

Fall 2014

The Failure and Future of Lake Okeechobee Water Releases: A Quasi-Governmental Solution

Jacquelyn A. Thomas

Follow this and additional works at: <https://ir.law.fsu.edu/lr>



Part of the Constitutional Law Commons, Environmental Law Commons, State and Local Government Law Commons, and the Water Law Commons

Recommended Citation

Jacquelyn A. Thomas, *The Failure and Future of Lake Okeechobee Water Releases: A Quasi-Governmental Solution*, 42 Fla. St. U. L. Rev. 285 (2017) .
<https://ir.law.fsu.edu/lr/vol42/iss1/10>

This Note is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

THE FAILURE AND FUTURE OF LAKE OKEECHOBEE WATER RELEASES: A QUASI-GOVERNMENTAL SOLUTION

JACQUELYN A. THOMAS*

I.	INTRODUCTION.....	285
II.	THE HISTORY AND CURRENT REGIME SURROUNDING THE LAKE OKEECHOBEE BASIN	287
	<i>A. How Did We Get Here?</i>	287
	<i>B. The Senate Select Committee on Indian River Lagoon and Lake Okeechobee Basin</i>	290
III.	JURISDICTION OVER NAVIGABLE WATERWAYS	291
	<i>A. The Case Law Defining Navigability</i>	292
	<i>B. The Clean Water Act</i>	294
IV.	FEDERALISM AND THE QUASI-GOVERNMENTAL ORGANIZATION.....	299
	<i>A. Public-Private Partnership: The Quasi-Governmental Organization</i>	300
	<i>B. Point/Counterpoint: Army Corps Versus FDEP Versus Quasi- Governmental Organization</i>	302
	<i>C. Criticisms of the Hybrid Model</i>	308
V.	THE QUASI-GOVERNMENTAL COMMITTEE OF THE LAKE OKEECHOBEE BASIN..	309
VI.	CONCLUSION	312

I. INTRODUCTION

The events that unfolded during the summer of 2013 with respect to Lake Okeechobee and the surrounding estuaries are tragic and unacceptable. The St. Lucie River and Caloosahatchee River estuaries were devastated after the Army Corps of Engineers (Army Corps) released billions of gallons of polluted fresh water from Lake Okeechobee into the estuaries during a particularly rainy season.¹ The outdated Herbert Hoover Dike surrounding Lake Okeechobee can only withstand so much water pressure, and with water levels approaching the maximum level of safety, the Army Corps chose to release lake water into the estuaries to the east and west rather than risk a breach of the dike, which would flood cities and farmland to the south.²

During and after these events, local citizens, nonprofit environmental organizations, and local and state politicians were vocal in their collective opposition to, and disapproval of, the Army Corps'

* J.D. 2014, *magna cum laude*, Certificate in Environmental, Land Use, and Energy Law with Highest Honors, Florida State University College of Law. I would like to thank Professor Garrick Pursley for his help and guidance during my time in law school. I would also like to thank my family for their unconditional love and support, with a special thanks to my father, who from an early age instilled in me a passion to think critically about this world in which we live.

1. Lizette Alvarez, *In South Florida, a Polluted Bubble Ready to Burst*, N.Y. TIMES (Sept. 8, 2013), http://www.nytimes.com/2013/09/09/us/lake-okeechobee-in-florida-a-polluted-bubble-ready-to-burst.html?pagewanted=1&_r=0.

2. *Id.*

choices regarding Lake Okeechobee water releases. The Army Corps maintains plenary jurisdiction over the dike and the regulation of water releases under the Rivers and Harbors Act of 1899 and the Clean Water Act (CWA),³ and there are allegations that the agency has failed in its mission to properly regulate and maintain the infrastructure that keeps this delicate ecosystem in a constant state of flux.⁴ Many people called for reforms, and in February 2014, the Florida Senate sent a letter to Congress asking that it transfer authority over water releases from the Army Corps to the Florida Department of Environmental Protection (FDEP).⁵

A full assessment of the failed regulation of Lake Okeechobee and the surrounding estuaries is beyond the scope of this Note. Rather, this Note focuses on a narrower aspect of the problem: the Army Corps' plenary jurisdiction over the Herbert Hoover Dike and the regulation of water releases into the estuaries. It discusses the advantages and disadvantages of retaining jurisdiction in the Army Corps versus transferring jurisdiction to the FDEP, and it reaches the following conclusion: neither is best suited to manage this problem. Therefore, this Note proposes the transfer of jurisdictional power from the Army Corps to a new quasi-governmental commission composed of various interested parties—public and private—at the federal, state, and local level. This commission would make decisions about the regulation and maintenance of Lake Okeechobee and the Herbert Hoover Dike. Ideally, it would also oversee the implementation of short- and long-term restoration plans—both of which are already being discussed—to stop or significantly reduce the water released into the estuaries.⁶ There are several reasons why this solution is preferable to either the Army Corps maintaining jurisdiction or the FDEP obtaining jurisdiction. As will be discussed in greater depth below, a quasi-governmental organization would: (1) provide management flexibility and efficiency, (2) represent and incorporate the interests of various parties, (3) utilize the institutional knowledge and expertise of those who are closer to the resource, and (4) have the

3. See *infra* Part III.

4. Andy Reid, *Scott Blames Feds for Lake Okeechobee Flooding Threats, Draining Problems*, SUN SENTINEL (Aug. 20, 2013), http://articles.sun-sentinel.com/2013-08-20/news/fl-lake-okeechobee-draining-help-20130820_1_caloozahatchee-dike-lake-okeechobee (“Blaming ‘inaction’ by the Army Corps of Engineers for the lake flooding threats and the polluting discharges, Scott called for an immediate influx of federal spending on strengthening the lake’s dike and in backlogged Everglades restoration projects that are supposed to create alternatives for dumping lake water to the east and west.”).

5. See *infra* notes 25-31 and accompanying text.

6. SELECT COMMITTEE ON INDIAN RIVER LAGOON AND LAKE OKEECHOBEE BASIN, FINAL REPORT 14-18 (Nov. 8, 2013) [hereinafter SELECT COMMITTEE FINAL REPORT], available at <http://www.flsenate.gov/usercontent/topics/irlllob/finalreport.pdf>; Alvarez, *supra* note 1 (discussing various proposals and projects).

ability to obtain private funding in a time of public funding reductions and constrained budgets.

Part II briefly summarizes the history of Lake Okeechobee and the events that unfolded in 2013 during and after the water releases that overwhelmed the estuaries. Part III discusses the history of the Army Corps' jurisdiction over navigable waterways, including its expansion under the CWA. Then, Part IV analyzes arguments for and against reserving the Army Corps' jurisdiction over Lake Okeechobee water releases and the Herbert Hoover Dike. It also argues for a cooperative federalism regime in which a quasi-governmental organization is formed, which, as will be explained, is the best solution for balancing the various interests of all parties involved. Part V highlights what such a transfer of power would look like and how a quasi-governmental organization could be formed. Part VI concludes.

II. THE HISTORY AND CURRENT REGIME SURROUNDING THE LAKE OKEECHOBEE BASIN

A. *How Did We Get Here?*

The regulation of the Lake Okeechobee Basin is complex, and the problem has existed for decades.⁷ At 730 square miles, Lake Okeechobee is the largest lake in the southeastern United States, though it is extremely shallow, with an average lake-wide depth of nine feet.⁸ Lake Okeechobee naturally receives water from the north, "from a watershed . . . that includes the Upper Kissimmee Chain of Lakes, the Kissimmee River," and other smaller lakes, creeks, and drainage basins.⁹ The Eleventh Circuit recently explained the history and current state of the lake, which is worth quoting at length:

Historically, the lake had an ill-defined southern shoreline because during rainy seasons it overflowed, spilling a wide, shallow sheet of water overland to the Florida Bay. "But progress came and took its toll, and in the name of flood control, they made their plans and they drained the land."

In the 1930s the Herbert Hoover Dike was built along the southern shore of Lake Okeechobee. It was intended to control flooding but failed during the hurricanes of 1947 and 1948. Con-

7. Andy Reid, *People Criticize Lake Okeechobee Draining Delays*, SUN SENTINEL (Aug. 9, 2013), http://articles.sun-sentinel.com/2013-08-09/news/fl-lake-pollution-response-20130808_1_caloosahatchee-lake-okeechobee-u-s-sugar-land.

8. *Restoring Lake Okeechobee*, S. FLA. WATER MGMT. DIST., <http://my.sfwmd.gov/portal/page/portal/xweb%20protecting%20and%20restoring/lake%20okeechobee> (last visited Jan. 18, 2015).

9. R. THOMAS JAMES & JOYCE ZHANG, 2008 SOUTH FLORIDA ENVIRONMENTAL REPORT 10-5 (2008), available at http://www.sfwmd.gov/portal/page/portal/pg_grp_sfwmd_sfer/portlet_sfer/tab2236041/volume1/chapters/v1_ch_10.pdf.

gress then authorized the Central and Southern Florida Flood Project; as part of it the Army Corps of Engineers expanded the Hoover Dike and built pump stations including S-2, S-3, and S-4. Under the modern version of that project, nearly all water flow in South Florida is controlled by a complex system of gates, dikes, canals, and pump stations.

The area south of Lake Okeechobee's shoreline was designated the Everglades Agricultural Area. The Corps dug canals there to collect rainwater and runoff from the sugar cane fields and the surrounding industrial and residential areas. Not surprisingly, those canals contain a loathsome concoction of chemical contaminants including nitrogen, phosphorous, and un-ionized ammonia. The water in the canals is full of suspended and dissolved solids and has a low oxygen content.

Those polluted canals connect to Lake Okeechobee, which is now virtually surrounded by the Hoover Dike.¹⁰

The above passage describes how pollution makes its way into the lake. This is an important and controversial problem in itself and has been the subject of multiple lawsuits.¹¹ However, this Note focuses on what happens next in the regulation of this intricate water system.

When the water level of Lake Okeechobee reaches its limit, the Army Corps releases the polluted fresh water into the delicate St. Lucie River and Caloosahatchee River estuaries.¹² This is nothing new; the Army Corps has been overseeing water releases for many years. The difference is that during the summer of 2013, heavy rain caused the water level to rise so quickly that the Corps was forced to open the proverbial floodgates and inundate the estuaries with polluted fresh water.¹³ The estuaries are composed of "brackish water with higher salinity levels [to] support a delicate ecosystem. The fresh water lowered the salinity levels and oysters, sea grasses and other wildlife began dying."¹⁴ Toxic algae bloomed, and water conditions were so poor in August that signs were posted to warn people to

10. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1214 (11th Cir. 2009) (footnotes omitted).

11. *See, e.g., id.*; *see also* *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1192-93 (11th Cir. 2009) (making parallel arguments to those made in *Friends of the Everglades*); *Fla. Wildlife Fed., Inc. v. U.S. Army Corps of Eng'rs*, No. 4:12cv355-RH/CAS, 2013 WL 5436707 (N.D. Fla. Sept. 27, 2013) (alleging the Army Corps is operating water-control structures along the Okeechobee Waterway in a manner that violates state water-quality standards).

12. Liz Balmaseda, *Corps Increases Flow of Lake O Waters into St. Lucie Estuary, Caloosahatchee River; Move Follows Environmental Problems*, PALM BEACH POST (Sept. 21, 2013, 10:56 AM), <http://www.palmbeachpost.com/news/news/corps-increases-flow-of-lake-o-waters-into-st-luci/nZ4N4/>.

13. *Id.*

14. *Id.*

stay out of the water.¹⁵ One only needs to see the photographs of brown water pouring out of the lake and into the rivers; the massive, toxic brown and green algae blooms overtaking the naturally vibrant blue water; and dead flora and fauna (including manatees) to comprehend the seriousness of this problem.¹⁶ The releases have had negative effects on the region's economy, as well.¹⁷

However, it is important to note that water releases from Lake Okeechobee are not the sole cause of this delicate ecosystem's decline.¹⁸ "Rather it has been a combination of factors that have resulted in what some scientists have referred to as 'the perfect storm.'"¹⁹ Comprehensive regulation of the lake and its natural and artificial tributaries is necessary to solve this problem. Water releases into the surrounding estuaries, however, have a direct negative impact on the health of these ecosystems, and the releases need to be addressed as part of a complete restoration plan.

In any event, residents are angry, frustrated, and powerless, and the overlapping participation of several entities can be confusing. Is Congress, the Army Corps, the U.S. Environmental Protection Agency (EPA), the Florida Legislature, the state's Governor, FDEP, or the South Florida Water Management District (SFWMD) to blame? Depending on whom you ask, the fault allocation among the various entities is likely to change. At the very least, the federal government is not solely to blame, even if Florida Governor Rick Scott currently disagrees.²⁰ For example, when Charlie Crist was governor, the state began constructing a water reservoir for use as an alternative to releasing water into the estuaries, but construction was later abandoned after spending millions of dollars on it.²¹ Also, environmentalists point out that Governor Scott and the Florida Legislature have cut funding to the SFWMD in recent years and that "inexperienced managers" have been appointed to the governing board.²² And Governor Scott only turned his attention to Lake Okeechobee after the

15. *Id.*

16. *Devastating Photos of Florida Pollution Will Fill You with Rage*, HUFFINGTON POST (Oct. 3, 2013, 8:52 AM), http://www.huffingtonpost.com/2013/10/02/lake-okeechobee-pollution_n_4031154.html. The photographs come from Congressman Patrick Murphy's official Facebook page. Last summer, he asked local residents to send him photos of the devastation, which he then compiled into an album of over one hundred photos entitled, "Show Congress the Crisis of Our Waterways." *See id.*

17. *See* SELECT COMMITTEE FINAL REPORT, *supra* note 6, at 10; Reid, *supra* note 7.

18. SELECT COMMITTEE FINAL REPORT, *supra* note 6, at 1.

19. *Id.*

20. Reid, *supra* note 4.

21. *Discharges a Symbol of Failed Water Policies*, SUN SENTINEL (July 25, 2013), http://articles.sun-sentinel.com/2013-07-25/news/fl-dlyons-editorial-dumping-20130725_1-calooahatchee-water-district-hoover-dike.

22. Alvarez, *supra* note 1.

events of last summer.²³ Nevertheless, the fact remains that the Army Corps maintains plenary jurisdiction over the Herbert Hoover Dike and water releases into the estuaries.²⁴ Hopefully what happened last summer will finally act as the catalyst for reform; not piecemeal, ad hoc fixes that deal only with immediate issues, but real reform about the manner in which this extremely important, delicate, and complex water system is regulated.

*B. The Senate Select Committee on Indian River
Lagoon and Lake Okeechobee Basin*

Due to the growing concern over environmental damage from continued water releases and questionable decision-making by the Army Corps, the Florida Senate Select Committee on Indian River Lagoon and Lake Okeechobee Basin (IRLLOB) was formed on July 10, 2013.²⁵ The Select Committee's purpose was to review water management policies in the Basin, assess the environmental impacts of water releases, identify options for improvement at the state and federal level, and "[d]evelop recommendations for improved water management."²⁶ The Select Committee released a report on November 8, 2013, in which it "recommends amending the operational jurisdiction of the Army Corps of Engineers to give the State of Florida, specifically the Department of Environmental Protection, authority over regulatory releases when the risk of dike failure is less than 10 percent."²⁷ In addition, when the risk of dike failure is greater than ten percent, the report discusses procedures for providing the Army Corps with 24-hours' notice before the State of Florida decides whether to maintain control or to temporarily cede control to the Army Corps.²⁸ As a result of the Select Committee's report, State Sena-

23. *See id.*

24. The South Florida Water Management District published its *Final Adaptive Protocols for Lake Okeechobee Operations* in 2010, which were developed in cooperation with the Army Corps and the FDEP. The introduction summarizes the evolution of decision-making regarding Lake Okeechobee water releases from the early 1990s to present and highlights the relationship between the SFWMD and the Army Corps. It is true that the two entities have worked together to undertake studies of the issue, but in the end, the SFWMD (or any other entity) is limited to making recommendations, requests, and suggestions to the Army Corps. The day-to-day decision-making remains solely within the federal agency's jurisdiction and control. *See* S. FLA. WATER MGMT. DIST., FINAL ADAPTIVE PROTOCOLS FOR LAKE OKEECHOBEE OPERATIONS iii-v (2010) [hereinafter SFWMD FINAL ADAPTIVE PROTOCOLS], available at http://www.sfwmd.gov/portal/page/portal/xrepository/sfwmd_repository_pdf/ap_lo_final_20100916.pdf.

25. Letter from Don Gaetz, President of the Fla. Senate, to Debbie Brown, Sec'y of the Fla. Senate (July 10, 2013), available at http://www.flsenate.gov/usercontent/topics/IRLLOB/07-10-2013-Creating_IRLLOB_Senate_Select_Committee.pdf.

26. *Id.*

27. SELECT COMMITTEE FINAL REPORT, *supra* note 6, at 21.

28. *Id.*

tor Joe Negron, chair of the Select Committee, wrote a letter to Congress asking that it remove the Army Corps' sole jurisdiction over the lake.²⁹ Senator Negron stated that the Army Corps "has [recently] demonstrated a willingness to be more proactive and coordinate with the South Florida Water Management District to manage lake levels."³⁰ He also noted that the Army Corps uses its plenary power to make decisions "even when those actions conflict with the state water managers' better judgment" and thus asked Congress to "rebalance this delegation of responsibility and authority."³¹ As of this writing, Congress has yet to respond.

The solution proposed in this Note is thus similar to the Select Committee's proposal in that it seeks to divest the Army Corps of plenary jurisdiction, but it is also different in several fundamental respects that will be addressed later. Furthermore, while the Select Committee's proposal seems simple and straightforward, in actuality, removing jurisdiction from the Army Corps and placing it in a different entity is serious and complex, and it would alter the current balance of federal and state power. The origins of this power are discussed in the following Part.

III. JURISDICTION OVER NAVIGABLE WATERWAYS

In addition to the duties the Army Corps performs for the Army in times of conflict, its civil engineering jurisdiction has evolved, contracted, and expanded over the last two centuries. Currently, the Army Corps maintains jurisdiction over certain important aspects of water resources management, including the authorization and regulation of all structures built in, on, or across navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899.³² The Army Corps also maintains control over all dredging and filling of navigable waters under section 404 of the CWA.³³ Historically, the Army Corps' jurisdiction has covered transportation (e.g., bridges and roads), civil projects (e.g., lighthouses, public buildings, and monuments), and surveying (e.g., much of the West and the Great Lakes).³⁴ However, this Note limits its focus to the evolution

29. Letter from Joe Negron, Fla. State Sen., to Jeff Miller, U.S. Rep. (Feb. 18, 2014), available at http://www.flsenate.gov/usercontent/topics/IRLLOB/02-18-14-Senator_Negron_Letter_CODEL.pdf.

30. *Id.* at 1-2.

31. *Id.* at 2.

32. Rivers and Harbors Act of 1899, ch. 425, § 10, 30 Stat. 1121, 1151 (codified as amended at 33 U.S.C. § 403 (2012)).

33. Clean Water Act, Pub. L. No. 92-500, § 404, 86 Stat. 816, 884 (1972) (codified as amended at 33 U.S.C. § 1344 (2012)).

34. *The U.S. Army Corps of Engineers: A Brief History*, U.S. ARMY CORPS OF ENG'RS, <http://www.usace.army.mil/About/History/BriefHistoryoftheCorps.aspx> (last visited Jan. 18, 2015).

and expansion of the Army Corps' control over "navigable waters of the United States."³⁵ In order to understand the current state of affairs regarding the regulation of the Lake Okeechobee Basin, it is important to review precisely how the Army Corps came into power in the first place.

A. *The Case Law Defining Navigability*

The U.S. Constitution indirectly mentions water only once; Article III, Section 2 states that "all Cases of admiralty and maritime jurisdiction" are within federal judicial control.³⁶ What this means is that admiralty cases must be heard in federal court; state courts do not have jurisdiction to hear these disputes. Admiralty jurisdiction is important "because of the seminal role it played in defining 'navigability' in early U.S. law, and the subsequent adoption of some of the same principles in other definitions of navigable waters."³⁷ Essentially, the definition of "navigable waters," developed by the courts in the nineteenth century to define the scope of federal admiralty jurisdiction, was exported to other areas of federal law when Congress sought to expand the scope of its power over the country's waters.

In England, a special court existed that heard only admiralty disputes at the time the U.S. Constitution was drafted, and the English court's jurisdiction was limited to waters affected by the ebb and flow of the tide.³⁸ In the early years of the Republic, American courts essentially adopted the English definition and narrowly construed federal admiralty jurisdiction to encompass only coastal and tidal waters.³⁹ This limitation was abandoned in *Waring v. Clark*,⁴⁰ which acted as a catalyst for the expansion of the definition of navigability in the United States. In *The Propeller Genesee Chief v. Fitzhugh*,⁴¹ the Supreme Court demonstrated the effects of *Waring* by adopting a new, broader definition of the term navigability. This change was due in part to the realization and acceptance that the geography of the United States was far different than that of England; for example, the Court noted that the Mississippi River is navigable well beyond the location at which the tide ceases to have any effect.⁴² It would be "purely artificial and arbitrary as well as unjust" to draw a line across the Mississippi River, as commerce took place on the river

35. See Clean Water Act § 404; Rivers and Harbors Act § 10.

36. U.S. CONST. art. III, § 2.

37. ROBERT W. ADLER, ROBIN K. CRAIG & NOAH D. HALL, MODERN WATER LAW 283 (2013).

38. *Id.*

39. *Id.* at 283-84 (collecting cases).

40. 46 U.S. (5 How.) 441 (1847).

41. 53 U.S. (12 How.) 443 (1851).

42. *Id.* at 456-57.

above and below this location.⁴³ The Court's new, broader definition made jurisdiction "depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable it was deemed to be public; and if public, was regarded as within the legitimate scope of the [federal] admiralty jurisdiction."⁴⁴ Thus, the important factor for the Court was whether the water body could maintain commerce, not whether the water body was tidal in nature. This was an important and necessary first step in the federal government's desire to expand its regulatory power over U.S. waters.

In a separate doctrinal field nearly three decades earlier, the Supreme Court clarified the ambiguity between commerce and navigation in *Gibbons v. Ogden*.⁴⁵ There, the Court held that limiting accessibility to a state's navigable waters gives rise to a Commerce Clause violation, as this unconstitutionally infringes upon Congress's power to regulate commerce.⁴⁶ In response to the challenge that navigation is not a commercial transaction, the Court explained that so long as navigation has the capability to affect interstate commerce, it can be regulated under Congress's Commerce Clause power.⁴⁷ Thus, this decision, combined with the Court's later opinion in *The Propeller Genesee Chief*, opened the door for the Supreme Court to address the scope of the navigability doctrine—as previously developed in admiralty law—in the context of the Commerce Clause.⁴⁸ In *The Daniel Ball*, the Supreme Court put a name to its new test: navigability in fact.⁴⁹ More specifically, the Court stated that "[t]hose rivers must be regarded as public navigable waters in law which are navigable in fact."⁵⁰ Further, "they constitute navigable waters of the United States . . . when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States . . ." ⁵¹ Thus, the test has two elements that must be established before the federal government can claim jurisdiction over the water body: (1) it must be in its ordinary condition, and (2) it must form a continued highway for commerce.⁵² These elements have been construed quite broadly in later cases, however.⁵³

43. *Id.* at 457.

44. *Id.*

45. 22 U.S. (9 Wheat.) 1 (1824).

46. *See id.* at 89-91.

47. *See id.*

48. ADLER, CRAIG & HALL, *supra* note 37, at 289.

49. 77 U.S. (10 Wall.) 557, 563 (1870).

50. *Id.*

51. *Id.*

52. ADLER, CRAIG & HALL, *supra* note 37, at 291.

53. *See id.* at 291-92 (citing examples of the Court's broad construction of these elements).

In addition to the expansion of Congress's jurisdiction over the physical location of navigable waters, the Court in *United States v. Appalachian Electric Power* articulated the full scope of Congress's Commerce Clause powers over several ancillary issues of navigability.⁵⁴ Encompassed within the concept of commerce for navigability purposes is more than just the regulation of boats on the water; commerce also includes flood control, watershed management, and the creation of electricity sources.⁵⁵ As a result of this evolution in the case law, much of the ambiguity surrounding the limits of federal jurisdiction over waters of the United States was resolved, and the federal government thus gained the potential for control over most of this country's waters.⁵⁶

B. *The Clean Water Act*

Using its articulated power, Congress enacted a statute in 1948 that attempted to address the problems of water pollution throughout the United States.⁵⁷ The CWA in its current form is the result of amendments to the original statute in 1972.⁵⁸ The amendments over the years progressively gave more regulatory power to the federal government, and the 1972 amendments solidified federal regulatory control over certain aspects of water management and pollution control of navigable waters.⁵⁹ The term "navigable waters" is defined in the CWA as "the waters of the United States, including the territorial seas."⁶⁰ This term has been litigated many times, and the Supreme Court most recently articulated its definition in *Rapanos v. United*

54. 311 U.S. 377, 426 (1940).

55. *Id.* In addition, the Supreme Court held that "[t]o appraise the evidence on navigability on the natural condition only of the waterway is erroneous. Its *availability* for navigation must also be considered." *Id.* at 407 (emphasis added). The Court explained that some artificial improvement to a waterway to make it navigable in fact (and the question of what constitutes too much improvement) is "a matter of degree." *Id.* The improvements need not be completed or even begun before jurisdiction attaches. *Id.* at 408. Also, it is important to note the Court's statement that "[o]nce found to be navigable, a waterway remains so." *Id.*

56. This author says the "potential" for control because, for reasons that may seem obvious, the federal government must first affirmatively determine whether a particular water body is "navigable" before it may assert jurisdiction over it. Once a water body is deemed navigable, certain statutory regimes take effect, and the federal government has expressly preempted state jurisdiction (e.g., CWA NPDES permitting). For other types of regulation concerning a navigable water that are not expressly preempted by Congress, there may still be dormant preclusion under the Supreme Court's holding in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

57. The Federal Water Pollution Control Act of 1948, ch. 758, 62 Stat. 755.

58. Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (2012)); see also ADLER, CRAIG & HALL, *supra* note 37, at 557.

59. ADLER, CRAIG & HALL, *supra* note 37, at 557-58.

60. 33 U.S.C. § 1362(7).

States.⁶¹ In that case, the Supreme Court narrowed the EPA's broad definition of "waters of the United States" in regards to wetlands adjacent to a traditional navigable water; however, the extent of the limitation is not certain. This is because the main opinion only consisted of a plurality of four Justices, led by Justice Scalia, who articulated a narrow definition of "waters,"⁶² while Justice Kennedy's concurrence explicated a different, broader, and more fact-specific definition of the term.⁶³ Justice Kennedy's test is known as the "significant nexus" test, because it requires "the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. . . . [I]f the wetlands . . . significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable,' " then that water body may also be regulated under the CWA.⁶⁴ As a result of the Supreme Court's failure to reach a majority, states were free to adopt either Justice Scalia's narrower definition or Justice Kennedy's broader definition. A circuit split has since emerged, with most circuits either adopting Justice Kennedy's test or holding that either test applies.⁶⁵

The two most well-known provisions of the CWA are sections 402 and 404. Section 402 regulates discharges of pollutants from point sources, which excludes agricultural and other nonpoint source runoff.⁶⁶ Essentially, if an entity wishes to discharge pollutants into a water of the United States, it must obtain a National Pollutant Discharge Elimination System (NPDES) permit from the EPA or from a state agency that, pursuant to a cooperative federalism provision in the statute, has been authorized and delegated to run the program.⁶⁷ Such a provision requires that the state agency demonstrate to the EPA that it is qualified to implement the program before the EPA will cede jurisdiction.⁶⁸ In Florida, the EPA has authorized the FDEP

61. 547 U.S. 715 (2006) (plurality opinion).

62. *Id.* at 732. Specifically, Justice Scalia's definition limits "waters" to include "only relatively permanent, standing or flowing bodies of water." *Id.* Importantly, this definition limited the Army Corps' section 404 jurisdiction over wetlands that are only saturated intermittently, not permanently. *See id.*

63. *Id.* at 779-80 (Kennedy, J., concurring).

64. *Id.*

65. Keith A. Johnston & Kristine Sendek-Smith, *Muddy Waters: Recent Developments Under the Clean Water Act*, NAT. RESOURCES & ENV'T, Winter 2010, at 31, 34. As of this writing, the EPA has issued a notice of proposed rulemaking to clarify the definition of "waters of the United States," which essentially adopts Justice Kennedy's "significant nexus" test for tributaries and adjacent wetlands. *See* Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.).

66. 33 U.S.C. § 1342 (2012).

67. *Id.*

68. *Id.*

to manage the NPDES permitting program within the state.⁶⁹ In addition, Congress left control over nonpoint source pollution (e.g., runoff from the land and atmospheric deposition of pollutants) to the states to manage as each sees fit, so long as minimum federal water quality standards are met.⁷⁰ In Florida, the FDEP develops these water quality standards and implements them with the aid of the five water management districts.⁷¹ The second provision of the CWA, section 404, encompasses “the discharge of dredged or fill material into the navigable waters” of the United States, which requires a permit from the Army Corps.⁷² In sum, “[f]rom a federalism perspective, Congress designed the Clean Water Act to reflect a balance between national uniformity in some respects and individual state needs in others.”⁷³ Confusion regarding overlapping jurisdictional authority has not been entirely eradicated, however, as the resource in question is not always easy to conceptualize, quantify, and manage; that is, water is a fluid resource. The regulation of the Lake Okechobee Basin provides a good example of this ambiguity and jurisdictional overlap.

In the early twentieth century, the Army Corps built a complex system of “spillways, locks, pump stations, culverts, canals, reser-

69. *National Pollutant Discharge Elimination System (NPDES)*, FLA. DEP'T OF ENVTL. PROT., <http://www.dep.state.fl.us/water/stormwater/npdes/index.htm> (last updated Dec. 19, 2014).

70. See 33 U.S.C. §§ 1313, 1329, 1362(14); see also ADLER, CRAIG & HALL, *supra* note 37, at 561.

71. STORMWATER/NONPOINT SOURCE MGMT. SECTION, FLA. DEP'T OF ENVTL. PROT., FLORIDA: NONPOINT SOURCE MANAGEMENT PROGRAM UPDATE 16 (1999), available at <http://www.dep.state.fl.us/water/nonpoint/docs/319h/nps2000.pdf>; *Nonpoint Source Management Program*, FLA. DEP'T OF ENVTL. PROT., <http://www.dep.state.fl.us/water/nonpoint/> (last updated Sept. 25, 2013).

72. 33 U.S.C. § 1344(a). Similar to section 402, the CWA provides states the opportunity to take over section 404 permitting—to an extent. Unlike the NPDES permitting program, if a state wishes to administer its own section 404 permitting regime, its jurisdiction only extends to those waters deemed “non-navigable” under federal law. See *id.* § 1344(g); see also *State or Tribal Assumption of the Section 404 Permit Program*, U.S. EPA, <http://water.epa.gov/type/wetlands/outreach/fact23.cfm> (last updated July 1, 2014). From this author's reading of the statutory provision and EPA's explanation on its website, this limitation maintains the status quo—that is, the Army Corps retains jurisdiction over all section 404 permitting for navigable waters of the United States, and the states may administer dredge-and-fill permitting for non-navigable waters over which the federal government never had jurisdiction anyway. It appears that what this “cooperative federalism” provision does is simply allow states to utilize and incorporate the federal section 404 regime as its own, which is why authorization is required from the EPA. See *id.* However, it is important to note that states do retain some power over section 404 permitting pursuant to section 401 of the CWA, which requires state certification of compliance with federal and state water quality standards before a federal permit may be issued. See 33 U.S.C. § 1341; see also *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994).

73. ADLER, CRAIG & HALL, *supra* note 37, at 561.

voirs, and water conservation areas” in South Florida.⁷⁴ Interestingly, the operational control of this system has since been transferred from the Army Corps to the SFWMD.⁷⁵ Among other things, the network of canals and pump stations artificially diverts agricultural, industrial, and residential runoff away from the agricultural lands to the south and carries the runoff to Lake Okeechobee, which pollutes the water that is periodically released into the estuaries when the lake’s water level reaches its limit.⁷⁶ It is important to note that because the polluted canal water being pumped into the lake comes from nonpoint source pollutants, there is no NPDES permit requirement by the EPA or FDEP, and there is no Army Corps permit requirement, as the pollutants are not considered dredge or fill material. The FDEP and SFWMD regulate nonpoint source pollution under the provision of the CWA that requires states to create and implement water quality-based standards, which allows for the inclusion of nonpoint source pollution when deciding how to enforce them.⁷⁷ The FDEP thus regulates pollutants from all sources, and for those water bodies that are “impaired,” the agency must determine the “total maximum daily load” (TMDL) for each pollutant and allocate the allowable daily amount among all of the water body’s polluters.⁷⁸ The main pollutant

74. *Water Management*, U.S. ARMY CORPS OF ENGRS, <http://www.saj.usace.army.mil/Missions/CivilWorks/WaterManagement.aspx> (last visited Jan. 18, 2015).

75. *Operational Planning*, SFWMD, <http://www.sfwmd.gov/portal/page/portal/xweb%20-%20release%20operational%20planning> (last visited Jan. 18, 2015) (“With approximately 2,100 miles of canals and 2,000 miles of levees/berms, 70 pump stations and more than 600 water control structures and 625 project culverts, the District actively operates and maintains the water management system to protect regional water supplies and provide flood control for 8.1 million people—plus the environment, agriculture, businesses and visitors—in South Florida.”); *see also* *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1214 (11th Cir. 2009) (“Those polluted canals connect to Lake Okeechobee, which is now virtually surrounded by the Hoover Dike. The S–2, S–3, and S–4 pump stations are built into the dike and pump water from the lower levels in the canals outside the dike into the higher lake water. . . . At full capacity, the pumps within the S–2, S–3, and S–4 stations can each move 900 cubic feet of water per second—more than 400,000 gallons per minute. The South Florida Water Management District operates the pumping stations.”).

76. *See supra* text accompanying notes 10-12.

77. *See* STORMWATER/NONPOINT SOURCE MGMT. SECTION, *supra* note 71, at 14-16.

78. *See id.*; *see also* 33 U.S.C. § 1313(d) (2012); *Everglades: Lake Okeechobee*, FLA. DEP’T OF ENVTL. PROT., <http://www.dep.state.fl.us/everglades/lakeo.htm> (last updated May 17, 2013). After several years of litigation involving the EPA, FDEP, and environmental nonprofits, the FDEP finalized updated numeric nutrient criteria (i.e., TMDLs) of several nutrients for the various water bodies throughout the state, including nitrogen and phosphorus in Lake Okeechobee and the estuaries, in 2013. The updated criteria went into effect on September 17, 2014, when the EPA formally withdrew its competing numeric nutrient criteria. *See* EPA, NUMERIC NUTRIENT CRITERIA FOR THE STATE OF FLORIDA: WITHDRAWING THE FEDERAL ACTIONS (2014), *available at* <http://water.epa.gov/lawsregs/rulesregs/upload/Numeric-Nutrient-Criteria-for-the-State-of-Florida-Withdrawing-the-Federal-Actions-Factsheet.pdf>; *see also* *Development of Numeric Nutrient Criteria for Florida’s Waters*, FLA. DEP’T OF ENVTL. PROT., <http://www.dep.state.fl.us/water/wqssp/nutrients/>

of concern in the Lake Okeechobee Basin is phosphorous, which continues to be discharged into the lake at a rate exceeding that which is necessary to maintain a healthy ecosystem.⁷⁹ Only time will tell whether the FDEP's newly updated TMDL for phosphorus has an appreciable effect on lowering the level of this pollutant in the Lake Okeechobee Basin.

In 2002, environmental nonprofits filed suit against the SFWMD in an attempt to limit the water management district's authority to freely pump polluted canal water originating from nonpoint sources. Specifically, in *Friends of the Everglades v. South Florida Water Management District*,⁸⁰ the parties argued over the definition of "discharge of a pollutant" in relation to NPDES permitting requirements. A NPDES permit is required for the "discharge of any pollutant," and "discharge" is defined as "any addition of any pollutant to navigable waters from any point source."⁸¹ The plaintiffs argued that "the transfer of a pollutant from one navigable body of water to another [constituted] a 'discharge of a pollutant' within the meaning of the Clean Water Act."⁸² In other words, the plaintiffs believed that the artificial pumping stations used to pump polluted water from the canals into Lake Okeechobee constituted a separate "point source," such that the SFWMD should be required to obtain a NPDES permit before discharging pollutants into a navigable water—here, the lake itself.⁸³ The Eleventh Circuit noted that other circuits had previously agreed with similar arguments and ruled in favor of requiring NPDES permits.⁸⁴ And it appears that the Court agreed in theory with this line of decisions; however, the EPA had recently promulgated a new regulation that took the opposite view.⁸⁵ The EPA's "water transfers" rule exempts water transfers from NPDES permitting, "'defin[ing] water transfers as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.'"⁸⁶ The Eleventh Circuit undertook a *Chevron* analysis of this new rule, and it determined that the definitions within the CWA were sufficiently

(last updated Sept. 8, 2014); *Nutrients Water Quality Standards for the State of Florida*, U.S. EPA, <http://water.epa.gov/lawsregs/rulesregs/florida-index.cfm> (last updated Sept. 25, 2014).

79. *Everglades: Lake Okeechobee*, *supra* note 78.

80. 570 F.3d 1210 (11th Cir. 2009).

81. *Id.* at 1216 (citing 33 U.S.C. §§ 1311, 1342(a)(1), 1362(12)).

82. *Id.* at 1213.

83. *See id.* at 1216.

84. *Id.* at 1217-18 (discussing decisions of other circuits).

85. *Id.* at 1218.

86. *Id.* at 1218-19 (quoting NPDES Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i))).

ambiguous to move on to step two.⁸⁷ Thus, so long as the agency's interpretation was reasonable, which the Court found it to be, the Court was bound to give effect to the rule.⁸⁸

This case demonstrates the complexity of the overlapping jurisdiction of the Lake Okeechobee Basin, with different entities having control over different aspects of the system's resources. While the Army Corps has control over the water releases into the estuaries, the FDEP and the SFWMD have control over the levels of phosphorus and other pollutants that run off into the canals, whose waters ultimately end up in the lake. Also, the Army Corps transferred operational authority over the complex network of physical infrastructure to the SFWMD, and the water management district provides the Army Corps with much of the data that it uses to make decisions.⁸⁹ Thus, these groups currently work in coordination with one another, but only to a certain extent. For example, the Army Corps did not consult with the SFWMD, FDEP, or any other entity before choosing to release the deluge of water that caused last summer's devastation to the estuaries.⁹⁰ The following Part addresses this federal, state, and local jurisdictional overlap and argues that jurisdiction should be transferred to a new, quasi-governmental entity.

IV. FEDERALISM AND THE QUASI-GOVERNMENTAL ORGANIZATION

In its basic form, federalism is "the distribution of power in an organization (as a government) between a central authority and the constituent units."⁹¹ In the United States, federalism describes the balance of power and authority between the federal government and the states, based on concepts and boundaries articulated in the U.S. Constitution.⁹² In the context of environmental law generally, and water law more precisely, federalism plays an important role in de-

87. *Id.* at 1222-27.

88. *Id.* at 1219-20, 1227-28.

89. See *Operational Planning*, *supra* note 75 ("Operational Planning includes the review and development of operating protocols and plans, coordination with District groups and the U.S. Army Corps of Engineers regarding Operating Manual review and development. Operational Planning uses the current state of the system (Lake Okeechobee levels and groundwater levels) as input to the South Florida Water Management Model (SFWMM). A suite of graphics are produced for the decision makers to analyze. The application involves the investigation of potential areas of flexibility in the South Florida Water Management District water control system operational guidelines and federal regulation water level schedules. The objective is to improve the water resource evaluation tools available to water managers to develop a comprehensive set of operational performance measures and to provide a forum for public input to operations.").

90. See SELECT COMMITTEE FINAL REPORT, *supra* note 6, at 10, 21.

91. *Federalism*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/federalism> (last visited Jan. 18, 2015).

92. See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1143 (1995).

fining the boundaries of federal and state control.⁹³ In the context of this Note, the federal government expressly preempted Florida from regulating in some areas, while in other areas, Congress paved the way for a cooperative federalism regime in which Florida was allowed to take over regulatory authority after receiving approval from the EPA or the Army Corps. Still in other areas, Congress affirmatively required Florida to take the lead role. But what about quasi-governmental organizations—where do they fit into this picture? Before addressing this question in depth, the following section briefly describes the quasi-governmental organization.

*A. Public-Private Partnership:
The Quasi-Governmental Organization*

Simply put, quasi-governmental organizations are “hybrids”—that is, “entities that combine characteristics of public- and private-sector organizations.”⁹⁴ More specifically, they “combine authority from more than one level of government, whether as a formal or informal part of their structure or governance process, and also include private and public actors within the governance process.”⁹⁵ Hybrid organizations purportedly combine the “best of both worlds,” so to speak, by providing the efficiency and resources of the private market and the accountability of the public domain.⁹⁶ In addition, hybrid organizations are each unique; they exist on a continuum of organizational power vis-à-vis government regulatory oversight and control, public-private monetary funding, and composition of the organization’s board members.⁹⁷ In 2003, there existed more than fifty quasi-governmental organizations at the federal level and several hundreds at the state and local level.⁹⁸ These entities oversee many important interests and perform essential functions for the government and society, some more prominent than others (e.g., the Port Authority of New York and New Jersey versus the management of railroads),⁹⁹ and as of 2003 these organizations’ collective liability was calculated at over two trillion dollars.¹⁰⁰ In the realm of environmental regula-

93. *Id.* at 1143-44.

94. JONATHAN G.S. KOPPELL, *THE POLITICS OF QUASI-GOVERNMENT: HYBRID ORGANIZATIONS AND THE DYNAMICS OF BUREAUCRATIC CONTROL* 1 (2003). I use the terms quasi-governmental and hybrid interchangeably.

95. Hari M. Osofsky & Hannah J. Wiseman, *Hybrid Energy Governance*, 2014 U. ILL. L. REV. 1, 4.

96. *Id.* Of course, there are many criticisms of quasi-governmental organizations, as well, including the potential for a lack of public accountability. The advantages and limitations of adopting this entity will be discussed in more detail *infra* Part IV.B.

97. Osofsky & Wiseman, *supra* note 95, at 1-2, 9.

98. KOPPELL, *supra* note 94, at 2.

99. *Id.*

100. *Id.*

tion, “cooperative environmental decision-making processes exist at all levels of government—irrespective of community and/or ecosystem size—and in various private and quasi-governmental organization guises. Some of these processes are largely defined by geographic setting, others by resource use and/or protection, and still others by statutory authorization or requirement.”¹⁰¹

One might reasonably ask: Where does the authority for hybrid organizations come from? Are these organizations even constitutional? The answer is ambiguous, much in the same way that the answer regarding the constitutionality of the modern administrative state remains unsettled. Article I, Section 8, clause 18 of the U.S. Constitution is known as the “Necessary and Proper Clause.” It states that “Congress shall have the power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹⁰² Since the country’s early history, this clause was interpreted to justify the creation of administrative agencies that aid Congress and the President in the execution of Congress’s statutory regimes and policy goals.¹⁰³ This malleable provision has also been the justification for Congress’s experimentation with hybrid entities, which have expanded as the administrative state has expanded and the need for flexibility has increased.¹⁰⁴

There are proponents and critics of hybrid organizations, and each side offers logical and valid opinions. Likewise, there are groups on both sides of the debate concerning whether the Army Corps should retain or cede jurisdiction over water releases from Lake Okeechobee. Currently, the Lake Okeechobee Basin is already operating in a system that is largely cooperative. The goal of this Note is to shift the balance of power among the various actors so as to reach a more efficient and effective result. This shift is two-fold: it calls for an incremental increase in the amount of non-federal regulatory authority, plus a shift from state government to quasi-government. The remainder of this Part discusses several reasons for and against this shift, and it describes the quasi-governmental organization’s potential to leverage a greater amount of expertise, access to private capital, and superior flexibility and responsiveness. It also builds a case that responds to two critiques—democratic accountability and the possibility of capture.

101. Peter M. Lavigne, *The Movement for American Ecosystem Restoration and Interactive Environmental Decisionmaking: Quagmire, Diversion, or Our Last, Best Hope?*, 17 TUL. ENVTL. L.J. 1, 4 (2003).

102. U.S. CONST. art. I, § 8, cl. 18.

103. KOPPELL, *supra* note 94, at 5.

104. *See id.* at 5-6.

B. Point/Counterpoint: Army Corps Versus FDEP Versus Quasi-Governmental Organization

There are many reasons why those who feel negative impacts locally may be opposed to a distant and disinterested federal agency (or, at least, that is how some perceive federal agencies) making important decisions for which it does not suffer the consequences. On the other hand, there are valid reasons for maintaining the status quo, which include institutional knowledge gained from decades of regulation, the monetary resources of the federal government, and the clarity in having one agency make this decision.

First, there is some credence to the argument that the Army Corps has superior institutional knowledge. The agency has been regulating water releases and maintaining the Herbert Hoover Dike for decades, and it knows how to do the job. The agency knows how to calculate and interpret the data on weather patterns, water levels, and other factors affecting the water body, and it has technology in place to monitor lake conditions on a constant basis.¹⁰⁵ However, as mentioned above, the SFWMD also provides important data, both for itself and for the Army Corps.¹⁰⁶ The Army Corps has also ceded control over the complex web of physical infrastructure that it built throughout South Florida to the SFWMD, and the latter is successfully managing “approximately 2,100 miles of canals and 2,000 miles of levees/berms, 70 pump stations and more than 600 water control structures and 625 project culverts” for more than eight million people.¹⁰⁷ Thus, it appears that the SFWMD has institutional knowledge and capacity similar to the Army Corps in this area. As Robert Percival points out, part of the reason that the federal government began preempting the states in the realm of environmental law was because the states had failed to implement their own laws and policies, even after prodding from Congress.¹⁰⁸ While this was certainly true in many respects fifty years ago, state and local governments have since modernized and expanded, and many have gained expertise and competence in regulating environmental issues themselves.¹⁰⁹ This is especially true for water law; around forty states implement the federal NPDES permitting program, and all fifty states oversee the cre-

105. See *SAJ Water Management Daily Reports*, U.S. ARMY CORPS OF ENG'RS, <http://w3.saj.usace.army.mil/h2o/reports.htm> (last visited Jan. 18, 2015).

106. See *Operational Planning*, *supra* note 75.

107. *Id.*

108. Percival, *supra* note 92, at 1147.

109. The rise of state expertise and competence in regulating aspects of the environment is partially, if not mostly, due to cooperative federalism provisions in which Congress encouraged the states to take action by offering monetary incentives, allowed them to take over federal statutory schemes after receiving the necessary approval, or required states to implement programs at the state and local level. See *id.* at 1173-75.

ation and implementation of state water quality standards.¹¹⁰ There can be no doubt that the federal government has the power to regulate navigable waters under the Commerce Clause and the federal navigational servitude,¹¹¹ but it does not necessarily follow that the federal government *must* or *should* act on that power if important federal interests are not at stake and other sub-federal entities have sufficient capacity to regulate.

The hybrid organization that this Note proposes would enhance, rather than hinder, the expertise required to properly manage the dike and water releases from the lake. It would require members of the Army Corps and the SFWMD who possess this important knowledge and skill set to be part of the governing board, thus rendering transaction costs in transferring the information negligible.¹¹² Also, outside experts from industry and non-governmental organizations—such as engineers, hydrologists, and biologists—would be part of the commission, which only adds to the level and diversity of expertise. These individuals would be able to provide and analyze data that the Army Corps currently does not in order to reach a more complete understanding of the dike's capabilities and the ability of the estuaries to withstand such releases. When dealing with a watershed as complicated as this one, it is important to have input and analysis from many sectors. The Florida Senate Select Committee criticized the Army Corps for recently failing to consider the ecological effects of its actions,¹¹³ and the hybrid organization would address this valid concern.

The next argument for maintaining the status quo stems from the federal government's vast monetary resources. The idea here is that the federal government has more funds available to it than state governments, and federal funding is usually necessary to fully implement an environmental program.¹¹⁴ There is evidence that state

110. *See id.* at 1174-75.

111. The federal navigation servitude is always lurking beneath the depths of every navigable water—or water with the potential for navigability—of the United States. It “effectively insulates the federal government from otherwise legitimate takings claims where federal projects or operation of federal regulatory authority in navigable waters impair private property rights in those waters.” ADLER, CRAIG & HALL, *supra* note 37, at 299-300.

112. Indeed, the SFWMD and the Army Corps have already worked extensively together in conducting studies of the issue, and the SFWMD has published its own final adaptive protocols concerning Lake Okeechobee operations, which are “intended to provide operational guidance to the” water management district's staff and Governing Board. *See* SFWMD FINAL ADAPTIVE PROTOCOLS, *supra* note 24, at iii-v.

113. *See* SENATE COMMITTEE FINAL REPORT, *supra* note 6, at 10 (“[M]inimizing the risk of dike failure to ensure public safety is the primary concern when lake levels increase. This concern trumps all other considerations, including environmental harm.”); *see also id.* at 12 (“The Corps has been criticized over the past decade . . . for its disregard for the environmental damage some water resource projects have caused.”).

114. Percival, *supra* note 92, at 1175.

budget cuts, combined with a reduction in federal financial assistance and a failure of state governments to replace these lost funds with state funds, leads to state regulatory programs that fail to meet federally required environmental standards.¹¹⁵ When considering the Lake Okeechobee Basin, it is true that the Army Corps has the *potential* for far more funding than the State of Florida could provide. However, the fact remains that Congress must first appropriate funds to the agency, and the President must then allocate funds to this project in particular. In the past, the federal government has failed to allocate the funds necessary to fix the Herbert Hoover Dike and build other infrastructure that would help reduce the flow of water into the estuaries, such as water reservoirs.¹¹⁶ Indeed, Congress's failure to provide funding for additional water reservoirs is one of the main criticisms the State of Florida has against Congress and the Army Corps.¹¹⁷ The Florida Legislature has pledged to split the financial burden of construction with the federal government,¹¹⁸ and Governor Scott claims that Congress has not been living up to its end of the bargain.¹¹⁹ While the federal government's knee-jerk reaction might be to reject any proposal that limits its power, Congress and the Army Corps should soon realize that this reduces the burden on an overworked agency with a limited budget.¹²⁰

115. *Id.*

116. See SENATE COMMITTEE FINAL REPORT, *supra* note 6, at 12 (summarizing a 2012 study that “found that the Corps faces an unsustainable situation driven by budgetary considerations” and that if current funding levels from Congress remain, “degraded performance” will occur).

117. See *id.* at 15; Alvarez, *supra* note 1.

118. In its 2014 budget, the Florida Legislature appropriated 231 million dollars in funding for the Indian River Lagoon and Lake Okeechobee Basin projects—including funding for additional water reservoirs and a series of southward bridges to allow some water to flow naturally into the Everglades again—by not only approving the Senate Select Committee's monetary recommendations, but exceeding them. See Press Release, Fla. Senate, Senator Negron Announces Full Funding of Lagoon Recommendations (Apr. 28, 2014), available at <http://www.flsenate.gov/Media/PressReleases/Show/1785>.

119. See Alvarez, *supra* note 1.

120. The President's budget for the Army Corps for fiscal year 2014 was released on March 3, 2014. In total, the budget includes roughly 4.5 billion dollars in gross discretionary spending for civil works projects. However, the President only allocated 75 million dollars to Herbert Hoover Dike seepage control and 66 million dollars to the more-general South Florida Everglades Restoration Program. See News Release No. 14-002, U.S. Army Corps of Eng'rs, U.S. Army Corps of Engineers Releases Work Plans for Fiscal Year 2014 Civil Works Appropriations (Mar. 4, 2014), available at <http://www.usace.army.mil/Media/NewsReleases/NewsReleaseArticleView/tabid/231/Article/475460/us-army-corps-of-engineers-releases-work-plans-for-fiscal-year-2014-civil-works.aspx>. Based on the Army Corps' own figures, the cost of repairing and stabilizing the dike is around two billion dollars, and the agency has already spent 400 million dollars on repairs since 2007. SELECT COMMITTEE FINAL REPORT, *supra* note 6, at 8-9. Considering that the repairs are supposed to be completed by 2018, it can be inferred that appropriating 75 million dollars to control dike seepage for fiscal year 2014 falls far short of the annual amount of money required to work expeditiously to secure the dike. See *id.* In addition, the Select Committee's report highlights many recent Army

The current state of affairs, therefore, does not necessarily tip the scales in favor of reserving jurisdiction in the Army Corps, but it also does not necessarily imply that the state government is preferable. Jonathan Koppell notes that this is where quasi-governmental organizations have frequently found their functional justification.¹²¹ Hybrid organizations may be funded by both public and private funds, or they may even be fully privatized.¹²² This Note's proposal would call for a combination of public and private funding to best meet the large fiscal demand necessitated by dike repairs and other operations. This would ensure that the federal and state governments would still have incentives to oversee that the hybrid organization is properly managing its funds, but it also allows the inclusion of desperately needed private capital to make up the continuous public funding shortfall.¹²³ It also provides a buffer against changing political tides, as future politicians who come into power may decide that the health of Lake Okeechobee and the St. Lucie and Caloosahatchee estuaries are low on their list of priorities.

Also, there is a third argument that having one agency—the Army Corps—control the dike and the decision over water releases actually supports simplicity, clarity, and efficiency through structural norms and accountability.¹²⁴ In a similar fashion, this would be the argument made in support of the transfer of jurisdiction to the FDEP rather than a quasi-governmental organization, as jurisdiction would still remain in a single governmental body within an established hierarchical structure. There may be fears that a hybrid organization would lead to inefficiency and deadlock based on its composition by persons with varying and opposing interests.¹²⁵ However, the reality of the situation is that jurisdiction in the Lake Okeechobee Basin is *already* split among various actors. The entire watershed is managed in a cooperative manner between federal, state, and local govern-

Corps civil works failures and seeming lack of concern for environmental damage caused by its authorization of projects. *See id.* at 12.

121. KOPPELL, *supra* note 94, at 6 (“Budget constraints and rules have always been a significant factor in the explanation for the growth of American quasi-government.”).

122. *See generally* KEVIN R. KOSAR, THE QUASI GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS (2011), *available at* <https://www.fas.org/sgp/crs/misc/RL30533.pdf> (describing the various types of quasi-governmental organizations at the federal level).

123. KOPPELL, *supra* note 94, at 3.

124. *See* KOSAR, *supra* note 122, at 31 (describing “[a] unified executive structure, coupled with hierarchical lines of authority and accountability”). *But see id.* at 32 (“Those favoring the public law approach to management . . . believe that the democratic value of political accountability should take precedence over the managerial value of maximizing efficiency and outcomes.”).

125. *See* Meghan Gruebner, Note, *Delaware's Answer to Management Deadlock in the Limited Liability Company: Judicial Dissolution*, 32 J. CORP. L. 641, 649-52 (2007) (describing deadlock in the private partnership context).

ments, and the federal government has already ceded control to the FDEP (which then delegated authority to the SFWMD) to manage the extremely important infrastructure that the Army Corps itself had built. Thus, the argument that jurisdiction over the Herbert Hoover Dike and the water releases into the estuaries must rest within the sole discretion of the Army Corps is without much merit. Nevertheless, this is also precisely the reason why this author does not agree with Senator Negron's proposal to transfer jurisdiction to the FDEP. While the FDEP's expert knowledge about the environmental issues occurring within the state are to be desired, the fact remains that this would allow one entity to control water releases without any input from other entities—essentially what is happening now with the Army Corps, just at the state level. This is contrary to the ultimate goal of managing the Basin cooperatively, effectively, and efficiently.

Proponents of hybrid organizations argue that including various interested parties in the decision-making process from all levels of government and the private sector is preferable and actually more efficient and meaningful than overlapping, ambiguous jurisdictional boundaries.¹²⁶ While it may seem counterintuitive, several sectors can be involved while also increasing flexibility and responsiveness.¹²⁷ This is because this type of organization requires cooperation between horizontal actors who all have the ability to influence outcomes.¹²⁸ Also, the hybrid organization's foundational procedures would be structured in such a way that deadlock would be made very difficult.¹²⁹ The fears of those who criticize hybrid organizations out of concern that clashing opinions will lead to deadlock are thus likely overstated.

It is also important to think about the precedent that such a transfer of jurisdiction might set. Depending on one's views, this could be a good or bad thing. For those who prefer power to be centralized in the federal government, the transfer of control over the Herbert Hoover Dike and Lake Okeechobee's water releases might be seen as the beginning of a slippery slope. Their argument would be that by allowing a quasi-governmental entity to gain control over actions that have historically been within the sole purview of the federal government, this would open the door for other states that are also

126. Osofsky & Wiseman, *supra* note 95, at 10-12.

127. KOSAR, *supra* note 122, at 31-32.

128. *See id.* at 10.

129. *See id.* at 11 ("Recent scholarship on new governance informs [the authors'] assessment of how hybrid structures can be designed to include stakeholders effectively and appropriately. New governance views regulation not as solely top-down, public control by state and federal agencies with central authority, but rather as an ongoing and ever-changing relationship—often one of negotiation and compromise—between agencies, regulated entities, and other stakeholders.").

dissatisfied with the Army Corps' regulatory decision-making. To be sure, the Army Corps does not have a perfect track record; the agency "has been criticized over the past decade for underperforming or failing civil works projects" and has been accused of displaying a lack of concern for negative environmental impacts caused by its projects.¹³⁰ Also, the slippery slope argument only matters if, as a substantive matter, reserving jurisdiction in the Army Corps is the desirable alternative. For others, the hybrid organization would be a welcome solution to a federal agency that has arguably failed in its duty to properly manage this water system,¹³¹ as well as a Congress that appears apathetic and repeatedly fails to appropriate sufficient funds to build additional infrastructure and thus prevent further environmental degradation.¹³²

There also exists a notable policy reason for ceding control to a sub-federal governmental entity, which is based on the argument that state and local governments should be able to manage their own resources as they see fit.¹³³ The idea here is that the federal government is detached and removed from the reality of various situations and differences on the ground, and a federal agency's decisions are sometimes contrary to those that state or local governments think are best.¹³⁴ Of course, there are good reasons for having federal control in many instances, including the "guarantee [of] a minimum level of environmental protection to citizens regardless of their place of residence" and the prevention of states engaging in competition that

130. SELECT COMMITTEE FINAL REPORT, *supra* note 6, at 11-12.

131. The Army Corps recently completed a five-year project in which the most vulnerable portion of the dike was repaired, but there are many more repairs that need to be done. See Alvarez, *supra* note 1; Reid, *supra* note 4. Furthermore, the Army Corps has invested 400 million dollars since 2007 to make improvements to the dike, see SELECT COMMITTEE FINAL REPORT, *supra* note 6, at 8-9, and that it will continue to work diligently with "a team of engineers, hydrologists, geologists, scientists, contract and real estate specialists, budget analysts, and many others . . . to ensure the very best rehabilitation strategies are applied to the dike today and in the future." U.S. ARMY CORPS OF ENG'RS, JACKSONVILLE DIST., HERBERT HOOVER DIKE REHABILITATION: PROJECT UPDATE (Spring 2013), available at http://www.saj.usace.army.mil/Portals/44/docs/FactSheets/HHD_FS_Rehab_Spring2013_508.pdf. Nevertheless, the dike remains one of the most vulnerable in the country, and this increased risk of failure drives the Army Corps' decisions to release polluted water into the estuaries. See Alvarez, *supra* note 1; Reid, *supra* note 4. State and local officials emphasize that the area is one tropical storm away from a potentially catastrophic disaster. Alvarez, *supra* note 1.

132. See *supra* note 120 and accompanying text.

133. Percival, *supra* note 92, at 1144 ("State and local governments argue that federal regulations infringe on their autonomy and sovereignty, and that they impose costly unfunded mandates states can ill afford. Even though Congress has taken care to ensure that federal environmental law rarely preempts state standards, states argue that they should be given more freedom and flexibility to develop environmental standards tailored to local circumstances.").

134. *Id.*

creates a race to the bottom.¹³⁵ This would not be the case here, however, as the problem does not affect interstate pollution and involves no competition among states; rather, this involves the transfer of control of a single water body to some type of sub-federal entity (here, a hybrid organization) that is capable of managing it.

C. Criticisms of the Hybrid Model

Every idea has its drawbacks and weak points, and the quasi-governmental organization is no exception. Two criticisms of this model are worth mentioning: democratic accountability and the possibility of capture.

Fundamentally, democratic accountability is based on the idea that elected government officials can be held accountable for their actions by the citizenry.¹³⁶ When a politician makes a mistake or a decision with which her constituents disagree, she may be voted out of office. Concerns over democratic accountability regarding the traditional administrative state have been discussed in great depth,¹³⁷ but the issue with quasi-governmental organizations is that they go one step further than traditional administrative agencies; they are even more attenuated and protected from the potentially negative effects of the electorate.¹³⁸ Critics of the hybrid form ask: What if the committee makes a mistake or an unpopular decision? To whom would the committee be held accountable? These are not easy questions, and the answer remains ambiguous. However, the beauty of the quasi-governmental organization is in its flexibility—depending on its structure, a hybrid organization can be subject to more or less regulatory oversight and more or less accountability.¹³⁹ In the case of the Lake Okeechobee Basin, this author believes that the committee should maintain a fair amount of independence in its management of the dike and water releases, in the same way that an agency's actions are entitled to deference and are only overturned if arbitrary, capricious, or otherwise not in accordance with law.¹⁴⁰ However, there still must be some governmental oversight, especially because the committee will be partially composed of governmental actors and public

135. *Id.* at 1171-72.

136. KOPPELL, *supra* note 94, at 3.

137. KOSAR, *supra* note 122, at 3-5.

138. *See id.*; *see also* KOPPELL, *supra* note 94, at 3-4.

139. KOSAR, *supra* note 122, at 2 (describing the relationship of hybrid organizations to Congress or the Executive Branch as “a descending scale from closest to the most distant”).

140. 5 U.S.C. § 706(2)(A) (2012). There is also the issue of sovereign immunity and whether hybrid organizations should be entitled to it. Because the organization would still receive substantial public funding and be partially compiled of representatives from different levels of government, this author believes that the committee should be entitled to the protection of sovereign immunity.

funds will be utilized. The extent and type of oversight would need to be fleshed out in more detail, but at the least, an annual review of the quasi-governmental organization's actions and allocation of funds should be required.

The second critique to consider is that of the theory of the firm, and more specifically, the possibility of capture.¹⁴¹ Opponents may argue that because the hybrid organization would attract private funding and be partially composed of individuals from the private sector—both for profit and not for profit—the committee could become captured by perverse, self-serving private interests.¹⁴² It could become profit-driven rather than goal-driven. However, the hybrid organization would be created as a nonprofit entity, thus largely eliminating this threat.¹⁴³ There are several additional buffers that would help prevent this from occurring, as well, including the existence of public-sector board members, maintenance of some level of regulatory oversight by the federal government, and the ability to remove individuals from the governing board.

In sum, there are valid reasons for and against ceding jurisdiction to the FDEP or a quasi-governmental entity. The above discussion analyzes these issues and provides support for the transfer of jurisdiction to a hybrid organization rather than preserving the status quo in the Army Corps or transferring jurisdiction to the FDEP. In the next Part, this Note fleshes out how this organization could be composed.

V. THE QUASI-GOVERNMENTAL COMMITTEE OF THE LAKE OKEECHOBEE BASIN

A quasi-governmental committee composed of various interested parties at the federal, state, and local levels—public and private—should be created to oversee the regulation of Lake Okeechobee water releases and the related infrastructure, including the Herbert Hoover Dike. This entity would represent the collective decisions of a group of people, each representing different interests, who are able to analyze and discuss a situation before taking action. The interests of one party would weigh against the interests of a different party, and ideally, these parties would discuss the various alternatives and reach a consensus. It may very well be the case that the committee, if presented with a similar situation to the one the Army Corps faced last summer, would make the same decision in light of public health and

141. See Osofsky & Wiseman, *supra* note 95, at 63.

142. See *id.* (“Public-private hybrids must always be alert to concerns about industry capture.”).

143. Of course, this does not entirely address the threat of capture in quasi-governmental organizations that are for-profit, but that problem is not at issue here.

safety concerns.¹⁴⁴ Yet, rather than have different entities continue to point fingers at one another for any mistakes or shortcomings, this entity would take responsibility as a collective group.

Quasi-governmental organizations are vast and varied, and each entity's structure is unique.¹⁴⁵ Nevertheless, rough classifications have been created that sufficiently encompass many of the organizations at the federal level.¹⁴⁶ The type of organization that would best suit the needs of Lake Okeechobee and the estuaries is similar to an entity classified as a nonprofit "organization independent of, but dependent upon, an agency of the federal government."¹⁴⁷ These organizations are mission-oriented¹⁴⁸ rather than profit-driven, and they exist in large part because of the flexibility and necessity of funding from both public and private sources.¹⁴⁹ Nonprofits can maintain surplus funds and invest them into the organization's future plans; they simply cannot be used to benefit the governing board or owners.¹⁵⁰ This would work well for the Herbert Hoover Dike; if the organization were to become profit-driven, the committee would likely appear too privatized and its governing board self-serving. The question of whether Army Corps and/or SFWMD employees would continue to work on the physical infrastructure or whether the committee could hire workers from private construction and engineering firms to complete some of the work would need to be decided, but this is not a sticking point.

The proposed committee would be composed of eleven individuals, and it would include two representatives each from the Army Corps, FDEP, and SFWMD, and one representative each from local government, an environmental nonprofit, the agricultural industry, the fishing/tourism industry, and a private engineering firm.¹⁵¹ Each gov-

144. See SFWMD FINAL ADAPTIVE PROTOCOLS, *supra* note 24, at iv (The 2008 Lake Okeechobee Regulation Schedule "made . . . clear that the issue of public health and safety regarding the integrity of the Herbert Hoover Dike was the dominant factor in the decision making process to select a preferred alternative regulation schedule.").

145. KOPPELL, *supra* note 94, at 2.

146. KOSAR, *supra* note 122, at 2-3.

147. *Id.* at 16.

148. Koppell notes that there are four types of principal preferences, which can be classified as (1) positive, mission; (2) negative, mission; (3) positive, non-mission; and (4) negative, non-mission. KOPPELL, *supra* note 94, at 71-75. He finds that negative, non-mission preferences are most likely to be satisfied, while positive, mission preferences are least likely. *Id.* at 75. This makes intuitive sense, though, as it is easier *not* to do something inconsequential than it is to actively do something important, as the latter requires much more work. The Lake Okeechobee Basin Committee would be fulfilling a positive, mission-based preference; it should be evident that the task will not be easy.

149. KOSAR, *supra* note 122, at 16-17.

150. *Definition of 'Not For Profit,'* INVESTOPEDIA, <http://www.investopedia.com/terms/n/not-for-profit.asp> (last visited Jan. 18, 2015).

151. It is important to note that this is only a proposal, and the composition of the governing committee could obviously be tweaked.

ernmental entity would choose its own representatives. Once chosen, the public-sector representatives would choose the private-sector representatives. This would help to preserve government accountability, which distinguishes this committee from a traditional nonprofit organization independent of, but dependent upon, the government.¹⁵² Also, the enabling statute would provide more detailed procedures for selection, term limits, and removal.

The committee could meet weekly, bi-weekly, or monthly, which should not be difficult given the widespread use of teleconferencing. In addition, the group should create a set of rules and regulations beyond those specified in the enabling statute to aid in self-governance and coordination of activities. This could be done by utilizing notice and comment rulemaking in order to ensure that the public has a voice.¹⁵³ In times of disagreement or stalemate, there should be a process by which a tie is broken, and, potentially, a process for vetoing a decision. In times of urgency—for example, when the committee must make an immediate decision about whether to release water into the estuaries due to rising lake water levels—there should be a plan in place to convene the group immediately (requiring a certain number of participating members to form a quorum) and to quickly make decisions based on scenarios and outcomes already calculated and anticipated by the group.¹⁵⁴ There should also be a method by which the governing board may seek assistance from the federal or state government in times of emergency, such as when a tropical storm or hurricane hits.

Ideally, if this experiment proves to be successful, the concept of hybrid organizations in this area of regulation may take hold elsewhere. Other states may seek to petition Congress for transfers of jurisdiction to newly created entities that could manage and oversee each particular state's expensive, contentious, and important water resources and infrastructure. Further down the road, Congress may feel comfortable creating a provision of the CWA that outlines a procedure for the creation of hybrid organizations to oversee "state waters of significant concern," much in the same way section 402 of the

152. See KOSAR, *supra* note 122, at 16-17. One criticism of these organizations is that they need more regulatory oversight and accountability regarding management of funds. *Id.* As discussed above, the federal government would be able to review all of the committee's spending annually, which should eliminate this concern.

153. See, e.g., 5 U.S.C. § 553(b) (2012).

154. The Army Corps already makes decisions now "based on a set of quantitative performance measures of ecosystem and water supply conditions that have a strong foundation in population ecology, regional environmental science, and water resources engineering." SFWMD FINAL ADAPTIVE PROTOCOLS, *supra* note 24, at iv-v. Thus, it should not prove difficult to transfer and utilize these measures, or to create updated measures, once the quasi-governmental committee is formed.

CWA outlines the procedure for transferring jurisdiction over the NPDES permitting program from the EPA to the states.

VI. CONCLUSION

This Note's goal is to propose the best—not the perfect—regulatory solution to this very real and urgent problem. The Lake Okeechobee Basin and the St. Lucie and Caloosahatchee estuaries require action now, and Congress continues to withhold the funds necessary to properly repair the Herbert Hoover Dike and build additional water reservoirs. The Army Corps is also delayed in its schedule of repairs. Florida has allocated 230 million dollars to Basin projects in 2014, but it simply does not have enough money in its coffers to cover the entire cost—and why should it, when the state does not have control over the infrastructure and plays no role in the decision-making process regarding water releases? The time has come, then, to think critically and innovatively about the best solution moving forward, which is to create a quasi-governmental committee to manage the Herbert Hoover Dike and water releases from Lake Okeechobee into the St. Lucie and Caloosahatchee estuaries. This proposal seeks to address the critical needs of the estuaries while balancing jurisdiction among various interested parties with limited governmental oversight. It would allow the committee to seek funding from private capital and would aid in management flexibility and efficiency.