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ENVIRONMENTAL REGULATORY STREAMLINING: A STATE PERSPECTIVE

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A seemingly insoluble maze of governmental regulation lies between concept and construction for the Florida developer. Permits, licenses, and other forms of authorization are required by local, regional, state, and federal government agencies. Often the review processes of the various agencies require analysis of the same or similar standards. This overlap and duplication is generally unnecessary and results in additional direct and indirect costs to the taxpayer. Direct costs, such as paying for government employees whose review functions are duplicative, are the more obvious. Indirect costs include delays and added expenses for developers. These expenses are eventually passed on to the home buyer in residential development or the consumer in commercial and industrial development. This article will be restricted to one facet of this problem—the duplication and overlap present in Florida's environmental regulatory process.

Currently, there are three principal state agencies which, by statutory mandate, must consider the impacts of proposed construction on the environmental resources of the state: the Department of Environmental Regulation (DER), the Department of Natural Resources (DNR), and the Department of Community Affairs (DCA). In addition, five water management districts exercise

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authority over activities which may have potential environmental impacts on waters of a particular district. Other state agencies, such as the Game and Fresh Water Fish Commission and the Department of Health and Rehabilitative Services play ancillary roles but usually are not directly involved in the permitting process.

The current morass of overlap and redundancy evolved from the early beginnings of the regulatory process. Prior to 1975, the Department of Pollution Control, DNR, and the Trustees of the Internal Improvement Trust Fund actively regulated development. In addition, the state planning agency, later to become the DCA, together with the Governor and Cabinet, acting as the Administration Commission, had a responsibility to plan for growth and development within the state. During this period, responsibilities that would eventually culminate in the state Development of Regional Impact Program were just emerging for the DCA. Water resources of the state were regulated by the water management districts. Conflict and duplication of effort was chronic at this early stage of environmental regulation.

The legislature attempted to eliminate some of this duplication by passing the Environmental Reorganization Act of 1975¹ and the Warren S. Henderson Wetlands Protection Act of 1984.² In spite of these efforts, considerable problems persist. Lack of certainty about applicable standards makes it difficult to properly design and plan a project while duplication and delay increase costs to the consumer and waste state resources. Streamlining the regulatory process would result in an equal or greater degree of environmental protection and make better use of Florida's environmental regulatory machinery. Florida's problem and challenge is to improve the state environmental permitting process to benefit both the public and private sectors.

I. BACKGROUND

A. *The Florida Environmental Land and Water Management Act of 1972*

Prior to the Environmental Reorganization Act of 1975, the Florida Legislature had enacted the Florida Environmental Land and Water Management Act of 1972 (Land and Water Manage-

1. 1975 Fla. Laws ch. 75-22 (codified at FLA. STAT. § 403.801-.8171 (1985)).

2. 1984 Fla. Laws ch. 84-79 (codified at FLA. STAT. § 403.91-.938 (1985)).

ment Act).³ The purposes of this Act were to provide for the planning of growth and development within the state, "to protect the natural resources and environment of the state as provided in § 7, art. II of the State Constitution, insure a water management system that will reverse the deterioration of water quality, and provide optimum utilization of our limited water resources . . ."⁴

As a means of accomplishing these purposes, the Land and Water Management Act established the development of regional impact (DRI) review process.⁵ This process subjects developments which are anticipated to have a substantial effect upon the health, safety, or welfare of citizens of more than one county to an intense review by the regional planning agency, the DCA, and the applicable local government.⁶ The end result is the issuance or denial of a development order by the local government based on the recommendations of the particular regional planning council.⁷ In making its recommendations, the regional planning council identifies regional issues based upon certain enumerated criteria.⁸ Among these criteria is the extent to which the "development will have a favorable or unfavorable impact on the environment and natural resources of the region."⁹ This provision is the sole basis for the regional planning council, as well as the DCA, to review the impacts a project might have on water quality and natural resources.¹⁰

B. Florida Water Resources Act of 1972

In the same year that the Florida Legislature addressed the state's land development problems through the Land and Water Management Act, it also passed the Florida Water Resources Act of 1972 (Water Resources Act).¹¹ The declared policy of the legislature in passing this Act was "to provide for the management of

3. 1972 Fla. Laws ch. 72-317 (codified at FLA. STAT. § 380.012-.12 (1985)).

4. FLA. STAT. § 380.021 (1985); FLA. CONST. art. II, § 7 establishes a state policy of conservation and protection of the state's natural resources and scenic beauty via the abatement of air and water pollution as well as excessive noise.

5. FLA. STAT. § 380.06 (1985).

6. FLA. STAT. § 380.06(1) (1985).

7. FLA. STAT. § 380.06(15) (1985).

8. FLA. STAT. § 380.06(12) (1985).

9. FLA. STAT. § 380.06(12)(a) 1 (1985) (emphasis added).

10. Although the DRI process has been substantially amended since the article was written, see A. Frith, Florida's Development of Regional Impact Process, Practice, and Procedure. 1 J. Land Use & Env'tl. L. 71 (1985), for an overview of DRI standards and procedures.

11. 1972 Fla. Laws ch. 72-299 (codified at FLA. STAT. § 373.013 (1985)).

water and related land resources; to promote the conservation of surface and ground water; . . . preserve natural resources, fish and wildlife. . . ."¹² To help accomplish these goals, the Water Resources Act created six water management districts each controlled by a nine-member board appointed by the Governor.¹³ In 1977, these six were reorganized into five districts^{13.1}. Powers of the governing boards include: (1) the authority to prescribe the manner in which private persons may make use of the works^{13.2} of the district;¹⁴ and (2) the authority to require permits for construction that involves the management and storage of surface waters to assure that such construction will not be harmful to the water resources of the district.¹⁵ Four of the five districts now have rules which regulate the use of works of the district¹⁶ and the management and storage of surface water.¹⁷ Though the Act created the water management districts, the ultimate responsibility for administration of chapter 373 has been placed in DER.¹⁸

C. *The Environmental Reorganization Act of 1975*

Florida's first real attempt to improve the efficiency of the environmental permitting process was the Environmental Reorganization Act of 1975.¹⁹ The Act restructured the state environmental agencies, abolished the Trustees of the Internal Improvement Trust Fund and transferred its land management functions to DNR.²⁰ The Trustee's regulatory responsibilities over "navigable waters" were combined with the water pollution control responsibilities of the Department of Pollution Control.²¹ These combined

12. FLA. STAT. § 373.016(2) (1985).

13. FLA. STAT. §§ 373.069, 373.073 (1985).

13.1 1976 FLA. LAWS ch. 76-243 (codified at FLA. STAT. § 373.069 (1985)).

13.2 The *works* of a water management district are defined as "those projects and works, including but not limited to, structures, impoundments, wells, streams, and other water-courses, together with the appurtenant facilities and accompanying lands which have been officially adopted by the governing board of the district as works of the district." FLA. STAT. § 373.019(15) (1985).

14. FLA. STAT. § 373.085 (1985).

15. FLA. STAT. § 373.413 (1985).

16. FLA. ADMIN. CODE R. 40A-6 (1980) (Northwest Florida Water Management District), 40C-6 (1977) (St. Johns River Water Management District), 40D-6 (readopted 1974) (Southwest Florida Water Management District), 40E-6 (1981) (South Florida Water Management District).

17. FLA. ADMIN. CODE R. 40A-4 (1980), 40C-4 (1981), 40D-4 (1974), 40E-4 (1981).

18. FLA. STAT. § 373.016(3) (1985).

19. 1975 Fla. Laws ch. 75-22 (codified at FLA. STAT. § 403.801 (1985)).

20. *Id.* at § 15.

21. *Id.* at § 12.

responsibilities were transferred to a newly created agency, DER.²² The Bureau of Water Resources Management was transferred from DNR to DER,²³ and the public drinking water responsibilities of the Bureau of Sanitary Engineering were transferred from the Department of Health and Rehabilitative Services to DER.²⁴ In addition to complete jurisdiction over water management, DER absorbed the other responsibilities of the Department of Pollution Control, including air quality, solid waste, and noise abatement management.²⁵

The 1975 Act also established the Environmental Regulation Commission.²⁶ The commission's responsibility is to adopt rules containing standards for all matters regulated by DER and to hear appeals from the Department's final orders issued pursuant to chapter 403, Florida Statutes.²⁷

From a functional standpoint, the purpose of the reorganization was to pinpoint responsibility, to put all water-related activities together, water quality, quantity, and drinking water, and to make DER the primary state environmental regulatory agency.

More than a decade has passed since the Environmental Reorganization Act. The question now is whether legislative intent has become an administrative reality.

D. The Warren S. Henderson Wetlands Protection Act of 1984

DER's dredge and fill permitting authority, previously found in chapters 253 and 403, Florida Statutes, was consolidated in chapter 403 by the Warren S. Henderson Wetlands Protection Act (Wetlands Act).²⁸ Prior to the Wetlands Act, DER had the authority to review the impact of dredge and fill activities on water quality in water as defined in chapter 403.²⁹ Under chapter 403, how-

22. *Id.* at § 4.

23. *Id.* at § 11.

24. *Id.* at § 9.

25. *Id.* at § 8.

26. *Id.* at § 4(7).

27. *Id.* at § 6.

28. FLA. STAT. §§ 253.123, 403.061, 403.087, 403.088, 403.813 (1983); FLA. STAT. § 403.91 (1985); FLA. ADMIN. CODE R. 17-4.28 (1984).

29. FLA. STAT. § 403.031(3) (1983) defined "waters" to include, but not be limited to: rivers, lakes, streams, springs, impoundments, and all other waters or bodies of water, including fresh, brackish, saline, tidal, surface or underground. Waters owned entirely by one person other than the state are included only in regard to possible discharge on other property or water. Underground waters include, but are not limited to, all underground waters passing through pores of rock or soils or flowing through in channels, whether man-made or natural.

ever, DER could not consider, in non-navigable waters, or above the ordinary high water line of navigable waters, the impact of those activities on biological resources. If the project was to be constructed in navigable water, DER could consider, *inter alia*, the impact of the project on "the conservation of fish, marine, and other wildlife or other natural resources" pursuant to sections 253.123(3)(d) and 253.124(2) Florida Statutes.³⁰

Under the Wetlands Act, projects being constructed within DER's dredge and fill permitting jurisdiction are subject to the same criteria for review regardless of whether the waters involved are navigable or non-navigable.³¹ These criteria include both the water quality impacts of the project, as well as the impacts of the project on fish and wildlife.³²

Another benefit of the Wetlands Act was to eliminate the bifurcated appeals process which had developed as a result of DER's dual permitting authority under chapters 253 and 403. Prior to the Wetlands Act, appeals from DER's final agency action, involving chapter 403 water quality issues, had to be taken to a district court of appeal pursuant to the Administrative Procedures Act.³³ However, if the project involved navigable waters and impacted on natural resources, the appeal was to the Governor and Cabinet sitting as the Trustees of the Internal Improvement Trust Fund.³⁴ A project involving both issues would have to be taken to both appellate bodies. Now all appeals from DER final actions may be reviewed by the district courts of appeal.³⁵

II. SPECIFIC AREAS OF OVERLAP AND DUPLICATION

Regulation of construction activities falls into four broad categories: environmental permitting, state lands management, land use planning, and water management. As a result, several different agencies may end up reviewing the same project for the same potential environmental impacts with the possibility of arriving at different conclusions.

30. FLA. ADMIN. CODE R. 17-4.29 (1984).

31. FLA. STAT. § 403.913 (1985).

32. FLA. STAT. § 403.918 (1985).

33. FLA. STAT. § 120.68 (1985).

34. FLA. STAT. § 253.76 (1983), *repealed by* 1984 Fla. Laws ch. 84-79.

35. FLA. STAT. § 403.925 (1985).

A. *Environmental Permitting*

DER regulates a multitude of activities which have the potential for causing air and water pollution. The most serious problems of duplication arise from applications for dredge and fill permits,³⁶ and permits for the construction of stormwater discharge facilities.³⁷

The DER dredge and fill permit review process is primarily concerned with two issues: (1) the impact of the project on water quality, and (2) the impact of the project on biological resources. An applicant for a dredge and fill permit must meet two standards under the Wetlands Act. First, he must provide reasonable assurances that water quality standards will not be violated as a result of the project.³⁸ Second, he must provide reasonable assurances that the project is not contrary to the public interest.³⁹ If the project is in Outstanding Florida Waters, the applicant must provide reasonable assurance that the project will be clearly in the public interest.⁴⁰ In determining whether a project is contrary to the public interest, DER must consider and balance seven criteria including whether the project will adversely affect: (1) the conservation of fish and wildlife, including endangered or threatened species, or their habitats, and (2) the fishing or recreational values or marine productivity in the vicinity of the project.⁴¹

In practice, a member of the DER dredge and fill permitting staff conducts an on-site inspection and prepares an application appraisal in which the impacts of the project are described. Subsequently, a recommendation for issuance or denial of the permit is made. At that point, a supervisory staff member will review those recommendations and make a decision to propose issuance or denial of the permit. The ultimate responsibility for issuing or denying the permit lies with the secretary of DER.⁴²

In addition to the permitting requirements, the legislature by statute, and DER by rule, have provided for the exemption of certain types of dredging and filling activities based presumably on

36. FLA. ADMIN. CODE R. 17-4, 17-12 (1984).

37. FLA. ADMIN. CODE R. 17-25 (1984).

38. FLA. STAT. § 403.918(1) (1985).

39. FLA. STAT. § 403.918(2) (1985).

40. FLA. STAT. § 403.918(2)(a) (1985). Outstanding Florida Waters as described in FLA. STAT. § 403.061(27)(a) are water bodies designated by Fla. Admin. Code R. 17-3.041 (1985) as those worthy of special protection because of their natural attributes.

41. FLA. STAT. § 403.918(2)(a) (1985).

42. FLA. STAT. § 403.805 (1985).

the de minimis impact of those types of activities on water quality and biological resources.⁴³ For example, where the water body is not an Outstanding Florida Water, no permit is required for the construction of a private dock with a surface area of 1,000 square feet or less.⁴⁴ The construction of seawalls is also exempt where such construction is between and adjoins at both ends existing seawalls or riprap, and is no more than 150 feet in length.⁴⁵ However, just because a project is exempt from DER permit requirements does not mean that it is exempt from review by other agencies.

DER regulates the construction of stormwater discharge facilities under Florida Administrative Code Rule 17-25. A construction permit may be issued to an applicant only if the applicant provides DER with reasonable assurances that the construction and operation of the facility will not violate water quality standards.⁴⁶ DER also provides exemptions and general permits for facilities that meet certain specifications.⁴⁷ These exemptions and general permits, as with the dredge and fill exemptions, are based upon the presumed minimal impact anticipated from these stormwater discharge facilities. Like the dredge and fill exemptions, an exemption under the stormwater rule does not preclude review of the stormwater impacts of the project by other agencies.

Once the developer has satisfied DER that his project will not violate water quality standards and will not impact biological resources to any significant extent, he often will have to face further review of these same aspects of the project by DNR, DCA, and the appropriate regional planning council and water management district.

Because waterfront developments requiring permits from DER will generally involve some encroachment onto submerged lands, we next consider the role of the DNR in the regulation of development activities.

B. State Lands Management

1. Sovereignty Submerged Lands

Pursuant to the 1975 Environmental Reorganization Act, DNR absorbed the land management functions of the Trustees of the

43. FLA. STAT. § 403.813(2) (1985); FLA. ADMIN. CODE R. 17-4.04(9) (1984).

44. FLA. STAT. § 403.813(2)(b)(1) (1985); FLA. ADMIN. CODE R. 17-4.04(9)(c) (1984).

45. FLA. ADMIN. CODE R. 17-4.04(9)(r) (1984).

46. FLA. ADMIN. CODE R. 17-25.04(4) (1984).

47. FLA. ADMIN. CODE R. 17-25.03 (1984), 17-25.035 (1984).

Internal Improvement Trust Fund (Trustees), which included the management of state-owned submerged lands and uplands.⁴⁸ This resulted in a splitting of functions that were previously unified in the Trustees. Prior to reorganization, an applicant for a dredge and fill permit, dock, marina, or related activity, obtained the required authorizations from the Governor and Cabinet acting in their sovereign capacity while at the same time exercising their regulatory responsibilities. After reorganization, one wishing to undertake any of the regulated activities, in addition to obtaining a permit from DER, had to receive authorization from DNR if the activity took place on submerged lands owned by the state. This includes the vast majority of activities in navigable waters because only a small percentage of submerged lands around the state are privately owned.

Prior to the Wetlands Act, a permit for an activity on state-owned land could not be issued by DER before DNR gave its consent.⁴⁹ This provision was modified by the Wetlands Act which now allows DER to issue the permit conditioned on subsequent authorization by DNR.⁵⁰

The current area of overlap and repetition arises out of the statutory obligations of DNR and DER to consider the environmental impacts of a particular project. The role of DER in assessing the impacts of proposed development on air and water quality and on biological resources is clear from its statutory authority under chapter 403, Florida Statutes, and its authority under Title 17 of the Florida Administrative Code. Less clear however, is the role of DNR in assessing the environmental impacts of proposed development on state lands management.

DNR is responsible for the management of sovereign submerged lands pursuant to chapter 253, Florida Statutes, and Florida Administrative Code Rule 16Q-21. There are two sections in chapter 253 which address the assessment of environmental impacts of proposed conveyances of sovereign submerged lands. Section 253.02(3), Florida Statutes, provides that:

In the event submerged tidal land is to be sold and transferred . . . the board of trustees shall first require the Department of Natural Resources to inspect said lands and to file a written report with the board of trustees which report shall state *whether*

48. 1975 Fla. Laws ch. 75-22 § 15 (codified at FLA. STAT. § 20.25 (1975)).

49. FLA. STAT. § 253.77 (1983).

50. Fla. Laws ch. 84-79, § 12 (codified at FLA. STAT. § 253.77 (1985)).

or not the development of said lands would be detrimental to established conservation practices. (emphasis added).

Section 253.12(2)(a), Florida Statutes, provides that:

The Board of Trustees . . . may . . . convey such . . . submerged land if determined to be in the public interest. . . . However, prior to consummating any such sale, the Board shall determine to what extent the sale of such . . . lands . . . *would interfere with the conservation of fish, marine and other wildlife, or other natural resources* (emphasis added).

These statutes address only sales of submerged sovereign land. There is no corresponding statutory authority which allows DNR to consider the environmental impacts of any other use (for example, a lease) of submerged sovereign lands. Yet DNR has adopted rules which allow it to consider such impacts that might result from any use of submerged sovereign lands.⁵¹ Relevant portions of those rules are that:

- (1) All sovereignty lands . . . shall be managed primarily for maintenance of essentially natural conditions, propagation of fish and wildlife . . . ;⁵²
- (2) Activities which would result in significant adverse impacts on sovereignty lands and associated resources shall not be approved;⁵³
- (3) Activities shall be designed to minimize or eliminate any cutting, removal, or destruction of wetland vegetation . . . on sovereignty lands;⁵⁴ and
- (4) Activities on sovereignty lands shall be designed to minimize or eliminate adverse impacts to fish and wildlife habitat. Special attention and consideration shall be given to endangered and threatened species habitat.⁵⁵

These statutory provisions and rules give DNR broad authority to consider the impact of any proposed conveyance or use of sovereign submerged lands on the environment. Therefore, an applicant who has complied with all DER rules and requirements, nevertheless may face the task of convincing DNR that his project will not

51. FLA. ADMIN. CODE R. 16Q-21.04 (1985).

52. *Id.* at (2)(a).

53. *Id.* at (2)(b).

54. *Id.* at (2)(d).

55. *Id.* at (2)(i).

adversely impact the water quality and biological resources of the area.

DNR has provided, by rule, that the DER biological assessments "may be considered in evaluating" requests to use sovereign lands.⁵⁶ However, DER biological assessments are not binding on DNR. In fact, DNR staff in some instances have disputed the findings of the DER assessment.

It also is significant to note that both agencies require a public interest determination before the appropriate authorizations can be issued. In the case of a DER permit, the applicant must show that the project is *not contrary to the public interest*, and if the project is in an Outstanding Florida Water, the applicant must demonstrate that the project is clearly in the public interest.⁵⁷ In order for the Trustees to authorize a sale of submerged sovereign land, they must determine that the conveyance is "*in the public interest*."⁵⁸ If the applicant seeks a lease or some other use of the submerged land, then he only needs to show that the project is *not contrary to public interest*.⁵⁹ A consequence of this dual public interest test is that a review of the same project by the two agencies can result in a determination by one that a project is in the public interest (or at least not contrary to the public interest) and a determination by the other that the project is not in the public interest (or perhaps even contrary to the public interest). Many an applicant has been left totally confused and frustrated by such inconsistency.

2. Aquatic Preserves Management

In addition to its authority under chapter 253, Florida Statutes, DNR also is charged with managing the state's aquatic preserves.⁶⁰ The legislative intent is expressly stated: "[that] state-owned submerged lands in areas which have exceptional biological . . . value . . . be set aside forever as aquatic preserves . . . for the benefit of future generations."⁶¹ Except for vague language referring to the need for a conveyance to be in the "public interest,"⁶² there is no specific language in chapter 253 which addresses DNR's authority

56. *Id.* at (2)(c).

57. FLA. STAT. § 403.918(2) (1985).

58. FLA. STAT. § 253.12(2)(a) (1985).

59. FLA. ADMIN. CODE R. 16Q-21.04(1)(a) (1985).

60. FLA. STAT. §§ 258.35-258.46 (1985).

61. FLA. STAT. § 258.36 (1985).

62. FLA. STAT. § 258.42(2) (1985).

to evaluate the impact of a conveyance or use of submerged land in an aquatic preserve on biological resources.

From this statutory basis, the aquatic preserve Rule 16Q-20, states that "all sovereignty lands within a preserve shall be managed primarily for the maintenance of essentially natural conditions"⁶³ The rule also provides that the preserves shall be administered and managed to encourage the protection, enhancement, or restoration of the biological values of the preserves.⁶⁴ The rule further states that the preserves shall be managed to protect indigenous life forms and habitats.⁶⁵ Where a DER permit is required for activities on sovereignty lands in an aquatic preserve, DNR is to coordinate with DER. DNR has provided, by rule, that the DER biological assessment is to be considered by DNR in making its staff recommendations to the Trustees.⁶⁶

For those projects in aquatic preserves, in addition to the DER site assessment, the DNR Bureau of Environmental Land Management routinely does its own site inspection to assess the environmental impacts of a project on the aquatic preserve. This is one of the clearest areas of duplication. When the outcome of the two site inspections is the same, all that is accomplished is a wasting of time and money. When the outcome is different, i.e., one recommendation for issuance and the other for denial, the applicant is again left confused and frustrated and generally facing substantial economic loss from delays caused by trying to reconcile the contradictory recommendations.

To demonstrate how this situation can arise, consider the following scenario based on an actual case. A developer in a south Florida county applied for a dredge and fill permit and a lease to use state lands to construct a 22-slip boat dock as an amenity to upland condominiums. The location was in a portion of the Indian River, designated as an aquatic preserve. DER conducted a site inspection and determined that construction of the project would impact only a very small portion of the local biological community and that long-term water quality impacts would be minimal. DER notified the developer of its intent to issue the permit subject to final approval for use of state sovereign lands from DNR. The DNR Bureau of Environmental Land Management originally recommended denial of the application unless the project was demon-

63. FLA. ADMIN. CODE R. 16Q-20.01(1) (1985).

64. *Id.* at 3(e).

65. *Id.* at 3(f).

66. FLA. ADMIN. CODE R. 16Q-20.16 (1985).

strated to be in the public interest.

The project was modified to satisfy the Bureau of Environmental Land Management. However, another DNR bureau, the Bureau of State Lands Management still recommended denial of the submerged land lease because the applicant had not shown that the project was "in the public interest" as required under section 253.12(2)(a) Florida Statutes. DER found that the project, as modified, would not violate state water quality standards. Furthermore, because the project was in an Outstanding Florida Water, DER determined that the project was clearly *in* the public interest. DNR's judgment of public interest factors prevailed. Even though DER issued its permit, the Governor and Cabinet denied the lease application based on DNR staff recommendations.⁶⁷

To justify this dual review process, DNR has argued that DER had no specific authority to consider the impacts of a project affecting threatened or endangered species. The legislature has now given DER that specific authority under the Wetlands Act.⁶⁸ In evaluating the public interests of a dredge and fill project, DER is now to consider "whether the project will adversely affect the conservation of fish and wildlife, *including endangered or threatened species, or their habitat.*"⁶⁹ In addition, as justification for its expanding role, DNR cites its general proprietary authority as a landowner which it claims is separate and apart from its regulatory authority.⁷⁰

Another area of direct duplication of permit application review is in assessing the impacts of a project upon water quality in an aquatic preserve. DER is the only state agency delegated responsibility for regulating water pollution. However, the DNR Bureau of Environmental Land Management can recommend denial of a lease for state lands in an aquatic preserve if they find impacts on water quality to be in conflict with the public interest.⁷¹

DNR, in association with application for submerged land leases, has even requested applicants to supply plans for stormwater dis-

67. See "Florida's Environmental Permitting Process: A Review with Recommendations," compiled by the Florida Defenders of the Environment, Inc. (1985).

68. FLA. STAT. § 403.912 (1985).

69. FLA. STAT. § 403.918(2)(a)(2) (1985) (emphasis added).

70. See *Graham v. Edwards*, 472 So. 2d 803 (Fla. 3d DCA 1985) involving a dispute as to whether a dock which is exempt from DER permitting requirements is still subject to DNR submerged land lease requirements. The court found that the use of the word "permit" in FLA. STAT. § 403.813(2)(b) (1983) refers to an exemption from the state's regulatory functions only and does not refer to an exemption from the state's proprietary powers.

71. FLA. STAT. § 258.42(1) (1985).

charge facilities which are to be constructed on the applicant's *up-land* property. Unless the authority is otherwise delegated to a water management district, DER is the sole agency responsible for regulating the construction of stormwater discharge facilities.⁷² DNR has neither the manpower nor the expertise to review plans for stormwater discharge facilities. Once the applicant has satisfied DER that his stormwater discharge facility will not violate state water quality standards, there is no rational basis for DNR staff to conduct additional review. Although DNR is not likely to deny use of state lands based on water quality issues alone, there is duplication of site inspection, water quality review, and biological assessments in aquatic preserves.

3. Mining Reclamation

As part of its responsibility for overseeing the administration and management of state lands, DNR is charged with the development and enforcement of criteria for site reclamation of land mined for solid minerals. DNR's authority over the reclamation of mined lands derives from part II of chapter 211 of the Florida Statutes enacted in 1971.⁷³ The Act established a tax on the severance of solid minerals from the soils or waters of the state. It also provided for tax credits and refunds to the taxpayers who *reclaim* the land disturbed by the mining.⁷⁴

In 1975, the Florida Legislature amended chapter 211. All lands mined after July 1, 1975, became subject to the severance tax and mandatory reclamation.⁷⁵ As a result of the 1975 amendments, DNR promulgated Florida Administrative Code Rule 16C-16 which governs the reclamation of mining sites. The requirements of Rule 16C-16 are based on the standards set forth in section 211.32(1)(a) of the Florida Statutes. According to these rules, a reclamation program must meet standards that include: (1) control of the physical and chemical quality of the water draining from the area of operation; (2) soil stabilization including contouring and vegetation; (3) elimination of health and safety hazards; (4) conservation and preservation of remaining natural resources; and (5) establishment of a time schedule for completing various phases of the program.

72. FLA. STAT. § 403.812 (1985).

73. FLA. STAT. § 211.32 (1985) (originally enacted in part by 1971, Fla. Laws ch. 71-105).

74. FLA. STAT. § 211.32(1)(d) (1985).

75. 1975 Fla. Laws ch. 75-40 (codified at FLA. STAT. § 211.32 (1985)).

In 1980, substantive amendments were made to Rule 16C-16. The amendments require each operator to file a conceptual plan for reclamation for the entire mine.⁷⁶ The amendments also require that the operator file annual applications for reclamation prior to mining for all mining the operator plans to undertake during the upcoming year.⁷⁷ An annual report describing what lands were mined in the previous year and the status of reclamation is also to be filed.⁷⁸ The 1980 amendments require radiation monitoring and the restoration of wetlands and drainage patterns. New revegetation standards include plants, trees, and other appropriate vegetation not previously required.⁷⁹

Each mine subject to the severance tax must have an approved conceptual plan which must be filed six months prior to beginning mining operations.⁸⁰ The plan must provide an overview of the entire mine with respect to pre-mining and post-mining conditions, such as topography, drainage, and vegetation.⁸¹ It must also provide information on waste disposal and the amount and status of nonmandatory lands (lands not required to be reclaimed) within the mine.⁸² The conceptual plan should provide sufficient information to allow long-range planning of reclamation activities.

Phosphate mining involves numerous activities which have the potential to pollute state waters and impact biological resources. Accordingly, a multitude of DER permits may be required for the construction and operation of the mine and its associated processing facilities. This creates yet another area of unnecessary overlap with DNR. For example, phosphate companies planning to mine in state waters may be required to obtain dredge and fill permits from DER. To obtain DER approval for the various dredging and filling activities within its jurisdiction, some form of restoration of the original biological, ecological, hydrological, and water quality functions may be required.

In addition to the review of mining reclamation by DNR and DER, conceptual reclamation plans are reviewed by DCA and the regional planning council as part of the DRI process.⁸³ Florida Ad-

76. FLA. ADMIN. CODE R. 16C-16.041 (1980).

77. FLA. ADMIN. CODE R. 16C-16.032 (amended 1981).

78. FLA. ADMIN. CODE R. 16C-16.091 (1980).

79. FLA. ADMIN. CODE R. 16C-16.051 (amended 1981).

80. FLA. ADMIN. CODE R. 16C-16.041(3) (1980).

81. FLA. ADMIN. CODE R. 16C-16.041(2) (1980).

82. *Id.*

83. FLA. ADMIN. CODE R. 27F-2.06 (1985).

ministrative Code Rule 27F-2, names mining as one of twelve types of development presumed to have a regional impact. DRI review is concerned primarily with the impacts of the mining on the environment and natural resources of the region. Specific environmental issues commonly addressed include mining of streams and wetlands, groundwater impacts, waste clay settling areas, threatened and endangered species, air quality, and reclamation.⁸⁴

Mining reclamation may be subject to review by the same three state agencies already engaged in redundant regulation of other resources. A mining company must obtain approval of its reclamation plan from DNR, obtain dredge and fill permits from DER which, as a condition for issuance, may require some degree of restoration of the mining site. Further, the company must secure a favorable report and recommendation from the regional planning council for its reclamation plan as well as local government approval. At any stage, one agency may place conditions on the mining and reclamation plan which directly conflict with the requirements of the other two agencies. Consequently, a mining company, having satisfied one agency, may be faced with differing and conflicting requirements imposed by other agencies.

4. Coastal Construction

Pursuant to chapter 161 of the Florida Statutes, the Beach and Shore Preservation Act, DNR exerts considerable regulatory responsibility over Florida's sandy beaches. The Governor and Cabinet, sitting as the head of DNR, establish a coastal construction control line for each county.⁸⁵ It is then necessary to obtain permits from DNR for any activities taking place seaward of that control line.⁸⁶ This includes the construction of houses, apartment buildings, condominiums, hotels, motels, other types of dwellings, towers, swimming pools, pipelines, piers, elevated beach walkover structures, structures for beach access, ramps and walkways, stairways, elevated viewing platforms, lifeguard support stands, cantilevered decks, fences, subgrade utilities, as well as coastal and shore protection structures such as seawalls, bulkheads, revetments and groins.⁸⁷ Some of these activities take place on upland, while some take place in the water. Many of the above listed projects

84. *Id.*

85. FLA. STAT. § 161.053(2) (1985).

86. FLA. STAT. § 161.053(5) (1985).

87. FLA. ADMIN. CODE R. 16B-33.02(23) (1980).

also require DER permits, because they take place in state waters. It is not unusual for the two departments to disagree on the permitability of a particular project.

C. Land Use Planning

Although the DCA is referred to as the state land planning agency, its role and that of the regional planning council in the development of regional impact review process is more of a regulator than a planner.

The DCA is the agency responsible for overseeing the DRI process. Its statutory authority to consider environmental impact from proposed development is derived from various sections of chapter 380 of the Florida Statutes. The legislative intent section of the statute provides that it is necessary to plan for and guide growth and development for the protection of the natural resources and environment of the state.⁸⁸ The DCA is authorized to adopt rules to carry out the intent of the act.⁸⁹ In addition, the DCA is authorized to adopt rules to ensure uniform procedural review of DRI's by the DCA and regional planning agencies.⁹⁰ Florida Administrative Code Rule 9B-16 was adopted to implement these provisions. After DCA has determined that a project will have regional impacts, the DRI process is initiated by the developer filing an application for development approval (ADA) with the appropriate local government with copies to the regional planning council and DCA.⁹¹ The regional planning council then reviews the application to determine whether adequate information has been supplied to allow it to make its report and recommendations to the local government.⁹² When all requested information has been submitted by the applicant and after a public hearing, the regional planning council conducts its review of the ADA and submits its report and recommendation to the local government.⁹³

It is the local government's responsibility to render a decision on an application for development approval.⁹⁴ In making its decision, the local government is to consider criteria which are set out in

88. FLA. STAT. § 380.021 (1985).

89. FLA. STAT. § 380.032(2)(a) (1985).

90. FLA. STAT. § 380.06(2)(a) (1985).

91. FLA. STAT. §§ 380.06(6), 380.06(10) (1985).

92. FLA. STAT. § 380.06(10)(b) (1985).

93. FLA. STAT. § 380.06(12)(a) (1985).

94. FLA. ADMIN. CODE R. 9B-16.25 (1983).

section 380.06(14), Florida Statutes.⁹⁵ One criterion is that development be "consistent with the report and recommendations of the regional planning agency [which is] submitted [to the local government] pursuant to [section 380.06(12)]."⁹⁶ Under this section, the regional planning agency makes recommendations to the local government considering, among other things, whether and to what extent "[t]he development will have a favorable or unfavorable *impact on the environment and natural . . . resources* of the region."⁹⁷ The DCA and the regional planning councils retain ultimate oversight responsibilities since they may appeal any development order issued by a local government.⁹⁸

It is primarily in the regional planning council review and reporting process that the duplication arises. Because the regional planning council must consider the extent to which the development will have a favorable or unfavorable impact on the environment and natural resources of the region, it must request from the applicant information pertinent to those issues. Often, concurrent with the DRI review, an applicant will be seeking permits from DER. Many times the same information which has been requested by DER will be requested by the regional planning council. However, based on a review of the identical information, each agency may reach the opposite conclusion regarding approval of the project. If DNR is also involved in reviewing the project because of an application for a conveyance or use of submerged sovereign lands and perhaps the existence of an aquatic preserve at the project site, the possibilities multiply.

Consider the following scenario. A developer proposes a residential development along a navigable water body located in an aquatic preserve. As an amenity for the development, the developer also proposes to construct a docking facility of reasonable dimensions. This developer would be faced with the following regulatory hurdles.

1. Minimally, permits from DER would be required for: (a) the docks, (b) the construction and operation of the stormwater discharge facility for the residential development, and (c) any dredging and filling associated with the docks and the residential development that is within DER's regulatory jurisdiction.

2. A submerged land lease for the docks would be required from

95. FLA. STAT. § 380.06(14)(c) (1985).

96. *Id.*

97. FLA. STAT. § 380.06(12)(a)(1) (1985) (emphasis added).

98. FLA. STAT. § 380.07(2) (1985).

DNR. Other authorizations may also be required depending on the nature and extent of any proposed dredging and filling.

3. DCA would require the residential development to undergo the DRI review process if the number of residential units exceeds a numerical threshold based on the population of the county. The docking facility would also be subject to the DRI process if the number of slips exceeds ninety-nine.⁹⁹

DER would review the impacts of the marina and any associated dredging and filling activities on water quality and biological resources. DER also reviews the design of the proposed stormwater discharge facility to ensure that water quality standards will not be violated.

The DNR would consider, in the course of its review, the impacts of the marina and any dredging and filling on biological resources and water quality. It may also consider the impacts of the stormwater discharge on the water quality of the aquatic preserve.

The regional planning council and DCA would review the impact of the development on the "environment and natural resources." As such, they review the impacts of the docks and any dredging and filling on biological resources and water quality. They also review the stormwater discharge facility to ensure that it does not have an unfavorable impact on the environment or natural resources of the region.

Regardless of any one agency's determination as to the impacts of the project, the other agencies may reach different, even completely contrary conclusions regarding approval of the project. Suppose that DER, the agency with primary environmental regulatory authority, determines that the project will meet the state's water quality standards. Neither DNR, nor the regional planning council is bound by that determination even though neither agency has the same degree of expertise or trained personnel to scientifically dispute DER's determination.

Suppose also that DER, after a comprehensive and thorough site inspection, determines that the project will not adversely affect any biological resources and in fact will enhance them through an overall mitigation plan.¹⁰⁰ DER accordingly determines that the

99. FLA. ADMIN. CODE R. 27F-2.09 (1985). Under FLA. STAT. § 380.06(2)(d) (1985), the development may be deemed a DRI even if the number of residential units and docking slips are below the presumptive thresholds.

100. Often the minor impacts of a project may be more than compensated for by actions taken by the applicant, for example, planting vegetation at the site, dedicating private land as a conservation area, creating wetlands where none existed previously, etc.

project is not contrary to the public interest, but indeed is in the public interest. Again, neither DNR nor the regional planning council is bound by DER's determination. DNR might still find that, because of its perception of the adverse impacts of the project on biological resources and water quality, the submerged land conveyance or use should be denied. The regional planning council could also determine that perceived impacts of the project would adversely affect biological resources and water quality and subsequently recommend to the local government that the ADA be denied.

For those aspects of a project which do not come under review by DER, the regional planning council should be allowed to review and make recommendations regarding the project's impacts on the environment and natural resources of the region. It is also recognized that DNR may have valid reasons for denying a submerged land conveyance or use which go beyond the project's impacts on water quality and biological resources. However, it makes little sense to allow DNR or the regional planning agency to withhold their respective approvals where the grounds for withholding that approval fall within DER's regulatory authority.

D. Water Management

To add to the confusion created by the conflicts between DER, DNR, and DCA and the regional planning councils, additional permits may be required from the appropriate water management district if the project involves construction which impacts the works of one of the districts or involves construction for the management and storage of surface waters. These works of the district, in most instances, will be waters over which DER also has regulatory authority. It is also possible that these same waters will involve submerged sovereign lands eliciting input from DNR as well.

The legislature has authorized the water management districts "to prescribe the manner in which local works provided by other districts or private persons will connect with and make use of the works or land of the district, to issue permits therefore, and to cancel the permits for non-compliance"¹⁰¹ All but the Suwannee River Water Management District currently have rules for permitting use of the works of the district.¹⁰² Only one district to date provides criteria for permit issuance that address the impact of a

101. FLA. STAT. § 373.085(1) (1985).

102. *Supra* note 16 and accompanying text.

project on water quality or biological resources. In order to be able to obtain a permit from the South Florida Water Management District, an applicant must provide reasonable assurances that the proposed use of the works, among other things, does not degrade the quality of the water body. An applicant must also demonstrate that the project meets the water quality standards of DER for the receiving water body.¹⁰³ In addition, seven other provisions are found in the South Florida Water Management District rule.¹⁰⁴ Among these is a provision allowing the water management district to deny permits for projects encroaching upon environmentally sensitive areas, even though all other criteria are satisfied.¹⁰⁵

A district may also require permits "to assure that . . . any dam, impoundment, reservoir, appurtenant work, or works *will not be harmful to the water resources* of the district."¹⁰⁶ Three districts now have rules which address the impacts of such projects on water quality and biological resources.¹⁰⁷ Again, it is obvious that there is considerable potential for agency duplication.

III. RECOMMENDATIONS

The environmental regulatory process should act as an integrated system, not a series of isolated independent decisions with little relevance. Currently, the various agencies charged with environmental regulatory powers often exchange comments and information regarding applications. Such an exchange, however, does not effectively resolve the conflicts among agencies.

It is not the purpose of this article to suggest ways to facilitate ill-advised and poorly planned projects. However, protection of the environment must be achieved with a view toward the realities of the public interest and the economic benefits that are derived from development activities.

The effectiveness and efficiency of Florida's environmental regulatory system is hindered by duplication of effort, lack of coordination, and conflicts in assessments among the agencies. The following are recommendations to alleviate some of these problems.

103. FLA. ADMIN. CODE R. 40E-6.301(1)(c) (1981).

104. FLA. ADMIN. CODE R. 40E-6.301(2) (1981).

105. FLA. ADMIN. CODE R. 40E-6.301(2)(d) (1981).

106. FLA. STAT. § 373.413(1) (1985) (emphasis added).

107. FLA. ADMIN. CODE R. 40C-4.301 (1983) (St. Johns River Water Management District), 40D-4.301 (1983) (Southwest Florida Water Management District), 40E-4.301 (1983) (South Florida Water Management District).

A. *Give binding effect to DER determinations regarding water quality impacts*

As noted, there are circumstances which give rise to as many as five different state or regional agencies reviewing, analyzing, and making determinations whether to issue or deny approval of a project based on its impact on water quality (DER, DNR, DCA, the regional planning councils, and water management districts). DER is the agency primarily responsible for making water quality determinations.¹⁰⁸ Other agencies, based on broadly worded statutory authority, have taken it upon themselves to make determinations regarding water quality impacts. These agencies lack the degree of expertise and technical staff which exists at DER.

It is recommended that where a project involves review by multiple state or regional agencies for its impact upon water quality (whether those impacts result from dredging and filling, stormwater, or any other type of project for which DER requires a permit), DER's determination be binding on those other agencies as to that particular issue. This would prevent any of the other agencies from withholding their approval solely on water quality issues which are within DER's purview and would remove a source of deadlock to the applicant.

B. *Give binding effect to DER's determination of the public interest as it relates to conservation of biological resources*

In those situations where DER is reviewing a dredge and fill permit application for projects or portions of projects which are also subject to submerged sovereign land uses, DRI reviews, or water management district permits, DER's determination of the biological impacts and corresponding public interest factors should be binding. As previously noted, under the Wetlands Act, DER must consider and balance seven different criteria to determine whether a project is contrary to the public interest (or in the public interest if Outstanding Florida Waters are involved).¹⁰⁹ This determination includes a comprehensive review of all of the potential adverse impacts of a project on the biological resources of the project area. Neither DNR, DCA, a regional planning council, nor a water management district should be permitted to withhold approval of the

108. See 1975 Op. Att'y Gen. Fla. 075-16 (January 29, 1975) stating that DER's predecessor agency, the Department of Pollution Control, had primary authority over water quality issues where a conflict with the water management districts existed.

109. See *supra* notes 39-41 and accompanying text.

project based on biological impacts if DER arrives at a favorable determination after its consideration and balancing of the seven criteria. DNR, DCA, the regional planning councils, and the water management districts would still have the power to deny approval for a project, but such denial would have to be based on other statutory grounds than the impact upon biological resources.

C. DER permitting exemptions should apply to other agencies

As discussed above, section 403.813 of the Florida Statutes, and certain DER rules exempt specific types of activities from DER's dredge and fill permitting requirements. These exemptions presumably are based on the minimal impact these activities have on water quality and biological resources. If this is indeed the case, then water quality and biological impacts should be exempt from review by DNR, DCA, the regional planning councils, and the water management districts for such activities.

D. Transfer all DNR regulatory functions to DER

Even though DNR's function is to be the manager and proprietor of state lands, this role has expanded to include many regulatory functions. Among these are the mining reclamation review and coastal construction permitting.

Currently, the review of mining reclamation plans is conducted by DNR's Bureau of Mine Reclamation. Because the scope of review of mine reclamation plans overlaps to a considerable degree with the permitting responsibilities of DER, much effort and duplication could be eliminated by transferring the Bureau of Mine Reclamation to DER. The various DER permitting staffs, e.g., dredge and fill, dam construction, stormwater, and others, could then provide close coordination throughout the permitting and reclamation plan review procedures. A miner would still have to meet the statutory requirements of chapter 211, Florida Statutes, but the confusion, frustration, and added expense of dealing with two separate agencies would be eliminated.

To further eliminate duplication in the mining reclamation review process, it is also suggested that review of reclamation plans by DCA and the regional planning councils be curtailed. Any decision by the Bureau of Mining Reclamation as to the acceptability of a reclamation plan would be binding on DCA and the regional planning council.

The Division of Beaches and Shores principally acts in the role

of a regulator in setting coastal construction lines, reviewing applications for coastal construction lines, and reviewing applications for coastal construction permits. This division should be transferred to DER. Such a transfer would be consistent with the need to maintain DER as the primary environmental regulatory agency while retaining in DNR the management and proprietary responsibilities over state lands.

IV. CONCLUSION

In spite of their various designations as state land managers, land use planners, and water use managers, DNR, DCA, the regional planning councils, and water management districts often are required to function as environmental regulatory agencies. As such, their authority frequently overlaps that of DER. There is no central state policy coordinating the environmental review activities of these agencies. The areas of review and information required for their respective approvals are duplicative. For the applicant, satisfaction of the cumulative requirements for issuance of the necessary licenses is a confounding process. As many as five different state and regional agencies must make similar assessments which often conflict as to the same impacts of the same activity. Policies for issuing approvals differ among the agencies. No agency is designated as the lead agency or has the binding decision. The process is costly in time and money for the applicant and is not necessarily the most effective protection for the environment.

The responsibilities of the various agencies have expanded since their initial creation by the legislature. This growth was not planned and has been incremental in nature; it was the result of agencies adopting rules based upon broadly worded statutory authority. As an agency identified an area it felt had inadequate protection or regulation, the agency would adopt rules to cover it. The result has been overlapping and illogically acquired agency responsibilities. The ultimate effect is the frustration of the potentially smooth operation of an effective environmental regulatory process.

The Environmental Reorganization Act of 1975 helped to streamline the state environmental permitting process. The Warren S. Henderson Wetlands Protection Act of 1984 also aided the efficiency of the process. However, it is clear that substantial problems remain. These problems are not insoluble. The implementation of the recommendations presented herein would be a major step in alleviating the problems. Such implementation will require legislative action. The potential benefits would be substan-

tial and include:

1. a decrease in the amount of agency staff time reviewing impacts of proposed projects, which could result in the elimination of certain staff positions to assume other non-duplicative responsibilities;

2. a decrease in the time taken to reach a final determination to grant or deny permit approval;

3. increased economic benefits for the state which would accrue as a result of the construction and completion of well-planned, environmentally sound developments; and

4. increased savings for applicants as a result of the shortened time frames for review of the environmental impacts of proposed projects.

No doubt there are other areas in which further streamlining of the environmental regulatory process could be accomplished. In fact, nearly as much duplication exists between federal, state, and local environmental agencies as exists between the state agencies described herein.

