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Florida Water Policy: A Twenty-Five Year Mid-Course Correction

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FLORIDA WATER POLICY:
A TWENTY-FIVE YEAR MID-COURSE CORRECTION

Frank E. Mathews & Gabriel E. Nieto

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FLORIDA WATER POLICY: A TWENTY-FIVE YEAR MID-COURSE CORRECTION

FRANK E. MATTHEWS* AND GABRIEL E. NIETO**

| | | |
|------|---|-------|
| I. | INTRODUCTION..... | 365 |
| II. | PRELUDE TO REFORM..... | 367 |
| III. | LEGISLATIVE CONTROLS OVER WATER MANAGEMENT DISTRICT GOVERNANCE. | 371 |
| | A. Governing Boards..... | 372 |
| | B. Executive Directors and Attorneys | 373 |
| | C. Budget Oversight..... | 373 |
| | D. Water Management District Employee Compensation | 374 |
| IV. | WATER RESOURCES AND WATER SUPPLY..... | 375 |
| | A. Water Resources and Supply Development | 375 |
| | B. Regional Water Supply Plans | 377 |
| | C. Water Resource Development by Local Government and Private Enterprises..... | 379 |
| V. | PLANNING..... | 381 |
| VI. | MINIMUM FLOWS AND LEVELS..... | 384 |
| | A. New Criteria for Setting Minimum Flows and Levels | 38584 |
| | B. Redefining the District's Requirements for Setting Minimum Flows and Levels | 385 |
| | C. Scientific Review of Minimum Flows and Levels | 388 |
| VII. | CONCLUSION..... | 389 |

I. INTRODUCTION

In addition to being an essential natural resource, water can also be a divisive political issue. The 1997 Legislature successfully negotiated a minefield of potentially divisive conflicts when it passed the Committee Substitute for House Bills 715, 1249, 1321, and 1339, collectively known as the “1997 Water Act.”¹ These conflicts included water rich versus water poor areas, urban versus rural areas, public water supply versus agricultural use, and coastal versus inland concerns. This legislation marked Florida’s first major revision of its water law since the state adopted the Model Water Code in 1972.² In light of the failures in 1995 and 1996 to pass similar, but far more limited reforms, the resulting legislation was all the more surprisingly broad in scope.³

The 1997 Water Act was the culmination of a three-year legislative effort that began with the 1995 appointment of the House and

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1. See Act effective July 1, 1997, ch. 97-160, 1997 Fla. Laws 3002 (amending and codified in scattered sections of FLA. STAT.).

2. See Act effective July 1, 1972, ch. 72-299, 1972 Fla. Laws 1082; see also, FRANK E. MALONEY ET AL., A MODEL WATER CODE (1972).

3. See Fla. S.B. 1396 (1995); Fla. S.B. 4552 (1996); Fla. H.B. 2335 (1996).

Senate Select Committees on Water Policy. Subsequently, the Governor, through Executive Order 96-297, put into motion water policy initiatives at both the water management district and the Florida Department of Environmental Protection (FDEP) levels, which many felt preempted legislative prerogatives on water issues.⁴ Additionally, the Governor, recognizing the importance of avoiding regional and statewide "water wars," convened an informal task force that worked for nearly a year to address these issues in model legislation.⁵ These executive initiatives created an impetus for legislative intervention. If the Legislature had refused to act, it could easily have been accused of abdicating its responsibility for establishing water policy. Given this tense political climate, the Legislature had little choice but to deal decisively with these issues.

The product of these political clashes was a statutory scheme purposefully designed to increase water resources. For the first time, the state's water policy focused on the development of water resources and water supply, rather than merely allocating water among competing users.⁶ This should significantly benefit all water users and the state as a whole.

This change in water policy was drastically needed. Florida is a water-rich state.⁷ However, many areas are experiencing or will experience water shortfalls.⁸ Since 1950, the statewide demand for fresh water has more than doubled.⁹ The state's population has increased from under 3 million in 1950 to over 13 million in 1990, and will surpass 20 million by 2020.¹⁰ This ongoing population boom is particularly problematic because eighty percent of Florida's population is concentrated in coastal areas.¹¹ These areas have the most limited water supplies in the state, and are particularly susceptible

4. See Fla. Exec. Order No. 96-297 (Sept. 30, 1996).

5. This task force, the Governor's Water Supply and Funding Work Group, was convened by the Governor's Office on September 30, 1996. See EXECUTIVE OFFICE OF THE GOV., GOVERNOR'S WATER SUPPLY DEVELOPMENT AND FUNDING REPORT 2-3 (1997) (on file with the Exec. Office of the Gov., Tallahassee, Fla.) [hereinafter GOVERNOR'S WATER REPORT].

6. See *infra* notes 84-85 and accompanying text.

7. Florida receives approximately 175 billion gallons of water inflow per day. One hundred and fifty billion of these gallons come from rainfall, with the rest flowing in from neighboring states. See EDWARD A. FERNALD & DONALD PATTON, WATER RESOURCES ATLAS OF FLORIDA 15, 16 (1984). Additionally, Florida's aquifers can hold over a quadrillion gallons of water. See *id.* at 39. By contrast, in 1990, the state consumed only 7.5 billion gallons of fresh water per day. See FLORIDA DEP'T OF ENVTL. PROT., FLORIDA WATER PLAN, 22 (1995) [hereinafter FLORIDA WATER PLAN].

8. See FLORIDA WATER PLAN, *supra* note 7, at 23.

9. See *id.* Total withdrawals have risen from 2.9 billion gallons per day in 1950 to 7.5 billion gallons per day in 1990. See *id.* at 22.

10. See *id.*

11. See *id.*

to problems such as saltwater intrusion.¹² While inland areas generally have ample water supplies, many coastal areas, particularly on Florida's west coast, have instituted water rationing measures.¹³ Florida's west coast is already exceeding its available supplies of fresh water.¹⁴ Additionally, Florida's supply of water can be highly variable from year to year, and extremes of flood and drought are common.¹⁵ These hydrologic and demographic factors have created the need for improved management of Florida's water resources.

This Article explores the four major components of the 1997 legislation. Part II outlines the political backdrop that surrounded the passage of this legislation. Part III examines Water Management District governance issues and the new emphasis on legislative controls. Part IV explores the new water resource and water supply directives. Part V outlines the measures taken to entice water policy planning and the integration of this planning with land use policies. Part VI examines the new provisions regarding minimum flows and levels. Finally, this Article concludes by noting that although the 1997 Water Act provided much-needed guidelines and clarifications, the 1998 Legislature should consider enacting legislation to address some remaining unanswered issues.

II. PRELUDE TO REFORM

In 1995, the House of Representatives formed the Select Committee on Water Policy, which gathered information and public comments but yielded little substantive legislation. The only meaningful piece of legislation resulting from this effort was the apportionment of funds from the Preservation 2000 (P-2000) trust fund to purchase lands in the East Everglades Buffer Strip.¹⁶ This purchase ostensibly assisted water supply development for the southeast region of the state. Originally, however, the P-2000 program was intended to fund a statewide conservation and recreational lands purchase program.¹⁷ The Committee, through this and subsequent legislation, diverted these funds for water supply purposes. This represented a significant ideological departure from the original purpose of the program. It also opened the door for the use of the P-2000 program, and its \$3 billion in funding, for water supply purposes.

12. See *id.*

13. See Michael Browning, *Water Woes Threaten State's Future*, MIAMI HERALD, June 23, 1997, at A1. These measures include an increased use of reclaimed water and limits on lawn watering and car washing. See *id.*

14. See FLORIDA WATER PLAN, *supra* note 7, at 23.

15. See *id.*

16. See FLA. STAT. § 259.101(2)(e), (3) (1995).

17. See Press Release from the Exec. Office of the Gov., Gov. Lawton Chiles (Jan. 22, 1990) (proposing the "Preservation 2000" bonding program to acquire environmental and recreational land) (on file with the Exec. Office of the Gov., Tallahassee, Fla.).

In 1996, the Legislature authorized the use of \$12 million in P-2000 funds for the restoration of Lake Apopka.¹⁸ These funds were used to buy farmland surrounding the lake in an attempt to improve its water quality. This trend continued in 1997 with the appropriation of almost \$25 million in P-2000 funds for the Lake Apopka project.¹⁹

During 1996, the Legislature also passed limited legislation to deal with the "water wars" that had been ongoing in Southwest Florida.²⁰ The legislation focused solely on the water crisis in Hillsborough, Pinellas, and Pasco counties.²¹ It was also, surprisingly, the only water legislation passed under the direction of a Southwest Florida legislator, House Speaker Peter Wallace.²²

Also during 1996, the Governor ordered water management districts to take affirmative steps for water resource development.²³ The executive order required the districts to engage in needs and sources analysis by projecting water demand over the next two decades and determining whether this demand would be met.²⁴ The districts were also ordered to evaluate current groundwater withdrawals to determine if the withdrawals would result in environmental damage.²⁵ Additionally, the order directed the Executive Office of the Governor to make recommendations to the Legislature regarding water law reform.²⁶ This resulted in the establishment of a Governor's task force on water supply and funding, which made sweeping recommendations on how to reform the state's water laws.²⁷

This executive order initiated many of the reforms that found their way into the 1997 Water Act. For instance, the executive order directed the FDEP and the districts to develop a priority list for the setting of minimum flows and levels.²⁸ The order also required that water management districts allow independent scientific peer review of minimum flows and levels.²⁹ Moreover, the order incorporated a

18. See Act effective July 1, 1996, ch. 96-207, § 2, 1996 Fla. Laws 779, 779-780.

19. See Act effective July 1, 1997, ch. 97-152, 1997 Fla. Laws 2508, 2755 (item 1226A).

20. See Act effective May 31, 1996, ch. 96-339, 1996 Fla. Laws 1952 (amending scattered sections of FLA. STAT.).

21. See *id.*

22. *Dem.*, St. Petersburg.

23. See Fla. Exec. Order No. 96-297 (Sept. 30, 1996).

24. See *id.* § 3.

25. See *id.* § 3(2)(c).

26. See *id.* § 4.

27. See GOVERNOR'S WATER REPORT, *supra* note 5, at 1-3.

28. See Fla. Exec. Order No. 96-297 (Sept. 30, 1996).

29. See *id.* § 2(5). Additionally, the 1997 Water Act's emphasis on long-term water planning is a descendant of the water planning provisions promulgated by the Governor. See *id.* § 3. These provisions included the use of a 20-year planning horizon and a mandate for regional water supply planning for those regions where the supply may become inadequate. See *id.*

requirement that water management districts engage in needs and sources assessments that is virtually identical to the 1997 Water Act.³⁰ This impetus on water resource development was followed and strengthened by the 1997 legislation.

Even before the Governor's task force effort, a coalition of public and private interests organized itself for the 1997 legislative session.³¹ This coalition worked alongside the Governor's task force to develop model legislation. The work of the coalition was eventually reflected in House Bill 1321, sponsored by Representative David Bitner,³² and Senate Bill 1428, sponsored by Senator Jack Latvala.³³

As noted, Executive Order 96-297 led to the establishment of an informal Governor's task force on water law reform.³⁴ The 1997 Legislature had the advantage of approximately fifty recommendations from the Governor's task force.³⁵ These recommendations dealt with a wide variety of issues, such as state and regional planning, water supply and resource development, peer review of regulations, and general funding principles.³⁶ These recommendations represented the consensus of a widespread group of interested persons who had attended months of meetings to develop model legislation. Eventually, these recommendations took the form of House Bill 1339, sponsored by Representatives Debbie Horan³⁷ and Harry Goode,³⁸ and Senate Bill 1428, sponsored by Senator Latvala, which were frequently referred to as "the Governor's Water Legislation." Because of the diverse interests represented by the group, the Legislature gave great deference to the task force's recommendations.³⁹

30. See *id.* §§ 3-4.

31. This group, the Florida Water Coalition, began meeting in September 1996 and consisted of representatives from the following: A. Duda & Sons, Inc.; Alico, Inc.; Association of Florida Community Developers; Avatar Properties; Broward County; City of St. Petersburg; City of Tallahassee; City of Tampa; Dade County; ELW Water, Inc.; Florida Association of Realtors; Florida Chamber of Commerce; Florida Cities Water Company; Florida Electric Power Coordinating Group, Inc.; Florida Engineering Society; Florida Home Builders Association; Florida League of Cities; Florida Land Council; Florida Pulp and Paper Association; Florida Sugar Cane League; Florida Water Council; Florida Water Services; Florida Waterworks Association; Hilliard Brothers of Florida; Lee County Public Works Department; Lykes Brothers; Palm Beach County; Palm Coast Utility Corporation; Pinellas County; Pinellas County Utilities; Seminole Electric Cooperative; Southern States Utilities; Sugar Cane Growers Cooperative, Inc.; United Florida Water; U.S. Sugar Corporation; Utilities, Inc. of Florida; and the West Coast Regional Water Supply Authority.

32. Repub., Port Charlotte.

33. Repub., Palm Harbor.

34. See GOVERNOR'S WATER REPORT, *supra* note 5, at 2-3.

35. See *id.*

36. See *id.*

37. Dem., Key West.

38. Dem., Melbourne.

39. See Memorandum from Dan Stengle and Eustus Whitfield to the Governor's Water Supply and Funding Work Group (June 17, 1997) (on file with the Exec. Office of the Gov., Tallahassee, Fla.). The task force consisted of various representatives from business

The task force was divided into two distinct workgroups: one group focused on water supply regulation and development, and the other focused on water supply funding issues.⁴⁰ However, both groups worked from the same key assumptions. They noted that increased demand was inevitable and that this demand must be met.⁴¹ At the same time, however, they noted the need to protect Florida's environment, public health, and quality of life.⁴² Increasing the supply of available water was seen as the common solution to these problems.⁴³ Sufficient water is the only way to ensure continued supply for economic and population growth, while protecting Florida's delicate environment.

The Senate allowed the House to take the lead on water legislation, and House Water and Resource Management Committee Chair John Laurent⁴⁴ boldly decided to combine the four major pieces of water legislation into a single committee substitute.⁴⁵ Several dozen proposed amendments were offered in committee, with the most contentious issues being the desire to incorporate a "local sources first" provision into chapter 373, and an attempt to clarify that lands owned by the state or water management districts can be used for water resource and supply purposes.⁴⁶ Neither of these proposals saw its way into the final legislation, but the 1997 Water Act does expand somewhat the use of district lands for water resource and supply.⁴⁷ The "local sources first" proposal was passionately advocated by Pasco County interests, who feared water export from their historically water-rich area.⁴⁸ This "local sources" debate will likely come up again, and be a major issue in the 1998 legislative session.

and industry, agriculture, environmental and citizens groups, water suppliers, local governments, water management districts, the FDEP, the Florida Department of Consumer Affairs, the Florida Department of Agriculture and the Florida Public Service Commission. See *id.*

40. See GOVERNOR'S WATER REPORT, *supra* note 5, at 2-3.

41. See *id.*

42. See *id.*

43. See *id.*

44. Repub., Bartow.

45. The consolidated bill retained all House bill numbers, as well as most substantive provisions from the four bills. See Fla. CS for HB 715, 1249, 1321, and 1339 (1997).

46. Telephone Interview with Joyce Pugh, Legis. Res. Dir., Fla. H.R. Comm. on Water & Resource Mgmt. (Nov. 10, 1997) [hereinafter Pugh Interview].

47. See Act effective July 1, 1997, ch. 97-160, § 12, 1997 Fla. Laws 1853 (amending FLA. STAT. § 373.139(5) (1995)).

48. Pasco County is already a water exporter. Interests in Hillsborough and Pinellas counties would no doubt wish to increase reliance on neighboring areas for water supply. Under the current statute there are very few restrictions to this activity. Section 373.223(2), Florida Statutes, allows water management districts to issue consumptive use permits authorizing water transfers "beyond overlying land, across county boundaries, or outside the watershed from which it is taken," and also prohibits local governments from interfering with these transfers. FLA. STAT. § 373.223(2) (1997). The only restriction imposed by section 373.223(2) is that the governing board must determine that both the

III. LEGISLATIVE CONTROLS OVER WATER MANAGEMENT DISTRICT GOVERNANCE

Traditionally, one of the Legislature's greatest difficulties with the various water management districts has been the absence of district accountability. This issue was frequently considered by the Water Management District Review Commission.⁴⁹ The Commission at-

transport and the use of the water are in the public interest before allowing the water transfer. See *id.* Of course, any transfer of water must also meet the requirements of section 373.223(1), which apply to all consumptive uses, as well as the consumptive use rules of the district where the water will be withdrawn. The transfer must therefore be a "reasonable-beneficial use," and must not interfere with pre-existing legal uses. *Id.* § 373.223(1)(a)-(b). Similarly, section 373.196(3) states that chapter 373, Florida Statutes, is not to be construed to limit transport of water, so long as the transport does not result in adverse effects to the withdrawal area. *Id.* § 373.196(3).

Additionally, section 373.196(1)(e) may apply to certain transfers. See *id.* § 373.196(1). The statute prohibits districts from "depriving" a county of water that is necessary to supply the county's needs. See *id.* § 373.196(1)(e). The applicability of this provision will depend on the meaning of the term "deprive." If a county does not presently need the excess water supply it is not "deprived" in the short term. However, the same county may, due to projected population increases, anticipate a future need for the water. Present day withdrawals of water that are transferred outside the watershed may limit the amount that can be withdrawn from the source in the future. If this is the case, the county may assert that it is being "deprived" of the future use of this water, and that the transfer therefore violates section 373.196(1)(e). The only case construing this provision indicated that it provides "some protection to users and potential users within the area from which water is withdrawn," but did not define the extent of this protection nor the time frame for determining if there was a deprivation. *Charlotte County v. Southwest Fla. Water Mgmt. Dist.*, No. 94-5742RP, slip op. at 570 (Fla. Div. of Admin. Hearings Mar. 26, 1997), appeal docketed, No. 97-1626 (Fla. 2d DCA Apr. 22, 1997).

Charlotte County also indicates that districts will be hard-pressed to paternalistically protect local sources from intradistrict transfer. See *id.* at 567-74. A portion of this case concerned a challenge to a rule that tried to limit any transfers of water by imposing a general water use permit condition requiring the applicant to "utilize local water resources to the greatest extent practicable." FLA. ADMIN. CODE R. 40D-2.301(1)(j) (1997). Under this rule, before a permit could be issued for any water transfer, all potential sources that were closer to the user than the proposed source had to be utilized to the maximum extent technologically feasible. The Administrative Law Judge (ALJ) invalidated this provision as being inconsistent with chapter 373, and therefore beyond the SWFWMD's rulemaking authority. See *Charlotte County*, No. 94-5742RP, at 574. Additionally, the ALJ noted that section 373.223(2) provided no restriction on intradistrict water transfers, and that prioritization of local resources over regional ones was not authorized by chapter 373. See *id.* at 569. Because this case dealt only with intradistrict transfers, the ALJ did not consider the extent to which a district can limit interdistrict transfers. The ALJ did note, however, that section 373.223(2), as construed by *Osceola County v. St. Johns River Water Management Dist.*, 504 So. 2d 385 (Fla. 1987), is a "rejection of a parochial view of water management in favor of . . . managing water resources at both the state and regional level." *Charlotte County*, No. 94-5742RP, at 571.

49. This commission was created by chapter 94-270, Florida Laws. See Act effective May 28, 1994, ch. 94-270, 1994 Fla. Laws 1941. It consisted of 21 members appointed by the Governor, the President of the Senate, and the Speaker of the House of Representatives. See *id.* at 1942. The commission was charged with investigating the legal responsibility delegated to the districts, their costs and funding, the need to improve the district budgeting process, ways to improve financial and political responsibility, possible reforms of governing board appointments, and ways to increase legislative oversight over water management districts. See *id.* at 1942-43.

tempted to address this issue with a number of proposed reforms, such as staggered terms for governing board members and expanded legislative and executive oversight of water management district budgets.⁵⁰ Using these recommendations, the Legislature enacted a number of procedural measures designed to make the water management districts accountable to the Legislature. These measures included modifying the appointment process for district governing board members,⁵¹ increasing the accountability of professionals employed by the district,⁵² and implementing several appropriations reforms.⁵³

A. Governing Boards

Governing board members will now serve staggered four-year terms.⁵⁴ Generally, at least two governing board seats will become vacant every year and be filled by gubernatorial appointment.⁵⁵ These appointees must also be confirmed by the Senate.⁵⁶ Furthermore, the Governor must now affirmatively consider appointing members who "represent an equitable cross-section of regional interests and technical expertise."⁵⁷ This stresses the importance of having board members with diverse backgrounds. However, the Governor need only consider these issues; there is no mandatory language regarding the background of board members other than the minimum qualifications described below.⁵⁸

Additionally, governing board members must now meet more stringent qualifications for appointment. New board members must have expertise in agriculture, the development industry, local government, law, water utilities, civil engineering, environmental science, hydrology, accounting, or financial businesses.⁵⁹ Because of the wide variety of categories, this provision will probably not prove dif-

50. See FLORIDA WATER MGMT. DIST. REVIEW COMM'N, BRIDGE OVER TROUBLED WATER: RECOMMENDATIONS OF THE WATER MANAGEMENT DISTRICT REVIEW COMMISSION (1995) (available at Fla. Legis., Jt. Legis. Mgmt. Comm., Div. of Legis. Library Servs., Tallahassee, Fla.).

51. See discussion *infra* Part III.A.

52. See discussion *infra* Part III.B.

53. See discussion *infra* Part III.C.

54. See FLA. STAT. § 373.073(1)(a) (1997).

55. See *id.* § 373.0731(1)(b). During the first year of the Governor's term, the Governor will appoint three board members to each district. See *id.* § 373.073(1)(b)(1). In the second and third years of the Governor's term, two members will be appointed to each district except the SWFWMD. See *id.* § 373.073(1)(b)(2)-(3). For the SWFWMD, which has 11 board members rather than the usual nine, the Governor will appoint three members during the second and third years. See *id.* In the fourth year of the Governor's term, two members will be appointed to each district. See *id.* § 373.073(1)(b)(4).

56. See *id.* § 373.073(1)(a).

57. *Id.* § 373.073(1)(b).

58. See *id.*

59. See *id.* § 373.073(2).

ficult for most prospective governing board members. What this provision will do, however, is discourage the appointment of persons who are wholly unqualified, technically or substantively, to be governing board members.

B. Executive Directors and Attorneys

The new law reformed the nomination process for water management district executive directors. For the first time, the Senate must reconfirm the executive director in the term immediately following the next gubernatorial election.⁶⁰ This provision insures that the executive director is politically accountable to the Governor and the Legislature. Additionally, when there is a shift in the political leadership, the newly elected Senate will have the opportunity to reject any existing executive director.

New controls were also placed on attorneys employed by water management districts. The new legislation makes it clear that the district's legal staff is to represent the position and legal interest of the governing board.⁶¹ This provision reflects a legislative desire to emphasize the legal staff's obligation to counsel and advise the governing board, independent of the desires and influence of the district's other professional employees.

C. Budget Oversight

New provisions seek to improve participation in water management district budgeting matters by the general public and by state and local governments. To this end, water management districts must now furnish detailed budget reports to the Governor, Speaker of the House, President of the Senate, the FDEP, any relevant legislative committees, and any affected local governments.⁶² Significantly, any of these entities can comment on the report.⁶³ The district must then provide written responses to any such comments.⁶⁴ Additionally, the districts must now advertise all budget meetings and workshops in a newspaper of general circulation in each county over which the district has authority.⁶⁵

The 1997 Water Act also heightened the level of detail required for water management district budgets. Districts must now categorize expenses along individual district program lines.⁶⁶ Section

60. See *id.* § 373.079(4)(a).

61. See *id.* § 373.079(5)(c).

62. See *id.* § 373.507(3)(a).

63. See *id.* § 373.507(3)(c).

64. See *id.*

65. See *id.* 373.536(1). This notice requirement does not apply to budget workshops that address the fixing of tax millages under section 200.065, Florida Statutes. See *id.*

66. See *id.*

373.536(5)(c)(2), Florida Statutes, lists several specific program areas that must be separately accounted for in district budgets.⁶⁷ Along with the total expenses for each project, districts must separately report the amounts of salary and capital expenditures for each project.⁶⁸ Lobbying activities must be reported with even greater detail. Districts must report expenditures for lobbying in a separate section of the budget, giving a full description of the activities on a local, regional, state, and federal basis.⁶⁹ Moreover, this reporting requirement extends beyond traditional lobbying to include any public relations or advertising expenditures.⁷⁰

These new reporting and accounting rules will aid the Governor's Office, which has always had the power to disapprove any part of a water management district's budget.⁷¹ Additionally, the Governor's Office must now closely scrutinize district budgets.⁷² The Governor's Office is required to analyze all expenditures related to water supply, water quality, flood protection, or natural resources.⁷³ This analysis examines expenditures on a program-by-program basis.⁷⁴ Using this procedure, the Governor's Office must determine the adequacy of district expenditures for water supply, water quality, flood control, floodplain management, and natural resources management.⁷⁵ The Governor's Office must then submit a report to the Legislature that summarizes all district expenditures and identifies any district that has not complied with the statutory reporting requirements.⁷⁶

D. Water Management District Employee Compensation

Greater scrutiny is also being paid to the compensation of water management district personnel. In response to complaints regarding the recent departure of the Executive Director and the Assistant Executive Director from the Southwest Florida Water Management District (SWFWMD), a new provision prohibits severance pay to district employees.⁷⁷ The 1997 Water Act provides a limited exception

67. These program areas include: (1) management and administration; (2) outreach activities; (3) regulatory activities; (4) acquisition, restoration, and public works; (5) operation and maintenance of district lands; (6) water resource planning and monitoring; and (7) lobbying activities. See *id.* § 373.536(5)(c)2.

68. See *id.*

69. See *id.* § 373.536(5)(c)(2)(g).

70. See *id.*

71. See *id.* § 373.536(5)(a).

72. See *id.*

73. See *id.*

74. See *id.*

75. See *id.*

76. See *id.* § 373.536(5)(e).

77. See Act effective July 1, 1997, ch. 97-160, § 33(1)-(3), 1997 Fla. Laws 3002, 3037-38.

where a district is under a contractual duty to grant severance pay.⁷⁸ However, as of July 1, 1997, the districts may not enter into any such contracts.⁷⁹ Thus, existing severance pay covenants will be honored, but no new severance agreements or severance awards will be permissible.⁸⁰

The Legislature acknowledged that there is actual or perceived disparity in pay for water management district employees compared to other state environmental agencies.⁸¹ Responding to this inequity, the Legislature funded a study to examine the compensation of water management district personnel in comparison to similarly situated government employees.⁸² This study should culminate in a report containing findings and recommendations to remedy the discrepancies.⁸³

IV. WATER RESOURCES AND WATER SUPPLY

Repeatedly, Committee Chair Laurent has remarked that the objective of the 1997 Water Act is to provide more water, both for human consumption and for natural systems.⁸⁴ This emphasis on water resource and supply development attempts to avoid the shortages that pit consumptive users against one another, with each seeking a larger allocation of a diminishing resource. To this end, water management districts are, for the first time, directed to actively engage in water resource development.⁸⁵ This is a fundamental shift from prior regulatory approaches that focused mainly on allocation of water.

A. Water Resources and Supply Development

The need for sustainable water supply sources is growing ever more pressing. Although Florida is one of the most water-rich states in the nation, it also has the highest per capita water consumption in the world.⁸⁶ Historically, most of this water was used for mining and agriculture or diverted to the ocean to make former wetlands usable for agriculture or development.⁸⁷ The rising stress to Florida's water resources is most evident on its west coast. Lake levels in Pasco, Hillsborough, and Pinellas counties have dropped dramatically over

78. See *id.* § 33(2)(a), 1997 Fla. Laws at 3037-38.

79. See *id.*

80. See *id.*

81. See *id.* § 34(2), 1997 Fla. Laws at 3038.

82. See *id.* § 34(3), 1997 Fla. Laws at 3038.

83. See *id.* § 34(2), 1997 Fla. Laws at 3038.

84. See Pugh Interview, *supra* note 46.

85. See FLA. STAT. § 373.0831(3) (1997).

86. See Browning, *supra* note 13, at A1.

87. See *id.*

the past ten years, and some lakes have dried up altogether.⁸⁸ The need for water supply development grows each year as the demands on Florida's water resources continue to increase due to an expanding population.

The statute uses several new terms to implement the goals of water resource and water supply development. Many of these are "plans," such as the Florida water plan, district water management plans, and regional water supply plans.⁸⁹ The very term "water resource development" is also new to the statute. This term encompasses just about every form of large scale water control, including flood control, water storage, groundwater recharge augmentation, and any other structural or non-structural program that relates to water resources.⁹⁰ In comparison, "water supply development" is a much more restricted term, concerning only consumptive uses of water, and those facilities that collect, treat, and transmit water.⁹¹ "Water resources development" is what will, hopefully, increase the overall amount of available water. "Water supply development," however, is merely concerned with the capacity to harvest this water and make it available for end users, such as industry, crops, cattle, and municipalities.

The legislative findings of section 373.0831, Florida Statutes, differentiate between the primary responsibilities of water management districts and local governments, water supply authorities, and utilities.⁹² Districts have the primary responsibility for water resource development.⁹³ They should therefore be engaged in research and development issues which can include locating potential sources of supply, determining how much water exists, and developing the means for extracting and delivering the water.⁹⁴ Local governments, water supply authorities, and utilities should engage in water supply development.⁹⁵ They are the wholesalers and retailers of water.⁹⁶ Although the statute does not preclude districts from developing water supply, or other local governments and utilities from working toward better water resources, this differentiation does provide a clearly defined mission for the various entities involved.⁹⁷

The Legislature directed the districts to affirmatively engage in water resource development projects, which will include securing the

88. See *id.*

89. See FLA. STAT. § 373.019(3), (5), (14) (1997).

90. See *id.* § 373.019(19).

91. See *id.* § 373.019(21).

92. See *id.* § 373.0831(1)(a)-(b).

93. See *id.* § 373.0831(1)(a).

94. See *id.* § 373.019(19).

95. See *id.* § 373.0831(1)(b).

96. See *id.* § 373.019(21).

97. See *id.* § 373.0831(1).

necessary funding and using those funds on projects that enhance sustainable water resources.⁹⁸ Furthermore, water management districts must now, for the first time, take into account cumulative impacts on water resources, and seek to insure sustainability of those resources.⁹⁹ Districts must now also promote the replenishment and recapture of water.¹⁰⁰ To accomplish this, water reuse, desalination, and other alternative means of water supply are given funding priority.¹⁰¹

To aid in resource development across water management district boundaries, the Legislature granted districts the authority to enter into interagency agreements with one another.¹⁰² However, all affected local governments must acquiesce before an interagency plan can be finalized.¹⁰³ Once a plan is agreed to, it may designate a lead water management district that will have full administrative authority over, and responsibility for, the project.¹⁰⁴ This designated water management district will also have the regulatory responsibility for the project, and its rules will apply.¹⁰⁵

Section 373.0831(4), Florida Statutes, seeks to spur environmentally desirable water supply development projects by prioritizing water management district funding among various types of projects.¹⁰⁶ Projects that establish dependable, sustainable water sources that are not financially feasible without assistance receive priority funding.¹⁰⁷ Priority funding is also granted to projects that implement reuse, storage, recharge or conservation of water,¹⁰⁸ and to projects that have significant environmental benefits.¹⁰⁹ If a project meets one of these criteria, and also restores a minimum flow or level, it enjoys a “super-priority” and is funded ahead of other priority projects.¹¹⁰

B. Regional Water Supply Plans

One key way in which water resources are to be developed is through regional water supply plans. As part of its planning responsibilities, each district must determine if there will be sufficient wa-

98. See *id.* § 373.0831(3).

99. See *id.* § 373.016(2).

100. See *id.* § 373.016(3)(b).

101. See *id.* § 373.0831(4).

102. See *id.* § 373.046(6).

103. See *id.*

104. See *id.*

105. See *id.*

106. See *id.* § 373.0831(4)(a).

107. See *id.* § 373.0831(4)(a)(1).

108. See *id.* § 373.0831(4)(a)(3).

109. See *id.* § 373.0831(4)(a)(2).

110. *Id.* § 373.0831(4)(b).

ter to meet anticipated needs over the next twenty years.¹¹¹ When a water management district determines that there will be a water supply shortfall for any region, it must develop a twenty-year regional water supply plan.¹¹² This plan must identify all available sources of water, including any “alternative sources.”¹¹³ The plan must then estimate the cost of fully developing each source, list potential sources of funding to accomplish this, and estimate the amount of water that each source will yield.¹¹⁴ The districts must also consider whether the options addressed in the plan will serve the public interest or save overall costs by preventing the loss of natural resources.¹¹⁵ The status of these regional plans must be reported annually to the Governor and the Legislature.¹¹⁶ This report must update the data on the cost of potential sources, as well as describe the district’s progress toward the plan’s goals.¹¹⁷

Due to the pressing water shortages in the west coast area, the SWFWMD has been one of the first districts to actively engage in water resource development. During the late 1980s and early 1990s, the SWFWMD engaged in water resource assessments, similar to the needs and sources analyses now required of all districts.¹¹⁸ The SWFWMD used these assessments to designate Water Use Caution Areas, those areas where there was a danger of a supply shortfall within the district.¹¹⁹ A 1992 needs and sources assessment showed that there would be increasing demands on the region’s water resources through 2020.¹²⁰ These combined studies showed that demand for water was clearly outstripping supply.

To meet this increasing demand, the SWFWMD instituted a multi-stage resource protection plan. In the short term, withdrawal restrictions and conservation measures were used to minimize impact to water resources in the caution area.¹²¹ These measures included educational programs on water use, irrigation research, xeriscape demonstrations, and plumbing retrofits.¹²² The SWFWMD

111. See *id.* § 373.0361(1).

112. See *id.*

113. *Id.* § 373.0361(2)(a)(2).

114. See *id.* § 373.0361(2)(a)(3).

115. See *id.* § 373.0361(2)(e).

116. See *id.* § 373.0361(5).

117. See *id.*

118. See SOUTHWEST FLA. WATER MGMT. DIST., WATER SUPPLY NEEDS AND SOURCES 1990-2020 (1992) [hereinafter WATER SUPPLY REPORT] (on file with the SWFWMD, Brooksville, Fla.).

119. See Douglas Manson et al., New Developments in Consumptive Use Permitting; Water Reuse; Water Use Caution Areas; Minimum Flows and Levels, in 9TH ANNUAL ENVIRONMENTAL PERMITTING SUMMER SCHOOL 365, 369 (Fla. Chamber of Com. 1995).

120. See WATER SUPPLY REPORT, *supra* note 118, at 188.

121. See Manson, *supra* note 119, at 367-68.

122. See *id.*

also relied on the development of alternative resources to diminish ground water withdrawals. These potential alternative sources include reclaimed waste water,¹²³ offstream storage systems,¹²⁴ desalination,¹²⁵ and storm water reuse systems. Although these areas are still short of meeting the anticipated water needs, this advance planning and resource development has been beneficial. For instance, in 1990, thirty-seven percent of the 1076 waste water plants permitted within the SWFWMD accounted for ninety-three percent of the reclaimed water used in the district.¹²⁶ As Florida's population continues to expand, similar alternative source efforts will likely be necessary in other parts of the state.

C. Water Resource Development by Local Government and Private Enterprises

The Legislature has also taken steps to make it easier for local governments and private enterprises to improve water resources. Local governments now have the statutory authority to engage in water resource development.¹²⁷ The new law expressly allows regional water supply authorities and private parties to construct and maintain potable water supply facilities.¹²⁸ These include alternative sources of potable water such as desalination plants.¹²⁹ Additionally, the classification of demineralization concentrate as a potable water by-product, and limited exemptions for its discharge, will make the construction of desalination plants simpler and less expensive. This was specifically intended to spur the construction of the desalination

123. Reclaimed wastewater has always been used to some extent. Generally it is used for irrigation, as an alternative source of disposal. With the growing water shortages in the SWFWMD, wastewater reuse is now seen as a multi-purpose source of water. These new applications for reclaimed wastewater include lake augmentation, aquifer recharge, and wetland rehydration. These applications are currently being tested and funded in cooperation with local governments and the West Coast Regional Water Supply Authority. See *id.* at 369.

124. Surface water has traditionally been stored by the use of in-stream dams, which can lead to a variety of environmental concerns. The SWFWMD is funding an off-stream system that captures stream flow during peak flow periods, and stores it in a series of underground aquifers. This system allows a sustained stream flow to continue as it only captures water during peak flow periods, and goes off-line at other times. See *id.*

125. Although desalination of seawater has never been successful on a large scale in the United States, desalination of brackish water is common throughout Florida. With over 170 brackish water desalination plants, Florida has the largest utilization of desalinated water of any state. The use of desalinated brackish water and, with the proposed West Coast Desalination Plant, seawater, is likely to be more feasible in the future due to the 1997 Water Act's reclassification of desalination concentrates as a potable water by-product. This should make it legally simpler to dispose of concentrates and to spur additional reliance on desalinated water. See *infra* notes 146-50 and accompanying text.

126. See WATER SUPPLY REPORT, *supra* note 118, at 263.

127. See FLA. STAT. § 373.1962(3) (1997).

128. See *id.*

129. See *id.*

plant proposed by the West Coast Regional Water Supply Authority (WCRWSA) for the Tampa Bay area.¹³⁰ Regional authorities may also subsidize private potable water supplies to reduce the wholesale price of the water.¹³¹

The Legislature also provided incentives for reformation of the WCRWSA. The WCRWSA proposed changes in a report to the Legislature dated February 1, 1997, which was later incorporated by reference into the 1997 Water Act.¹³² Under the new statute, the WCRWSA is authorized to implement the governance changes suggested by the report under a voluntary interagency agreement with a minimum twenty-year term.¹³³ The Legislature did not, however, direct the member governments to implement these changes. Instead, it provided strong encouragement for the local governments to make the recommended changes voluntarily.¹³⁴

All member governments are encouraged to voluntarily relinquish their rights to develop potable water sources to the authority.¹³⁵ The WCRWSA would then become the exclusive wholesale water supplier to member governments.¹³⁶ A majority vote of the authority board members would bind all member governments on any funding matter related to water supply, production, or delivery.¹³⁷ Under this system, WCRWSA would be obligated to supply its members' water needs at a uniform per-gallon rate.¹³⁸ This uniform rate would be the authority's sole source of funding for its operations and water supply development projects.¹³⁹ As the exclusive supplier of water, the WCRWSA would have the absolute obligation to meet the needs of member governments.¹⁴⁰ To meet this obligation the authority is authorized to acquire the water supply assets of local governments,

130. This proposed plant will be the largest desalination plant in the United States. See Ronald A. Cristaldi, *Florida's Water Future: A Legislative Proposal for the Distribution of Water Resources in Florida*, 71 FLA. B. J., June 1997, at 88-89. At a cost of over \$200 million, it will provide up to 50 million gallons per day of potable water. See Earle Kimel, *Two Companies Eye Desalination*, CITRUS COUNTY CHRON., Mar. 31, 1995, at A1. However, the per gallon cost of this water could be almost seven times that of other water sources. See *Charlotte County v. Southwest Fla. Water Mgmt. Dist.*, No. 94-5742RP, slip op. at 406 (Fla. Div. of Admin. Hearings Mar. 26, 1997), appeal docketed, No. 97-1626 (Fla. 2d DCA Apr. 22, 1997). Desalinated seawater will cost \$3.40 to \$5.80 per 1000 gallons. See Cristaldi, *supra*, at 91 (citing John E. Potts, *Advantages and Costs of Seawater versus Brackish Water 3*) (undated, prepared for the Fla. Water Law and Regulation Conference)). Conventional sources range from \$.85 to \$1.90 per 1000 gallons. See *id.*

131. See FLA. STAT. § 373.1962(3) (1997).

132. See *id.* § 373.1963(1).

133. See *id.*

134. See *id.*

135. See *id.* § 373.1963(1)(b)(1).

136. See *id.* § 373.1963(1)(b)(2).

137. See *id.* § 373.1963(1)(g).

138. See *id.* § 373.1963(1)(d).

139. See *id.*

140. See *id.* § 373.1963(1)(b)(3).

which would be conveyed to it for an agreed upon value.¹⁴¹ The costs of acquiring existing facilities and developing new ones would be passed on to member governments through the uniform wholesale price system.¹⁴²

If the recommended interagency agreement is entered into, the WCRWSA would be allowed to develop alternative sources of water, including desalination and regional pipelines, in conjunction with the SWFWMD.¹⁴³ The costs for these alternative source facilities will be shared by the authority and the district.¹⁴⁴ Additionally, the authority and the district may enter into cost-sharing agreements with private enterprises to further spread the cost of water supply development.¹⁴⁵

New provisions also ease environmental restriction on the disposal of demineralization concentrate produced by desalination plants. The new law orders the FDEP to classify this concentrate as a potable water by-product, rather than as industrial wastewater.¹⁴⁶ Additionally, the discharge of concentrate from small water utility businesses¹⁴⁷ will be exempt, so long as it does not cause a violation of the total maximum daily load for the water body, and meets applicable water quality standards.¹⁴⁸ However, this will not apply if the concentrate is discharged into Class I or II waters, or into a sole-source aquifer.¹⁴⁹ The concentrate may also be discharged into a domestic wastewater treatment plant or reuse system.¹⁵⁰ These provisions will greatly aid Florida's 170 brackish water desalination plants.

V. PLANNING

The Florida Statutes have always been replete with water plans. However, the state water use plan and the state water policy were disjuncted directives that failed to generate an action agenda. Some commentators have attributed this lack of regulatory initiative to inadequate funding and to the regionalization of water authority.¹⁵¹

141. See *id.* § 373.1963(1)(c).

142. See *id.* § 373.1963(1)(d).

143. See *id.* § 373.1963(1)(f).

144. See *id.*

145. See *id.*

146. See *id.* § 403.0882(2).

147. A small water utility is defined as one that has a concentrate discharge of less than 50,000 gallons per day. See *id.* § 403.0882(1)(c).

148. See *id.* § 403.0882(3)(a).

149. See *id.* Class I or Class II waters are waters designated for potable water supplies or protected for shellfish propagation or harvesting. See FLA. ADMIN. CODE ANN. r. 62-302.400 (1997).

150. See *id.* § 403.0882(4).

151. See Cristaldi, *supra* note 130, at 90; see also Richard G. Hamann, Consumptive Water Use Permitting, in I FLA. ENVTL. & LAND USE L. 10-9 (1991).

The Legislature has addressed some of these concerns by increasing water management district oversight, and clarifying the FDEP's role in water resource planning.

The new Florida water plan simplified water planning considerably by creating a unified planning document.¹⁵² This plan is to be a cooperative effort between the FDEP, water management districts, and regional water supply authorities.¹⁵³ It will guide all FDEP water programs, including programs for water supply, flood control, water quality standards, floodplain management, and management of natural systems.¹⁵⁴ The Florida water plan also incorporated several narrower planning documents. These include the "water resource implementation rule" (WRIR), which replaced the "state water policy rule" and set regulatory goals for the water management districts.¹⁵⁵ The Florida water plan also incorporated the various "district water management plans," which regulate the same issues as the Florida water plan, but on a district-wide level, thereby improving the consistency between the various levels of planning.¹⁵⁶

The WRIR is an important tool for the FDEP to control water management district programs, policies, and rules. The FDEP is to use this authority by promulgating rules that are consistent with the statutory policies and directives relating to water.¹⁵⁷ If a water management district rule is inconsistent with the WRIR, or any other part of the Florida water plan, the FDEP can order the water management district to amend or repeal the rule.¹⁵⁸ Special rulemaking procedures apply to the WRIR.¹⁵⁹ Unlike other portions of the Florida water plan, the WRIR can only be changed through formal rulemaking.¹⁶⁰ Any amendments to the rule must be promulgated by the Secretary of the FDEP, and forwarded to the President of the Senate and the Speaker of the House within seven days.¹⁶¹ Also, the amended rule will not become effective until the conclusion of the next regular legislative session.¹⁶² This provision ensures legislative

152. See FLA. STAT. § 373.036(1) (1997). This plan replaces the former state water use plan. See *id.* § 373.036 (1995). The Florida water use plan differs in scope from the former plan as it is a truly comprehensive planning document. Additionally, the plan is given greater flexibility and authority through the use of the water resource implementation rule. See *id.* § 373.036(1)(d).

153. See *id.* § 373.036(1).

154. See *id.* § 373.036(1)(a).

155. See *id.* § 373.036(1)(d).

156. See *id.* § 373.036(2).

157. See *id.* § 373.036(1)(d).

158. See *id.* § 373.114(2)(b).

159. See *id.* § 373.036(1)(d).

160. See *id.*

161. See *id.*

162. See *id.*

participation in state water policy by giving the Legislature sufficient time to take action regarding any changes to the WRIR.

As part of a comprehensive planning effort, water management districts must engage in planning that is similar to the Florida water plan, except on a smaller scale. These district water management plans, like the Florida water plan, are to be comprehensive efforts to manage water quality and supply, flood control and flood plain management, and natural systems.¹⁶³ Additionally, the district plans must establish criteria and methodologies for setting minimum flows and levels.¹⁶⁴ The districts must engage in careful water supply planning as part of the district water management plan.¹⁶⁵ To accomplish this, the district may divide into several water supply planning regions, or may utilize a district-wide planning region.¹⁶⁶ In either case, the district must develop a water supply assessment that identifies all anticipated sources of water, planned conservation efforts, and all anticipated water needs.¹⁶⁷ The district must then evaluate this data to determine if the sources of water will be sufficient to meet the anticipated need.¹⁶⁸ If there will be a shortfall the district must develop a water supply plan for the region.¹⁶⁹

The district water management plans are developed along a twenty-year planning horizon.¹⁷⁰ These plans are to be cooperative efforts, utilizing participation from affected parties in a manner similar to the Florida water plan.¹⁷¹ Districts must develop their plans in cooperation with regional water supply authorities, local

163. See *id.* § 373.036(2).

164. See *id.* § 373.036(2)(b)(1); discussion *infra* Part VI (discussing other provisions affecting minimum flows and levels).

165. See FLA. STAT. § 373.036(2)(b)(4) (1997).

166. See *id.* § 373.036(2)(b)(2). This trend toward localizing water policy has been criticized by some commentators. See, e.g., Cristaldi, *supra* note 130, at 90. The original Model Water Code envisioned a comprehensive statewide water policy initiative, with the water management districts engaged in mere administrative functions. See Hamann, *supra* note 151, at 10-9. According to this argument, the localization of authority in the water districts is the source of "local sources" conflicts, and leads to inefficient allocation of water. See Cristaldi, *supra* note 130, at 91. If the statutory scheme utilized a statewide planning and distribution process there would be sufficient water for all areas of the state, because the state as a whole has sufficient water to meet its needs. See *id.* Under this proposed system, the FDEP would take responsibility for all planning level decisions, and the districts would be relegated to administrative and ministerial duties. See *id.* This argument for statewide control finds support in the Model Water Code, and from its drafters. See Richard C. Ausness, *The Influence of the Model Water Code on Water Resource Management in Florida*, 3 J. LAND USE & ENVTL. L. 1, 13 (1987); Frank E. Maloney & Richard C. Ausness, *Administering State Water Resources: The Need for Long-Range Planning*, 73 W. VA. L. REV. 209, 213 (1971).

167. See FLA. STAT. § 373.036(2)(b)(4)(a) (1997).

168. See *id.* § 373.036(2)(b)(4)(b).

169. See *supra* notes 111-17 and accompanying text.

170. See FLA. STAT. § 373.036(2)(a) (1997).

171. See *id.*

governments, and interested persons.¹⁷² Public participation is further enhanced by requiring the governing board to hold a public hearing at least thirty days before the close of the planning process.¹⁷³

These various planning provisions seek to promote a more long-term approach to water management. This is critically necessary, particularly if Florida's economic and population boom is to continue. These factors can only increase the demands for low-cost, high-quality water. Because of the need to build large-scale water infrastructure to meet these demands, it is increasingly more important to promote water resource development at an earlier stage.

VI. MINIMUM FLOWS AND LEVELS

The most contentious issue in the new law, and during the last three legislative sessions, has been minimum flows and levels. In 1972, the Legislature directed the establishment of minimum flows and levels for all surface waters and aquifers,¹⁷⁴ but, by and large, the water management districts have failed to implement this directive.¹⁷⁵ In the early 1990s citizens' groups concluded that saltwater intrusion, wetland loss, exotic infestation, and lowering of the groundwater tables could all be attributed to deteriorating minimum flows and levels.¹⁷⁶ Citizens initiated litigation to force the water management districts to establish minimum flows and levels to prevent further degradation to Florida's water resources.¹⁷⁷ Minimum flows and levels became a rallying cry for environmental restoration. However, existing users feared that the use of minimum flows and levels would reduce their permitted withdrawals. This divisiveness was worsened by the fact that the 1995 version of section 373.042, Florida Statutes, provided only the most general guidance for setting minimum flows and levels, merely requiring that they be set at the point where additional withdrawal would cause "significant harm" to area water resources or the ecology of the area.¹⁷⁸ There was no guidance as to the methodology to be used, nor was the meaning of "significant harm" defined.

172. See *id.*

173. See *id.*

174. See Act effective July 1, 1972, ch. 72-299, § 6, 1972 Fla. Laws 1082, 1091.

175. See *Pinellas County v. Southwest Fla. Water Mgmt. Dist.*, FLWAC No. RFR 95-001 (Feb. 14, 1996); *Concerned Citizens of Putnam County For Responsive Gov't, Inc. v. St. John's River Water Mgmt. Dist.*, 622 So. 2d 520, 522 (Fla. 5th DCA 1993); FLA. H.R. COMM. ON NAT. RESOURCES, ANALYSIS AND MODELING OF WATER SUPPLY ISSUES FOR THE REGION BOUNDED BY HILLSBOROUGH, MANATEE, PASCO, AND PINELLAS COUNTIES 14 (1994) (on file with comm.).

176. See *Concerned Citizens*, 622 So. 2d at 521.

177. See *id.*

178. FLA. STAT. § 373.042(1) (1995).

A. New Criteria for Setting Minimum Flows and Levels

In 1996, a legislative debate ensued over whether minimum flows and levels determinations were to be made without any regard to changes that have occurred to the natural system. Horror stories of overzealous water use restoration and rampant environmental degradation were put forth by persons on both sides of this issue.¹⁷⁹ The solution to this discord seemed to be in marrying water supply initiatives to realistic minimum flows and levels. To this end, sections 373.042 and 373.0421, Florida Statutes, attempt to strike a balance between continuing economic growth and prosperity and water resource protection.

To achieve this balance, the criteria for minimum flows and levels was changed. Water management districts must now place much less reliance on re-establishing historic levels.¹⁸⁰ Additionally, the Legislature has required the districts to take into account any structural changes to the water body in establishing the minimum flow or level.¹⁸¹ The Legislature also expressly noted that many water bodies no longer serve their historic hydrologic functions.¹⁸² Accordingly, the use of historical data to set the minimum flow or level for these water bodies would be inappropriate.¹⁸³ Moreover, restoration of the historic flow for these water bodies may not be feasible, technologically or economically, or may cause negative hydrologic impacts.¹⁸⁴

B. Redefining the District's Requirements for Setting Minimum Flows and Levels

Each water management district must prepare an annual report to the FDEP outlining the district's "priority list" for setting mini-

179. See Pugh Interview, *supra* note 46.

180. See FLA. STAT. § 373.0421(1) (1997).

181. See *id.*

182. See *id.* § 373.0421(1)(b)(1).

183. See *id.*

184. See *id.* The consequences of these provisions to Hillsborough, Pinellas, and Pasco counties is seemingly unclear and left to the courts. Regarding the establishment of minimum flows and levels, the 1997 Water Act states that, to the extent that the 1997 version of section 373.0421(2), Florida Statutes, conflicts with the 1996 version of section 373.0421, the 1996 version governs. See Act effective July 1, 1997, ch. 97-160, § 28(2), 1997 Fla. Laws 3002, 3031-32. This creates the issue of whether the structural alterations that have occurred in those counties should affect establishment of minimum flows and levels. The language relating to conflicts between the two statutes relates to the implementation section of the Act; therefore, the provisions in section 373.0421(1) regarding the establishment of minimum flows and levels will apply to these counties. However, the need to engage in regional planning that appears in section 373.0421(2) must yield to the prior version of the statute. See *id.* Similarly, the peer review provision of the 1997 Water Act does not apply to Hillsborough, Pinellas, and Pasco counties, which remain governed by 1996 legislation. See *id.*

minimum flows and levels.¹⁸⁵ The priority list is really a schedule for establishing minimum flows and levels for surface water bodies and aquifers within each district. The priority list must also indicate which water bodies the district will voluntarily subject to independent scientific peer review.¹⁸⁶ To facilitate the production of these documents, the priority list is exempt from any chapter 120 administrative challenges.¹⁸⁷

One of the most important facets of this legislation is that the mere establishment of the priority list satisfies the water management district's obligation with regard to minimum flows and levels.¹⁸⁸ The water management districts will no longer be subject to water-body-specific litigation demanding that a level or flow be fixed.¹⁸⁹ This feature of the new law recognizes the reality that minimum flows and levels cannot be set for all surface water bodies and aquifers within the foreseeable future. In *Concerned Citizens of Putnam County For Responsive Government, Inc. v. St. John's River Water Management District*,¹⁹⁰ the Fifth District Court of Appeals ruled that the prior version of section 373.042, which stated that the districts "shall" establish minimum flows and levels, created a mandatory duty to promulgate minimum flows and levels.¹⁹¹ Although the statute did not set a time frame for establishment of minimum flows and levels, the court held that the use of the word "shall" required the minimum flows and levels to be set within a reasonable time.¹⁹² After *Concerned Citizens*, the Governor and Cabinet, sitting as the Florida Land and Water Adjudicatory Commission (FLWAC), ordered two districts to compile schedules for setting minimum flows and levels.¹⁹³ In one of these cases, the FLWAC also ordered the SWFWMD to complete all minimum flows and levels within its water use caution areas by 2001.¹⁹⁴ The 1997 Water Act incorporated scheduling requirements similar to the FLWAC orders.¹⁹⁵ However, recognizing the difficulty in setting levels for Florida's large number of water bodies, the Legislature did not include any mandatory lan-

185. See FLA. STAT. § 373.042(2) (1997).

186. See *id.*

187. See *id.*

188. See *id.*

189. See, e.g., *Concerned Citizens of Putnam County for Responsive Gov't, Inc. v. St. John's River Water Mgmt. Dist.*, 622 So. 2d 520, 521 (Fla. 5th DCA 1993) (finding that the establishment of minimum flows and levels is mandatory).

190. 622 So. 2d 520, 522 (Fla. 5th DCA 1993).

191. *Id.* at 523.

192. See *id.*

193. See *Pinellas County v. Southwest Fla. Water Mgmt. Dist.*, FLWAC No. RFR 95-001 (Feb. 14, 1996); *Lake Brooklyn Civic Assoc., Inc. v. St. Johns River Water Mgmt. Dist.*, FLWAC No. RFR 93-003 (Sept. 30, 1993).

194. See *Pinellas County*, FLWAC No. RFR 95-001 at 7.

195. See FLA. STAT. § 373.042(2)-(4) (1997).

guage requiring districts to set minimum flows and levels. Thus, the Legislature removed the basis for any future suits attempting to enforce promulgation of minimum flows and levels.

Minimum flows and levels are no longer required for any water bodies under twenty-five acres in size.¹⁹⁶ However, if the water body has significant hydrologic, economic, or environmental value, either individually or in conjunction with other water bodies, then the minimum flow or level must still be set.¹⁹⁷ A similar provision applies to artificial water bodies.¹⁹⁸ These water bodies do not require a minimum flow or level unless they have significant hydrologic value or are essential to the water resources of the area.¹⁹⁹ However, unlike the small size exclusion, the exclusion for artificial water bodies does not apply within the Everglades Protection Area.²⁰⁰

The 1997 Water Act also attempted to strengthen the protection for those minimum flows and levels that have been set. If a water management district projects that any minimum flow will be violated within the next twenty years, it must implement a recovery or prevention strategy as soon as possible.²⁰¹ The projected violation of the minimum flow or level also triggers the duty to engage in regional supply planning.²⁰² The recovery strategy will then be incorporated into a regional water supply plan for the area of the projected violation.²⁰³

The delicate balance between the need for minimum flows or levels to protect water bodies and water users' interest in protection from withdrawal reductions is found in negotiated language incorporated into section 373.0421(2), Florida Statutes. The task force and Legislature realized that, in certain instances, minimum flows and levels cannot be achieved or maintained without reducing permitted withdrawals. To equitably achieve and maintain a minimum flow or level under such circumstances, the 1997 Water Act provides that the district must develop alternative water supplies concurrently with any reductions in permitted withdrawals.²⁰⁴ Furthermore, the water supplies that are developed must be allocated to the existing users to offset the reductions.²⁰⁵ This language inextricably ties a water management district's desire to engage in environmental restoration to its ability to engage in productive water resource develop-

196. See *id.* § 373.0421(1)(b)(2).

197. See *id.*

198. See *id.* § 373.0421(1)(b)(3).

199. See *id.*

200. See *id.* §§ 373.0421(1)(b), .4592 (defining the Everglades Protection Area).

201. See *id.* § 373.0421(2).

202. See *id.*

203. See *id.*

204. See *id.*

205. See *id.*

ment. Thus, the environment should be protected without inequitably reducing groundwater withdrawals or stifling economic development.

C. Scientific Review of Minimum Flows and Levels

As with other provisions in the 1997 Water Act that increase water management district accountability, decisions on minimum flows and levels are subject to greater administrative checks on district discretion. Affected persons now have new power to affect the setting of minimum flows and levels.²⁰⁶ Any substantially affected person can petition for “independent scientific peer review” of a proposed minimum flow or level.²⁰⁷ The costs of peer review are split equally between the water management district and each party that requests review.²⁰⁸ Water management districts may also voluntarily subject any proposed minimum flow or level to peer review.²⁰⁹ The proposed minimum flow or level will then be reviewed by a panel of experts.²¹⁰ These experts can be any persons with expertise in hydrology, hydro-geology, limnology, biology, or other disciplines.²¹¹ The statute envisions a cooperative effort to choose this panel of experts.²¹² However, if there is no agreement between the parties, either the district involved or the FDEP will make the decision.²¹³ Once chosen, the panel must submit its report and recommendations to the district governing board within 120 days.²¹⁴ Although the panel’s recommendations are not binding, the governing board must give the report significant weight when establishing the minimum flow or level.²¹⁵ This report is also admissible evidence in any subsequent administrative challenge to the minimum flow or level, despite its hearsay nature.²¹⁶

206. The peer review provisions do not apply to water bodies in Hillsborough, Pinellas, and Pasco counties, which have their own peer review procedure as established by chapter 96-339, Florida Laws. See Act effective July 1, 1997, § 28(2), 1997 Fla. Laws 3002, 3031.

207. FLA. STAT. § 373.042(4)(a) (1997). This petition can be made to either the FDEP or the relevant district’s governing board. See *id.* A grandfather provision prevents this from being applied to any minimum flows and levels for which formal notice of adoption was published prior to May 2, 1997. See *id.* § 373.042(4)(d).

208. See *id.* § 373.042(4)(b).

209. See *id.* § 373.042(4)(a). If the proposed minimum flow or level has been subjected to independent scientific peer review at the request of either the FDEP or the district, then interested persons will no longer have the right to petition for review. See *id.* § 373.042(4)(c). Each proposed minimum flow or level will therefore be subjected to independent scientific peer review only once. See *id.*

210. See *id.*

211. See *id.*

212. See *id.* § 373.042(4)(b).

213. See *id.*

214. See *id.*

215. See *id.*

216. See *id.* § 373.042(5).

The key to successful use of these new minimum flows and levels provisions is, of course, combining water resource development with realistically established minimum flows and levels. The major conflicts ahead will be over who gets water inexpensively. Industry, agriculture, and public supply interests all want the economically desirable ground and surface water. Therefore, the challenge is to conserve water to the maximum extent possible, and to spread the cost of alternative water supply as equitably as possible.

VII. CONCLUSION

The 1997 Water Act sets forth a course of action for water resource and water supply development. The water management district's role as water resource managers has been clarified. The framework put forth by the 1997 Water Act must now be reconciled with historical policies that artificially deflate the cost of water and which seek to implement environmental restoration through restrictions in consumptive use.

In 1997, the Legislature showed its schizophrenia on water supply development and fiscal regulation by failing to pass a measure intended to allow private water utilities the right to recover environmental compliance cost or investments for prudent long-term capital facility improvement.²¹⁷ Florida has remarkably few private water utilities.²¹⁸ The current fiscal regulations imposed on private water utilities create a major disincentive that discourages the venture capital needed to maximize water supply development. It is hoped that the 1998 Legislature will address this issue and reconcile the desire to stimulate water supply development with the Public Service Commission's practice of maintaining artificially low consumer water rates.²¹⁹

The penchant to use consumptive use of water as the means by which environmental restoration is accomplished was demonstrated by the minimum flows and levels proposed by the SWFWMD in September of 1997 for the Northern Tampa Bay area.²²⁰ These proposed minimum flows and levels exemplify a desire to restore wetlands and natural systems by significantly reducing existing water withdrawals. Radical cutbacks in water withdrawal by public water suppliers cannot be the restoration tool of choice without lengthy and conten-

217. See Fla. HB 1699 (1997); Fla. SB 1368 (1997).

218. Florida has 210 Florida Public Service Commission regulated water utilities compared to the 8537 reported as regulated nationwide. See JANICE A. BEECHER, INVENTORY OF COMMISSION REGULATED WATER/WASTEWATER UTILITIES App. 14-15 (1995).

219. See Fla. HB 3185 (1998).

220. See Southwest Fla. Water Mgmt. Dist., minutes of governing board meeting at 1 (Sept. 9, 1997); 23 Fla. Admin. W. 5045-85 (Sept. 19, 1997) (listing proposed rules 40D-2, 40D-4, and 40D-8).

tious litigation. The establishment and implementation of reasonable minimum flows and levels will be the battleground between natural system protection and the adequate protection of water for existing and reasonably foreseeable future water users. The 1997 Water Act provides water managers with the weapons needed to wage this battle, but it also provides the tools for a negotiated settlement of the water wars. The direction that will be plotted is now up to the combatants.