The Florida Senate

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Committee on Environmental Preservation and Conservation

CHAPTER 373, F.S., WATER RESOURCES

Issue Description

During the past two regular sessions, legislation has been filed which proposes to reorganize and create a new Part VII of Chapter 373, F.S.[1] Chapter 373, F.S., represents the cornerstone of laws related to creation and operation of the water management districts (WMD), planning and regulating the use of water, Everglades and Lake Okeechobee restoration, water supply, and wetlands. The focus of this report will examine several aspects of the law governing Florida's water resources, including:

- The development of the Riparian Rights Doctrine,[2]
- The history that led up to the creation of Chapter 373, F.S.,
- The construction and evolution of Part I of this chapter,
- Analysis of the sections governing water resources in Part I,
- Findings and conclusions, and
- Recommendations.

Background

Riparian Rights Doctrine

There are two distinct ideological underpinnings of laws governing water usage in the United States. Western, drier states use the law of prior appropriation. Users have a priority property right in the water they have appropriated. It is often called the "first in time, first in right" doctrine.[3] Eastern states, including Florida, generally follow the doctrine of riparian rights. This doctrine is rooted in English common law[4] and was upheld in Tyler v. Wilkinson.[5] There are several characteristics unique to riparian rights:

- All water rights are equal for riparian owners. There are no priority rules.
- The quantity of water used is the amount that can be reasonably and beneficially used by the riparian owner.
- Consumptive use is permissible as long as it is reasonable and does not deprive other users of their rights.
- The rights are conferred on riparian lands only. They cannot be transferred or used on other non-riparian parcels.
- The riparian rights are not extinguished when the land is sold. They run with the land.
- Riparian owners do not lose their water rights by non-use and may resume reasonable usage at any time.

The Water Resources Act of 1957

Florida is well known for its abundance of rain during the rainy season and, to a lesser extent, its cyclical

[1] Senate Bill 2088 (2008); House Bill 1111 (2009).
[2] Riparian land abuts the bank of a stream, river, or other water body. (*Black's Law Dictionary*)
[3] Charles R. Fletcher, *Florida Water Resource Development: A Call for Statewide Leadership*, 18:1 J. of Land Use 113 (2002) (citing Sax and Abrams, *Legal Control of Water Resources* 154, 158-62 (1986)).
[4] *Id*. at 126.
[5] 24 F.Cas. 472 (C.C.D.R.I 1827). The case involved Rhode Island mill owners who used a stream to power their mills. The dispute over water arose when downstream mill owners accused upstream mill owners of using too much water. The court held the upstream mill could not deprive the downstream mill of its use of the stream, even though it was first in priority. They each had an equal right to the stream's flow as long as such use was reasonable and beneficial.

droughts. The wet season usually lasts from May to October with significant year-to-year variations.[6] What is less well known about the state today is its history of flooding in the 1920s and 1940s. The resultant call for flood control by property owners and farmers changed how the state managed water. The floods from multiple hurricanes and tropical storms in the late 1920s and again in the 1940s killed thousands of people and decimated livestock and other property in South Florida below Lake Okeechobee. These storm events coupled with a crippling drought during the interim years led to a public outcry for water management south of the lake.[7]

The federal government responded by authorizing the Central and Southern Florida Flood Control Project (C&SF) in 1948.[8] It represents the first step in significant water management that continues today. In fact, the C&SF project spawned the first multipurpose WMD, the Central and Southern Florida Flood Control District, which is the direct predecessor of the South Florida WMD.[9] In 1955, the Florida Legislature established the Water Resources Study Commission to conduct a study and report its findings on the possible enactment of comprehensive water legislation. The Commission studied existing water law in Florida and recommended creating new legislation to govern water usage. The Commission's report resulted in Florida's first comprehensive water legislation, the Florida Water Resources Act of 1957, codified as Chapter 373, F.S. Under the 1957 Act, existing WMDs were authorized to regulate water usage as long as its regulation did not preempt existing reasonable and beneficial uses of water.[10] However, flood control was the primary goal of the 1957 Act, not comprehensive water resources regulation.

Development of *A Model Water Code*[11]

In 1967, Frank E. Maloney, former Dean of the University of Florida Law School, set out to create a model water code for Florida. He realized that neither the riparian rights doctrine nor prior appropriation was sustainable for the state's water resources. Over the next five years, he and his team created a hybrid regulatory scheme that would take the best parts of both. The authors designed the model with three purposes:

> to take into account the hydrologic interrelationship of all types of water resources in the state; to provide greater certainty than is possible under a court-administered reasonable use approach; yet to retain sufficient flexibility to make possible realistic long-range plans for the conservation and wise use of water resources and the elimination of waste.[12]

The authors envisioned an administrative regulatory structure based on a riparian-appropriation hybrid system to meet the last of these purposes. *A Model Water Code* was published in 1972 and its first four chapters are the basis for much of the Water Resources Act of 1972.[13]

Evolution of Chapter 373, Florida Statutes

The Water Resources Act of 1972

The 1972 Act significantly modified Chapter 373, F.S., principally addressed flood control, the management and storage of surface water, the regulation of consumptive use of water including wells, and the governance of the WMDs. The 1972 Act provides for a two-tiered administrative structure governing water quality and consumption. The Department of Natural Resources (now the Department of Environmental Protection (DEP)) was given general supervisory authority to coordinate statewide efforts for water management.[14] The second tier

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[6] Randy Lascody, *The Onset of the Wet and Dry Seasons in East Central Florida - A Subtropical Wet-Dry Climate? available at* http://www.srh.noaa.gov/mlb/wetdry/WetDrySeason.html (last visited Sep. 17, 2009).
[7] Comprehensive Everglades Restoration Plan. *Everglades: A Brief History*. *available at* http://www.evergladesplan.org/about/learn_everglades.aspx (last visited Sep. 20, 2009).
[8] *Id.*
[9] Frank E. Maloney, et al., *Florida Water Law 1980* (Univ. of Fla. Publication No. 50).
[10] Fletcher, *supra* note 3, at 117.
[11] Frank E. Maloney, et al., *A Model Water Code with Commentary* (Univ. of Fla. Press 1972).
[12] *Id.* at vii.
[13] Fla. Stat. 373 (2009). The first four chapters of *A Model Water Code* were enacted as the Water Resources Act of 1972 with only minor changes.
[14] § 373.026(7), F.S. (2009).

was the creation of six WMDs along hydrological boundaries.[15] Each WMD has broad regulatory authority for managing water resources and ad valorem taxing authority to raise revenue for water projects. However, the 1972 Act did not address water supply, which was wholly managed under the state's water plan. Since the 1972 Act's passage, Chapter 373, F.S., has been amended numerous times to address burgeoning problems with water resources of the state.

One of the most important aspects of the 1972 Act was the establishment of minimum flows and levels for the state's surface waters and groundwaters.[16] The goal of establishing such levels was to ensure there would be enough water to satisfy consumptive use and public purposes. Maloney, et al., commented that commercial navigation, recreational boating, fishing, swimming, hunting and ecological protection are public purposes that needed protecting.[17] By establishing minimum flows and levels for non-consumptive use, water managers, theoretically, would then be able to establish how much water was available for consumptive use. Unfortunately, a 1994 report by the Florida House of Representatives showed that only two minimum flows were established by rule.[18] In addition, Pinellas County and Concerned Citizens of Putnam County filed lawsuits against the Southwest and the St. Johns River WMDs, respectively, to enforce establishment of minimum flows.[19]

1997 Amendments

The report and lawsuits spurred the Legislature to action. In 1997, it amended the Act to include additional initiatives for water development projects by the WMDs.[20] The primary goals of the 1997 amendments were to identify scarcities, develop additional water resources to accommodate those shortfalls and provide water necessary for continued growth.[21]

The statute requires the five water management districts to initiate regional water supply planning in all areas of the state where reasonably anticipated sources of water were deemed inadequate to meet year 2020 projected demands. Plans have been completed by all districts, except for the Suwannee River Water Management District which anticipates no shortages during the planning horizon. The districts are now undertaking the required 5-year update of these plans.[22] The statute also requires that the plans contain a list of "water supply development projects" and a list of water resource development projects that support water supply development.[23]

The 1997 amendments made a distinction between water supply and water resource development. Water supply development is primarily the responsibility of water utilities and other water users and is defined as the planning, design, construction, operation and maintenance of public or private facilities for water collection, treatment and distribution for sale, resale or end use.[24] Water supply development assistance represents water management district financial assistance for regional or local water supply development projects.

Water resource development is primarily the responsibility of the water management districts and includes such things as collection and evaluation of water data, structural and non-structural programs to manage water resources, construction and operation of major public works facilities for flood control and water storage, and technical assistance to water utilities.[25] Water resource development projects are considered a subset of water resource development.

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[15] In 1977, the Florida Legislature dissolved the Ridge and Lower Gulf Coast WMD and divided its territory between the South Florida and Southwest Florida WMDs. (§ 113, ch.77-104, L.O.F.)
[16] Maloney, *supra* note 11; Fla. Stat. § 373.042(1) (2009).
[17] *Id*. at 106.
[18] Fla. H.R. Comm. on Natural Res., Analysis and Modeling of Water Supply Issues for the Region Bounded by Hillsborough, Manatee, Pasco and Pinellas Counties 13-15 (1994).
[19] Fletcher, *supra* note 3, at 120.
[20] §§ 3, 4, ch. 97-160, L.O.F.
[21] Fletcher, *supra* note 3, at 120.
[22] Fla. Stat. § 373.0361(2) (2009).
[23] Fla. Stat. § 373.0831(4) (2009).
[24] Fla. Stat. § 373.019(24) (2009).
[25] Fla. Stat. § 373.019(22) (2009).

2005 Amendments

Largely heralded as the most significant bill of the 2005 Legislative Session, SB 444 added major revisions to Chapter 373, F.S. Historically, water resources management in Florida regulated water for flood, drought, consumptive uses and public purposes. SB 444 was the first time in Florida that alternative water resource development, and the money for such, was implemented. The amendments provided numerous changes to Florida water protection and alternative water supply development programs. The primary goal of SB 444 was to create a $100 million annual funding program entitled the "Water Protection and Sustainability Program" to assist in the implementation of many existing water protection and development programs.[26] In addition, funding was provided for a new alternative water supply development program. The 2005 amendments also created definitions for "alternative water supplies," "capital costs," and "multijurisdictional water supply entity."[27] The WMDs and local governments roles and responsibilities for developing alternative water supplies were defined and clarified or expanded where necessary. Additionally, developing alternative water supplies was declared in the public interest.[28] Finally, the 2005 amendments updated and further clarified how regional water supply plans were developed.[29]

Specific Water Resources Sections of Chapter 373, Florida Statutes

It is important to understand how the various sections of and amendments to Chapter 373, F.S., fit together when evaluating the chapter as a whole. The following sections of Chapter 373, F.S., specifically regulate or control water supply policy, planning and production in the state:

- § 373.016, F.S., Declaration of policy
- § 373.019, F.S., Definitions
- § 373.036, F.S., Florida water plan; district water management plans
- § 373.0361, F.S., Regional water supply planning
- § 373.0391, F.S., Technical assistance
- § 373.0831, F.S., Water resource development; water supply development
- § 373.196, F.S, Legislative findings
- § 373.1961, F.S., Water production
- § 373.1962, F.S., Regional water supply authorities
- § 373.1963, F.S., Assistance to West Coast Regional Water Supply Authority

Section 373.016, F.S., Declaration of policy

Section 373.016, F.S., was an original section of the 1972 Act. At that time, it did not embody a strong policy towards water supply planning and production. Section 373.016, F.S., was amended in 1997 to add what is now paragraph (3)(d). This paragraph establishes that the "availability of sufficient water for all existing and future reasonable-beneficial uses and natural systems" shall be promoted.[30] One year later, paragraphs (4)(a) and (b) were added to encourage consumptive uses of local water resources first before transporting water across county boundaries.[31]

Section 373.061, F.S., Florida water plan; district water management plans

Section 373.061, F.S., was also an original section of the 1972 Act. The statute directed the Department of Natural Resources to study the state's water resources and formulate a state water plan.[32] Maloney, et al., realized that duplication of effort and lack of communication over the state's water resources resulted in inefficiencies.[33]

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[26] § 3, ch. 2005-291, L.O.F.
[27] § 1, ch. 2005-291, L.O.F.; "alternative water supplies" means water developed from any non-traditional source, including salt water, brackish water, additional storage capacity, reclaimed water, etc.
[28] § 2, ch. 2005-291, L.O.F.
[29] § 3, ch. 2005-291, L.O.F.
[30] § 11, ch. 97-160, L.O.F.
[31] § 1, ch. 98-88, L.O.F.
[32] §§ 6, 7, part I, ch. 72-299, L.O.F.
[33] Maloney, *supra* note 11, at 109.

The Florida water plan was designed to combine the state water use plan with water quality standards to create a master plan for Florida.[34] There have been two significant amendments to this section since its enactment in 1972.

In 1997, this section was amended to require each WMD governing board to develop a district water management plan.[35] The key provision directed the governing boards to use a 20-year planning horizon in evaluating whether existing and reasonably anticipated sources of water could meet their current and future needs. The plans had to account for water used for both consumptive uses and natural systems.[36] The section was amended again in 2005 and directs the governing boards to include alternative water supplies in their updated plans.[37]

Section 373.0361, F.S., Regional water supply planning

In 1997, the Legislature addressed water supply planning at the regional level. Section 4 of Chapter 97-160, L.O.F., created the regional water supply planning process. In 2004, the Legislature revised this section further, clarifying the requirements for the regional water supply plan (RWSP).[38] The amendments regulate the water supply development component of the RWSP and include:

- Requiring WMDs to hold at least one public workshop prior to completion of a RWSP to discuss the technical data and modeling tools anticipated to be utilized in its development,
- Identifying the best available data for utilization to project populations,
- Allowing the use of water conservation and demand management measurements as water source options in water supply development,
- Including reservation of water as a component of the RWSP, and
- Requiring reporting progress made in developing water supplies consistent with a RWSP.

In 2005, the Legislature substantially reworked s. 373.0361, F.S.[39] The revision added new language regarding public education and assessment of the impacts of minimum flows and levels on water supply needs. It also added listing of water supply development projects, the joint development of RWSP and annual reporting requirements to the DEP on the status of regional water supply planning. A new subsection was added requiring the WMDs to notify the affected local governments and make every reasonable effort to educate and involve local public officials in working toward solutions when the water supply component demonstrates a need for one or more alternative water supply projects. An additional provision allows local governments to prepare their own water supply assessments to determine if existing water sources are adequate. This assessment must be submitted to the appropriate WMD to be considered when the RWSP is being developed or updated.

Section 373.0391, F.S., Technical assistance to local governments

Section 373.0391, F.S., was added to Chapter 373, F.S., in 1989 and requires the WMDs to provide a range of technical services to assist local governments. The primary assistance is in the preparation and implementation of local comprehensive plans and public facilities reports.

Section 373.0831, F.S., Water resource development; water supply development

In association with regional water supply planning, s. 373.0831, F.S., was another significant section added in 1997.[40] This section provides for legislative findings and intent relating to the planning and development of water resources and the production of water supplies from those water resources. This section was revised in 2004 to add subparagraph (4)(c). It dealt with permitting and funding for the development of alternative water supplies but the Legislature repealed it in 2005 in favor of larger reforms in this area.[41] This section was again amended in

[34] *Id*. at 110.
[35] § 3, ch. 97-190, L.O.F.
[36] *Id*.
[37] § 4, ch. 2005-36, L.O.F.
[38] § 9, ch. 2004-381, L.O.F.
[39] § 9, ch. 2005-291, L.O.F.
[40] § 11, ch. 97-160, L.O.F.
[41] § 4, ch. 2005-291, L.O.F.

2008 to include priority funding assistance for projects that implement reuse strategies that lead to the elimination of domestic wastewater ocean outfalls.[42]

Section 373.196, F.S., Alternative water supply development

Section 373.196, F.S., was created in 1974.[43] It contains provisions regarding the need for cooperation between local governments and the WMDs in order to meet the needs of the increasing demand on water resources of the state. It also authorizes the creation of regional water supply authorities. Subsection (2) of section 373.196, F.S., was amended in 1998 and provided that the WMDs are to have the power to engage in functions "that are related to water resource development pursuant to s. 373.0831."[44] This amendment reconciles the powers given to the WMDs in 1997, specifically granting them responsibility for water supply planning and water resource development.

In 2005, the Legislature substantially revised s. 373.196, F.S., by passing SB 444.[45] The amendments made changes to legislative findings regarding state water policy.
These findings acknowledge that:

- Demand for natural supplies of fresh water will continue to increase,
- There is a need for development of alternative water supplies to sustain the state's economic growth and its natural resources,
- Cooperation among all interest groups is required to develop adequate and dependable supplies of water and such efforts should use all practical means,
- Regional Water Supply Authorities are encouraged and used to facilitate the development of county-wide and multi-county projects that achieve necessary economies of scales and efficiencies,
- Public moneys and services provided to alternative water supply development, even to private interests for this purpose, serve a public interest, and
- In order to provide sufficient water and to avoid the adverse impacts of competition for limited supplies, coordinated efforts with the WMDs are required, and creating funding sources necessary to develop alternative water supplies is a shared responsibility.

The primary roles of the WMDs, local governments, and others regarding alternative water supply development were refined. The roles of the WMDs are the formulation and implementation of strategies and programs; collection and evaluation of data; construction, operation and maintenance of facilities for flood control, storage, and recharge; planning for development in conjunction with local governments and others; and providing technical and financial assistance.[46]

The primary roles of local governments, regional water supply authorities, special districts, and water utilities are planning, design, construction, operation, and maintenance of alternative water supply development projects; formulation, development, and implementation of alternative water supply development; planning, design, construction, operation, and maintenance of facilities to collect, divert, produce, treat, transmit, and distribute water; and coordination of activities with appropriate WMDs.[47]

Section 373.1961, F.S., Water production

Section 373.1961, F.S., was enacted in 1974[48] and has been amended several times since, with the most significant and recent changes stemming from the passage of SB 444 in 2005.[49] This section contains four

[42] § 2, ch. 2008-232, L.O.F.; according to a University of Florida report, domestic wastewater ocean outfalls in Miami-Dade, Broward and Palm Beach Counties accounted for nearly 400 million gallons per day in 2005. By 2025, those estimates rise to 475 million gallons per day and exceed the permitted capacities (*available at* http://www.dep.state.fl.us/water/reuse/docs/OceanOutfallStudy.pdf (last visited Sep. 30, 2009)).
[43] § 1, ch. 74-114, L.O.F.
[44] § 2, ch. 98-88, L.O.F.
[45] § 2, ch. 2005-291, L.O.F.
[46] *Id.*
[47] *Id.*
[48] § 2, ch. 74-114, L.O.F.

subsections: Subsection (1) sets forth the powers and duties of the WMD governing boards with respect to the production of water; Subsection (2) sets forth the identification and reporting of alternative water supply development funding in the WMDs' budgets; Subsection (3) sets forth the allocation, allowed uses, and conditions of funding provided through the Water Protection and Sustainability Program and its Trust Fund; and Subsection (4) sets forth the conditions a WMD may attach to reuse projects that receive funding assistance.
The revisions of SB 444 include:
Identification of water supply needs in WMD budgets, new subsection (2), requires the WMDs to identify in their annual budgets the amount needed to implement alternative water supply development projects, as prioritized in their RWSP.[50]
A dedicated source of funding was developed in subsection (3), and established several provisions:[51]

- Distributes state funding granted to the WMDs for use in developing alternative water supply projects under the Water Protection and Sustainability Program. 30 percent of the funds go to the South Florida WMD, 25 percent each to the Southwest Florida and St. Johns River WMDs and the remaining 20 percent is split evenly between the Suwannee River and Northwest Florida WMDs.
- Allows funds to be used for other water resource development projects including springs protection, if the WMD is without a RWSP (Suwannee River) or has no alternative water supply development project needs.
- Requires all applicants to submit the total capital cost of their projects.
- Requires all applicants to provide, at a minimum, 60 percent of the total capital costs of the project. The magnitude of state and WMD funding is determined per project.
- Provides the WMDs the latitude to grant waivers for the match requirement for financially disadvantaged small local governments.
- Allows the WMDs to accept non-state funding to meet match requirements.
- Gives the governing boards the flexibility to use up to 20 percent of these funds for projects not specifically identified in the RWSP, but that are consistent with it.
- Requires that utilities receiving funds establish rate structures that promote conservation of water and promote development of alternative water supplies.
- Establishes additional factors to be used by the governing boards in prioritizing and funding projects. The factors that require significant weight in the governing funding decision include:
    - Whether the project provides substantial environmental benefits by limiting adverse water resource impacts.
    - Whether the project reduces competition for water.
    - Whether the project brings about replacement of traditional water sources to aid in the implementation of minimum flows and levels, or reservations.
    - Whether the applicant is achieving goal based targets for water conservation.
    - The quantity of water supplied compared to its cost.
    - Projects in which reuse is a major component.
    - Whether the applicant is a regional water supply authority or multi-jurisdictional water supply entity.

The WMDs are required to conduct at least one public hearing prior to adopting a priority list of projects eligible for funding.[52]

Section 373.1962, F.S., Regional water supply authorities

In 1974, the Legislature established a process for the creation of regional water supply authorities in s. 373.1962, F.S.[53] Numerous minor amendments have been made to the section since then. The establishment of regional water supply authorities requires approval by the Secretary of the DEP. They may be created to develop, recover,

[49] § 3, ch. 2005-291, L.O.F.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] § 7, ch. 74-114, L.O.F.

store, and supply water for county or municipal purposes. Those activities must be prioritized to reduce adverse environmental effects of excessive or improper withdrawals of water from concentrated areas.[54]

Section 373.1963, F.S., Assistance to West Coast Regional Water Supply Authority

Section 373.1963, F.S., was created in 1976 to address issues relating to the governance of the West Coast Regional Water Supply Authority.[55] The section has been substantially rewritten three times with the last rewrite coming in 1998.[56] The West Coast Regional Water Supply Authority is currently known as Tampa Bay Water. Tampa Bay Water is a special district that serves as a water wholesaler for its member governments: Hillsborough County, Pasco County, Pinellas County, New Port Richey, St. Petersburg and Tampa.

House Bill 1111, 2009 Legislative Session

HB 1111 was introduced during the 2009 Legislative session. It proposed creating a new Part VII of Chapter 373, F.S., to include all sections of Part I of Chapter 373, F.S., that address water supply policy, planning, production and funding. The bill passed unanimously through both the House Government Accountability Act Council and the House General Government Policy Council before ultimately being indefinitely postponed. The goal of the bill was a non-substantive reorganization of the relevant sections. Unfortunately, detailed analysis of the bill illuminated numerous substantive changes. One such change was repealing the "local sources first" exemption for reuse of reclaimed water and stormwater and use of reclaimed water by electrical utilities.[57]

Findings and/or Conclusions

Water Use in Florida

Water is the lifeblood of Florida. It provides for our economic growth, natural beauty, food and electricity. Unfortunately, Florida's existing natural water resources will not be sufficient to supply Florida's needs in the future. Florida is the fourth most populous state with over 18 million residents. By 2020, Florida expects to climb into the third spot with an estimated 23.5 million residents.[58] Additionally, more than 80 million tourists visit the state each year.[59] By 2020, total water use is expected to be about 9.3 billion gallons per day, an increase of nearly 2 billion gallons per day over 1995 levels.[60]

Within water use sectors, agriculture is projected to account for 47 percent of the 2020 demand, followed by public water supply at 33 percent. Recreational irrigation will account for 8 percent with an additional 8 percent going to industrial, commercial, and power generation activities. While the projected growth in water demand is not as rapid as the growth in population, it is substantial.[61]

Because of the significant growth in demand and the realization that traditional sources will not be sufficient, the development of alternative water supplies is necessary. Alternative water supplies typically take many years to plan, design and construct, and are more expensive than traditional sources. Due to these higher costs, many suppliers have chosen not to develop alternative water supplies. For those projects that have been undertaken, significant cost-share arrangements must be utilized.

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[54] § 5, ch. 2005-191, L.O.F.
[55] § 13, ch. 76-243, L.O.F.
[56] § 4, ch. 339, L.O.F.; § 30, ch. 97-160, L.O.F.; and § 2, ch. 98-402, L.O.F.
[57] § 373.701(3), HB 1111 (2009)
[58] U.S. Census Bureau, *available at* http://quickfacts.census.gov/qfd/states/12000.html (last visited Sep. 30, 2009)
[59] VisitFlorida.org, Research FAQ, *available at* http://www.visitflorida.org/Content/NavigationMenu/PromoteYourBusiness/ToolsResources/Research/ResearchFAQ/default.htm (last visited Sep. 30, 2009).
[60] Florida Water Plan, 2004 update.
[61] *Id*.

Chapter 373, Florida Statutes, Revisions

Chapter 373, F.S., has undergone multiple revisions and additions since its enactment in 1957. The various major revisions have rendered the sections regulating water resources difficult to read as a whole, let alone navigate and understand from a regulatory perspective. This complexity, and the resultant inherent regulatory difficulties, stem from the multiple purposes of Chapter 373, F.S. as it has evolved over the last 50 years.

As originally enacted in 1957, the primary purpose of Chapter 373, F.S., was flood control. The regulatory structure was not built for water resource planning or development as no substantial need existed at the time. The 1972 revisions focused more on water resource management, for example codifying the creation of the five WMDs. Unfortunately, the regulatory structure set in place then, which still exists today, created water managers that are both regulators and suppliers.

Both the 1997 and 2005 major additions required water managers to forecast and plan for future water use, looking at 10-, 15- and 20-year planning horizons. The studies and data collected by the state's water managers show that traditional sources of water are not going to be sufficient to meet Florida's need in 2020. Yet, it was not until SB 444, passed in 2005, that a dedicated funding source was created for the development of alternative water projects. Since SB 444's enactment in 2005, funding for alternative water supply development has subsequently been stripped from the Water Protection and Sustainability Trust Fund due to budget shortfalls.[62] Thus the focus of Chapter 373, F.S., has evolved from flood control to resource management to planning and forecasting to alternative resource development.

Although Florida is rich with water, the greatest demand is in the southern part of the state, while the majority of water resources (supply) is in the northern part. This disparity in resources creates concerns that the thirstier southern population will try to draw off water from the north. In response to these concerns, the "local sources first" policy was part of the 1998 amendments to s. 373.016, F.S. The policy discourages transmission of water over distance until all reasonable traditional and alternative water resources have been exhausted.[63] The unintended consequence of this policy and state water management at the district or regional level is counties and regions believe that water in their region is "their" water. Florida law is clear that water is a public resource of the state and cannot be owned by anyone.[64] The WMDs are designed to regulate water within their hydrological boundaries, while the DEP has general supervisory authority.[65] However, each WMD has its own governing board, taxing authority and policies, which marginalizes the DEP's actual oversight authority.

Options and/or Recommendations

First, given the complexity and the various purposes and goals of Chapter 373, F.S., it is recommended that those sections that regulate water resources of the state should be combined into a new Part VII. Although difficult, non-substantive reorganization should be possible. Subsequent incarnations, if any, should be able to reorganize the relevant sections of Chapter 373, F.S., without substantive changes. In fact, there are current drafts that succeed in doing so that have been completed by experts in water law.

Second, annual funding for alternative water supply projects should be restored. Since enactment of SB 444, funding for alternative water projects has been steadily siphoned off.[66] Funding was completely removed for the 2009-2010 fiscal year.[67] A dedicated source of funding should be developed through either existing or new sources of revenue. In addition, projects that result in quantifiable water supply from best-management conservation efforts should be considered alternative water supply and be eligible for such grants. Alternative water supply projects benefit the state as a whole and the cost should be borne by all. Bonding is just one mechanism that may be utilized for alternative water projects.

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[62] 2008-2009 Florida Budget.
[63] § 373.016(4)(a), F.S. (2009).
[64] *Id*.
[65] § 373.026(7), F.S. (2009).
[66] FY 2005-06, 100 million; FY 2006-07, 60 million; FY 2007-08, 52 million; FY 2008-09, 7.7 million; Projected FY 2009-10, unfunded.
[67] In 2009, the Legislature passed SB 1750 directing documentary stamp revenue to the General Revenue Fund.

Third, the "local sources first" policy should be reviewed. Successes and failures of the policy should be examined and evaluated to identify inefficiencies and possible alternative solutions, if warranted. The impact to both economic growth and environmental protection also needs assessment. Changes to the policy, if any, must safeguard water supplies in counties that currently have abundant water resources to ensure those counties can meet their forecasted needs.

Last, establish a central regulatory commission that oversees Florida's water resources and supply development, or review the DEP's role as a general supervisory authority. Currently, there is no centralized body that has responsibility for a statewide vision of water resource management or development. Frequently, the five WMDs lack consistency in regulation and policy development for a statewide resource that is regionally significant. There are many examples of centralized authorities from which to choose: the Florida Board of Governors, the Environmental Regulation Commission, The Governor and Cabinet, etc. The people of Florida own the water collectively, irrespective of regional jurisdiction, and a statewide body should govern Florida's water supply accordingly.