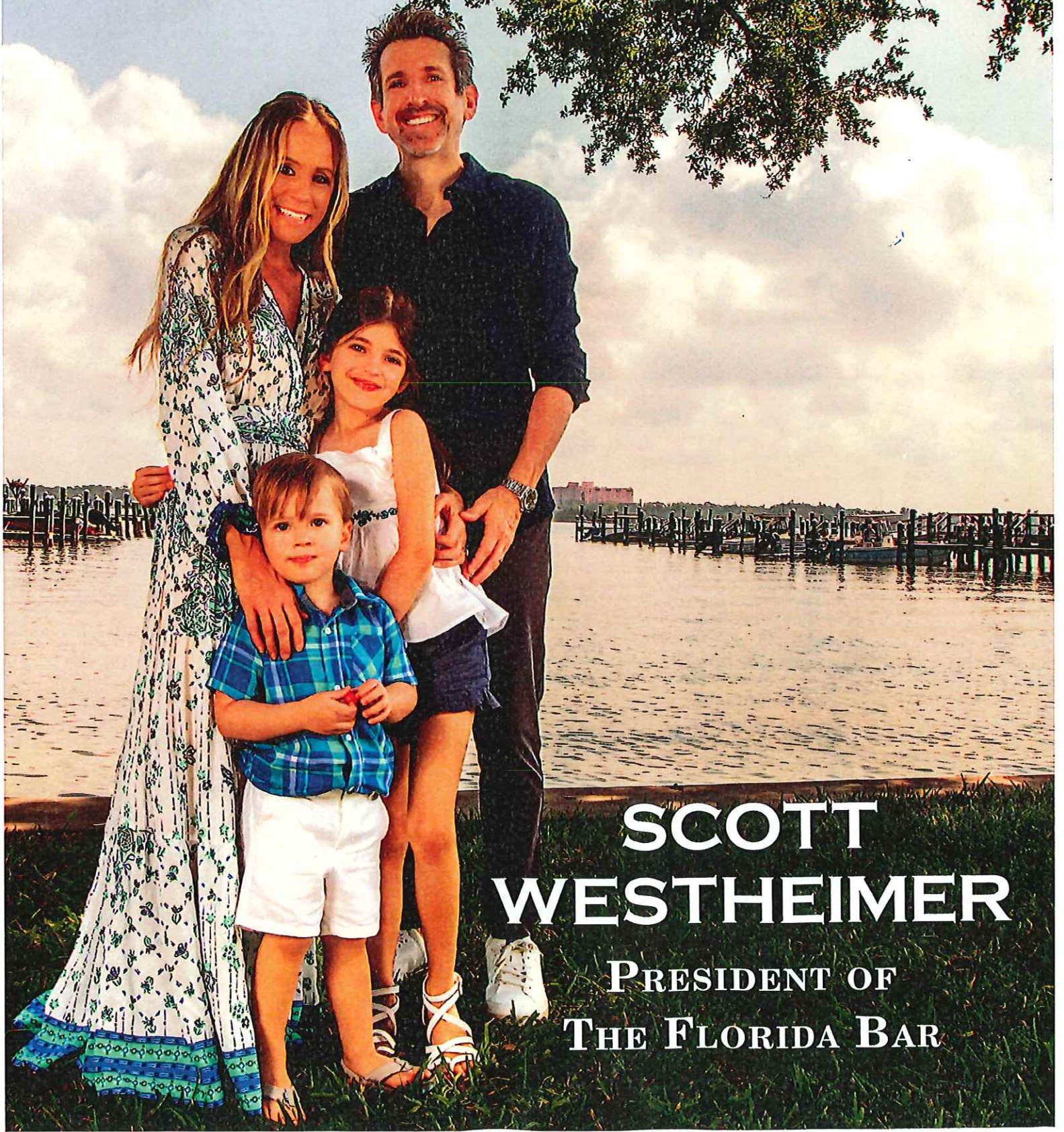


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Florida's Water Quality Rules Under The Clean Waterways Act

The Department of Environmental Protection (DEP) recently adopted (pending ratification) the most significant rules in its history pertaining to stormwater¹ quality. The rules will drastically alter the environmental resource permit (ERP) requirements for water quality treatment. The rules will greatly enhance water quality in Florida, but will come with a significant cost, as discussed below. Virtually everyone supported DEP's efforts to improve water quality. However, there was not consensus on how this should be accomplished or the costs for increased water quality treatment.

This article builds on the information presented in the article, "Modernization of Stormwater Quality Rules," by Susan Roeder Martin and Karen West, published in the March/April 2021 Florida Bar *Journal*.²

Legislative Direction

Florida has recognized that stormwater-related pollution represents one of the largest potential contributors of nutrients throughout the state, especially pollution from excess nutrients. In recognition of this fact, in 2020, the legislature passed Senate Bill 712, also known as the Clean Waterways Act.³ This legislation was passed with unanimous, bipartisan support. The legislation requires DEP and the water management districts to update the ERP stormwater design and operation regulations under F.S. Ch. 373, Part IV, using the latest scientific information. These provisions are set forth in F.S. §373.4131(6)(a), which required, by January 1, 2021: The department and the water manage-

ment districts [to] initiate rulemaking to update the stormwater design and operation regulations, including updates to the Environmental Resource Permit Applicant's Handbook, *using the most recent scientific information available*. As part of rule development, the department shall consider and address low-impact design best management practices and design criteria that increase the removal of nutrients from stormwater discharges, and measures for *consistent application of the net improvement performance standard* to ensure significant reductions of any pollutant loadings to a water body. (emphasis added)

The net improvement performance standard referenced in above section refers to the F.S. §373.414(b)3, which states:

If the applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the governing board or the department shall consider mitigation measures proposed by or acceptable to the applicant that cause net improvement of the water quality in the receiving body of water for those parameters which do not meet standards.

Initiation of Rule Development

On November 19, 2020,⁴ DEP formally began the process of developing amendments to update the ERP stormwater design and operation regulations; specifically, DEP set out to "increase the removal of nutrients from stormwater discharges, and measures for consistent application of the net improvement performance standard to ensure significant reductions of any pollutant loadings to a waterbody."⁵ The rulemaking updates Fla. Admin. Cod. Ch. 62-330 and the ERP Applicant's Handbook Volume I (AHI) that applies statewide. Each of the state's five water management districts also initiated rule develop-

ment, primarily to delete water quality provisions that will be addressed in AHI.⁶ While DEP's rulemaking effort was widely supported, there were differences in opinion as to how to achieve improved water quality.

Technical Advisory Committee

DEP's practice in rule development is to seek stakeholder input. To do this, DEP formulated a Technical Advisory Committee (TAC) to provide public input and recommendations during the rule development process.⁷ The TAC's mission was to provide a forum for identifying and outlining recommendations to strengthen the ERP stormwater design and operation regulations. The stated TAC goal "was to develop and provide consensus on stormwater rulemaking recommendations for DEP and the WMDs through public discussion and constructive deliberation."⁸ Under DEP's leadership, the TAC participated in 13 meetings, beginning on December 1, 2020. DEP requested recommendations from the TAC on: 1) Changes to improve existing stormwater operation regulations to ensure water resource protection; 2) Measures for consistent application of the net improvement performance standard to ensure significant reductions of pollutant loadings to waterbodies impaired by stormwater discharges; and 3) Options for identifying stormwater design criteria and best management practices that are effective for increasing the removal of nutrients from stormwater discharges.⁹

To provide the opportunity for additional public comment, DEP also held four public workshops between

May and December 2022.

Rule Publication

DEP published notice of the proposed rule according to the requirements of F.S. §120.54(3)(a)1, which states:

Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency, upon approval of the agency head, shall give notice of its intended action, setting forth a short, plain explanation of the purpose and effect of the proposed action; the full text of the proposed rule or amendment and a summary thereof; a reference to the grant of rule-making authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented or interpreted. The notice must include a summary of the agency's statement of the estimated regulatory costs, if one has been prepared, based on the factors set forth in s. 120.541(2);...

DEP published the proposed rule on February 24, 2023, which included changes to Fla. Admin. Code Ch. 62-330 and changes or new language to the following parts of AHI: Part 2 (definitions); Part 3 ("grandfathering"¹⁰); Part 8 (criteria for evaluation); Part 9 (stormwater quality treatment calculations); and Part 12 (operations and maintenance). Changes and new language were also proposed for dams, appendices, and forms. The published rule contained the following additional permitting requirements: 1) Modeling or calculations are required, rather than presumptive best management practice design; 2) Minimum stormwater treatment performance standards for design are based on a pre/post analysis or a nutrient reduction efficiency, whichever is more protective; 3) Treatment designs must provide 80% nutrient reduction for both total phosphorous (TP) and total nitrogen (TN); 4) Additional removal requirements of 95% for projects discharging within Outstanding Florida Waters; 5) Additional provisions for projects discharging to impaired waters to ensure consistent procedures for demonstrating that a project will provide a net improvement to receiving waters; 6) For redevelopment, the proposed provisions would allow a reduced TN performance standard of 45%, under limited conditions, which are expected to support redevelop-

ment in areas where there are likely little or no historical stormwater treatment.¹¹

The published rule also proposed changes to the operation and maintenance requirements in §12 of AHI. These include strengthened training, documentation, and inspection frequency requirements to help ensure that new stormwater management systems will be properly operated and maintained over time. There are also new permitting requirements to ensure that entities will be capable of performing operation and maintenance over time.¹²

Statement of Estimated Regulatory Costs (SERC)

Section 120.54(3)(b)1 requires agencies to prepare a SERC when the rule would exceed the following regulatory costs:

1. Statement of estimated regulatory costs.—...However, an agency must prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541, if:
 - a. The proposed rule will have an adverse impact on small business; or
 - b. The proposed rule is likely to

directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate in this state within 1 year after the implementation of the rule.

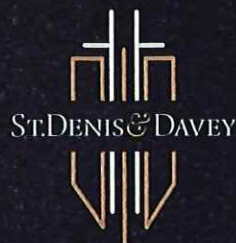
The proposed rule tripped the statutory requirement for a SERC because DEP determined that regulatory costs exceed \$200,000 within one year. To prepare the SERC, DEP estimated the new design and permitting requirements to meet the minimum stormwater treatment design performance criteria for new or altered stormwater management systems. Specifically, DEP estimated the costs of a sample project under the new rule requirements. DEP determined the total estimated cost (prior to revisions made in response to lower regulatory cost alternatives) would be \$1,441,867,660. On a per project basis DEP estimated:

1. Increased Stormwater Treatment Requirement, \$102,755
2. Additional Treatment System Design, \$1,004
3. New Operation and Maintenance Permitting, \$1,631
4. Strengthened Inspection and Reporting, \$443

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5. Total Per Project Items (Add lines 1-4), \$105,833

6. Number Projects, five years from implementation, 14,032

7. Total Per Project Cost,¹³ \$1,485,050,000

8. Dam safety total for five years, \$620,200

Total Proposed Rule Revisions, \$1,485,670,000

F.S. Ch. 120 allows affected persons to submit proposals for a lower cost regulatory alternative to the agency. Four Lower Cost Regulatory Alternatives (LCRAs) were submitted to DEP. Under §120.541(1)(a), DEP was required to respond to each LCRA, revise the SERC, and either adopt the LCRA or provide a statement of the reasons for rejecting the LCRA. Additionally, DEP received minor comments from the legislature's Joint Administrative Procedures Committee (JAPC).

Three of the LCRAs requested clarification of "grandfathering" language for construction permits that are consistent with their conceptual permits and clarification that minor permit modifications would not be subject to the new rule language. The fourth LCRA focused on the requirement that treatment designs provide 80% nutrient reduction for both TP and TN and the additional nutrient removal requirements of 95% for projects discharging within Outstanding Florida Waters. The fourth LCRA argued that the rule language was not based on the most recent scientific data or statutory authority.

Rule Adoption Hearing and Response to LRCAs

DEP conducted a rule adoption hearing on March 22, 2023, in which DEP not only presented the rule, but also considered the LCRAs. It also took general public comment. DEP published revised rule language on March 24, 2023, responding to the LRCAs and JAPC comments.

DEP published amendments reducing some of the percentage reduction requirements set forth in the minimum performance standards. The general minimum performance standard was changed from an 80% to a 55% reduction in the average annual

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loading of TN from the proposed project. For Outstanding Florida Waters, the percentages were changed from a 95% reduction of the average annual loading of nutrients to a 90% reduction of the average annual loading of TP and 80% reduction of the average annual loading of TN.¹⁴

DEP also clarified that activities that were approved by an unexpired conceptual approval, general, or individual ERP, management and storage of surface waters permit, or surface water management permit issued prior to rule's effective date, and subsequent permits to construct and operate the future phases consistent with an unexpired conceptual approval permit, will be exempt from the rule. The exemption does not apply to a major modification or one that will cause substantially different water resource impacts. Additionally, the new rule will not apply to permit transfers of grandfathered permits, or conversion of such permits to the operation phase. However, operation phase permits will be subject to the Inspections and Reporting Requirements of §§12.5 and 12.6 of AHI. These grandfathered permits will be reviewed under the rule in effect at the time the permit was originally issued, unless the applicant elects to have such modification reviewed under the new rule.

In addition to grandfathered activities, the rule has a delayed application date. Under §3.1.2(e)(4) of AHI:

Projects or activities that are the subject of a general or individual permit application that is deemed complete on or before [effective date + 12 months] shall be exempt from the amendments to Chapter 62-330, F.A.C., and Volume I adopted on [effective date], and the corresponding amendments to the applicable Volume II.

Legislative Ratification

Under F.S. §120.541(3):

If the adverse impact or regulatory costs of the rule exceed any of the criteria established in paragraph (2)(a), the rule shall be submitted to the President of the Senate and Speaker of the House of Representatives no later than 30 days prior to the next regular legislative session, and the rule may not take effect until it is ratified by the []legislature.

The SERC prepared by DEP contains costs that trip the above requirement for legislative ratification. The proposed rule was considered by the legislature, but not adopted, primarily due to the costs associated with the proposed rule. DEP will now need to seek legislative ratification in 2024. In the meantime, DEP will need to learn what changes to the language are necessary for successful ratification in 2024. If alternative language is proposed, it will have to be formalized by the initiation of rule development, prior to the 2024 legislative session.

Water Management District Rulemaking

Early in 2023, each of the water management districts also held workshops to present its proposed amendments to its individual ERP Applicant's Handbook Volume II (AHII). Each water management district currently has its own rules on water quality and water quantity in its individual AHII. Due to the proposed revisions to address the new statewide stormwater requirements in AHI, each water management district proposed the necessary changes within its AHII to be consistent with AHI. The stated purpose of the rulemaking is to address redundant rule language; obsolete rule language; refinement of rule language; and the expansion of existing rule language for better clarification.¹⁵

The water quantity or flood control provisions will continue to remain in each water management district's AHII. While the legislature has called for statewide consistency in ERP rules, these differences in AHII are acceptable because they are based on the differences in physical and natural characteristics of the geographic areas in each water management district.¹⁶

Other DEP Water Quality Rulemaking — Water Quality Enhancement

On June 24, 2022, Gov. DeSantis signed House Bill 965¹⁷ into law, codified at F.S. §373.4134, to provide an additional tool to assist in water quality enhancement.¹⁸ Recognizing the need for more options to assist in the enhancement of water quality, the bill was unanimously passed by the Florida House and Senate.¹⁹ The bill creates, for the first time in Florida, the concept of water quality enhancement areas (WQEAs).²⁰

A WQEA is a natural system²¹ that is constructed, operated, managed, and maintained pursuant to a permit to provide offsite, compensatory, regional treatment within an identified enhancement service area.²² It is much like a mitigation bank, but will be used to offset water quality rather than wetland impacts. During the legislative process, the rule was limited to use by governmental entities. While anyone can construct and permit a WQEA, credit sales are limited at this time to governmental entities.

On March 14, 2023, DEP initiated rulemaking to implement the requirements of F.S. §373.413. The stated purpose of the rulemaking is to establish a water quality credit trading program between WQEA facilities permitted under the ERP program and governmental entities. The rulemaking also will set forth associated ERP requirements for the WQEA facilities and the governmental entities.²³

This is a separate rulemaking docket from the Clean Waterways Act rulemaking docket. This means the rulemaking process can proceed and be finalized while the clean waterways rulemaking awaits legislative ratification. □

¹ "Stormwater" means the flow of water that results from, and that occurs immediately following, a rainfall event. Florida Department of Environmental Protection (DEP), *Environmental Resource Permit Applicant's Handbook*, 2(a)98 (June 1, 2018).

² Susan Roeder Martin & Karen West, *Modernization of Stormwater Quality Rules*, 95 Fla. B. J. 30 (Mar./Apr. 2021).

³ Act effective July 1, 2020, FLA. LAWS. Ch. 2020-150 (2020).

⁴ 46. 226 FLA. ADMIN. REG. 5019 (Nov. 19, 2020).

⁵ *Id.*

⁶ DEP's notice also included amendments to the ERP Applicant's Handbook Volume II that applies within the Northwest Florida Water Management District.

⁷ Members of the TAC included the following interests: academia, environmental interests, homebuilders, agriculture, government, green building, urban redevelopment, low impact design, stormwater utilities, and Florida Stormwater Association.

⁸ Florida Department of Environmental Protection (FDEP), *Clean Waterways Act Technical Advisory Committee Summary Report 2* (Mar. 2022), available at <https://floridadep.gov/sites/default/files/CleanWaterwaysAct-TAC-SummaryReport.pdf>.

⁹ *Id.* at 3.

¹⁰ Grandfathering means an exemption from new rules or laws for a person or entity that already engages in certain activities or had a permit before the rules take effect.

¹¹ FDEP, *Clean Waterways Act Stormwater Rulemaking Public Hearing 4* (Mar. 22, 2023), available at <https://floridadep.gov/sites/default/files/Hearing%20Presentation.pdf>.

¹² *Id.* at 5.

¹³ FDEP, *Statement of Estimated Regulatory Costs [from Revisions to Fla. Admin. Code R. 62-330]* 3 (Mar. 23, 2023), available at <http://publicfiles.dep.state.fl.us/dwrm/drafruledocs/stormwater/noc/serc-template-updated.pdf>.

¹⁴ FDEP, [Unofficial Updated] *Environmental Resource Permit (ERP) Applicant's Handbook Vol. I* §8.3.3(a) (Mar. 23, 2023), available at http://publicfiles.dep.state.fl.us/dwrm/drafruledocs/stormwater/noc/Updated%20AH_I_thru%20CompareCourtesy.pdf; see also *Notice of Change to Fla. Admin. Code R. 62-330.010* (Mar. 24, 2023) (effecting the revisions to AH I §8.3.3(a)).

¹⁵ See, e.g., Florida Department of Environmental Protection & Nw. Fla. Water Mgmt. Dist., [Unofficial Updated] *Environmental Resource Permit Applicant's Handbook Vol. II* (Design and Performance Standards Including Basin Design and Criteria) (Mar. 17, 2023), available at publicfiles.dep.state.fl.us/dwrm/drafruledocs/stormwater/noc/AHII-nwfwmd-FINAL.pdf; Northwest Florida Water Management District, *Statewide Environmental Resource Permitting Rules for Stormwater Design and Operation Regulations Rule Development Workshop for Applicant's Handbook Vol. II, Appendices, and Refer-*

ences and Design Aids (Jan. 11, 2023), available at https://floridadep.gov/sites/default/files/NORTHWEST%20FLORIDA%20WATER%20MANAGEMENT%20DISTRICT%20-AH%20Vol%20II_2.pdf.

¹⁶ See FLA. STAT. §373.4131(c)2 (2022).

¹⁷ H.B. 965 (Environmental Management) (Fla. 2022).

¹⁸ The bill took effect on July 1, 2022.

¹⁹ The history for the bill, which was sponsored by Rep. Truenow and others, is: State Affairs Committee; Agriculture and Natural Resources Appropriations Subcommittee; Environment, Agriculture and Flooding Subcommittee. The history for the companion S.B. 1426, which was sponsored by Sen. Burgess, is: Appropriations Subcommittee on Agriculture, Environment, and General Government; Environment and Natural Resources Committee.

²⁰ A water quality enhancement area is "a natural system constructed, operated, managed, and maintained for the purpose of providing offsite regional treatment for which enhancement credits may be provided pursuant to a water quality enhancement area permit...." FLA. STAT. §373.4134(2)(d) (2022).

²¹ Natural system is defined as "an ecological system supporting aquatic and wetland-dependent natural resources, including fish and aquatic and wetland-dependent wildlife habitats." FLA. STAT. §373.4134(2)(c) (2022).

²² Florida Senate Committee on Environment and Natural Resources, *Summary of CS/CS/CS HB 965 — Environmental Management*, <https://www.flsenate.gov/Committees/bills/summaries/2022/html/2621>.

²³ 49. 50 FLA. ADMIN. REG. 877 (Mar. 14, 2023).

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This column is submitted on behalf of the Environmental and Land Use Law Section, Josh Coldiron, chair, and Brendan Mackesay, editor.