ref-13154.

(2) Show the amount of flooding, inundation, and wave action damage risk expected over 50 years or the expected life of the structure, whichever is less. The amount of flooding and wave damage expected must be calculated using the following criteria:

(a) FEMA storm surge water surface elevation for the 1% annual chance (100 year) flood event must be approximated in NAVD88 for the entire project location. Location-specific water surface elevations can be found within the SLIP tool or at the FEMA Flood Map Service Center https://msc.fema.gov/portal/home, hereby incorporated by reference http://www.flrules.org/Gateway/reference.asp?No=Ref-13156. Copies of these documents may be obtained by writing to the Office of Resilience and Coastal Protection, Mail Station 235, Department of Environmental Protection, Douglas Building, 3900 Commonwealth Blvd., Tallahassee, Florida 32399-3000.

(b) The FEMA 1% annual chance water surface elevation must be added to the NOAA 2017 Intermediate-High and any other chosen sea level rise scenario, and then compared to the project's critical elevations to assess flood risk. Critical elevations must be Finished First Floor Elevation (FFE), the Lowest Adjacent Grade (LAG) of the structure, or another critical design element which

may be substantially damaged if flooded. Refer to the 2020 Florida Building Code, Section 1603.1.7, Flood Design Data, for assistance in defining the critical elevation at https://codes.iccsafe.org/content/FLBC2020P1/chapter-16-structural-design#FLBC2020P1_Ch16_Sec1603.1.7, hereby incorporated by reference http://www.flrules.org/Gateway/reference.asp?No=Ref-13157. Copies of these documents may be obtained by writing to the Office of Resilience and Coastal Protection, Mail Station 235, Department of Environmental Protection, Douglas Building, 3900 Commonwealth Blvd., Tallahassee, Florida 32399-3000.

(c) Depth-Damage Curves from the 2015 North Atlantic Coast Comprehensive Study, titled "Resilient Adaptation to Increasing Risk: Physical Depth Damage Function Summary Report", hereby incorporated by reference http://www.flrules.org/Gateway/reference.asp?No=Ref-13158. Copies of these documents may be obtained by writing to the Office of Resilience and Coastal Protection, Mail Station 235, Department of Environmental Protection, Douglas Building, 3900 Commonwealth Blvd., Tallahassee, Florida 32399-3000, must be used to estimate the cost of future flood damage, for vertical construction only, by assessing the approximate flood depth within the structure, using the comparison of the critical elevations to the previously calculated 1% annual chance water surface elevation added to the NOAA 2017 Intermediate-High and any other chosen local sea level rise scenarios.

(3) The state-financed constructor must show the risk to public safety and environmental impacts expected over 50 years or the expected life of the structure, whichever is less using the following criteria.

(a) Each structure must be assigned a Risk Category using the 2020 Florida Building Code Table 1604.5, Risk Category of Buildings and Other Structures. The table can be found at https://codes.iccsafe.org/content/FLBC2020P1/chapter-16-structural-design#FLBC2020P1_Ch16_Sec1604.5, hereby incorporated by reference http://www.flrules.org/Gateway/reference.asp?No=Ref-13159. Copies of these documents may be obtained by writing to the Office of Resilience and Coastal Protection, Mail Station 235, Department of Environmental Protection, Douglas Building, 3900 Commonwealth Blvd., Tallahassee, Florida 32399-3000.

(b) The ultimate design windspeed for the project location must be provided to define the risk of flying debris. This windspeed varies based on the Risk Category of the building and can be found in Figures 1609.3(1), 1609.3(2), 1609.3(3), and 1609.3(4) in the 2020 Florida Building Code at: https://codes.iccsafe.org/content/FLBC2020P1/chapter-16-structural-design#FLBC2020P1_Ch16_Sec1609.3, hereby incorporated by reference http://www.flrules.org/Gateway/reference.asp?No=Ref-13160. Copies of these documents may be obtained by writing to the Office of Resilience and Coastal Protection, Mail Station 235, Department of Environmental Protection, Douglas Building, 3900 Commonwealth Blvd., Tallahassee, Florida 32399-3000.

(4) Alternatives must be provided for the project's design and siting and the SLIP study must state how such alternatives would address public safety and environmental impacts, including but not limited to, leakage of pollutants, electrocution and explosion hazards, and hazards resulting from floating or flying structural debris as well as the risks and costs associated with construction, maintenance and repair of the structure.

(5) If a state-financed constructor chooses to conduct its own SLIP study and not use the Department's web-based tool, the SLIP study shall be submitted to the Department for publication via secure sign-in on the DEP-provided website. The study report shall be in an Americans with Disabilities Act (ADA) Section 508 compliant portable document format. The report contents shall include, but not be limited to, a description of the approach used in conducting the study, numbered references to the information used in the study, a narrative with graphic illustrations to demonstrate the application of the study approach to the information used, and a discussion of the assessments and alternatives.

Rulemaking Authority 161.551(6) FS. Law Implemented 161.551 FS. History–New 7-1-21.

62S-7.014 Implementation of SLIP Study findings.

The Department's intent in this rule is to inform and raise awareness with the state-financed constructor of the potential impacts of sea level rise and increased storm risk on coastal infrastructure. Implementation of the findings of the SLIP studies is at the discretion of the state-financed constructor.

Rulemaking Authority 161.551(6) FS. Law Implemented 161.551 FS. History–New 7-1-21.

62S-7.016 Enforcement by DEP.

Failure to comply with the SLIP study requirements may result in compliance or enforcement action by the Department, including but not limited to:

(1) Pursuit of injunctive relief to cease construction until the constructor comes into full compliance with the requirement;

(2) Recovery of all or a portion of state funds expended on the construction activity.

Rulemaking Authority 161.551(6) FS. Law Implemented 161.551 FS. History–New 7-1-21.

62S-7.020 Effective Date.

Any enforcement shall not proceed until 1 year after the rule takes effect.

Rulemaking Authority 161.551(6) FS. Law Implemented 161.551 FS. History–New 7-1-21.

TAB 6d
Florida Oceans Alliance Update

TAB 6e
DERA and VW Mitigation Grants

DEMP - Volkswagen Settlement and DERA

The Diesel Emissions Mitigation Program (DEMP) utilizes funds from the Volkswagen Settlement and EPA's Diesel Emissions Reduction Act (DERA) state grant program for projects which mitigate mobile sources of emissions. For more information about the Volkswagen Settlement and the Environmental Mitigation Trust for State Beneficiaries, please visit the Volkswagen Settlement Information. All DEMP activities related to the Volkswagen Settlement are guided by the state's Beneficiary Mitigation Plan. Download a copy of the Mitigation Plan at Florida's Beneficiary Mitigation Plan.

DEMP Initiatives

Electric School Bus Project

On Nov. 16, 2020, the Florida Department of Environmental Protection (Department) announced a Notice of Funding Availability (NOFA) for $57 million available for the purchase of electric Type C or Type D school buses to replace eligible Type C or Type D diesel school buses. As highlighted in the Beneficiary Mitigation Plan, the department continues to focus on increasing electric vehicle infrastructure and encouraging the growth of electric vehicles as well as the related construction and manufacturing.
Only school districts within an Air Quality Priority Area designated in the Mitigation Plan are eligible for this project. School districts must provide at least a 25% cost share. Funding will be provided on a competitive basis with school districts that provide the highest cost share being prioritized. Districts are encouraged to create partnerships with local electric utilities or other business entities to maximize cost-share opportunities. The selected school districts are required to use state-approved vendors or competitively identify the businesses to complete the project.
School districts in Air Quality Priority Areas (listed in the application worksheet) were required to submit the application worksheet **before Tuesday, Jan. 19, 2021, at 5 p.m., E.T.**
Electric School Bus Project - Application Worksheet

Electric Vehicle Charging Infrastructure - Phase 2

On Nov. 9, 2020, the department announced a second and final competitive grant funding opportunity for electric vehicle charging infrastructure using funds under DEMP. Funds are available for Level 3 (DC fast) charging near the following Interstate highways: I-10, I-95, I-75 and I-4. The department intends to fund approximately 32 charging station sites along these evacuation corridors and allocating remaining funds for projects from unawarded EVCI Phase 1 and EVCI Phase 2 applications. Each site will be eligible for up to $500,000 in grant funding, and cost-share requirements may apply.

Applications were due to the department's Division of Air Resource Management by **Tuesday, Jan. 19, 2021, at 5 p.m. E.T.** The Request for Applications (RFA), which includes information on project eligibility and instructions for how to apply, is available at the link below. Please note that the EVCI Phase 2 RFA below has been updated to correct segment numbers on the map in section 1.4 to be consistent with the segment numbers in the table in section 1.3.

- **EVCI-RFA-02 - Extended Deadline**
- EVCI Phase 02 - RFA Responses
- Attachment 1 Sample Grant EVCI
- EVCI Phase 2 Table of Awarded Applicants by Segment

The RFA was also available through the Vendor Bid System. The department's grant solicitation number for this RFA was EVCI-RFA-02. The EVCI Phase 2 RFA includes 14 segments along Interstate 10 plus 18 segments to complete charging corridors along Phase 1 routes.

Electric Vehicle Charging Infrastructure - Phase 1

The department initially posted a competitive grant funding opportunity for Level 3 (DC Fast) electric vehicle charging infrastructure (EVCI) on Feb. 10, 2020, for a period of 60 days. The department extended the application period for an additional 30 days and accepted applications submitted before May 7, 2020, at 5 p.m. E.T. Links to EVCI Phase 1 Request for Applications (RFA), and the responses to the RFA question period are linked below.
The department has awarded grants for all 27 segments identified in the EVCI Phase 1 RFA. A list of the awarded applicants for each of the 27 segments and a map of the project locations are linked below.
The closed RFA and Agency Decisions/Notice of Award is also available through the Vendor Bid System (VBS). For the VBS posting search, the closed RFA is EVCI-RFA-01 and the Agency Decisions post is EVCI-RFA-01-AD.

- EVCI-RFA-01
- EVCI Phase 01 RFA Responses
- EVCI Phase 1 Table of Awarded Applicants by Segment
- EVCI Phase 1 Map of Project Locations by Region

DERA State Grant - Marine Vessel Engine and Drayage Truck Replacements

The department is currently administering grant funding for a drayage truck replacement project eligible under the DERA program. All funded projects will be completed within the strict parameters of the state and federal budget.
For more information about the DERA program, including specific eligibility, cost-share requirements, and past projects, please visit the department's DERA State Grant Program or contact the Division of Air Resource Management directly at VWMitigation@FloridaDEP.gov.

News and Information

DEP has established an email list for parties interested in following developments related to the Volkswagen Settlement, DERA, and as the department develops and administers project-specific funding under DEMP. Please visit DEP's subscription page to sign up for email updates.

Sign Up for News & Info

Recent Florida Projects

The most recent cycle of DERA State Grant Program projects concluded before the end of the state fiscal year in June, 2020. These projects used a mix of EPA funding and Mitigation Trust Funds. The next cycle of DERA projects will be administered under the Department's Diesel Emissions Mitigation Program. The Department is pleased to provide the following information about our completed 2019 and 2020 DERA State Grant Program projects.

Marine Vessel Diesel Engine Replacement Program - 2019

Yacht Starship Dining Cruises, out of Port Tampa, replaced two 42-year-old unregulated diesel propulsion engines and one 25 year-old unregulated auxiliary diesel engine were with all new units. The Department provided the maximum allowable 40 percent cost share for the $348,454 project. Using EPA's Diesel Emissions Quantifier (DEQ), the Department calculates that this project yields over 5 tons of nitrogen oxides (NOx) reductions annually, which is an over 55 percent reduction from the old engines.

Port Drayage Truck Replacement Program - 2019

Seaboard Marine, out of Port Miami, replaced three diesel port drayage trucks, all at least 20 years-old, with three new diesel port drayage trucks. The Department provided the maximum allowable 50 percent cost share for the $311,267 project. Using EPA's DEQ, the Department calculates that this project yields over 2 tons of NOx reductions annually, which is an over 96 percent reduction from the three old units.

Marine Vessel Diesel Engine Replacement Program - 2020

Key West Express, operating out of Lee, Collier, and Monroe Counties, replaced four 65 liter Tier-1 propulsion engines with all new Tier-3 units. The Department provided the maximum allowable 40 percent cost share for the $4,520,018 project totaling $1,808,007.20 in Department funding. Using EPA's DEQ tool, the Department calculates that this project yields over 115 tons of nitrogen oxides (NOx) reductions annually, an emissions benefit of 58 percent over the four replaced propulsion engines.

Port Drayage Truck Replacement Program - 2020

JZ Expedited Trucking out of Duval County replaced one fourteen-year-old diesel port drayage truck, with an all new diesel port drayage truck. The Department provided the maximum allowable 50 percent cost share for the $174,437.99 project. Using EPA's DEQ, the Department calculates that this project yields over half a ton in nitrogen oxides (NOx) reductions annually, an emissions benefit of nearly 89 percent over the replaced port drayage truck.

Port Drayage Truck Replacement Program - 2020

Seaboard Marine, out of Port Miami, replaced four diesel port drayage trucks, all at least 21 years-old, with four new diesel port drayage trucks. The Department provided the maximum allowable 50 percent cost share for the $400,000 project. Using EPA's DEQ, the Department calculates that this

project yields just under one ton of nitrogen oxides (NOx) reductions annually, an emissions benefit of nearly 95 percent over the replaced port drayage trucks.

TAB 6f
Federal Updates

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 26, 2021

M-21-23

MEMORANDIUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Shalanda D. Young
Acting Director

SUBJECT: Revocation of OMB Memorandum M-21-01, "Budget and Management Guidance on Updates to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act"

On January 20, 2021, President Biden signed Executive Order 13990 entitled "Protecting Public Health and the Environmental Science to Tackle the Climate Crisis" (EO). Section 1 of the EO set out the public health and environmental policy objectives of the Administration. Section 2 of the EO directed agencies to "immediately review all existing regulations, orders, guidance documents, policies, and any other similar agency actions . . . promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, the policy set forth in section 1 of [the EO]."

On June 16, 2020, the Council on Environmental Quality (CEQ) issued a final rule, "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," 85 Fed. Reg. 43,304, revising its NEPA regulations, which apply to all Federal agencies. Pursuant to that regulation, agencies were instructed to develop new or revised NEPA procedures, as necessary, including eliminating any inconsistencies with the CEQ regulations by no later than September 14, 2021. Based on the EO, CEQ has identified the updated NEPA regulations for potential review for consistency with the Administration's policies.

On November 2, 2020, OMB issued Memorandum M-21-01, "Budget and Management Guidance on Updates to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act" (NEPA). The memorandum requested agencies to provide to OMB within 30 days a plan outlining the agency's schedule for initiating, proposing, and finalizing new or updated agency NEPA procedures and related materials. Agencies were also requested to provide status reports by March 15, 2021, and August 1, 2021, on their progress in developing and proposing new or revised NEPA procedures.

OMB Memorandum M-21-01 is hereby revoked as it is or may be inconsistent with, or present obstacles to, the Administration's policies. Agencies are no longer expected to submit progress reports regarding implementation of the revised NEPA procedures.

NEWS & UPDATES

CEQ Extends Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures

JUNE 28, 2021 • PRESS RELEASES

The White House Council on Environmental Quality (CEQ) today provided two additional years for Federal agencies to propose updates to their National Environmental Policy Act (NEPA) procedures, a deadline set in the 2020 NEPA regulations issued by the previous administration.

CEQ issued an interim final rule, published in the Federal Register , to extend this deadline for agencies. The extension will provide time for CEQ to review and potentially revise the 2020 NEPA rules. The deadline change also will ensure that agencies avoid expending their limited resources developing procedures to conform with regulations that may soon be updated.

Today's action was announced previously in the Spring Unified Regulatory Agenda, which the Office of Management and Budget released on Friday, June 11, 2021.

Additional Background:

CEQ's 2020 National Environmental Policy Act (NEPA) Rule (2020 Rule), published on July 16, 2020, required Federal agencies to propose updates to their agency NEPA procedures to be consistent with the 2020 Rule by September 14, 2021. This deadline was 12 months following the effective date of the 2020 Rule. Through this interim final rule, CEQ is revising 40 CFR 1507.3(b) to change the deadline from 12 months to 36 months. This change provides Federal agencies an additional two years, until September 14, 2023, to propose revisions to their NEPA procedures.

The step taken today is consistent with and follows upon a memo that the Office of Management and Budget sent to Federal agencies in April, revoking previously issued reporting requirements related to the development of updated NEPA procedures.

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News Releases from Headquarters, Headquarters > Water (OW)

CONTACT US <https://epa.gov/newsreleases/forms/contact-us>

EPA, Army Announce Intent to Revise Definition of WOTUS

June 9, 2021

Contact Information
EPA Press Office (press@epa.gov)

WASHINGTON – Today, the U.S. Environmental Protection Agency (EPA) and Department of the Army (the agencies) are announcing their intent to revise the definition of "waters of the United States" (WOTUS) to better protect our nation's vital water resources that support public health, environmental protection, agricultural activity, and economic growth. As described in an EPA declaration requesting remand of the 2020 Navigable Waters Protection Rule, a broad array of stakeholders—including states, Tribes, local governments, scientists, and non-governmental organizations—are seeing destructive impacts to critical water bodies under the 2020 rule.

"After reviewing the Navigable Waters Protection Rule as directed by President Biden, the EPA and Department of the Army have determined that this rule is leading to significant environmental degradation," **said EPA Administrator Michael S. Regan**. "We are committed to establishing a durable definition of 'waters of the United States' based on Supreme Court precedent and drawing from the lessons learned from the current and previous regulations, as well as input from a wide array of stakeholders, so we can better protect our nation's waters, foster economic growth, and support thriving communities."

"Communities deserve to have our nation's waters protected. However, the Navigable Waters Protection Rule has resulted in a 25 percentage point reduction in determinations of waters that would otherwise be afforded protection," **said Acting Assistant Secretary of the Army for Civil Works Jaime A. Pinkham**. "Together, the Department of the Army and EPA will develop a rule that is informed by our technical expertise, is straightforward to implement by our agencies and our state and Tribal co-regulators, and is shaped by the lived experience of local communities."

Upon review of the Navigable Waters Protection Rule, the agencies have determined that the rule is significantly reducing clean water protections. The lack of protections is particularly significant in arid states, like New Mexico and Arizona, where nearly every one of over 1,500 streams assessed has been found to be non-jurisdictional. The agencies are also aware of 333 projects that would have required Section 404 permitting prior to the Navigable Waters Protection Rule, but no longer do.

As a result of these findings, today, the Department of Justice is filing a motion requesting remand of the rule. Today's action reflects the agencies' intent to initiate a new rulemaking process that restores the protections in place prior to the 2015 WOTUS implementation, and anticipates developing a new rule that defines WOTUS and is informed by a robust engagement process as well as the experience of implementing the pre-2015 rule, the Obama-era Clean Water Rule, and the Trump-era Navigable Waters Protection Rule.

The agencies' new regulatory effort will be guided by the following considerations:

- Protecting water resources and our communities consistent with the Clean Water Act.
- The latest science and the effects of climate change on our waters.
- Emphasizing a rule with a practical implementation approach for state and Tribal partners.
- Reflecting the experience of and input received from landowners, the agricultural community that fuels and feeds the world, states, Tribes, local governments, community organizations, environmental groups, and disadvantaged communities with environmental justice concerns.

The agencies are committed to meaningful stakeholder engagement to ensure that a revised definition of WOTUS considers essential clean water protections, as well as how the use of water supports key economic sectors. Further details of the agencies' plans, including opportunity for public participation, will be conveyed in a forthcoming action. To learn more about the definition of waters of the United States, visit: https://www.epa.gov/wotus <https://epa.gov/wotus>.

Background

The Clean Water Act prohibits the discharge of pollutants from a point source to navigable waters unless otherwise authorized under the Act. Navigable waters are defined in the Act as "the waters of the United States, including the territorial seas." Thus, "waters of the United States" (WOTUS) is a threshold term establishing the geographic scope of federal jurisdiction under the Clean Water Act. The term "waters of the United States" is not defined by the Act but has been defined by EPA and the Army in regulations since the 1970s and jointly implemented in the agencies' respective programmatic activities.

The 2020 Navigable Waters Protection Rule was identified in President Biden's Executive Order 13990, which directs federal agencies to review all existing regulations, orders, guidance documents, policies, and any other similar agency actions promulgated, issued, or adopted between January 20, 2017, and January 20, 2021. See Fact Sheet: List of Agency Actions for Review, available at: https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review>/ <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>.

Contact Us <https://epa.gov/newsreleases/forms/contact-us> to ask a question, provide feedback, or report a problem.

TAB 6g
Other Issues