

PROTECTING WATER FOR BISCAYNE BAY

**South Miami-Dade
Issues Coordination Meeting
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*Beth Lewis, Senior Specialist Attorney, Office of Counsel
Brenda Mills, Principal Technical Program Specialist, Federal and State Policy Division
Everglades Restoration and Capital Projects*

Process for Protecting Water - Issues

- Water for Biscayne Bay will be protected by rule
- Rulemaking is subject to the requirements of the Florida Administrative Procedure Act (APA) – Chapter 120, F.S.
- The Florida Legislature approved changes to the APA on November 17, 2010 which are effective immediately
- One signification change requires agencies to prepare a Statement of Estimated Regulatory Cost (SERC) if a proposed rule will have an adverse impact on small business or is likely to directly or indirectly increase regulatory costs in excess of \$200,000 within one year of rule implementation – 120.54, 120.541, F.S.



Process for Protecting Water – Issues con't

- The SERC must include a regulatory analysis showing whether:
 - the rule directly or indirectly is likely to have an adverse impact on economic growth in excess of 1 million dollars aggregated over 5 years;
 - The rule is likely to have an adverse impact on business competitiveness in excess of 1 million dollars aggregated over 5 years;
 - Is likely to increase regulatory costs, including transactional costs in excess of 1 million dollars aggregated over 5 years – 120.541(2), F.S.
- If any of these criteria are exceeded, the Legislature must ratify the rule and it will not take effect until ratification occurs – 120.541(3), F.S.



Process for Protecting Water – Issues con't

- A proposed rule must be able to withstand challenge
 - The agency has the burden to prove by a preponderance of the evidence standard that the rule is not an *invalid exercise of delegated legislative authority*
- *Invalid exercise of delegated legislative authority* means action that goes beyond the powers, functions, and duties delegated by the Legislature



Process for Protecting Water - Issues con't

Rule is an invalid exercise of delegated legislative authority if any one of the following applies:

- Agency has materially failed to follow rulemaking requirements;
- Agency has exceeded its grant of rulemaking authority;
- Rule enlarges, modifies, or contravenes the specific provisions of law implemented;
- Rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
- Rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;
- Rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives - 120.52, F.S.



Tools to Protect Water for the Natural System

- Minimum Flows and Levels (MFLs)
- Water Reservations
- Restricted Allocation Areas (RAA)



Overview: Chapter 373, F.S. Part I

Chapter 373, Part I sets forth the declaration of policy for State water management, and covers a broad range of activities including:

- Managing water and related land resources;
- Promoting proper utilization of surface and groundwater;
- Developing and regulating works and provide water storage for beneficial purposes;
- Promoting the availability of sufficient water for all existing and future reasonable-beneficial uses and natural systems;
- Preventing damage from floods, soil erosion, and excessive drainage;
- Minimizing degradation caused by the discharge of stormwater;
- Preserving natural resources, fish, and wildlife;
- Promoting recreational development, protecting public lands, and assisting with navigability of rivers and harbors – 373.016, F.S.

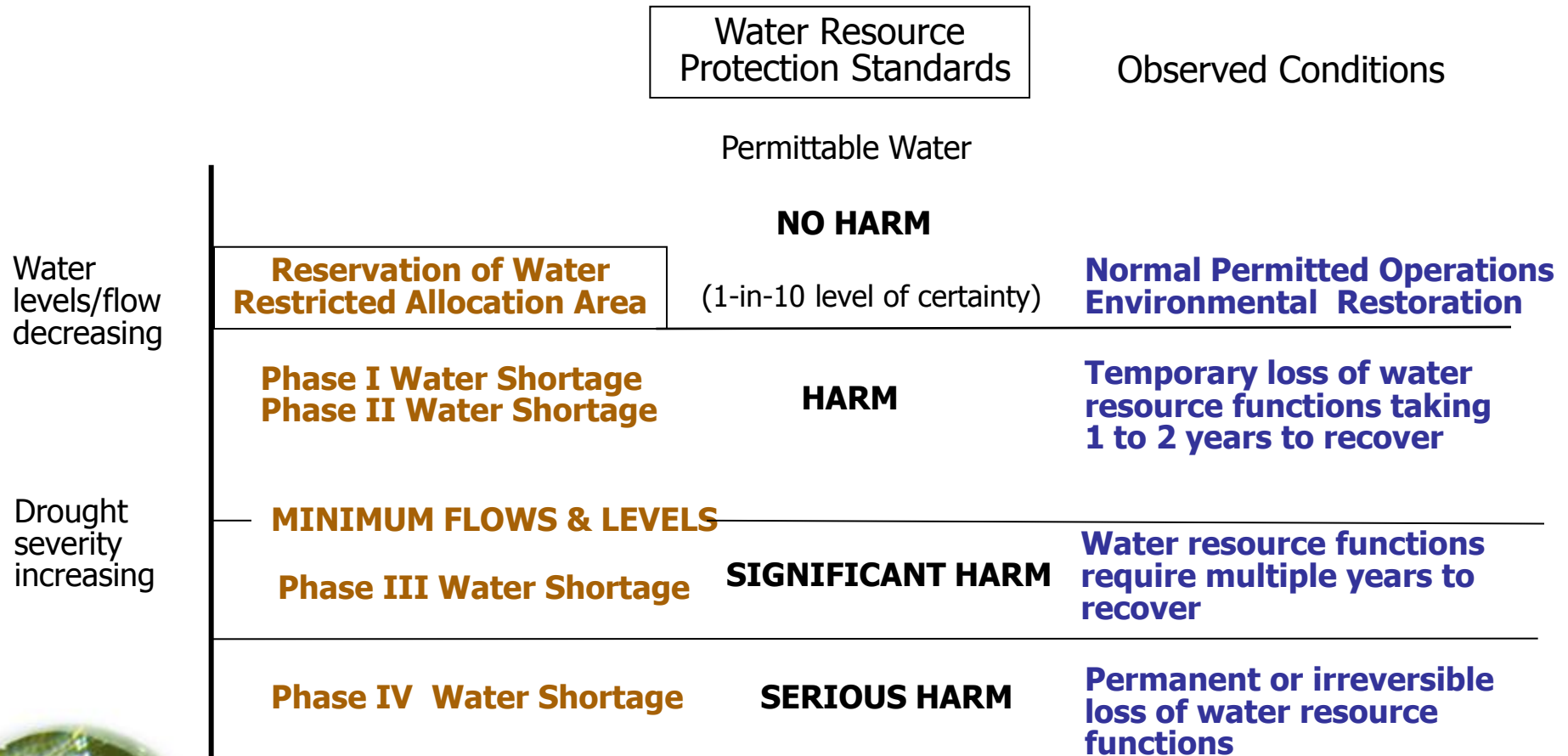


Overview: Chapter 373, F.S. Part II

- Chapter 373, Part II addresses the permitting of consumptive uses of water
- Governing Boards shall be responsible for implementing permitting program
- Covers many topics related to permitting such as: conditions for a permit; application; duration; modification; revocation
- Addresses other topics related to permitting such as: water conservation, water shortage, water reuse



Water Protection Tools and How They Relate to Each Other



Water Protection Tool - MFLs

- MFLs are the limit at which further *withdrawals* would be significantly harmful to the water resources or the ecology of the area - 373.042, F.S.
 - Minimum Flows and Levels are found in Part I – State Water Resource Plan. This is important because withdrawals are not limited to consumptive use
- MFL improvements are predicated upon implementing the recovery or prevention strategy. Existing permits consistent with these strategies will be renewed
- Rule based on defining “significant harm” which requires scientific and technical analysis



Water Protection Tool - Reservations

- Water reservations set aside water from consumptive use for the protection of fish and wildlife or for public health and safety – 373.223(4), F.S.
 - Water Reservations are found in Part II – Permitting of Consumptive Uses of Water. This is important because only consumptive use can be regulated under this authority
- SFWMD rules establish a baseline that prevents future consumptive use
- Rule based on defining “protection of fish and wildlife” which requires scientific and technical analysis



Water Protection Tool Differences - RAA

- Restricted Allocation Area (RAA) rules regulate consumptive use in a specific geographic area based on conditions for permit issuance – 373.223(1), F.S.
 - reasonable, beneficial – “economic and efficient utilization”
 - public interest
- Conditions for permit issuance are found in Part II – Permitting of Consumptive Uses of Water. This is important because only consumptive use can be regulated under this authority
- Rule based on defining what is in the public’s interest



Water Protection Tool Differences – Reservations and RAA

- Florida statutes contain specific authority to reserve or allocate water associated with CERP projects – 373.470, F.S.
- Legislature has found that CERP projects are in the public interest – 373.470, 373.1501, F.S.



Limitations of Tools

- Minimum Flows and Levels do not
 - Enhance or restore natural systems
 - Restrict existing consumptive use that is consistent with the recovery or prevention strategy
 - Meet Federal requirements for protecting CERP project water



Limitations of Tools (Cont.)

- Water Reservations and Restricted Allocation Rules do not
 - change system operations or guarantee water delivery
 - prevent changes caused by sea level rise
 - prevent changes caused by surface water management
 - create water
 - drought proof the system
 - affect existing legal uses so long as the users are not contrary to the public interest

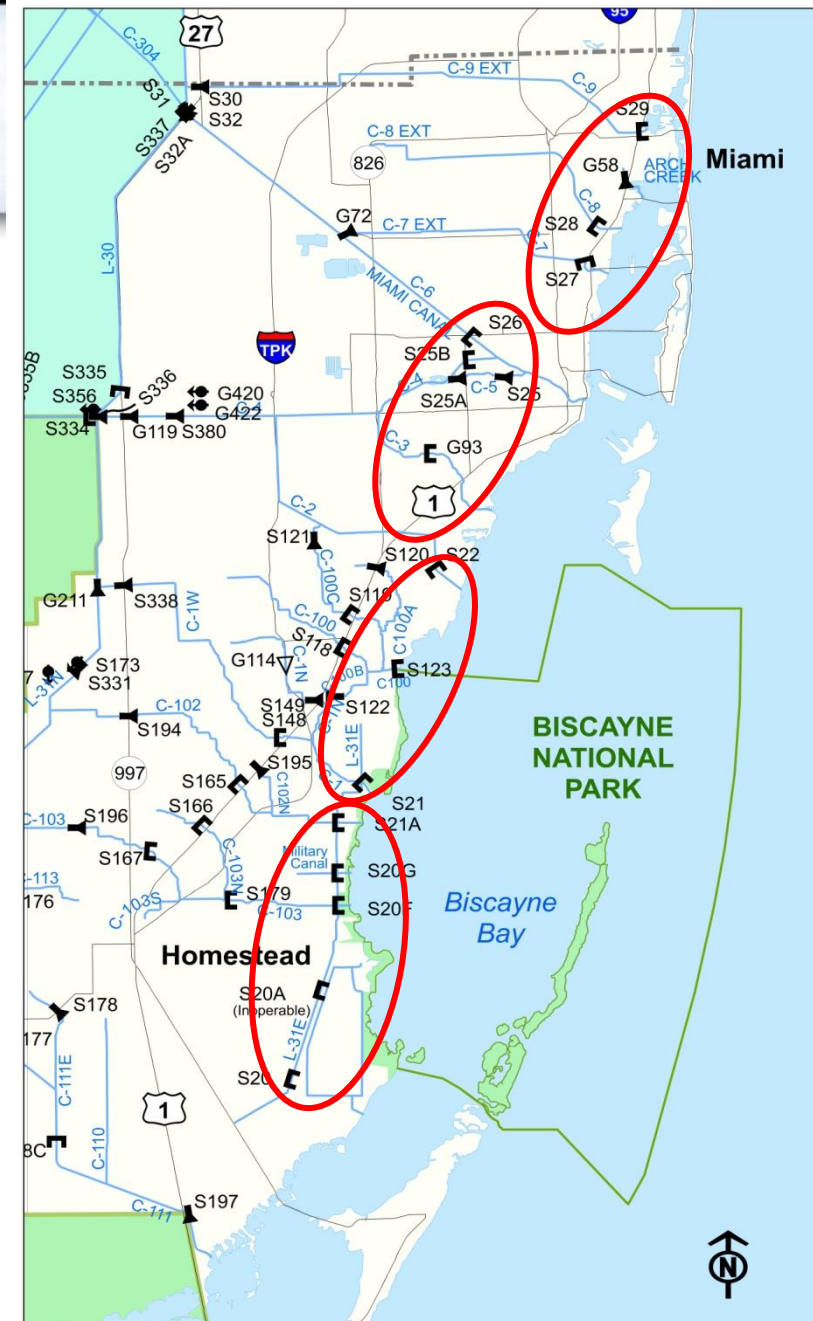


Current Staff Direction

- Rulemaking must protect water identified for the CERP Biscayne Bay Coastal Wetlands project and choice of tool must be acceptable to the U.S. Army Corps of Engineers
- Initial scope broader to protect all existing surface water inflows to Biscayne Bay
- Rule development proposed for December Governing Board meeting
- This will be first step to protect water for the Bay

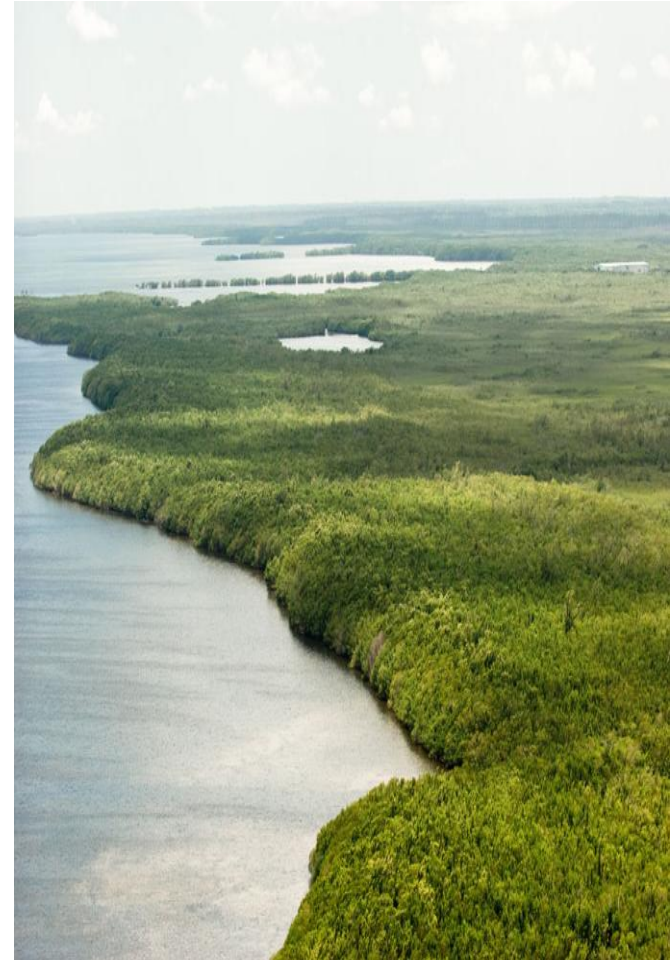


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How Regulatory Criteria Could Work

- No changes to volume and timing of inflows through coastal canals
- Inflows measured at coastal canal structure
- No direct withdrawals from canals
- No indirect withdrawals that increase seepage from canals



Summary: Staff Perspective

- A Restrict Allocation Area rule can be completed to protect all existing surface water inflows to Biscayne Bay in the least amount of time
 - Fish and wildlife needs do not have to be specifically defined by geographic area
 - No peer review requirements
 - Acceptable to the U.S. Army Corps of Engineers
 - Protects “pot of water” for Bay by preventing additional consumptive uses that could reduce existing flows into Bay
 - Flexible – protects existing flows, future increases or redistribution of flows



Questions?



Minimum Flows and Levels

- MFLs identifies the point at which further withdrawals will cause "significant harm" to the water resources or ecology of an area. 373.042 and 373.0421, F.S.
- MFLs have recovery or prevention strategies. These are included in applicable regional water supply plan. 373.709(2)(c)
- The MFL rules are contained in Chapter 40E-8, F.A.C.
- Significant Harm is defined at Chapter 40E-8.021(24), F.A.C.
- The MFL rules set forth under what conditions consumptive use permits that propose to withdraw directly or indirectly from and MFL water body will be issued and how existing permits will be treated. 40E-8.431
- The MFL rules set forth the relationship between MFLs and Water Shortage plan implementation. 40E-8.441, F.A.C.



Minimum Flows and Levels (Cont.)

- The rules governing issuance of consumptive use permits require that the applicant give reasonable assurances that the proposed water use is in accordance with the established MFL and implementation provisions – 40E-2.301(i); 40E-20.301(i).
- The specifics of how this evaluation will be undertaken are found in the “Basis of Review for Water Use Permit Applications” which is incorporated by reference in Chapters 40E-2 and 40E-20. BOR, Sec. 3.9.



Water Reservations

- Water Reservations are required to be identified in Regional Water Supply Plans – 373.709(2)(h).
- “Protection of Fish and Wildlife” is not defined in statute or in rule. The phrase has received interpretation in *Ass’n of Florida Community Developers v. Department of Environmental Protection et. al.*, DOAH Case No. 04-0880RP (2006)



Water Reservations (Cont.)

- Water Reservations are found in Chapter 40E-10, F.A.C.
- The water reservations rules set forth under what conditions applicants for consumptive use permits meet the requirements of the water reservations rule – 40E-10.031(1).
- The rules governing issuance of consumptive use permits require that the applicant give reasonable assurances that the proposed water use will not withdraw reserved water – 40E-2.301(k); 40E-20.301(k).
- The specifics of how this evaluation will be undertaken are found in the “Basis of Review for Water Use Permit Applications” which is incorporated by reference in Chapters 40E-2 and 40E-20. B.O.R., Sec. 3.11.



Restricted Allocation Area Rules

- Each RAA and the implementing criteria specific to that area are found in Section 3.2.1 of the “Basis of Review for Water Use Permit Applications” which is incorporated by reference in the rules governing the issuance of consumptive use permits, Chapters 40E-2 and 40E-20. BOR., Sec. 3.11.

