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The Water Quality Assurance Act of 1983 -- Florida's "Great Leap Forward" into Groundwater Protection and Hazardous Waste Management

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THE WATER QUALITY ASSURANCE ACT OF 1983—FLORIDA’S “GREAT LEAP FORWARD” INTO GROUNDWATER PROTECTION AND HAZARDOUS WASTE MANAGEMENT

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I. INTRODUCTION

The Water Quality Assurance Act of 1983 (the Act)¹ is the single most important environmental law passed by the Florida Legislature during the last ten years. It addresses numerous pollution-related issues, principally groundwater protection and hazardous waste contamination in Florida. The Act also creates funding mechanisms that will provide millions of dollars for state and regional agencies, as well as local governments, to create new environmentally oriented programs and to expand existing ones. Subsequent administrative rulemaking and implementation, which will necessarily follow the Act's enactment, will be substantial and will continue for several years to come.

Most major Florida environmental laws passed during the 1970's dealt with fairly evident problems, such as surface water pollution and visible air emissions.² In this regard, state legislation tended to track companion federal laws which focused regulatory efforts on "point source" or "end of pipe" discharges from industrial sources. In response to effluent limitations on their waste streams, many industries perceived an incentive to pre-treat their wastes through on-site facilities such as evaporation-percolation ponds before discharging into surface waters. Thus, groundwater discharges across Florida and throughout the nation were condoned and even fostered because the U.S. Environmental Protection Agency lacked jurisdiction over direct discharges to groundwater. In hindsight, this statutory and regulatory incentive for groundwater discharges was misplaced.

While many of Florida's laws were broad enough to address a range of environmental issues, in practice the state's chief environmental agency focused on immediate problems to which the legislature would devote funding. That agency, the Florida Department of Environmental Regulation (DER),³ lacked the staff and budget

1. Ch. 83-310, 1983 Fla. Laws —.

2. See, e.g., Florida Water Resources Act of 1972, ch. 72-299, 1972 Fla. Laws 1082 (current version at FLA. STAT. §§ 373.012-.619 (1981 & Supp. 1982)); The Florida Environmental Land & Water Management Act of 1972, ch. 72-317, 1972 Fla. Laws 1162 (current version at FLA. STAT. §§ 380.012-.10 (1981)); Florida Coastal Management Act of 1978, ch. 78-287, 1978 Fla. Laws 814 (current version at FLA. STAT. §§ 380.21-.25 (1981)); Florida Air & Water Pollution Control Act, ch. 67-436, 1967 Fla. Laws 1364 (current version at FLA. STAT. §§ 403.011-.4153 (1981 & Supp. 1982)); Florida Safe Drinking Water Act, ch. 77-337, 1977 Fla. Laws 1426 (current version at FLA. STAT. §§ 403.850-.864 (1981 & Supp. 1982)).

3. The Department of Environmental Regulation was created pursuant to the Florida Environmental Reorganization Act of 1975, ch. 75-22, 1975 Fla. Laws 42, and assumed those responsibilities previously vested in the Department of Pollution Control. DER is headed by

necessary to address acknowledged but less obvious matters of environmental concern, such as groundwater contamination and hazardous waste management.

By the early 1980's, Florida could no longer ignore the need for improved groundwater protection and hazardous waste management. In 1980, Florida's legislature enacted substantial amendments to state laws dealing with hazardous waste management and regulation.⁴ The amendments were patterned on the hazardous waste provisions of the federal Resource Conservation and Recovery Act of 1976,⁵ and enabled Florida to embark upon its own program of hazardous waste management. Additionally, in 1981 and 1982, DER renewed its effort to amend its rules regulating the discharge of domestic and industrial liquids into the groundwater by strengthening related groundwater protection standards and requirements. This effort culminated in the adoption of groundwater-oriented rule amendments that took effect on January 1, 1983.⁶ Notwithstanding substantial progress in its groundwater and hazardous waste programs, DER was unable to implement the state hazardous waste management program to the degree and with the speed which the legislature desired.⁷

Other sources of concern emerged. The Temik⁸ crisis in central Florida touched off a joint effort by DER and the Florida Department of Agriculture and Consumer Services to define and analyze the scope of pesticide-related groundwater contamination in the state.⁹ Also, both DER and the Florida Department of Health and

a secretary appointed by the Governor and subject to confirmation by the Senate. FLA. STAT. § 20.261(1) (1981). The current DER Secretary is the Hon. Victoria J. Tschinkel.

4. Ch. 80-302, 1980 Fla. Laws 1322 (codified throughout FLA. STAT. §§ 403.701-.730 (1981 & Supp. 1982)).

5. 42 U.S.C. §§ 6901-6987 (1976).

6. FLA. ADMIN. CODE R. 17-3.401 to -.406, 17-4.245 (Supp. 1982). The DER groundwater rule amendments are discussed in Green & Preston, *Florida's New Groundwater Regulations*, 62 FLA. B.J. 345 (1983).

7. The 1980 hazardous waste legislation created a State Hazardous Waste Policy Advisory Council within DER to assess the hazardous waste program of DER as well as to perform other duties. FLA. STAT. § 403.729 (1981). In its final report, the Advisory Council recommended that additional state funding should be provided for DER's hazardous waste program since DER was constrained financially and structurally in its attempt to cost-effectively manage the state's hazardous waste effort. Governor's Hazardous Waste Policy Advisory Council, *Hazardous Waste: A Management Perspective* 43 (Dec. 1981).

8. Temik, or aldicarb, is a toxic systemic pesticide which is applied and worked into the soil around the roots of crops. The compound is very water soluble to facilitate uptake by plants, but this feature can cause the pesticide to behave as a water soluble contaminant.

9. In mid-1982 DER initiated a water sampling program to evaluate the potential for Temik to migrate into Florida's groundwaters. DER and the manufacturing company are

Rehabilitative Services (HRS) perceived a need to examine further the cumulative impact of widespread septic tank use in the emerging urban areas of Florida. As a consequence of this examination, HRS substantially revised its rules regulating the construction, placement and use of septic tanks.¹⁰ Thus, while the widespread use of septic tanks and the application of registered agricultural pesticides throughout Florida were sanctioned by state regulators, the potential impacts upon groundwater resources were not fully recognized by public and private interests.

Key leaders of the Florida Legislature focused on the state's groundwater problems in advance of the 1983 legislative session. House of Representatives Speaker H. Lee Moffitt (D-Tampa) appointed in August, 1982, a Task Force on Water Issues chaired by former Representative William E. Sadowski of Miami. In giving his charge to the task force, Speaker Moffitt noted:

There is no doubt that water is the one factor that is absolutely essential for the existence of life as we know it. This most essential resource, unfortunately, is so common and so familiar that we treat it with neglect, if not contempt.

Water is so crucial to Florida because Florida is one of the few states in the country that [relies] almost completely on groundwater to meet [its] water needs. This fact, plus the projection that our current population will double by the year 2000 makes it essential that we examine whether we have in place the mechanisms to ensure that we are adequately managing our water resources and that we are maintaining and protecting the quality of our water.¹¹

The task force held a series of meetings and workshops throughout Florida during the fall of 1982 and the winter of 1983 and issued a final report in March, 1983.¹² It made a series of recommendations on a variety of subjects including hazardous waste management, septic tanks and small wastewater treatment plants

presently monitoring groundwater at several separate locations in central and southern Florida. Additionally, an interagency task force was established to further analyze the scope of the potential problem and to make recommendations for further action.

10. FLA. ADMIN. CODE R. 10D-6 (Supp. 1982) (effective Jan. 1, 1983).

11. Personal comments made by Speaker Designate H. Lee Moffitt at the organizational meeting of the Task Force on Water Issues at the Capital, Tallahassee, on September 9, 1982.

12. Report of the Speaker's Task Force on Water Issues, Florida House of Representatives, March 1983 [hereinafter referred to as Water Task Force Report].

(package plants), groundwater contamination and protection strategies, pesticide use, sewage treatment plant construction funding, and organization and funding of DER and water management districts. The task force also made funding recommendations for each subject area studied.

The legislature translated most of the findings and recommendations of the task force report into actual legislative proposals. Numerous bills were introduced. After sixty days of the regular legislative session, a ten-day extension of the regular session, a ten-day special legislative session, and appointment of a legislative conference committee¹³ to resolve outstanding differences between versions of the legislation passed by the House and Senate, a compromise was reached and approved by both houses.¹⁴ On July 1, 1983, Governor Bob Graham signed into law the Water Quality Assurance Act of 1983. Most provisions of the Act took effect the same day.¹⁶

The remainder of this article will summarize the major provisions of the Act, including the funding sources and taxing mechanisms created. The key regulatory activities which local governments and regional and state agencies are likely to institute as a result of this law will be identified, and the legal and practical implications of such agency rulemaking also will be analyzed briefly.

II. PRIMARY PROVISIONS OF THE ACT

The complex, 117-page Act addresses two main subjects: groundwater protection and hazardous waste management.¹⁶ A separate section of the Act deals with reorganization of and delegation of powers among various state and regional environmental agencies.¹⁷

13. The conference committee was chaired by Representative Jon Mills of Gainesville, who also served as the chairman of the House Natural Resources Committee. The co-chairman of the conference committee was Senator Patrick K. Neal of Bradenton, who also served as the chairman of the Senate Natural Resources and Conservation Committee.

14. Fla. HB 47-B (1983) was passed unanimously by the House on June 23, 1983, and unanimously by the Senate the following day.

15. Those provisions of the Act which accelerate the state's sales tax collection do not take effect until Nov. 1, 1983. See *infra* Section III of text for a discussion of the accelerated sales tax and other funding mechanisms provided by the Act.

16. The Act is divided into twelve separate parts, each of which addresses a distinct groundwater or hazardous waste problem.

17. Ch. 83-310, §§ 61-78, 1983 Fla. Laws _____. This part of the Act is intended to decentralize many of the permitting functions presently carried out by DER. The main thrust of this part of the Act is to transfer to DER's substate "environmental district centers" and to the five water management districts the responsibility for various water quality permitting activities. Additionally, the Act requires DER's district centers and the water management

A. Groundwater Protection

The past inattention to groundwater discharges led the 1983 Legislature to enact several new statutory provisions in this area. These changes are principally aimed at detecting potential problems and preventing instances of groundwater contamination before they occur. Specific subjects addressed in the Act include groundwater monitoring, well field contamination, artesian well plugging, on-site sewage disposal, restricted-use pesticides, and underground and above ground storage tanks.

1. Monitoring and Data Collection

As part of the federal and state regulation of domestic and industrial wastewater discharges, owners and operators of polluting facilities must regularly sample and analyze effluents for compliance with surface water standards. In comparison, sources of discharge to groundwater were not required to conduct subsurface monitoring. Now, DER's groundwater rules require most owners or operators of facilities which discharge effluent into the groundwater to monitor, sample, and analyze groundwater quality in the vicinity of the discharge. Analyses of the samples collected are forwarded to DER for review. This information ordinarily is retained in one of several DER district offices throughout the state.¹⁸ Local governments, water management districts and other state agencies

districts to co-locate various permitting operations. These requirements are generally designed to streamline and better coordinate the permitting process of various water quality programs.

In general, this part of the Act appears to envision DER undertaking a sort of central rulemaking authority position, promulgating rules and standards for water quality which are to be implemented by the DER district offices and the water management districts. The major programs to be delegated to the water management districts are implementation of DER's stormwater discharge rule, FLA. ADMIN. CODE R. 17-25 (Supp. 1982), and the permitting of water wells. Additionally, this part of the Act specifies that the water management districts will have authority over permits relating to artificial aquifer recharge projects, licensing of water well contractors, registration of drillers and drilling equipment, and enforcement of statutes and DER rules.

The other major provision of this part of the Act clarifies who has jurisdiction for review of water management district rules, a subject of conflict between FLA. STAT. §§ 373.026(7) & .114 (1981). Under the Act, DER is given exclusive authority to review and conduct hearings on the consistency of any water management district rule with the state water policy as formulated in DER's rules. Exclusive authority for review of all other rules of the districts will lie with the Governor and Cabinet, sitting as the Land and Water Adjudicatory Commission.

18. DER operates six regional district offices throughout the state. The Act delegates to these district offices significantly greater permitting and regulatory authority. *See supra* note 17.

also generate a wide variety of water resources information. This collected but non-integrated data retained in countless files and drawers throughout Florida does not facilitate the identification of regional contamination or trends in groundwater degradation.

To overcome this problem, the Act directs DER to collect and compile all scientific and factual information relating to water resources that is generated by local governments, water management districts and state agencies, and to make it accessible in a central depository.¹⁹ DER is also directed to establish its own groundwater-quality monitoring network in conjunction with other cooperating state and federal agencies, water management districts, and local governments.²⁰ DER must develop a computerized groundwater data base with this information. Data is to be initially compiled for regions deemed prone to groundwater contamination as a result of land use, regions that have an identifiable direct connection with any confined aquifer used for drinking water, and regions dependent on a single-source aquifer.²¹

2. Potable Water and Well Programs

Since passage of the Florida Safe Drinking Water Act²² in 1977, both DER and HRS have shared joint responsibility for ensuring that potable water supplies in Florida remain fit to drink. DER has regulated all public drinking water systems.²³ HRS, along with local county health departments, has regulated private water supplies.²⁴ Only DER has had specific statutory authority to deal with imminent hazards to a public water system.²⁵

The new Act authorizes DER, in coordination with HRS, to take such action as DER may deem necessary to protect the public health from dangers associated with public or private water supplies.²⁶ DER must develop a program aimed at preventing contamination and minimizing the danger of contamination of all potable water supplies.²⁷ DER also must contract for clinical tests of affected populations if contaminants have entered or are likely to

19. Ch. 83-310, § 2, 1983 Fla. Laws — (to be codified at FLA. STAT. § 373.026(2)).

20. Ch. 83-310, § 3, 1983 Fla. Laws — (to be codified at FLA. STAT. § 403.063).

21. Ch. 83-310, § 2, 1983 Fla. Laws — (to be codified at FLA. STAT. § 373.026(2)).

22. FLA. STAT. §§ 403.850-.864 (1981 & Supp. 1982).

23. FLA. STAT. § 403.853 (1981); FLA. ADMIN. CODE R. 17-22 (1982).

24. FLA. STAT. § 403.862(1)(f) (1981); FLA. ADMIN. CODE R. 10D-4 (1982).

25. FLA. STAT. § 403.855 (1981).

26. Ch. 83-310, § 5, 1983 Fla. Laws — (to be codified at FLA. STAT. § 403.855).

27. *Id.* (to be codified at FLA. STAT. § 403.855(3)).

enter their public or private water supplies.²⁸

In certain instances, the unregulated upward flow of poorer quality water through a deep artesian well can contaminate or decrease water quality within a higher aquifer system used as source of potable water.²⁹ Current law addresses this potential problem by prohibiting the unrestricted flow from such a well under certain conditions.³⁰ Water management district authorities are well aware of the potential adverse effects of unregulated artesian wells. However, most water management districts have not established a detailed program to deal with the adverse impacts associated with free flowing artesian wells that have been abandoned by their former owners or operators.

The Act now defines an "abandoned artesian well"³¹ and directs each water management district to develop a plan to identify and plug such wells within its jurisdiction by January 1, 1992.³² Additionally, DER or the appropriate water management district is authorized to order the plugging of *any* artesian well in which the water is of such poor quality that it adversely affects an aquifer or other water body that serves as a source of public drinking water or is likely to serve as such a source in the future.³³

3. Septic Tanks

The Act clarifies and substantially modifies the siting requirements for on-site sewage disposal facilities and establishes new criteria and procedures for obtaining hardship variances from those requirements. The Act also establishes new provisions related to the use of septic tanks in industrial areas and limestone soils.

Under former law,³⁴ three primary factors were relied upon to regulate the siting and density of septic tanks. These factors included (1) the size and dimension of the lot, (2) the size of the subdivision in which the lot was located, and (3) the source of the potable water supply for the lot.³⁵ When the lot was served by a public water system, the statutes apparently prescribed conflicting

28. *Id.* (to be codified at FLA. STAT. § 403.855(4)).

29. Water Task Force Report, *supra* note 12, at 25.

30. FLA. STAT. § 373.206 (1981).

31. Ch. 83-310, § 6, 1983 Fla. Laws — (to be codified at FLA. STAT. § 373.203(3)).

32. Ch. 83-310, § 8, 1983 Fla. Laws — (to be codified at FLA. STAT. § 373.207).

33. Ch. 83-310, § 7, 1983 Fla. Laws — (to be codified at FLA. STAT. § 373.206).

34. FLA. STAT. § 381.272 (Supp. 1982).

35. FLA. STAT. § 381.272(2), (3) (Supp. 1982). Additionally, septic tank siting had to comply with the requirements of FLA. ADMIN. CODE R. 10D-6 (Supp. 1982) relating to soil conditions, water table elevation, setbacks, and other factors.

standards³⁶ and, under the more lenient of these standards, it was possible to service as many as sixteen dwelling units per acre with septic tanks.³⁷

Former law authorized HRS to grant variances from the siting requirement in hardship cases (but did not specify criteria for such variances),³⁸ and prescribed less stringent standards for lots platted before 1972.³⁹ The statutes attempted to encourage hook-ups to public sewerage systems by prohibiting septic tanks where the subdivision was contiguous to or within one-quarter mile of a sewerage system,⁴⁰ and by requiring dwellings to hook up to sewerage systems within one year after a system became available.⁴¹ These latter two provisions were substantially incorporated into the new Act.⁴²

Under the new Act, two of the three main siting factors—source of water supply and lot size and dimension—have been retained, but the third factor has changed significantly. Instead of subdivision size, the new statute regulates septic tank siting on the basis of projected domestic waste flowage in gallons *per acre* per day. This factor provides the much needed density control mechanism missing under the old statute.⁴³ Thus, if a lot has a minimum area of one-half acre, a minimum dimension of 100 feet, and is supplied by a private potable well, it may be developed with a septic tank so long as projected flowage does not exceed 1500 gallons per acre per day.⁴⁴ When the subdivision is serviced by public water and contains no more than four lots per acre, septic tanks may be used if projected flowage does not exceed 2500 gallons per acre per day.⁴⁵ The Act also specifies minimum setback distances from private

36. Compare subsection (3) with subsection (7) of FLA. STAT. § 381.272 (Supp. 1982).

37. See House Comm. on Natural Resources, Bill Analysis of Fla. HB 1301 (1983) (on file with committee).

38. FLA. STAT. § 381.272(5) (Supp. 1982).

39. FLA. STAT. § 381.272(8) (Supp. 1982). 1972 was the first year septic tank lot size requirements were regulated by the state.

40. FLA. STAT. § 381.272(4) (Supp. 1982). HRS was empowered to grant a hardship variance from this requirement.

41. FLA. STAT. § 381.272(6) (Supp. 1982).

42. Ch. 83-310, § 43, 1983 Fla. Laws — (to be codified at FLA. STAT. § 381.272(1) & (5)). This section of the Act also provides that the developer of a subdivision must provide sewer utility easements and rights-of-way to aid in the eventual hook-up to a sewer system.

43. See *supra* note 37 and accompanying text.

44. Ch. 83-310, § 43, 1983 Fla. Laws — (to be codified at FLA. STAT. § 381.272(2)).

45. *Id.* (to be codified at FLA. STAT. § 381.272(3)). The new statute also allows development under the higher 2500 gallons per acre standard when the subdivision is served temporarily by private well and the developer has received a commitment for hook-up to a central water system. *Id.* (to be codified at FLA. STAT. § 381.272(4)).

wells, public wells, and surface waters.⁴⁶

The requirements for septic tank use were considerably strengthened for lots platted prior to 1972.⁴⁷ Such lots are still not subject to lot-size requirements and the surface water setback requirement is lowered to fifty feet from the seventy-five feet required of other lots; however, all other provisions of the statute and departmental rules relating to soil conditions, water table elevation, and other setback provisions are expressly made applicable.⁴⁸ While language directs HRS to give pre-1972 lots "special consideration"⁴⁹ for a possible hardship variance, the statutory requirements for such variances have been strengthened. The Act provides specific criteria⁵⁰ to guide HRS in granting variances, and requires the appointment of an "advisory review variance board"⁵¹ to make recommendations on variance requests.

The Act adds several entirely new provisions affecting septic tanks. The sale and use of organic chemical solvents used to degrease septic tanks is prohibited.⁵² Those solvents are a potentially significant source of groundwater and surface water contamination. The use of septic tanks in industrially zoned areas is prohibited, since such tanks could be used to dispose of toxic or hazardous chemicals. However, industries currently using on-site sewage systems to dispose of chemicals have three years to develop an alternative system.⁵³ Another provision directs HRS to promulgate a special rule for the installation of septic tanks in soils comprised primarily of Key Largo limestone and Miami limestone.⁵⁴

46. The Act requires a 75-foot setback from surface waters and private wells, and a 200-foot setback from public wells. *Id.* (to be codified at FLA. STAT. § 381.272(6)).

47. *Id.* (to be codified at FLA. STAT. § 381.272(7)).

48. *Id.*

49. *Id.* (to be codified at FLA. STAT. § 381.272(8)).

50. *Id.* Before granting a variance, HRS must be satisfied that: (1) the hardship was not caused intentionally by the developer, (2) there is no reasonable alternative to on-site disposal, and (3) on-site disposal will not impact public health or water quality.

51. *Id.* HRS had already provided for such a review board by rule. *See* FLA. ADMIN. CODE R. 10D-6.45 (Supp. 1982).

52. Ch. 83-310, § 43, 1983 Fla. Laws ___ (to be codified at FLA. STAT. § 381.272(9)).

53. *Id.* (to be codified at FLA. STAT. § 381.272(10)).

54. *Id.* (to be codified at FLA. STAT. § 381.272(13)). This provision was originally added during the regular session as an amendment to Fla. HB 1129 (1983). The apparent intent of the amendment was to allow less stringent requirements in the affected areas, particularly the Florida Keys. However, there is nothing in the language of the Act that would prevent HRS from developing a rule as stringent or even more stringent if conditions warrant.

4. Pollution Spill Prevention and Control

Perceiving a need to protect *inland* waters and the groundwater supply from spills and discharges of certain specified pollutants, the legislature responded by enacting Part II of chapter 376, Florida Statutes. These provisions are patterned after Part I⁵⁵ of chapter 376 relating to spills and discharges in *coastal* areas. The Act also creates a sizable Water Quality Assurance Trust Fund to finance DER's responsibilities and to clean up contaminated areas.⁵⁶

Under the provisions of the Act,⁵⁷ DER is given broad authority to promulgate rules relating to the permitting, construction, installation, and maintenance of stationary storage tanks with a capacity to store in excess of 550 gallons of certain specified pollutants. It is interesting to note that the term "pollutants" is defined to include "oil of any kind . . . , gasoline, pesticides, ammonia, chlorine, . . . [but] excluding liquified petroleum gases."⁵⁸ Any person discharging pollutants is required by the Act to immediately "contain, remove, and abate"⁵⁹ the discharge to the satisfaction of DER;⁶⁰ if the polluter fails to do so, the department may arrange for cleanup using monies in the Water Quality Assurance Trust Fund. The Act shields persons who assist in cleanup activities from liability to third persons for everything except acts of gross negligence and willful misconduct. This so-called "Good Samaritan" provision is sure to be the source of interesting future legal disputes.

The "teeth" for the cleanup provisions are provided in several newly created sections of the statutes. If DER is required to spend money from the trust fund because the polluter failed to adequately contain or remove the spill, the Department is directed to "diligently . . . pursue the reimbursement to the fund of any sum

55. The Act designates existing FLA. STAT. §§ 376.011-21 (1981) as Part I of Chapter 376. The Act provides several minor changes to these sections, including directing the Department of Natural Resources to adopt rules providing for coordination with DER on pollution spill incidents and expenditures of funds from the Coastal Protection Trust Fund. The Act also lowers the cap in the Coastal Protection Trust Fund from \$30 to \$25 million, which is the point which triggers the levy of an excise tax of two cents per barrel on pollutants. See Ch. 83-310, §§ 79-83, 1983 Fla. Laws —.

56. See *infra* Section III of text dealing with the funding aspects of the Act for a discussion of the Water Quality Assurance Trust Fund.

57. Ch. 83-310, § 84, 1983 Fla. Laws — (to be codified at FLA. STAT. §§ 376.30-90).

58. *Id.* (to be codified at FLA. STAT. § 376.32(6)).

59. *Id.* (to be codified at FLA. STAT. § 376.55(1)).

60. *Id.*

expended.”⁶¹ If DER goes to court to obtain reimbursement,⁶² the statute places what amounts to strict liability on the polluter. The Act provides:

In any suit to enforce claims of the fund under this part, it shall not be necessary for the department in administering the fund to plead or prove negligence in any form or manner. The department in administering the fund need only plead and prove that the prohibited discharge or other polluting condition occurred. The only defenses of a person alleged to be responsible for the discharge to an action for damages, costs, and expenses of cleanup, or abatement shall be to plead and prove that the occurrence was solely the result of any of the following or any combination of the following:

- (1) An act of war.
- (2) An act of government . . .
- (3) An act of God . . .
- (4) An act or omission of a third party, other than an employee or agent of the defendant or other than one whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the defendant . . .⁶³

Interestingly, these same provisions also apply to suits brought by private parties for damages resulting from the discharge. Injured private parties may also recover costs and attorneys' fees.⁶⁴

Finally, the Act allows DER to assess penalties against a polluter in accordance with the provisions of chapter 403, Florida Statutes, except that no penalty may be assessed when the spill is reported and removed promptly.⁶⁵

5. Pesticides

After much debate over which agency should have primary responsibility for review and approval of restricted-use pesticides, the legislature enacted Part V of the Act.⁶⁶ The Department of Ag-

61. *Id.* (to be codified at FLA. STAT. § 376.65).

62. In addition to proceeding against the polluter, the Act also allows DER and others to proceed “directly against the bond, the insurer, or any other person providing a facility with . . . financial responsibility.” *Id.* (to be codified at FLA. STAT. § 376.70). This section also requires the facility to maintain evidence of such financial responsibility as is necessary to meet the potential liabilities imposed by the Act.

63. *Id.* (to be codified at FLA. STAT. § 376.65).

64. *Id.* (to be codified at FLA. STAT. § 376.85).

65. *Id.* (to be codified at FLA. STAT. § 376.75).

66. Ch. 83-310, §§ 9-15, 1983 Fla. Laws ____.

riculture and Consumer Services (DACS) has been given primary authority for review and regulation of pesticides under the Act, with DER relegated to a review-and-comment role.⁶⁷ The provisions of the Act deal almost exclusively with restricted-use pesticides.⁶⁸

Despite language in the Act indicating a strong intent not to burden agricultural production with unnecessary regulations,⁶⁹ the Act establishes mechanisms that could substantially limit the use of certain restricted-use pesticides. The Act abolishes the Pesticide Technical Council established by statute⁷⁰ within DACS and replaces it with a nine-member Pesticide Review Council,⁷¹ also within DACS. The Council is charged with, among other things, reviewing data on restricted-use pesticides that are presently registered in the state, initiating studies on such pesticides when preliminary data warrants further research, making recommendations on registered restricted-use pesticides to the Commissioner of Agriculture, and sharing information with other state and federal agencies.

The main regulatory feature of the pesticide section relates to the registration of new restricted-use pesticides.⁷² Under rules to be developed by DACS, the Pesticide Review Council will review all applications for registration of restricted-use pesticides. The Council may determine that field testing of a pesticide in Florida is warranted in light of the state's unique hydrogeologic environment;

67. The selection of DACS over DER as the primary regulatory agency was essentially a concession to agricultural interests who feared that DER would give too much weight to environmental concerns and insufficient weight to the ability of a pesticide to aid the efficient production of food.

68. Restricted-use pesticides are pesticides which when applied in accordance with its directions for use, warnings, and cautions and for uses for which it is registered or for one or more such uses, or in accordance with a widespread and commonly recognized practice, may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, or injury to the applicator or other persons, and which has been classified as a restricted-use pesticide by the department or the administrator of the United States Environmental Protection Agency.

FLA. STAT. § 487.021(46) (Supp. 1982).

69. Ch. 83-310, § 12, 1983 Fla. Laws ____.

70. FLA. STAT. § 487.061 (Supp. 1982).

71. Ch. 83-310, § 9, 1983 Fla. Laws ____ (to be codified at FLA. STAT. § 487.0615). The nine members include representatives from DER, HRS, the Department of Natural Resources, the Game and Fresh Water Fish Commission, the state chemist, the dean of research at the University of Florida's Institute of Food and Agricultural Sciences, and a toxicologist, hydrologist, and research consultant to be appointed by the Governor.

72. Ch. 83-310, § 10, 1983 Fla. Laws ____ (to be codified at FLA. STAT. § 487.043).

if so, the Act requires the applicant to apply to the Department for a special permit for field testing in Florida under criteria "developed by the most appropriate state agency, as determined by the council."⁷³ This procedure for field testing is designed to address a major shortcoming that became evident in the Temik episode—the lack of Florida-specific data and testing for potential groundwater contamination from pesticide use.⁷⁴ The final determination of whether a restricted-use pesticide should be registered lies with DACS; however, the Pesticide Review Council is given standing to participate in proceedings conducted by DACS relating to pesticide registration.⁷⁵

B. HAZARDOUS WASTE MANAGEMENT

In reviewing the status of the state's hazardous waste management program from its initiation in 1980⁷⁶ to the present, the Florida Legislature perceived several problem areas.⁷⁷ These included: (1) the need to clean up old disposal areas and contaminated groundwater plumes, and (2) the need to strengthen existing state hazardous waste regulatory programs in order to prevent additional instances of hazardous waste contamination from occurring.⁷⁸ Major generators of hazardous waste in Florida were generally aware of their responsibilities and liabilities under applicable provisions of both state and federal law. The owners and operators of major sources, for the most part, took steps to comply with initial permitting requirements and with various hazardous waste standards. DER knew of these major hazardous waste generators and, given the constraints of limited resources and staff, tended to focus regulatory efforts on them.⁷⁹

73. *Id.* (to be codified at FLA. STAT. § 487.043(2)).

74. Water Task Force Report, *supra* note 12, at 20-24.

75. The Act defines the Pesticide Review Council as a "substantially interested person" for purposes of the Administrative Procedure Act, FLA. STAT. ch. 120 (1981). *See* ch. 83-310, § 9, 1983 Fla. Laws — (to be codified at FLA. STAT. § 487.0615(3)).

76. Ch. 80-302, 1980 Fla. Laws 1322 (codified throughout FLA. STAT. §§ 403.701-.73 (1981)).

77. Water Task Force Report, *supra* note 12, at 8-12, 63-70.

78. A summary of known cases of groundwater contamination in Florida was begun by the Groundwater Section of DER in 1981. An updated version of this compendium was made available by DER officials in April, 1983. Additionally, the U.S. Environmental Protection Agency has qualified twenty-nine of the more than 200 uncontrolled hazardous waste sites in Florida for inclusion on the Environmental Protection Agency's national priority list for funding from the hazardous waste "superfund" created pursuant to 42 U.S.C. § 9631 (Supp. V 1981).

79. J. Moerlins, C. Teaf, & R. Herndon, Legislative Policy Issue Monograph: Hazardous

However, "small generators" of hazardous waste⁸⁰ generally did not know about or understand federal and state hazardous waste management requirements.⁸¹ Similarly, local governments, regional planning councils, some state agencies, and the state universities shared this ignorance.⁸² These factors have led to situations in which (a) small quantities of hazardous waste are collected and disposed of, along with normal garbage and other solid waste, in municipal or private solid waste landfills; (b) unknown amounts of state revenues are uncollected because the great majority of small-quantity generators of hazardous waste were unaware of the requirement to remit hazardous waste generator taxes;⁸³ and (c) few local governments or regional planning councils knew how to coordinate local hazardous waste management programs with DER state program requirements, even if they had the desire and capability to establish such local programs.

One additional significant hazardous waste related problem was evident. In order for any hazardous waste management program to be successful, a sufficient number of environmentally sound and economically attractive state and federally licensed⁸⁴ hazardous waste treatment, storage or disposal facilities must be available. A

Waste Issues in Florida, Institute of Science and Public Affairs, Florida State University, April 1983 [hereinafter referred to as Legislative Policy Issue Monograph].

80. A small-quantity hazardous waste generator has been defined as one which generates less than 1000 kilograms of hazardous waste in a calendar month. 40 C.F.R. § 261.5(a) (1982). One thousand kilograms equals approximately 2200 pounds.

81. One small business frequently mentioned as a small-quantity hazardous waste generator is a drycleaner.

82. Legislative Policy Issue Monograph, *supra* note 79.

83. FLA. STAT. §§ 208.001-.005 (1981). This tax was repealed by the Act effective June 30, 1983. Ch. 83-310, § 16, 1983 Fla. Laws ____.

84. A two-part permitting process was promulgated under the federal Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1976). Existing hazardous waste management facilities were able to qualify for "interim status" by filing Part A of the federal hazardous waste permit application by November 19, 1980. The Part A application is designed to enable facilities to qualify for interim status, and to provide EPA with information that will be useful to determine in which instances to move on to the next stage by requiring submission of Part B of the federal permit application. EPA fully expected that in light of the magnitude of the hazardous waste regulatory program, many facilities would not receive their final Part B permit for several years. Florida has developed a somewhat different approach to permitting state hazardous waste disposal, storage, or treatment facilities. Each person who intends to construct, modify, operate or close a hazardous waste facility is required to obtain a permit from DER prior to constructing, modifying, operating, or closing the facility. FLA. STAT. § 403.722(1) (Supp. 1982). An owner or operator of a hazardous waste facility in operation on May 19, 1982, was required to file an application for a temporary operation permit so that DER may identify any applicable rules which are being violated by the facility and for which a compliance schedule shall be established. FLA. STAT. § 403.722(2) (Supp. 1982).

program that specifically *requires*, under penalty of law, all hazardous waste to be properly treated, stored or disposed of must include sites that are accessible to the persons or industries covered by the law. Not a single licensed commercial⁸⁵ hazardous waste treatment or disposal facility exists in Florida. Only *one* commercial hazardous waste storage facility in Florida is fully licensed under state and federal law and available for use.⁸⁶ Thus, the legislature's attempt in 1980 to include a hazardous waste "siting" provision in state law generally was regarded to be a failure.⁸⁷ These circumstances led the 1983 Legislature to identify hazardous waste "siting" as another area in need of legislative attention.

The Act deals with the subject of hazardous waste management in two major categories and in several other areas as well.

1. *Local and Regional Involvement*

While some local governments and regional planning councils had begun to address hazardous waste related issues on their own,⁸⁸ no statutes or rules previously required or encouraged such involvement. Several provisions of the Act closed this gap in the hazardous waste management program.

One of the most significant sections of the hazardous waste component of the Act calls for local governments to become more involved in the hazardous waste management area.⁸⁹ Local hazardous

85. A great majority of hazardous waste facilities in Florida fall under DER's hazardous waste program because hazardous wastes are generated on the premises and then stored or treated in some fashion. These facilities are not "commercial" in the sense that hazardous wastes are dealt with for profit. Many of the facilities that deal with hazardous waste treat or recycle such wastes on-site so as to avail themselves of a permitting exemption for such action.

86. Chemical Waste Management, a private company recognized nationally as one of the leading firms in the field of hazardous waste treatment, storage and disposal, operates a hazardous waste transfer facility in Pompano Beach, Florida. Hazardous wastes collected from around Florida and temporarily stored at this facility are ultimately transported to that company's hazardous waste treatment and disposal facility near Livingston, Alabama.

87. Legislative Policy Issue Monograph, *supra* note 79.

88. Leon County and the City of Tallahassee, with assistance from Dr. Roy C. Herndon, Director, Institute of Science and Public Affairs, Florida State University, instituted a hazardous waste assessment designed to analyze the nature and extent of hazardous waste activities throughout Leon County in 1982. Additionally, DER and the Tampa Bay Regional Planning Council in March, 1983, entered into a contractual agreement under which the regional planning council undertook a two-phase plan of study, with technical assistance from the Institute of Science and Public Affairs, to provide DER and applicable local governments with information necessary to make decisions on the siting of a hazardous waste transfer/storage station and on the management of hazardous waste within the Tampa Bay Regional Planning Council's jurisdiction.

89. Ch. 83-310, § 25, 1983 Fla. Laws — (to be codified at FLA. STAT. § 403.7225).

waste management "assessments" must now be prepared by every county in the state. The local assessments must identify all hazardous waste generators; types and quantities of hazardous waste generated; current hazardous waste management practices of generators; waste management options available for hazardous waste generators; abandoned dump sites; and sanitary landfill operating procedures.⁹⁰ Counties that prepare their own assessments are to submit them to the regional planning council within whose jurisdiction the county lies.⁹¹ Each regional planning council is required to coordinate and assist in the preparation of local hazardous waste management assessments for counties within its region and to submit them to DER. If a county declines to perform its own assessment, the regional planning council shall do so in its stead.⁹² The Act establishes a staggered schedule for completion of the county hazardous waste plans.⁹³

The Act imposes other hazardous waste related responsibilities on regional planning councils. Within six months of the completion of *all* local hazardous waste management assessments within a region, each council must complete a "regional" hazardous waste management facility needs assessment.⁹⁴ DER is required to assemble the regional hazardous waste needs assessments and to determine if hazardous waste generator needs will be met by existing regional storage facilities, or if additional storage, treatment or disposal facilities are needed, and which regions have the greatest need. This determination is to be submitted to the legislature along with annual progress reports on the development of a needs assessment for each regional hazardous waste management

90. *Id.* (to be codified at FLA. STAT. § 403.7225(2)).

91. *Id.* (to be codified at FLA. STAT. § 403.7225(6)(b)).

92. *Id.* (to be codified at FLA. STAT. § 403.7225(3)).

93. *Id.* (to be codified at FLA. STAT. § 403.7225(10)). The schedule for completion of the plans is as follows: Counties in the Tampa Bay, South Florida, Northeast Florida, and East Central Florida Regional Planning Council areas, and Volusia County must complete their plans by July 1, 1984; counties in the Treasure Coast, Southwest Florida, West Florida and Central Florida Regional Planning Council areas are required to do so by July 1, 1985; and counties within the Apalachee, North Central Florida, and Withlacoochee Regional Planning Council areas, and Jefferson County must complete their plans by July 1, 1986.

94. *Id.* (to be codified at FLA. STAT. § 403.7225(8)). These regional assessments must include (a) a summary of hazardous waste quantity and types within the region; (b) a summary of hazardous waste management practices by generators; (c) a hazardous waste generator "profile" by industry, size and county or city location; (d) an assessment of excess demand for off-site commercial hazardous waste facilities and services; (e) an assessment of short-term and long-term needs for hazardous waste management facilities; and (f) a plan to eliminate any excess demand for off-site hazardous waste management facilities or services.

facility.⁹⁵

In recognition of the complexity and technical nature of most hazardous waste regulations, the Act specifically provides that no local government law, ordinance or rule pertaining to hazardous waste regulation shall be more stringent than DER rules.⁹⁶

The Act also requires local governments to identify small-quantity generators of hazardous waste and, in essence, to bring such generators out of the hazardous waste "closet."⁹⁷ Every county must notify each small-quantity generator within its jurisdiction of the generator's legal responsibilities for proper waste management practices and inform those generators of available methods of hazardous waste management. Within thirty days of receipt of the county's notice, each small-quantity generator identified in the county hazardous waste management assessment must inform the county of its hazardous waste types, quantities and management practices.⁹⁸ Failure to do so will subject a small-quantity generator to penalties.⁹⁹

The Act addresses the generation of small quantities of hazardous waste throughout the state in yet another fashion. A program known as "Amnesty Days" is established during which small quantities of hazardous waste will be collected free of charge and liability from homeowners, farmers, schools, state agencies and small businesses.¹⁰⁰ DER is required to contract with an approved, bonded waste handling company to collect and transport such wastes out of the state for proper disposal at a federally approved facility.¹⁰¹ Six separate periods from 1984 through 1986 are established for the implementation of Amnesty Days.¹⁰² The first such period shall be held between May 1, 1984, and June 30, 1984.¹⁰³

2. Hazardous Waste Siting

Under the siting provisions of the 1980 hazardous waste legislation, DER is required to notify each local government within three miles of a proposed hazardous waste facility of receipt of an appli-

95. *Id.* (to be codified at FLA. STAT. § 403.7225(9)).

96. *Id.* (to be codified at FLA. STAT. § 403.7225(15)).

97. Ch. 83-310, § 29, 1983 Fla. Laws ____.

98. *Id.*

99. *Id.*

100. Ch. 83-310, § 34, 1983 Fla. Laws ____ (to be codified at FLA. STAT. § 403.7261).

101. *Id.* (to be codified at FLA. STAT. § 403.7261(1)).

102. *Id.* (to be codified at FLA. STAT. § 403.7261(3)).

103. *Id.* (to be codified at FLA. STAT. § 403.7261(3)(a)).

cation to construct or modify the facility.¹⁰⁴ The permit applicant shall then request each local government within the three-mile area to "determine whether or not the proposed site is consistent and in compliance with adopted local government comprehensive plans,¹⁰⁵ local land use ordinances, local zoning ordinances or regulations, and other local ordinances in effect at the time" of the permit application.¹⁰⁶ Should the applicable local government determine that the proposed facility is not in compliance with such plans, ordinances, or regulations, the permit applicant may then request a variance from the local government.¹⁰⁷

If the variance request by the applicant is denied, the permit applicant was authorized by the 1980 Act to petition the Governor and Cabinet for an override of the local denial, but *only after* the applicant received a favorable recommendation on the requested variance from the regional planning council with jurisdiction.¹⁰⁸ This procedure was viewed with some misgivings by the legislature because no private entity had sought to utilize it since it was established. Such lack of use might be explained by the fact that the majority of the membership of each regional planning council is composed of representatives from local government.¹⁰⁹ Potential applicants in the private sector probably recognized that the chances of being able to secure an override of a local government variance denial were slim, due to the likely confirmation of the local denial by the regional planning council.

The Act removed this hurdle to siting hazardous waste facilities by eliminating the intermediate review by regional planning councils. The denial of a local government variance may now be appealed directly to the Governor and Cabinet for a decision on whether to override the local decision.¹¹⁰ The Governor and Cabinet are required to grant the requested variance if (a) a DER hazardous waste permit has previously been issued for the proposed facility, and (b) the Governor and Cabinet determine that the fa-

104. FLA. STAT. § 403.723(1) (1981).

105. Local governments are required to adopt a comprehensive plan pursuant to FLA. STAT. §§ 163.3161-.3211 (1981).

106. FLA. STAT. § 403.723(2) (1981) (footnote added).

107. FLA. STAT. § 403.723(3) (1981).

108. FLA. STAT. § 403.723(4) (1981).

109. See FLA. STAT. § 160.01 (1981) for a description of membership of the regional planning councils. Generally, this statute calls for two-thirds of the membership to be made up of representatives appointed by local governments within the region, and the remaining one-third to be appointed by the Governor.

110. Ch. 83-310, § 28, 1983 Fla. Laws ___ (to be codified at FLA. STAT. § 403.723(6)).

cility will not have a significant adverse impact on the environment, including ground and surface water resources of the region, or on the economy of the region.¹¹¹ In making their decision, the Governor and Cabinet must consider the record of the variance proceeding before the local government.¹¹² This provision may become the model for siting other LULU's.¹¹³

In order to foster the siting of additional hazardous waste storage facilities in Florida, the legislature also required each county to designate areas within the county where such a facility could be located. Counties may jointly designate areas or sites by interlocal agreement, and must hold public hearings to determine the areas to be designated. Counties should give siting preference to public lands and industrial areas designated on a local government's comprehensive plan.¹¹⁴ Counties are prohibited from amending their comprehensive plans or undertaking rezoning actions in order to prevent areas from being designated a hazardous waste storage facility site.¹¹⁵ Each regional planning council must also designate one or more sites at which a "regional" hazardous waste storage or treatment facility could be constructed.¹¹⁶ This regional site designation does not prevent the siting of a storage facility at some other site which is locally or state approved.¹¹⁷

Each water management district is also required to become involved in hazardous waste siting efforts by providing technical assistance concerning water resources to local governments and regional planning councils during the selection of the local and regional storage facility sites.¹¹⁸

The Act also establishes a separate procedure for the siting of a state-sponsored "multipurpose hazardous waste facility"¹¹⁹ by DER.¹²⁰ After considering the creation of a Hazardous Waste Facility Siting Commission,¹²¹ the legislature rejected such an approach in favor of using an existing agency, DER, and its standard

111. *Id.* (to be codified at FLA. STAT. § 403.723(7)).

112. *Id.* (to be codified at FLA. STAT. § 403.723(8)).

113. Locally Unpopular Land Uses. Prisons are another frequently cited LULU.

114. Ch. 83-310, § 25, 1983 Fla. Laws — (to be codified at FLA. STAT. § 403.7225(4)).

115. *Id.* (to be codified at FLA. STAT. § 403.7225(5)).

116. *Id.* (to be codified at FLA. STAT. § 403.7225(6)).

117. *Id.* (to be codified at FLA. STAT. § 403.7225(7)).

118. *Id.* (to be codified at FLA. STAT. § 403.7225(13)).

119. Defined simply by the Act as "a hazardous waste management facility which stores or treats hazardous waste." Ch. 83-310, § 37, 1983 Fla. Laws —.

120. *Id.*

121. See Fla. HB 1129 (1983).

setting entity, the Environmental Regulation Commission. DER is required to develop siting criteria designed to prevent any significant adverse transportation, land use and economic impacts resulting from the location or operation of the state hazardous waste facility. DER must also develop a list of potential state hazardous waste facility sites.¹²² After developing siting criteria and this list, DER is to distribute such information to known qualified hazardous waste facility owners or operators throughout the country to determine their interest in operating such a facility in Florida. Interested parties may select sites from the list and notify DER of those on which they would propose to locate and operate the facility.¹²³

The Environmental Regulation Commission is required to select a site for the state hazardous waste facility from the list prepared by DER in accordance with the siting criteria. Site preference is to be given to publicly owned land that meets the siting criteria.¹²⁴ The Commission is then directed to select a contractor to build and operate the multipurpose hazardous waste facility. Within six months of the selection, the contractor shall apply for a hazardous waste permit to construct and operate the state hazardous waste facility. If the contractor is denied the permit by DER, the Commission must select another contractor within thirty days of the denial.¹²⁵ Upon issuance of the permit, the contractor is authorized to begin construction immediately.¹²⁶ Costs associated with the construction of the facility may be paid through the issuance of state bonds.¹²⁷

While the Act makes specific provision for the siting, construction and operation of hazardous waste storage or treatment facilities, the legislature enunciated a clear policy of prohibiting hazardous waste landfills in Florida due to the permeability of Florida soils and the general presence of a "high water table" in Florida.¹²⁸ However, in the event that the Governor declares a hazardous

122. Ch. 83-310, § 37, 1983 Fla. Laws ____.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* The Act authorizes the issuance of bonds pursuant to FLA. STAT. § 403.1834 (1981), which provides for such bonds "to finance or refinance the construction of water supply and distribution facilities, and air and water pollution control and abatement and solid waste disposal facilities."

128. Ch. 83-310, § 38, 1983 Fla. Laws ____.

waste management emergency,¹²⁹ DER may issue a permit for a temporary hazardous waste landfill.¹³⁰

3. *Additional Hazardous Waste Provisions*

a. *Liability*

Penalty and liability sections of the current law were amended.¹³¹ Maximum penalties for knowingly violating hazardous waste provisions of the statutes were more than doubled in some cases.¹³² Persons potentially liable under Florida law for hazardous waste violations now include those same parties liable under federal law.¹³³ These parties include the owner and operator of a hazardous waste management facility, the transporter, and the hazardous waste generator who arranged for transport, disposal or treatment.¹³⁴ Liability may be assessed for all costs of removal or remedial action incurred by DER, and for related natural resources damages.¹³⁵

New statutory defenses to liability were also created. Those hazardous waste generators or transporters who have complied with the provisions of the Act and applicable rules, and who receive a certificate of disposal from a licensed hazardous waste disposal or processing facility, are relieved of liability.¹³⁶ Additionally, even those generators who have not received a certificate of disposal, but have complied with the Act and applicable rules, and have contracted for the transport of hazardous waste to a licensed hazardous waste facility, are relieved of liability to the extent that such liability is covered by the transporter's insurance or bond.¹³⁷

The liability of small hazardous waste generators is also addressed by the Act. In any action by DER against a small hazard-

129. *Id.*

130. *Id.* The permit may be issued only for a period of six months unless the Governor makes a further declaration of emergency.

131. Ch. 83-310, § 35, 1983 Fla. Laws ___, amending FLA. STAT. § 403.727 (Supp. 1982).

132. Violators of the provisions of the Act, rules or orders of the Department, or permit conditions are now liable for a civil penalty of up to \$50,000 per day, as opposed to \$25,000 per day before the Act. *Id.* (to be codified at FLA. STAT. § 403.727(3)(a)). The penalty for "knowingly" violating other specified provisions is set at \$50,000 per day for the first offense and \$100,000 per day for subsequent convictions, as opposed to \$25,000 and \$50,000, respectively, under former law. *Id.* (to be codified at FLA. STAT. § 403.727(3)(b)).

133. 42 U.S.C. § 9607 (Supp. V 1981).

134. Ch. 83-310, § 35, 1983 Fla. Laws ___ (to be codified at FLA. STAT. § 403.727(4)).

135. *Id.*

136. *Id.* (to be codified at FLA. STAT. § 403.727(6)).

137. *Id.* (to be codified at FLA. STAT. § 403.727(7)).

ous waste generator for the improper disposal of hazardous waste, a rebuttable presumption of improper disposal is created if the generator was notified of his legal responsibilities and hazardous waste management alternatives by the applicable county, as required by law. In such a case, the generator has the burden of proving that the hazardous waste disposal was proper. In the absence of notification by the county, the burden of proving improper disposal is on DER.¹³⁸

Finally, the Act provides immunity from hazardous waste liability for any "Good Samaritan" who provides good-faith assistance or advice in containing or treating an actual or threatened spill of any hazardous material.¹³⁹

b. Transportation

The legislature also closed a perceived gap in the existing state program for transporters of hazardous waste. Hazardous waste transporters currently must comply with fairly limited state transport standards relating to record keeping, manifest system requirements, and discharge or spill cleanup.¹⁴⁰ Under the new Act, intrastate transporters of hazardous waste must be bonded or insured in order to guarantee their financial responsibility for any liability which may be incurred in the transportation of such wastes.¹⁴¹ Cash, surety bonds, or casualty insurance, or a combination thereof, may be used to satisfy this requirement.¹⁴²

c. Permitting

Changes were also made to the permit review procedure followed by DER in licensing hazardous waste treatment, storage or disposal facilities. Statutory procedures for all other DER permits specify a time period within which DER must review and act upon each application.¹⁴³ Failure to act within the statutory period results in the mandatory issuance of a "default permit."¹⁴⁴ Because of the possible issuance of a hazardous waste facility default permit, the U.S. Environmental Protection Agency had not authorized

138. *Id.* (to be codified at FLA. STAT. § 403.727(3)(a)).

139. Ch. 83-310, § 39, 1983 Fla. Laws — (to be codified at FLA. STAT. § 768.1315).

140. FLA. ADMIN. CODE R. 17-30.17 (Supp. 1982) (incorporating by reference 40 C.F.R. pt. 263).

141. Ch. 83-310, § 23, 1983 Fla. Laws — (to be codified at FLA. STAT. § 403.724(7)).

142. FLA. STAT. § 403.724(2) (1981).

143. *See* FLA. STAT. §§ 120.60, 403.0876 (1981).

144. *Id.*

full delegation to Florida of administrative responsibilities under the federal Resource Conservation and Recovery Act program.¹⁴⁵ Lack of full delegation of the federal program could lead to the loss of certain federal funds. A more practical effect of non-delegation on hazardous waste facility owners or operators is that they are required to obtain both state and federal permits for a proposed or existing hazardous waste facility.

The Act now allows DER a longer time period within which to process and act upon a permit application for a hazardous waste facility.¹⁴⁶ More significantly, the failure of DER to approve or deny a hazardous waste permit application within the statutory time frame required will *not* result in the automatic approval of the permit.¹⁴⁷

d. Governmental Wastes

On a separate subject, the Act establishes specific procedures for the management of hazardous substances by governmental agencies. All local, state and other governmental agencies, as well as institutions of the state university system that utilize hazardous substances or that generate hazardous waste, must notify DER of their hazardous waste types, quantities and management practices.¹⁴⁸ Each such agency must also develop separate management and spill prevention control plans.¹⁴⁹ It will be interesting to see what kinds of hazardous materials are being used by governmental entities and, also, what kinds of governmental entities are covered by this provision.¹⁵⁰

e. Emergencies

The legislature also recognized that the threat or actual occurrence of a spill or other source of contamination to surface water and groundwater required that some agency be capable of immedi-

145. Telephone conversation with Robert M. McVety, Administrator, Solid and Hazardous Waste section of DER, July 22, 1983. While this requirement is not specified in the federal act or in EPA rules, EPA officials indicated to DER that they would not approve the Florida program until the possibility of a default permit was eliminated.

146. Ch. 83-310, § 24, 1983 Fla. Laws ___ (to be codified at FLA. STAT. § 403.722(10)).

147. *Id.* However, the applicant may petition for a writ of mandamus to compel issuance of the permit if not acted upon in a timely manner by the Department. *Id.*

148. Ch. 83-310, § 36, 1983 Fla. Laws ___ (to be codified at FLA. STAT. § 501.082).

149. *Id.*

150. This provision of the Act applies to "local, state and other governmental agencies and institutions of the State University System." *Id.* Entities such as municipal hospitals and mosquito control districts conceivably are covered by this language.

ate emergency response. To address short-term emergencies, rather than long-term contamination threats posed by past disposal sites, the Act specifies that DER shall be the lead agency for interdepartmental coordination relating to water pollution, toxic substances and hazardous waste, and other environmental and health emergencies not specifically designated within other statutes.¹⁵¹ DER is to provide technical assistance when responding to these short-term emergencies and is authorized to expend funds from the Water Quality Assurance Trust Fund on an emergency basis to respond to incidents which threaten the environment or public health when otherwise responsible parties do not adequately respond.¹⁵²

III. FUNDING

After identifying the needs and proposed solutions to Florida's hazardous waste and water protection problems, the legislature turned to possible funding sources for the programs envisioned by the Act, a subject of substantial conflict between the two Houses during the regular and special sessions. Through the use of existing trust funds, new trust funds, permit fees, excise taxes, general revenue, and a unique accelerated sales tax collection provision, the legislative conference committee was able to locate a projected \$134.4 million in revenue available to fund the Act over the next two years.¹⁵³

A. Major Funding Problems

In addition to funding the smaller ongoing operations and programs contemplated by the Act,¹⁵⁴ the legislature was faced with two major funding problems. The first of these was how to generate the matching funds necessary to tap into the \$1.6 billion fed-

151. Ch. 83-310, § 42, 1983 Fla. Laws ___ (to be codified at FLA. STAT. § 403.1655).

152. *Id.*

153. Fla. HB 47-B (1983), Conference Committee Report, Cash Flow Analysis of the Water Quality Bill (on file with House Committee on Natural Resources) [hereinafter referred to as Cash Flow Analysis].

154. The following programs were funded in the amounts indicated for the 1983-84 fiscal year:

eral "superfund"¹⁵⁵ available for the cleanup of hazardous waste sites. Federal law requires states to provide ten percent matching funds before receiving disbursements from the superfund for sites approved by the U.S. Environmental Protection Agency.¹⁵⁶ Florida has twenty-nine eligible sites, and DER projected a need for approximately \$8 million in matching funds for 1983-84¹⁵⁷ and \$6 million for 1984-85.¹⁵⁸ The second major funding problem posed by the Act was how to provide financial assistance to local governments for construction and reconstruction of sewage treatment systems.

B. The Funding Plan

Undoubtedly the most unique feature of the funding scheme, and one of the two main funding mechanisms of the Act, is the "accelerated" sales tax collection provision¹⁵⁹ which permanently amends the procedure used to collect the state's monthly revenue from the five percent sales tax.¹⁶⁰ This acceleration will result in a one-time "windfall" receipt of revenue for November, 1983, estimated at approximately \$150 million—of which \$100 million will be deposited in the Water Pollution Control Trust Fund.¹⁶¹ Forty-five percent of these funds will be transferred to the newly created

Data Collection	\$ 350,000
Pesticides	490,000
Groundwater Monitoring	2,943,000
Package Plants	407,000
Local Hazardous Waste Surveys	1,428,500
DER Local Program	75,000
Underground Storage Program	250,000
Amnesty Days	400,000
Facility Siting	25,000
Administration of Cleanup Activities	240,000
Co-Location of DER and WMDs	146,307
Total	\$ 6,754,807

Id.

155. 42 U.S.C. § 9631 (Supp. V 1981).

156. Legislative Policy Issue Monograph, *supra* note 79, at 3. A 50% match is required for municipal or publicly owned hazardous waste sites. *Id.*

157. Cash Flow Analysis, *supra* note 153.

158. *Id.* Additionally, another \$5 million was projected to be needed for state sites not on the "superfund" list.

159. Ch. 83-310, §§ 57-60, 1983 Fla. Laws ___ (to be codified at FLA. STAT. §§ 212.02(23), .11(1), & .12(2)).

160. See FLA. STAT. §§ 212.05, .06, .12 (Supp. 1982).

161. The Water Pollution Control Trust Fund was created prior to the Act pursuant to FLA. STAT. § 403.1824 (1981).

Small Communities Sewer Construction Assistance Trust Fund¹⁶² to be used for sewer grants to cities with a population of 35,000 or less. The Act attempts to stretch these funds by requiring local matching funds in the amount of forty-five percent of the grant, with certain exceptions,¹⁶³ and local governments are required to assess user fees and hook-up charges sufficient to fund the operation of a facility constructed with grant money.

The funds that remain in the Water Pollution Control Trust Fund will be available generally for additional sewer grants to local governments.¹⁶⁴ Again, local governments will be required to provide matching funds of forty-five percent of the grant, and must ensure that the facility will be self-supporting. No sewer grants from either the Water Pollution Control Trust Fund or the Small Communities Trust Fund will be made until the 1984-85 fiscal year, resulting in an accumulation of about \$8 million in interest during 1983-84; this interest will be transferred to the Water Quality Assurance Trust Fund.¹⁶⁵

The second major funding mechanism prescribed by the Act is the new Water Quality Assurance Trust Fund,¹⁶⁶ which is to "be used by the department [of Environmental Regulation] as a non-lapsing revolving fund for carrying out the purposes of this act."¹⁶⁷ The trust is primarily to be used to finance cleanup of hazardous waste sites, both superfund and state initiated.¹⁶⁸ Additionally, the trust fund is to support most of the ongoing programs discussed previously for the 1983-84 fiscal year.¹⁶⁹

In addition to the accelerated sales tax collections and the Water Quality Assurance Trust Fund, several smaller sources of revenue are provided by the Act. The provisions relating to septic tanks¹⁷⁰

162. Ch. 83-310, § 55, 1983 Fla. Laws — (to be codified at FLA. STAT. § 403.1837).

163. Grants of less than \$50,000 may be funded at 100%, and matching funds may be waived in all or in part if existing water quality standards pose an immediate health hazard or if the gross per capita income of the community is below the state average. *Id.* (to be codified at FLA. STAT. § 403.1838(2)(a)).

164. Ch. 83-310, §§ 47-53, 1983 Fla. Laws — (to be codified throughout FLA. STAT. §§ 403.1821-1832). Depending on how the Governor chooses to implement Executive Order No. 81-105 (Sept. 4, 1981), these funds may not be available for grants in coastal barrier areas.

165. Ch. 83-310, § 60(2), 1983 Fla. Laws —.

166. Ch. 83-310, § 84, 1983 Fla. Laws — (to be codified at FLA. STAT. § 376.60).

167. *Id.* (to be codified at FLA. STAT. § 376.60(4)).

168. *Id.* (to be codified at FLA. STAT. § 376.60(2)).

169. See *supra* note 154 for a list of such programs and the amount funded.

170. Ch. 83-310, §§ 43-44, 1983 Fla. Laws — (to be codified at FLA. STAT. §§ 381.272-273).

specify a schedule of fees designed to provide "an amount sufficient to meet the cost of carrying out the provisions of this part"¹⁷¹ of the Act. Additional septic tank fees are prescribed to provide funds for research and to accelerate the soil survey program being conducted by the state. The Act also provides for a three percent tax on the annual gross receipts of commercial hazardous waste facilities to be collected by the local government in which the facility is located;¹⁷² however, the impact of this tax in the immediate future will be nearly negligible as there is currently only one facility in the state subject to the tax. Finally, a \$4.6 million appropriation from the state's general revenue fund is anticipated during the 1984-85 fiscal year to help fund the recurring operations contemplated by the Act.¹⁷³

IV. FUTURE RULEMAKING AND REGULATORY ACTIVITY

The task of retooling existing programs and establishing new ones to accomplish the objectives of the Act will fall most heavily upon DER. Though additional funding and staff support is provided in the Act, full implementation of the groundwater and hazardous waste components of the 1983 legislation will be a lengthy process. The remainder of this article will discuss the more significant agency rulemaking and other regulatory activities that are likely to occur as a result of the enactment of the Act. Specific rules that must or may be developed are noted along with an estimated time frame for their adoption. Opportunities for affected parties to participate in rulemaking proceedings are mentioned, as are areas that may be worthy of future legislative action.

A. *Groundwater Protection*

1. *Septic Tank Regulation*

HRS rules traditionally have implemented septic tank statutes. HRS substantially rewrote these rules recently,¹⁷⁴ and it appears that the new Act will require additional changes. However, beyond rule changes, little will be required to implement the Act's septic tank provisions.

171. Ch. 83-310, § 44, 1983 Fla. Laws — (to be codified at FLA. STAT. § 381.273).

172. Ch. 83-310, §§ 17-18, 1983 Fla. Laws — (to be codified at FLA. STAT. §§ 208.006, 220.184).

173. Cash Flow Analysis, *supra* note 153.

174. FLA. ADMIN. CODE R. 10D-6 (Supp. 1982).

Principally, new rules will be needed to incorporate the sewage flow requirements specified in the Act.¹⁷⁵ These permit a maximum flow of 1500 gallons of sewage per acre per day for lots utilizing private wells, and 2500 gallons per acre per day for lots served by public water. Using flowage rates adopted in existing rules¹⁷⁶ to establish design standards, lots utilizing private wells would be limited to a development density of ten bedrooms per acre, while those with public water service could have up to sixteen bedrooms. This limitation contrasts with a possible sixteen *dwelling*s per acre serviceable by septic tanks under the former statute.¹⁷⁷ Implementation of this provision is perhaps the most critical aspect of the new septic tank statute because it controls the density of development serviceable by septic tanks.

Other rules that must or may be developed, and their estimated time frame for adoption, are as follows.

HRS *must* adopt rules governing:

- The installation of septic tanks in certain limestone soils found primarily in the Florida Keys. *Authority*: § 381.272; *Timing*: By January, 1984.
- Fees for septic tank permits and site evaluations. *Authority*: § 381.272; *Timing*: By January, 1984.

HRS *may* adopt rules governing:

- Criteria for hardship variances and special consideration for lots platted prior to 1972. *Authority*: § 381.272; *Timing*: By January, 1984.
- Procedures for approving "graywater" disposal systems. *Authority*: § 381.272; *Timing*: By January, 1984.
- Issuance of temporary permits for experimental on-site sewage systems. *Authority*: § 381.272; *Timing*: By January, 1984.

2. *Spill Prevention and Cleanup*

Implementation of Part XI of the Act, dealing with pollutant discharge and cleanup, rests primarily on three mechanisms. The first of these is a set of rules which the Department of Natural Resources (DNR) is required to promulgate by November, 1983.¹⁷⁸

175. Ch. 83-310, § 43, 1983 Fla. Laws — (to be codified at FLA. STAT. § 381.272).

176. FLA. ADMIN. CODE R. 10D-6.48 (Supp. 1982). The general rate of flow used for residential buildings is 150 gallons per day per bedroom.

177. See *supra* note 37 and accompanying text.

178. Ch. 83-310, § 81, 1983 Fla. Laws — (to be codified at FLA. STAT. § 376.051).

These rules actually relate to the implementation of existing law,¹⁷⁹ which was originally enacted in 1970 to address pollution spill incidents in coastal areas of the state. The Act requires DNR to establish rules that: (1) clearly delineate and coordinate the duties of DNR and DER; (2) establish procedures for responding to pollution spill incidents; and (3) establish criteria for expenditures from the Coastal Protection Trust Fund.¹⁸⁰ While it is unlikely that the rules will be able to consider every contingency, they should be a useful first step in responding to pollution spill incidents.

While DNR has been charged with primary responsibility for implementing existing law on *coastal* spills, DER is charged by the Act with primary authority over pollution spills in non-coastal areas. The Act gives DER broad authority to "[e]stablish rules to implement the intent of this part"¹⁸¹ of the Act, and more specifically to regulate the permitting, construction, maintenance, and inspection of tanks used for the storage of oil, gasoline, and other potential pollutants.¹⁸² Such storage tanks were identified and targeted by the legislative water task force, and the legislature, as a major existing source of groundwater contamination which was likely to increase in the future.¹⁸³

The driving force behind the pollution spill section is the power given DER to require polluters to clean up their discharges and to enforce the provisions of the Act. These powers have been discussed in detail previously.¹⁸⁴ It is clear that the success of these enforcement provisions rests on having the polluter voluntarily clean up the spill himself, without requiring DER to expend trust fund money or go to court to seek restitution. To achieve this end, the Act imposes virtual strict liability¹⁸⁵ on a polluter to dissuade him from asserting non-liability for a spill and from failing to clean up the spill to the satisfaction of DER. An additional incentive to encourage self-cleanup is a provision allowing DER to proceed with cleanup when the polluter fails to do so and to seek reimbursement for costs incurred. Strict liability should prevent unnecessary challenges to liability, and a polluter is more likely to clean up a spill

179. FLA. STAT. §§ 376.011-21 (1981).

180. Ch. 83-310, § 81, 1983 Fla. Laws — (to be codified at FLA. STAT. § 376.051).

181. Ch. 83-310, § 84, 1983 Fla. Laws — (to be codified at FLA. STAT. § 376.40).

182. *Id.* The provision applies to both underground and above ground storage tanks with a capacity of greater than 550 gallons.

183. Water Task Force Report, *supra* note 12, at 9.

184. See *supra* notes 61-65 and accompanying text.

185. See *supra* text accompanying note 63 for this provision of the Act.

himself than to risk liability for the costs incurred by DER in restoring a polluted area. However, if in actual practice DER finds itself in court often in an attempt to recover cleanup expenses, the law may need to be revised to strengthen the potential penalties for failure to report and restore polluted areas.

Specific rules that must or may be developed in order to implement the spill prevention and cleanup provisions, and their estimated time frame for adoption, are as follows.

- DNR *must* adopt rules governing the coordination between DER and DNR in responding to pollution spill incidents in coastal areas. *Authority*: § 376.051; *Timing*: By November, 1983.
- DER *must* adopt rules governing the regulation of underground and above ground storage tanks. *Authority*: § 376.40; *Timing*: By March, 1984.
- The Department of Revenue *must* adopt rules governing the collection of the excise tax on "pollutants." *Authority*: § 376.60; *Timing*: By March, 1984.

3. Pesticide Registration

Implementation of the provisions of the Act relating to pesticide registration will involve a new set of rules to be developed by DACS.¹⁸⁶ The Act offers little guidance for the content of these rules other than the directive that the rules should govern "the review of data submitted by an applicant for restricted-use pesticide registration" and should be used to "determine whether a restricted-use pesticide should be registered, registered with conditions, or tested under field conditions in Florida."¹⁸⁷ However, when the rules are in place, the state will have its own mechanism to review restricted-use pesticide registration and will no longer be primarily dependent on federal procedures and evaluations.¹⁸⁸

This procedure for independent state evaluation of restricted-use pesticides, while warranted in light of the Temik episode,¹⁸⁹ has the potential to create significant conflicts regarding pesticide registration in the state. First, a pesticide might be registered for

186. Ch. 83-310, § 10, 1983 Fla. Laws — (to be codified at FLA. STAT. § 487.043).

187. *Id.* The new rules will apparently only apply to restricted-use pesticides that are not already registered in the state. For those pesticides already registered, the Act provides that the Pesticide Review Council may review data and initiate studies, and may make recommendations to the Commissioner of Agriculture regarding further use of such pesticides. Ch. 83-310, § 9, 1983 Fla. Laws — (to be codified at FLA. STAT. § 487.0615(2)).

188. See 40 C.F.R. pt. 162 (1982).

189. See *supra* note 8.

use by federal authorities and the other forty-nine states, but denied registration in Florida. Such a result would surely lead to claims by agricultural interests that they were being placed at a competitive disadvantage with their counterparts in other states; however, the legality of stiffer pesticide registration provisions probably is not assailable.¹⁹⁰ By providing for Florida-specific field testing, the Act ensures that objective data will be available to allow the Pesticide Review Council and DACS to assess on a rational basis the potential impact of a particular pesticide in Florida. Moreover, the test data will be available to support DACS's decision not to register a pesticide despite approval from federal authorities and other states.

A more latent area of potential conflict in implementing the pesticide provisions lies in the interaction among DACS, the Pesticide Review Council, and DER. As mentioned earlier,¹⁹¹ DER has been relegated to a review-and-comment role in the pesticide registration process.¹⁹² How well DACS responds to DER's comments may very well determine the environmental sensitivity of the pesticide review program and, perhaps, the need to revisit the law in future legislative sessions to provide for more active input from DER.

The role and structure of the Pesticide Review Council also creates some potential for conflict. The Act indicates that the Council's role is primarily advisory, and that it is to make recommendations to the Commissioner of Agriculture and DACS.¹⁹³ The Act attempts to give the Council some "bite" to go along with its advisory "bark" by making the Council a substantially interested person for purposes of the Florida Administrative Procedure Act,¹⁹⁴ which gives the Council standing in any proceeding of DACS relating to the registration of a pesticide.¹⁹⁵ But this in itself creates the potential for conflict since the Council, by statute, is established

190. See 7 U.S.C. § 136v(a) (Supp. V 1981) (allowing states to regulate use of federally registered pesticides in a stricter manner than federal government); *National Agricultural Chemicals Ass'n v. Rominger*, 500 F. Supp. 465 (E.D. Cal. 1980) (federal law does not preempt states' power to require additional data on pesticides).

191. See *supra* notes 66-67 and accompanying text.

192. Ch. 83-310, § 10, 1983 Fla. Laws — (to be codified at FLA. STAT. § 487.043(3)).

193. Ch. 83-310, §§ 9-10, 1983 Fla. Laws — (to be codified at FLA. STAT. §§ 487.0615(2)(f), .043). The Council does apparently have one major source of power in that it may determine that field testing in Florida is warranted and require such testing before an application for registration will be acted upon. Ch. 83-310, § 10, 1983 Fla. Laws — (to be codified at FLA. STAT. § 487.043(2)).

194. FLA. STAT. ch. 120 (1981 & Supp. 1982).

195. Ch. 83-310, § 9, 1983 Fla. Laws — (to be codified at FLA. STAT. § 487.0615(3)).

within DACS and is supported by DACS staff.¹⁹⁶ This could lead to a somewhat paradoxical situation of a governmental entity challenging a ruling of its own parent agency, with staff of the agency faced with the prospect of advocating *against* the decision of its own director.

Specific rules that must be developed in order to implement the pesticide provisions, and their estimated time frame for adoption, are as follows.

- DACS *must* adopt rules governing the review of applications for registering restricted-use pesticides. *Authority*: § 487.043; *Timing*: By March, 1984.

4. *Other Groundwater Provisions*

The Act will also require the development of additional rules by DER and the water management districts. These rules will address groundwater protection in the areas of data collection and monitoring, potable water wells, stormwater management, and grants for sewage treatment facilities. Rules that must or may be developed in order to implement these provisions include the following.

DER *must* adopt rules governing:

- Eligibility and priority for state grants for local sewage treatment facilities. *Authority*: §§ 376.40, .60; *Timing*: By December, 1983.

DER *may* adopt rules governing:

- The priority of sites to be monitored in the groundwater quality monitoring network. *Authority*: § 403.063; *Timing*: By November, 1983.
- Licensing of water well contractors, drillers, and drilling equipment. *Authority*: § 373.323; *Timing*: By October, 1984.
- Specifications for plugging water wells. *Authority*: § 373.206; *Timing*: By October, 1984.

The water management districts *may* adopt rules governing:

- Licensing of water well contractors, drillers, and drilling equipment, if authority is delegated by DER. *Authority*: §

196. The Act creates a new Bureau of Product Data Evaluation to provide technical support staff for the Council. Ch. 83-310, § 13, 1983 Fla. Laws ___ (to be codified at FLA. STAT. § 570.44(4)).

373.323; *Timing*: By October, 1984.

- Specifications for plugging water wells, if authority is delegated by DER. *Authority*: § 373.206; *Timing*: By October, 1984.
- Permitting of aquifer recharge projects. *Authority*: § 373.106; *Timing*: By December, 1983.
- Permitting of water well locations, construction, repair, and abandonment. *Authority*: § 373.308; *Timing*: As needed.
- Implementation of DER stormwater management rule. *Authority*: § 373.106; *Timing*: By October, 1984.

B. Hazardous Waste Management

Through mid-1983, most DER rulemaking on this subject has involved the adoption by reference of comparable federal regulations promulgated by the U.S. Environmental Protection Agency,¹⁹⁷ although in a few instances DER has rejected certain federal regulations.¹⁹⁸ The adoption by reference indicated DER's recognition of the major rulemaking task that faced the U.S. Environmental Protection Agency, and also served DER's pragmatic goal of qualifying for delegation of the administration of the federal hazardous waste program.

DER's hazardous waste rules differ most from those of the U.S. Environmental Protection Agency in the permitting of hazardous waste facilities. Because of different federal and state statutory provisions, DER has established a more accelerated time period within which to license all hazardous waste facilities in Florida, and generally requires more types of permits for such facilities than does the U.S. Environmental Protection Agency.¹⁹⁹

Under the new Act, other rules differing from those of the federal agency also are anticipated.

1. Intergovernmental Coordination

Because the Act imposes new hazardous waste related responsibilities upon each regional planning council and county, the legisla-

197. FLA. ADMIN. CODE R. 17-30 (Supp. 1982) (incorporating by reference most of 40 C.F.R. pts. 260-265 (1982)).

198. For example, as part of its initial hazardous waste regulations, the U.S. Environmental Protection Agency required the owner or operator of a hazardous waste facility to complete and file an annual report summarizing the yearly activities at the facility. In 1982, the U.S. Environmental Protection Agency amended its regulation by substituting a requirement to conduct a biennial survey in lieu of an annual report. DER chose not to incorporate a comparable change to its state rule and retained the requirement for all Florida hazardous waste facilities to submit an annual report to DER.

199. See *supra* note 84.

ture took steps to ensure that such activities are undertaken in a uniform manner throughout the state. Each county is to prepare its local hazardous waste management needs assessment based on "guidelines"²⁰⁰ established by DER.²⁰¹ Each regional planning council, in turn, is to complete its regional hazardous waste management needs assessment using procedures and guidelines developed by DER. Such guidelines are to include a prescribed format to ensure consistent development of these planning documents.²⁰²

The incentive for each county to complete its hazardous waste assessment and site selection in a timely manner is the approximately \$2 million to be distributed among all counties for such purposes.²⁰³ It is conceivable that new arenas of institutional conflict could develop as a result. Probably the first significant opportunity for a county to interact regarding its new hazardous waste management responsibilities is during DER's development of local and regional guidelines. Since it is mandatory that counties and regional planning councils follow the DER guidelines in developing their local hazardous waste management assessments, those groups may wish to participate in the development of those guidelines.

The next step for each county choosing to participate is to "negotiate" its proportionate share of the total sum appropriated to the planning council for preparation of all local assessments within that council's jurisdiction.²⁰⁴ The county's share of the regional appropriation is to be based upon four considerations, two of which are fairly clear and two of which are less so.²⁰⁵ If the regional planning council and a county cannot agree on that county's proportionate share of the funds available, the Secretary of DER must settle the dispute.²⁰⁶ How the Secretary will handle this new job

200. Under the Administrative Procedure Act, FLA. STAT. § 120.52(14) (1981), a "rule" is defined to mean "each agency statement of general applicability that implements, interprets, or prescribes law or policy." It is likely that the guidelines to be prepared by DER under the Act will be considered "rules" and that the administrative rulemaking process called for in the Administrative Procedure Act will be followed in establishing such guidelines.

201. Ch. 83-310, § 25, 1983 Fla. Laws — (to be codified at FLA. STAT. § 403.7225(2)).

202. *Id.* (to be codified at FLA. STAT. § 403.7225(3)).

203. Ch. 83-310, § 27, 1983 Fla. Laws —.

204. Ch. 83-310, § 25, 1983 Fla. Laws — (to be codified at FLA. STAT. § 403.7225(3)).

205. Ch. 83-310, § 27, 1983 Fla. Laws —. These factors include: (a) the total population in each county; (b) the total number of manufacturing establishments in each county; (c) the anticipated level of effort and workload associated with completion of the local hazardous waste management assessment, as related to the level of effort and workload of other counties in the region; and (d) the anticipated level of effort and workload required to coordinate local hazardous waste assessments by the regional planning council.

206. Ch. 83-310, § 25, 1983 Fla. Laws — (to be codified at FLA. STAT. § 403.7225(3)).

responsibility as arbitrator of potential county/regional planning council differences over funding for local hazardous waste management assessments remains to be seen.

The local and regional hazardous waste management facility needs assessments will also be subject to review by other persons in both the private and public sectors. Private industry and business may want to participate in the development of such assessments to ensure that the information prepared is accurate. DER also may decide to participate to ensure that its developed guidelines are followed in a uniform manner.²⁰⁷

Small-quantity hazardous waste generators especially may desire to closely follow local and regional efforts in developing hazardous waste assessments. Because of the potential liability and penalties such generators are exposed to, they may find it extremely important to ensure that all information concerning them is accurate and complete. DER is directed to develop, by rule, a procedure for each county to annually verify the management practices of at least twenty percent of the small-quantity generators within its jurisdiction.²⁰⁸ Small-quantity generators with similar types of hazardous waste may wish to use a trade association or other assistance in disclosing the required information to local governments, as required under the Act.

DER's implementation of Amnesty Days is another area of particular importance to all small-quantity hazardous waste generators. The establishment, by rule, of maximum amounts of hazardous waste to be accepted from any one entity during Amnesty Days will be significant in establishing the scope of this new program.²⁰⁹ Also significant will be how DER defines "small" businesses, farmers, and other entities eligible for participation in the Amnesty Days program.²¹⁰ A specific implementation procedure must be established by DER and probably should, at a minimum, provide for: public notification; identification of collection methods, whether from several centralized repositories or from the generator itself; temporary storage and segregation of the probably diverse types of hazardous waste collected; and guidelines for safe handling of hazardous wastes by small-quantity generators who may be unaware of the potential risks associated with a particular

207. Ch. 83-310, § 26, 1983 Fla. Laws — (to be codified at FLA. STAT. § 403.7226(1)).

208. Ch. 83-310, § 29, 1983 Fla. Laws —.

209. Ch. 83-310, § 34, 1983 Fla. Laws — (to be codified at FLA. STAT. § 403.7261).

210. See *id.* The Act indicates that homeowners, farmers, schools, state agencies and small businesses may participate in Amnesty Days, but does not define these entities.

substance. Private waste-handling companies that may decide to seek a contract with DER in order to carry out Amnesty Days may wish to participate in devising a meaningful program of implementation and developing contractor selection criteria.

Specific rules that must or may be developed in order to implement the local and regional hazardous waste programs, and their estimated time frame for adoption, are as follows.

DER *must* adopt rules governing:

- Procedures by which counties are to verify the management practices of small-quantity hazardous waste generators. *Authority*: § 29 of the Act; *Timing*: By December, 1983.
- Guidelines for local and regional hazardous waste management assessments. *Authority*: § 403.7225; *Timing*: By December, 1983.

DER *may* adopt rules governing:

- Amnesty Days and the maximum amount of hazardous waste that may be accepted from one entity. *Authority*: § 403.7261; *Timing*: By April, 1984.
- Guidelines for management of hazardous materials by government agencies. *Authority*: § 501.082; *Timing*: By June, 1984.

The Governor and Cabinet *may* adopt rules governing:

- Procedures for obtaining variances from a local denial of a hazardous waste storage facility. *Authority*: § 403.723; *Timing*: By July, 1984.

2. *Siting Rules and Activities*

a. *Multipurpose Hazardous Waste Facility*

The Act's siting procedure for development of a state multipurpose hazardous waste facility by DER calls for significant rulemaking by the Environmental Regulation Commission. By July 1, 1984, the Commission must adopt specific siting criteria. While the Act specifies a purpose for the siting criteria, the Act provides no further guidance on the type or scope of criteria to be developed.²¹¹ The site designation for the state facility also must be adopted under the provisions of the state's Administrative Procedure

211. Ch. 83-310, § 37, 1983 Fla. Laws ____.

Act.²¹² Thus, DER's consideration and adoption of both the siting criteria and a site designation for the state multipurpose hazardous waste facility will afford any interested person or party the opportunity to participate under the rulemaking procedures of the Florida Administrative Procedure Act.

While the apparent intent of the siting procedure is to facilitate and expedite the construction and operation of a state hazardous waste facility, several factors could delay the ultimate licensing of the facility. Since DER is not granted eminent domain authority in conjunction with the statutory directive to choose a site designation, the Environmental Regulation Commission must either identify a publicly owned parcel in compliance with the adopted siting criteria or locate a private landowner willing to convey title to the site for reasonable consideration and under acceptable conditions. Also, the proposed issuance of a permit by DER to the contractor selected to construct and operate the facility is subject to challenge under the Administrative Procedure Act by any substantially interested party.²¹³ As in any administrative proceeding in which the proposed licensing of an industrial facility is at issue, the proceeding could last anywhere from three to twelve months. Judicial appeal of the final agency decision would take longer.

Additionally, the proposed facility may not be in full compliance with applicable local government comprehensive plans, local land use ordinances, local zoning ordinances or regulations, and any other applicable local ordinances in effect at the time the permit application is filed. In that case, the contractor selected would need to seek a variance from the applicable local government.²¹⁴ As mentioned earlier, should the variance request be denied, the permit applicant may petition the Governor and Cabinet for a decision reversing the local government denial.²¹⁵ However, the Act further provides that the Governor and Cabinet may grant the variance *only if* a hazardous waste permit has first been issued by DER.²¹⁶ If that same local government that has denied the requested variance, or any third party opposed to the proposed site, has filed a timely administrative challenge to the proposed issuance of the DER permit, no relief from the local government variance denial can be obtained from the Governor and Cabinet until

212. Ch. 83-310, § 37(4), 1983 Fla. Laws ____.

213. FLA. STAT. § 120.57 (1981).

214. FLA. STAT. § 403.723 (1981), as amended by Ch. 83-310, § 28, 1983 Fla. Laws ____.

215. Ch. 83-310, § 28, 1983 Fla. Laws ____ (to be codified at FLA. STAT. § 403.723(6)).

216. *Id.* (to be codified at FLA. STAT. § 403.723(7)).

final resolution of the permit proceeding.

Lastly, it is possible that a multipurpose hazardous waste facility, depending on its location, nature, method of operation and overall impact on the area, could require several additional permits in addition to the single construction/operation permit specified in the Act.²¹⁷ Unlike other siting acts which consolidate a review process for land use regulation into a one-stop permitting process,²¹⁸ no attempt is made under the Act to limit the number and type of other permits the state hazardous waste facility may require. All of the above factors suggest that further legislative action may be needed to facilitate the siting of a state multipurpose hazardous waste facility or any other type of hazardous waste installation.

b. Local and Regional Storage Site Selections

While the site designation for the multipurpose hazardous waste management facility will be based on specific criteria developed by DER, no criteria need be developed for county and regional planning council designations of additional areas in which to locate a hazardous waste storage facility. The only guidance provided by the legislature is that local governments are to give preference in local site selections to appropriate public lands and industrial areas as designated on local comprehensive plans.²¹⁹ This relative lack of guidance to local and regional officials, who are under a legislative mandate to identify a proposed site for what could

217. If the multipurpose hazardous waste facility, because of its character, magnitude, or location, is considered to have a substantial effect upon the health, safety, or welfare of citizens of more than one county, it could be classified as a "development of regional impact." FLA. STAT. § 380.06 (1981). Depending on the particular circumstances, other DER permits may be required under authority of FLA. STAT. ch. 403 (1981), including a permit to construct and operate a solid waste resource recovery and management facility; a permit to operate and construct an industrial wastewater treatment and disposal system, which may include groundwater discharge considerations; a permit to construct a new stormwater discharge facility; and a permit to construct and operate an air pollution source. Other permits from an applicable water management district with jurisdiction over the site of the proposed hazardous waste facility may be required to construct any water supply well, to consumptively use any water at the site, and for the management of surface water at the facility.

218. The three coordinated land use regulation acts which contain a consolidated permitting process are the Florida Electrical Power Plant Siting Act, ch. 73-33, 1973 Fla. Laws 73 (current version at FLA. STAT. §§ 403.501-.517 (1981)); the Florida Industrial Siting Act, ch. 79-147, 1979 Fla. Laws 527 (current version at FLA. STAT. §§ 288.501-.518 (1981)); and the Transmission Line Siting Act, ch. 80-65, 1980 Fla. Laws 203 (current version at FLA. STAT. §§ 403.520-.536 (1981)). The most recent of these legislative enactments is discussed in Hopping & Raepple, *A Solution to the Regulatory Maze: The Transmission Line Siting Act*, 8 FLA. ST. U.L. REV. 441 (1980).

219. Ch. 83-310, § 25, 1983 Fla. Laws — (to be codified at FLA. STAT. § 403.7225(4)).

prove to be an unpopular facility, may create problems given the pressures likely to accompany the siting decision.

The political implications of identifying an area within each county in Florida for the proposed location of a hazardous waste storage facility are obvious. One or several county commissioners in each county may face the potential consequences of a site designation within his district. A similar situation will occur whenever each regional planning council identifies the required site for a regional storage facility. The obvious danger in this process is that the designation will be based solely upon political or zoning considerations. While DER is required to provide technical assistance to county governments and regional planning councils in their preparation of local and regional hazardous waste assessments,²²⁰ that agency is not mandated to assist in the selection of hazardous waste storage facility sites.

Consequently, even if each county and regional planning council is ultimately able to identify areas within their respective jurisdictions for siting a hazardous waste storage facility, it may be selected without the benefit of DER review and analysis. This problem could lead to the selection of numerous local or regional storage facility sites that are essentially incapable of securing permits if such sites are designated without consideration of whether they conform to DER licensing standards. Although not required by provisions of the Act, it may prove useful for counties and regional planning councils to utilize the siting criteria developed by DER for designating the multipurpose hazardous waste facility in making their own local and regional site selections. However, such state siting criteria may not be final before the scheduled completion of the first round of county hazardous waste management plans currently due by July 1, 1984.²²¹

Specific rules that must or may be developed in order to implement the hazardous waste siting provisions, and their estimated time frame for adoption, are as follows.

DER *must* adopt rules governing:

- Siting criteria for state multipurpose hazardous waste facility. *Authority:* § 37 of the Act; *Timing:* By July, 1984.
- Financial responsibility for hazardous waste transporters. *Authority:* § 403.724; *Timing:* By February, 1984.

220. Ch. 83-310, § 26, 1983 Fla. Laws — (to be codified at FLA. STAT. § 403.7226).

221. Ch. 83-310, § 25, 1983 Fla. Laws — (to be codified at FLA. STAT. § 403.7225(10)).

DER *may* adopt rules governing:

- Selection of contractor for state multipurpose hazardous waste facility, site selection, and use of state lands for facility. *Authority:* § 37 of the Act; *Timing:* By December, 1984.
- Hazardous waste landfills. *Authority:* § 38 of the Act; *Timing:* By December, 1983.

Additionally, DER *may* adopt rules related to the following hazardous and solid waste matters:

- "Short-term" emergency response to contamination of surface or groundwater. *Authority:* § 403.1655; *Timing:* By October, 1983.
- Notification to DER by owners or operators of on-site solid waste disposal areas. *Authority:* § 403.707; *Timing:* By April, 1984.
- Closure requirements for solid waste facilities. *Authority:* § 403.707; *Timing:* By April, 1984.

V. SUMMARY

Despite the best intentions of the legislature, certain provisions of the Water Quality Assurance Act may lead to problems worthy of further legislative action or adjustments to the funding mechanisms created.

Probably the most potentially troublesome aspect is the fact that no single person or agency is assigned responsibility for coordinating the implementation of the Act. While DER is required to address a majority of the Act's provisions, it is unclear how that agency will be able to effectively synchronize corresponding responsibilities of the Department of Agriculture and Consumer Services, the Department of Health and Rehabilitative Services, regional planning councils, water management districts, and local governments. Effective coordination among all these entities will be a key to achieving meaningful progress towards the Act's goals.

Another area of concern is the sheer amount of agency effort needed to fully implement the Act under the timetables specified. The work necessary to even adopt those rules necessary under the Act will be a major undertaking. One must query whether the agency time spent in adopting new rules, modifying existing programs and creating new programs would be better spent implementing programs within the established regulatory framework. For example, it is generally recognized that DER has not yet had a

reasonable opportunity to utilize its most recent groundwater rule amendments to the fullest extent and that, given the proper attention, such rules constitute a worthwhile framework for effective groundwater protection.

Regardless of how one views the Act, it is clear that it represents a quantum leap forward toward substantial regulation of all discharges that may directly or indirectly affect Florida's valuable groundwater. A rational, scientific approach to these pollution-related problems is needed. Reasonable agency rulemaking and implementation based on that approach will best achieve the goals contemplated by the 1983 Florida Legislature.

