

MICRO-DEREGULATION: POLLUTING FLORIDA’S WATER, DROP BY DROP

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Water pollution threatens public health, especially in Florida, where excess nutrients cause reoccurring algal blooms. The law itself has become the problem. Florida serves as a case study in micro-deregulation because its system of environmental regulation has been incrementally dismantled through a combination of legally mandated “drops.” Some deregulation occurred openly through exemptions, presumptions, preemptions, and deadline-driven procrastination. Other efforts are less transparent. Exercises of agency discretion, often based on vague standards, may be known to the government but hidden from public view. Furthermore, justice is willfully blind because the judiciary refuses to listen to citizen advocates, invoking doctrines of judicial restraint, standing, and fee-shifting to undermine access to courts in environmental affairs. Finally, some of the deregulatory efforts will never be truly understood due to the unknown impacts of appropriations and other structural deregulatory efforts. But as water quality continues to decline, Florida’s citizens endure the consequences of deregulation, one drop at a time.

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INTRODUCTION

Pollution has been memorably defined as “something in the wrong place, wrong time, and wrong quantity.”² Decades ago, Florida forged a reputation as a leader in water management and regulation, implementing an influential water code to protect Florida waters from pollution.³ Today, Florida serves as a case study in micro-deregulation because its historic system of environmental regulation has been incrementally dismantled.

In theory, Florida Statutes⁴ and the Clean Water Act (CWA) require water quality monitoring to find and control pollution.⁵ Permits and other rules may place restrictions on specific point sources,⁶ such as a discharge pipe from a sewage-treatment plant.⁷ Other forms of regulation, such as a

2. MARTIN W. HOLDGATE, *A PERSPECTIVE OF ENVIRONMENTAL POLLUTION* 18 (1st ed. 1979).

3. See Richard C. Ausness, *The Influence of the Model Water Code on Water Resources Management Policy in Florida*, 3 J. LAND USE & ENV’T L. 1, 18–20 (1987) (detailing Florida’s history with water pollution legislation and explaining how adopting the Model Water Code helped cement Florida as a prominent state for water pollution control); see also FRANK E. MALONEY ET AL., *A MODEL WATER CODE WITH COMMENTARY* v (1972) (explaining the Model Water Code and stating that Florida adopted the majority of the Model Code in 1972).

4. See FLA. STAT. §§ 373.012–373.813, 403 (2023) (containing statutes relevant to water resources). All subsequent citations to the Florida Statutes are to the most current version unless otherwise indicated.

5. See generally Clean Water Act, 33 U.S.C. §§ 1251–1387 (discussing water quality restoration).

6. Point sources, when covered by Clean Water Act permits, must have monitoring conditions to protect the downstream waters. *Id.* §§ 1342, 1318 (requiring monitoring for point sources to determine whether effluent limits are met when discharges are granted permits).

7. *Id.* § 1362(14) (“[P]oint source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which

requirement for a farmer or construction worker to use best management practices for erosion control, address less discrete nonpoint sources created by rainfall runoff.⁸ Since those regulatory efforts are imperfect, large-scale public works projects can offer additional water quality improvement.⁹ Yet in practice, Florida law has undermined itself. The cumulative sum of small measures has become more impactful than individually significant laws and projects, and as a result, the whole water quality protection scheme endures systematic micro-deregulation.

Law is a core part of the grand social contract, where voters and public officials define society's rules and expectations.¹⁰ Florida water law now sets low expectations. While the state's general statutory scheme established lofty goals, and specific statutes might benefit individual watersheds, the whole system is riddled with self-destructive provisions that undermine the effective functioning of the legal or regulatory systems.¹¹ Known problems are openly accepted. Some problems are hidden from the public, while the government remains willfully blind to others. And in some instances, often due to the elimination of government agency funding, no one understands the problems at all. Expanding pollution and toxic algal blooms across the state reveal the consequences of this piecemeal deregulatory scheme.

Part I of the paper explores the idealistic design of the Florida water quality regulatory system. Part II reveals how the cumulative effects of small legal maneuvers have achieved deregulation, describing the nine deregulatory "drops" that diminish Florida's regulatory system. The Conclusion summarizes the author's views and provides recommendations.

I. BACKGROUND: FLORIDA'S REGULATION OF WATER QUALITY

Water is a defining and even existential issue in low-lying Florida, where the State Constitution demands protection of water resources.¹² Statutory

pollutants are or may be discharged. This term does not include agricultural discharges and return flows from irrigated agriculture."); *see also* Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Interpreting the "Point Source" Element of the Clean Water Act Offense*, 45 ENV'T L. REP. 11129, 11137 (2015) (explaining EPA's regulation of point source pollution).

8. *Controlling Nonpoint Source Pollution*, NAT'L OCEAN SERV., https://oceanservice.noaa.gov/education/tutorial_pollution/015controlling.html (last visited Apr. 3, 2024).

9. FLA. STAT. § 373.4592(4)(a).

10. *See generally* JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT* (G. D. H. Cole trans. 1762) (indicating law is an agreed upon tenant of the social contract).

11. *See infra* Part II (describing systemic failures).

12. FLA. CONST. art. II, § 7 (protection of natural resources); *id.* art. IV, § 9 (fish and wildlife conservation commission); *id.* art. VII, § 9(b) (taxation authority for water management districts); *id.* art. VII, §§ 11, 14 (bonds for pollution control and water resource development); *id.* art. X, § 11 (sovereign submerged lands held in public trust); *id.* art. X, § 16 (regulation of net fishing); *id.* art. X, § 17 (trust fund for the Everglades); *id.* art. X, § 28 (land acquisition trust fund for water resources protection).

provisions in Chapters 373 and 403, Florida Statutes, further describe a system of water governance and flood control.¹³ For example, Florida law gives the Florida Department of Environmental Protection (FDEP) the “power and the duty to control and prohibit pollution of air and water in accordance with the law and rules” of the state.¹⁴ To exercise that power, FDEP has authority to adopt rules,¹⁵ establish water quality standards,¹⁶ issue orders as necessary to control water pollution,¹⁷ and “[d]evelop a comprehensive program for the prevention, abatement, and control of the pollution of the waters of the state.”¹⁸ The Environmental Control chapter of the Florida Statutes¹⁹ includes the Water Resources Restoration and Preservation Act,²⁰ which assists in the restoration and preservation of bodies of water and a large-scale water quality monitoring program.²¹

While FDEP is the state’s lead water quality monitoring agency,²² it also supervises five important regional water management districts.²³ The water management district boundaries follow watershed boundaries.²⁴ These agencies, like FDEP, seek to manage, utilize, and conserve water resources to promote public health, safety, and welfare.²⁵ Pursuant to Chapter 373, these “water management districts are responsible for addressing issues such as water supply, flood protection, water quality, and protection of natural systems.”²⁶ Performing a critical role in the state’s water resource development,²⁷ the water management districts implement a comprehensive

13. FLA. STAT. § 373.016; *id.* § 403.011 (“This act shall be known and cited as the ‘Florida Air and Water Pollution Control Act.’”).

14. *Id.* § 403.061.

15. *Id.* § 403.061(7).

16. *Id.* § 403.061(11).

17. *Id.* § 403.061(8).

18. *Id.* § 403.061(10).

19. *See generally id.* § 403 (showing that the Environmental Control chapter contains various provisions devoted to water restoration in Florida).

20. *Id.* § 403.0615(1).

21. *Id.* § 403.0616; *id.* § 403.0625.

22. FLA. ADMIN. CODE ANN. r. 62-40.540 (“The Department is the state’s lead water quality monitoring agency and central repository for surface water and ground water information. The Department shall coordinate Department, District, state agency, and local government water quality monitoring activities to improve data and reduce costs.”).

23. FLA. STAT. § 373.026(7).

24. *Id.* § 373.016(4)(a).

25. *Id.* § 373.016(3).

26. Christina A. Klein et al., *Modernizing Water Law: The Example of Florida*, 61 FLA. L. REV. 403, 445 (2009).

27. FLA. STAT. § 373.019(24) (“‘Water resource development’ means the formulation and implementation of regional water resource management strategies, including the collection and evaluation of surface water and groundwater data; structural and nonstructural programs to protect and manage water resources; the development of regional water resource implementation programs; the construction, operation, and maintenance of major public works facilities to provide for flood control, surface and underground water storage, and groundwater recharge augmentation; and related technical assistance to local governments, government-owned and privately owned water utilities, and self-suppliers. . . .”).

environmental resource permit program for construction and operation of water structures, the regulation of wetland impacts, and the protection of Florida waters.²⁸ Some statutes include additional requirements for particular types of waters, such as estuaries,²⁹ ground waters,³⁰ wells,³¹ surface waters,³² and springs.³³

Overall, Florida's water laws, including the comprehensive Florida Water Resources Act of 1972,³⁴ now exceed 170,000 words and 250 printed pages.³⁵ In theory, the government ensures compliance by imposing civil penalties in the form of fines, jail, or both for violations.³⁶ Administrative enforcement can also be achieved by FDEP and the water management districts through court intervention.³⁷

Federal regulatory schemes pursuant to the CWA provide additional water resource protection.³⁸ In fact, Florida officials implement the federal programs because they have been delegated to the state through agreements with the Environmental Protection Agency (EPA). Industrial and sewage-treatment plant discharges are regulated through National Pollutant Discharge Elimination System (NPDES) permits.³⁹ Stormwater discharges are regulated, too.⁴⁰

Separately, Florida also received authority to implement the federal wetland regulatory program, thus satisfying the requirements of Section 404

28. FLA. ADMIN. CODE ANN. r. 62-330.010 (2020); FLA. STAT. § 373.4131.

29. *See, e.g.*, FLA. STAT. § 373.4592 (2018) (requiring special protection for the Everglades); *id.* § 373.4595.

30. *See id.* §§ 373.203–373.250 (permitting of consumptive uses of water).

31. *Id.* § 373.302.

32. *Id.* §§ 373.403–373.468.

33. *Id.* § 373.801.

34. *Id.* § 373.013.

35. *Id.* § 373.016; *see also* Keith W. Rizzardi, *Money, Mandates, and Water Management: Foreshadowing a Florida Disaster*, 21 VT. J. ENV'T L. 1, 44 (2019) (citing FLA. STAT. §§ 373.012–373.813).

36. *See generally* FLA. STAT. §§ 373.123–373.136 (showing the existing types of civil penalties for violations to Florida water laws).

37. *Id.* §§ 373.119, 403.121.

38. *See generally* Clean Water Act, 33 U.S.C. §§ 1251–1387 (providing an example of a federal regulatory framework that is designed to enforce water resource protection).

39. *Id.* §§ 1342(p)(3)(A), 1342(q)(1); *see also* *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Florida and the United States Environmental Protection Agency Region 4*, EPA (Nov. 2007), <https://www.epa.gov/sites/default/files/2013-09/documents/fl-mo-npdes.pdf> (explaining the permitting program between Florida and EPA) (describing general provisions); *see also* *Domestic Wastewater Forms*, FLA. DEP'T OF ENV'T PROT. (Oct. 4, 2023), <https://floridadep.gov/water/domestic-wastewater/content/domestic-wastewater-forms> (listing domestic wastewater permits).

40. *See generally* *Stormwater Regulation*, FLA. DEP'T OF ENV'T PROT., <https://floridadep.gov/water/stormwater> (last visited Apr. 6, 2024) (discussing regulation of stormwater discharges through Municipal Separate Storm Sewer Systems (MS4s), construction activities and industrial activities).

of the CWA.⁴¹ However, that authority has been called into question. A challenge to the 404 program brought by the Center for Biological Diversity concluded that the delegated program and its approval by the U.S. Fish and Wildlife Service violated the Endangered Species Act.⁴² Separately but similarly, the Miccosukee Tribe of Indians challenged EPA's approval of the delegated program, arguing that it violated the CWA.⁴³ As this Article was being written, the litigation was put on hold for further review by the U.S. Department of Justice and Army Corps of Engineers, and no 404 permits were being issued by the State of Florida.⁴⁴

Water management in Florida, however, is about much more than just permitting programs. For more than a century, and with the frequent assistance of the U.S. Army Corps of Engineers, Florida has grappled with flood control.⁴⁵ Most notably, Florida built a system of canals across the state⁴⁶ and a massive dike around Lake Okeechobee.⁴⁷ To address the byproducts of these public works projects, and to supplement the regulatory schemes, Florida Statutes create requirements to plan, finance, construct, operate, and monitor a variety of public works projects.⁴⁸ While the Everglades Forever Act dedicated efforts to the protection of the Everglades,⁴⁹ other similar statutes tackled pollution problems related to Lake Apopka, the Kissimmee River, Lake Okeechobee, the St. Lucie River, the Caloosahatchee River, and Florida Bay.⁵⁰ With billions of dollars

41. 33 U.S.C. § 1344; EPA's Approval of Florida's Clean Water Act Section 404 Assumption Request, 85 Fed. Reg. 83553 (Dec. 22, 2020).

42. *Ctr. for Biological Diversity v. Regan*, No. 21-119, 2024 WL 655368, at *38 (D.D.C. Feb. 15, 2024).

43. *Miccosukee Tribe of Indians of Fla. v. U.S. EPA*, 2022 U.S. Dist. LEXIS 240541, at *1 (S.D. Fla. Oct. 14, 2022).

44. Jim Saunders, *Miccosukee Tribe Wetlands Permitting Case Put on Hold*, WGPU (Mar. 19, 2024), <https://news.wgcu.org/section/environment/2024-03-19/miccosukee-tribe-wetlands-permitting-case-put-on-hold>.

45. See generally MATTHEW C. GODFREY & THEODORE CATTON, U.S. ARMY CORPS OF ENG'RS, RIVER OF INTERESTS: WATER MANAGEMENT IN SOUTH FLORIDA AND THE EVERGLADES, chs. 2–3 (2011).

46. See *Facility and Infrastructure Location Index Map*, S. FLA. WATER MGMT. DIST. (July 2016), https://www.sfwmd.gov/sites/default/files/documents/facility_map_overview.pdf (mapping out canals throughout the state of Florida); STEVEN J. MILLER ET AL., ST. JOHNS RIVER WATER MGMT. DIST., UPPER ST. JOHNS RIVER BASIN PROJECT INTERIM ENVIRONMENTAL WATER MANAGEMENT PLAN, iii (Apr. 2022), <https://static.sjrwmd.com/sjrwmd/technical-reports/technical-publications/SJ2022-01.pdf>; *Tampa Bypass Canal System*, SW. FLA. WATER MGMT. DIST., <https://www.sfwmd.state.fl.us/projects/tampa-bypass-canal-system> (last visited Apr. 6, 2024).

47. Alanna L. Lecher, *A Brief History of Lake Okeechobee: A Narrative of Conflict*, 1 J. FLA. STUDS. 1, 11 (2021), <https://www.journaloffloridastudies.org/files/vol0109/lecher-brief-history-lake-okeechobee.pdf>.

48. FLA. STAT. § 373.4595(1)(l).

49. *Id.* § 373.4592; *Central and Southern Florida Project Comprehensive Review Study: Final Integrated Feasibility Report and Programmatic Environmental Impact Statement*, U.S. ARMY CORPS OF ENG'RS JACKSONVILLE DIST. (Apr. 1999), <https://www.saj.usace.army.mil/Restudy/>.

50. See generally FLA. STAT. §§ 373.403–373.469 (showing state provisions designed to address pollution in other state water bodies).

invested, more than 100,000 acres of land acquisition and project construction, and thousands of miles of canals to monitor and manage, the state's investment is truly substantial.

Nevertheless, the consistent supervision and regulation of water quality standards in Florida relies on effective management and responsible stewardship by the state⁵¹—a point the U.S. Government Accountability Office has been explaining since the 1980s.⁵² And despite the collection of regulatory programs, expensive public works projects, and site-specific statutes, the truth is that Florida knows problems exist, yet its government increasingly chooses not to act. The high-profile public works projects offer great publicity, but micro-deregulation is the reality.

II. ANALYSIS: FLORIDA'S DEREGULATION OF WATER QUALITY

As American psychologists Joseph Luft and Harry Ingram explained, knowledge involves disclosure, understanding, feedback, and self-awareness.⁵³ Of course, management of natural resources and watersheds requires the careful use and application of knowledge. The logic of Luft and Ingram's famous diagram, known as the "Johari" Window (combining their first names),⁵⁴ readily applies to the regulation of water pollution, as depicted below. Some things are known to both the state government and its people and are openly addressed; these are the "known knowns." In an effective regulatory system, the known information is used. A distrustful public might worry that some things known to some state officials remain hidden from the community. But in an effective regulatory setting, the government simply uses the information behind the scenes. Other things are known by the citizens (and especially the scientific community) but not the state, leaving the state with a blind spot. In an effective regulatory system, the citizens have an opportunity to inform the state or even contest its decisions. As for the fourth quadrant and the concept of "unknown unknowns," neither the state

51. See Jason Totoiu & Jaclyn Lopez, *Holding States Accountable for Harmful Algal Blooms: Florida's Water Crisis in Focus*, 33 UNIV. FLA. J. L. & PUB. POL'Y 1, 14 (2022) (noting failures in water quality due to lack of effective management).

52. *Water Pollution: More EPA Action Needed to Improve the Quality of Heavily Polluted Waters*, GOV'T ACCOUNTABILITY OFF. (Jan. 13, 1989), <https://www.gao.gov/products/rced-89-38> (discussing Oregon implementation of TMDLs); *Clean Water Act: Changes Needed if Key EPA Program is to Help Fulfill the Nation's Water Quality Goals*, GOV'T ACCOUNTABILITY OFF. (Dec. 2014), <https://www.gao.gov/products/gao-14-80>.

53. JOSEPH LUFT, *THE JOHARI WINDOW: A GRAPHIC MODEL OF AWARENESS IN INTERPERSONAL RELATIONS* 34 (1982).

54. *Id.*; Dr. Parul Saxena, *Johari Window: An Effective Model for Improving Interpersonal Communication and Managerial Effectiveness*, 5 SIT J. MGMT. 134, 146 (Dec. 2015).

nor the citizens are fully aware of the problems. Ideally, in these circumstances, the government and people seek to know more.⁵⁵

The Johari Window was intended to provide a framework for developing greater self-awareness. Careful thought reveals that Florida law is no longer committed to the effective use of knowledge to solve water problems through regulation. While some of the trappings of regulation remain, Florida law simultaneously accepts and even demands non-use of the information, thereby embracing deregulation. The Johari Window, in other words, has a mirror image, which can help explain both the use of and the refusal to use information:

		THE JOHARI MIRROR: INFORMATION, REGULATION & DEREGULATION	
		<i>Known to the government</i>	<i>Unknown to the government</i>
<i>Known to citizens</i>	(I) OPEN	<p>Effective regulation: decision makers use known information</p> <p style="text-align: right;">Deregulation inhibits information using exemptions, presumptions, local preemption, & delayed deadlines.</p>	<p>(II) BLIND</p> <p>Effective regulation: citizens provide information for government use</p> <p style="text-align: right;">Deregulation inhibits information by obstructing citizen advocacy and preventing judicial review.</p>
	(III) HIDDEN	<p>Effective regulation: decisionmakers use known information and inform the public</p> <p style="text-align: right;">Deregulation inhibits information by allowing non-transparent (ab)use of standardless discretion.</p>	(IV) UNKNOWN
<i>Unknown to citizens</i>			

55. However, regarding unknowns, Professor Luft separately emphasized that “eventually some of these things become known” and that “the value system of a group and its membership may be noted in the way unknowns in the life of the group are confronted.” LUFT, *supra* note 53, at 34–35.

Deregulation includes far more than just the traditional concept of repealing statutes or rules—which can be notoriously difficult to achieve.⁵⁶ Other forms of deregulation can include altering an existing regulation to reduce its impact.⁵⁷ Florida law embraces micro-deregulation one drop at a time. Through a series of lawful but seemingly small measures—characterized as “drops” throughout this article—the state statutes, rules, and legal doctrines inhibit the government’s use of information. Cumulatively, these small drops undermine the regulatory system and achieve deregulatory objectives instead.

Some deregulatory drops exist in the open, where the problems are well-known to everyone but the law allows for a combination of exemptions, presumptions, and preemptions. Other drops are somewhat hidden, dealing with problems known to the government but not well-known to the public, and are often achieved through agency discretion and procrastination. Should citizen advocates endeavor to confront the problem, deregulation is achieved through the judiciary, which drops responsibility and otherwise engages in obstruction through doctrines of judicial restraint, inhibition of citizen standing, and enforcement of fee-shifting statutes.

Finally, some of the deregulatory drops are unknown, especially because appropriations change budgets and reorganization undermines efforts to track changes over time. The citizens, who thought that the system was designed to protect their waters, instead endure the consequences of micro-deregulation.

A. Open Deregulation

Drop #1: Exemptions

Sometimes, an agency’s inaction on a water pollution problem is permitted by the legislature’s decision to create an exemption.⁵⁸ Exemptions, by definition, openly acknowledge the existence of a problem and then refuse to apply the law to that problem. Florida’s Legislature expressly authorized FDEP to create rules with exemptions from water quality permitting

56. See generally Cary Coglianese et al., *The Deregulation Deception*, UNIV. PA. CAREY L. SCH.: PENN. CAREY LAW: LEGAL SCHOLARSHIP REPOSITORY 1–42 (2021), https://scholarship.law.upenn.edu/faculty_scholarship/2229; Jack Thorlin, *Deregulation Defanged: An Empirical Review of Federal Deregulatory Policy and its Legal Obstacles*, 34 BYU J. PUB. L. 333, 333 (2020), <https://digitalcommons.law.byu.edu/jpl/vol34/iss2/6>.

57. *Deregulation*, BRITANNICA, <https://www.britannica.com/topic/deregulation> (last visited May 10, 2024).

58. See, e.g., FLA. STAT. §120.542(1) (“Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation.”); *id.* § 373.406.

requirements,⁵⁹ thereby allowing permittees to evade otherwise applicable water quality requirements.⁶⁰ For example, Florida Statutes create exemptions for aquaculture;⁶¹ batteries;⁶² dock, seawall, and floating platforms;⁶³ electrical power and transmission facilities;⁶⁴ gravity sewer systems;⁶⁵ infrastructure maintenance, such as repair or replacement related to bridges, roads, and stormwater projects;⁶⁶ mangrove trimming;⁶⁷ natural gas;⁶⁸ packaging;⁶⁹ public water systems;⁷⁰ and solid waste facilities.⁷¹

59. *Id.* § 403.087(1) (“A stationary installation that is reasonably expected to be a source of air or water pollution must not be operated, maintained, constructed, expanded, or modified without an appropriate and currently valid permit issued by the department, unless exempted by department rule.”)

60. *Id.* § 403.087(6) (allowing use of site-specific alternative criteria or exemptions from water quality criteria).

61. *Id.* § 403.0885(5) (“Certified aquaculture activities under s. 597.004 that have individual production units whose annual production and water discharge are less than the parameters established by the NPDES program are exempt from wastewater management regulations.”).

62. *Id.* § 403.7192(2)(d) (“The secretary of the department may exempt a specific type of battery from this subsection if there is not a battery that meets those requirements and that reasonably can be substituted for the battery for which the exemption is sought.”).

63. *Id.* § 403.813.

64. *Id.* §§ 403.501–403.5365.

65. *Id.* § 403.1815 (“Notwithstanding any other provision of this chapter to the contrary, the department may, upon request, allow any county or municipality to independently regulate the construction of water distribution mains of 12 inches or less, gravity sewage collection systems of 12 inches or less, and sewage force mains of 12 inches or less, and pump stations appurtenant to such force mains, provided the plant is owned by the county or municipality making the request for approval or, pursuant to interlocal agreement, plant capacity is provided from a plant owned by another county or municipality or by a regional water supply authority of which the county or municipality requesting approval is a member. . . . In the event the department allows any county or municipality to independently regulate the construction of such systems, these construction projects shall be exempt from department permit requirements.”).

66. *Id.* § 403.813.

67. *Id.* § 403.9326(1) (“The following activities are exempt from the permitting requirements of ss. 403.9321–403.9333 and any other provision of law if no herbicide or other chemical is used to remove mangrove foliage...”).

68. *See id.* §§ 403.9401–403.9425 (containing the Natural Gas Transmission Pipeline Siting Act).

69. *Id.* § 403.7191(4) (“EXEMPTIONS.—All packages and packaging components shall be subject to the provisions of this section except: . . . (b) Packages or packaging components to which lead, cadmium, mercury, or hexavalent chromium has been added in the manufacturing, forming, printing, or distribution process in order to comply with health or safety requirements of federal or state law or for which there is no feasible alternative. The manufacturer of a package or a packaging component must petition the department for any exemption from the provisions of this paragraph for a particular package or packaging component based upon either criterion.”).

70. *Id.* § 403.854(1) (“The department may authorize variances or exemptions from the regulations issued pursuant to s. 403.853 under conditions and in such manner as it deems necessary and desirable, provided that such variances or exemptions are authorized under such conditions and in such manner as are no less stringent than the conditions under which and the manner in which variances and exemptions may be granted under the federal act.”).

71. *Id.* § 403.707(1) (“A solid waste management facility may not be operated, maintained, constructed, expanded, modified, or closed without an appropriate and currently valid permit issued by the department. The department may by rule exempt specified types of facilities from the requirement for a permit under this part if it determines that construction or operation of the facility is not expected to create any significant threat to the environment or public health.”).

Exemptions can also be created implicitly. Thus, a vast range of construction activity and operational discharges escapes the scrutiny of regulators.

Similarly, FDEP and the state's five water management districts were authorized to add additional exemptions from water regulation.⁷² The agencies have general authority to adopt rules and create exemptions for activities determined to have only minimal or insignificant individual or cumulative adverse impacts on the water resources of the district.⁷³ Exercising that authority, the agencies implemented exemptions for various types of home construction,⁷⁴ mining activities,⁷⁵ road maintenance,⁷⁶ and water quality treatment systems.⁷⁷ And sometimes, the term "exemption" is replaced with a mirror-image concept of "threshold." As the agencies explain in the *Permitting Applicants Handbook*, a permit is needed only if the "thresholds" are met, meaning that projects below the thresholds are exempt.⁷⁸ These types of threshold exemptions include modifications of "existing" water management systems along roads, developments, and agricultural surface-water management systems.⁷⁹ For example, the St. Johns River Water Management District states that an agricultural drainage project pumping less than 10,000 gallons per minute or serving an area smaller than 40 acres may fall below the permitting threshold.⁸⁰

Exemptions protecting agricultural activities from regulatory scrutiny and the associated monitoring requirements are especially problematic given the vast evidence that agriculture contributes to point-source and nonpoint-source pollution.⁸¹ But for better or worse, this exemption is well-

72. *Id.* §§ 403.854, 403.707(2); *id.* § 373.069(1)(a)–(e).

73. *Id.* § 373.406(6). ("Any district or the department may exempt from regulation under this part those activities that the district or department determines will have only minimal or insignificant individual or cumulative adverse impacts on the water resources of the district."); *id.* §373.4131(1)(a)(4) (authorizing permit rules with "[e]xemptions and general permits that do not allow significant adverse impacts to occur individually or cumulatively.").

74. *Id.* § 373.4145(2)(c).

75. *Id.* § 373.414(6) (creating exemptions for some types of otherwise regulated mining activities).

76. *Id.* § 373.4145(2)(e) (creating an exemption for "repair, stabilization, or paving of county-maintained roads" constructed on or before January 2002).

77. *Id.* § 373.4142 (explaining water quality within stormwater treatment systems).

78. SW. FLA. WATER MGMT. DIST., 1 ENVIRONMENTAL RESOURCE PERMITTING APPLICANT'S HANDBOOK, at 3-5 (2020) https://www.sfwmd.gov/sites/default/files/documents/swerp_applicants_handbook_vol_i.pdf.

79. *Id.* § 3.1.4(c) ("As referenced in paragraph 62-330.020(2)(i), F.A.C., District-specific thresholds are in section 1.2 of each Volume II."); *see, e.g.*, ST. JOHNS RIVER WATER MGMT. DIST., 2 ENVIRONMENTAL RESOURCE PERMIT APPLICANT'S HANDBOOK, at 1-2 (2018), <https://www.sjrwmd.com/static/permitting/PIM-20180601.pdf>.

80. ST. JOHNS RIVER MGMT. DIST., *supra* note 79, at 1-3 to 1-4.

81. U.S. DEP'T OF AGRIC., AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS (Daniel Hellerstein et al. eds, 2019), <https://www.ers.usda.gov/webdocs/publications/93026/eib-208.pdf> ("As of 2017, across the Nation, 55 percent of assessed rivers and streams; 71 percent of lakes; and 84 percent of bays and estuaries nationally have impaired water quality. Agriculture is the largest source of

established; in the CWA, agriculture is exempt from the requirements of the NPDES permitting program.⁸² Florida law, in fact, explicitly emphasizes the economic importance of the agricultural industry and the need to avoid “unnecessary expense.”⁸³ Agricultural and silvicultural byproduct materials are exempt from state hazardous waste regulation.⁸⁴ No permits are required to dispose of solid waste resulting from normal farming operations.⁸⁵ No permits are required for agricultural activities that alter the topography of any tract of land, even when they impede or divert the flow of surface waters or adversely impact wetlands.⁸⁶ No permits are required for the construction, operation, or maintenance of any agricultural closed system⁸⁷ or for environmental restoration or water quality improvement on agricultural lands.⁸⁸ Remarkably, even if the water management district disagrees about the applicability of an exemption, the Florida Department of Agriculture and Consumer Services has exclusive authority to make the determination about whether various exemptions apply.⁸⁹

The result of this system is that deliberately disregards known problems. Even if watershed monitoring finds pollution, and even when Florida officials discover an impaired watershed, the state officials cannot act. The exemptions, by preventing regulation, achieve deregulation. The state, by taking no action at all, permits the polluters to continue the status quo.

impairments in rivers and streams and the second-largest source in lakes and ponds.”); EPA, PROTECTING WATER QUALITY FROM AGRICULTURAL RUNOFF (2015), https://www.epa.gov/sites/production/files/2015-09/documents/ag_runoff_fact_sheet.pdf (“[A]gricultural nonpoint source (NPS) pollution is the leading source of water quality impacts on surveyed rivers and lakes, the second largest source of impairments to wetlands, and a major contributor to contamination of surveyed estuaries and ground water.”); *Agricultural Contaminants*, U.S. GEOLOGICAL SURV. (Mar. 1, 2019), https://www.usgs.gov/mission-areas/water-resources/science/agricultural-contaminants?qt-science_center_objects (“About 40 percent of the land in the United States is used for agriculture, and agriculture supplies a major part of our food, feed, and fiber needs. Agricultural chemicals move into and through every component of the hydrologic system, including air, soil, soil water, streams, wetlands, and groundwater.”).

82. 33 U.S.C. § 1342(l)(1) (“The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.”); *see generally* Jan G. Laitos & Heidi Ruckriegle, *The Clean Water Act and the Challenge of Agricultural Pollution*, 37 VT. L. REV. 1033, 1070 (2013) (discussing agricultural exemption from permitting).

83. FLA. STAT. § 403.927 (“The Legislature recognizes the great value of farming and forestry to this state and that continued agricultural activity is compatible with wetlands protection. In order to avoid unnecessary expense and delay from duplicative programs, it is the intent of the Legislature to provide for the construction and operation of agricultural water management systems under authority granted to water management districts and to control, by the department or by delegation of authority to water management districts, the ultimate discharge from agricultural water management systems.”).

84. *Id.* § 403.7045(2)(b).

85. *Id.* § 403.707(2)(e).

86. *Id.* § 373.406(2).

87. *Id.* § 373.406(3).

88. *Id.* § 373.406(9).

89. *Id.* § 373.407.

Drop #2: Presumptions

Even when activities are not completely exempt from regulation, various “presumptions” in Florida’s rules and statutes create another limitation on water quality investigation and understanding. Most notably, so long as upstream agricultural sites comply with required “best management practices” (BMPs)—defined as effective and practicable on-farm means to improve water quality in agricultural discharges⁹⁰—then the discharges are presumed to comply with water quality requirements.⁹¹

Although agricultural BMPs are a critical tool for improving water quality, the implementation of a BMP is not, by itself, a guarantee of water quality. For example, approved BMPs include the management of nutrient applications (including manure) to minimize impacts to water resources; irrigation management; and water resource protection using buffers, setbacks, and swales to reduce or prevent the transport of sediments and nutrients into waterbodies.⁹² Similar presumptions of water quality compliance exist for reclaimed water,⁹³ discharges of demineralization concentrate,⁹⁴ stormwater systems of up to 10 acres in size,⁹⁵ and water

90. *Id.* § 373.4292(2)(b) (“‘Best management practice’ means a practice or combination of practices determined by the district, in cooperation with the department, based on research, field-testing, and expert review, to be the most effective and practicable, including economic and technological considerations, on-farm means of improving water quality in agricultural discharges to a level that balances water quality improvements and agricultural productivity.”).

91. *Id.* § 403.067(7)(c)(3)(12)(b) (“The department shall use best professional judgment in making the initial verification that the best management practices are reasonably expected to be effective and, where applicable, must notify the appropriate water management district or the Department of Agriculture and Consumer Services of its initial verification before the adoption of a rule proposed pursuant to this paragraph. Implementation, in accordance with rules adopted under this paragraph, of practices that have been initially verified to be effective or verified to be effective by monitoring at representative sites, by the department . . . shall provide a presumption of compliance with state water quality standards. . . .”).

92. *What Are Agricultural Best Management Practices?*, FLA. DEP’T OF AGRIC. & CONSUMER SERV., <https://www.fdacs.gov/Agriculture-Industry/Water/Agricultural-Best-Management-Practices>; see generally FLA. ADMIN. CODE § 5M, <https://www.flrules.org/gateway/ChapterHome.asp?Chapter=5M-1> (discussing Best Management Practices for agricultural operations in the Northern Everglades as an example).

93. FLA. STAT. § 403.086(5)(a) (“Notwithstanding any other provisions of this chapter or chapter 373, when a reclaimed water product has been established to be in compliance with the standards set forth . . . that water shall be presumed to be allowable, and its discharge shall be permitted . . . at a reasonably accessible point where such discharge results in minimal negative impact.”).

94. *Id.* § 403.0882(6)(a) (“The discharge of demineralization concentrate from small water utility businesses is presumed to be allowable and permissible in all waters in the state. . . .”).

95. *Id.* § 403.814(12) (“A general permit is granted for the construction, alteration, and maintenance of a stormwater management system serving a total project area of up to 10 acres meeting the criteria of this subsection. Such stormwater management systems must be designed, operated, and maintained in accordance with applicable rules adopted pursuant to part IV of chapter 373. There is a rebuttable presumption that the discharge from such systems complies with state water quality standards.”).

management structures meeting pre-determined engineering requirements.⁹⁶ If a downstream Total Maximum Daily Load (TMDL) or Basin Management Action Plan (BMAP) is met, then upstream discharges are presumed to meet water quality standards.⁹⁷ These presumptions may all be law, but they are not necessarily reality. The pollution they permit, however, is all too real.

Drop #3: Preemption

Interconnected ecosystems and watersheds generally do not obey jurisdictional boundaries.⁹⁸ Water pollution is often regional in nature, coming from one place and flowing downstream to another, where it can cause distinctly localized effects.⁹⁹ As a result, even when state law includes exemptions or other limitations, local governments sometimes attempt to find their own solutions. But policy actions can generate policy reactions, and in Florida, when local governments attempt to get involved, the state legislature enacts new statutes to create barriers.¹⁰⁰

State lawmakers in Florida have increasingly used the doctrine of preemption to prevent local governments from adopting ordinances to protect the environment.¹⁰¹ Notably, when local governments attempted to regulate fertilizer use to prevent nutrient pollution of local watersheds, state

96. *Id.* § 373.4131(b)–(c). If a stormwater management system is designed in accordance with the stormwater treatment requirements and criteria adopted by the department or a water management district, or otherwise constructed, operated, and maintained for stormwater treatment in accordance with a valid permit or exemption under this part, then stormwater discharged from the system is presumed not to cause or contribute to violations of applicable state water quality standards. *Id.*

97. *Id.* § 403.061(44)(c) (2023) (“Compliance with an allocation calculated under s. 403.067(6) or, if applicable, the basin management action plan established under s. 403.067(7) for the downstream water shall constitute reasonable assurance that a discharge does not cause or contribute to the violation of the downstream nutrient water quality standards.”).

98. Josh Epperly et al., *Relationships Between Borders, Management Agencies, and the Likelihood of Watershed Impairment*, PLOS ONE, Sept. 2018, at 1, 3, <https://doi.org/10.1371/journal.pone.0204149>; Gerald J. Kauffman, *What if... the United States of America Were Based on Watersheds?*, 4 WATER POL'Y 57 (2002).

99. Tim Hyde, *Why Does Water Pollution Get Worse at Political Boundaries?*, AM. ECON. ASS'N (Dec. 14, 2015), <https://www.aeaweb.org/research/why-does-water-pollution-get-worse-boundaries>.

100. See, e.g., Solomon Gustavo, *Florida's Local Governments are Sick and Tired of State Lawmakers Pre-empting Home Rule, and They're Starting to Push Back*, ORLANDO WEEKLY (Feb. 5, 2020), <https://www.orlandoweekly.com/news/floridas-local-governments-are-sick-and-tired-of-state-lawmakers-pre-empting-home-rule-and-theyre-starting-to-push-back-26756020> (showing how the creation of new statutes can create barriers).

101. See generally Parker Watts, *Florida Preemption of Local Environmental Ordinances*, 74 FLA. L. REV. 483, 502 (2022). Local lawmakers in Texas have recently run into similar preemption issues. See *id.*; see also Paul S. Weiland, *Preemption of Local Efforts to Protect the Environment: Implications for Local Government Officials*, 18 VA. ENV'T L. J. 467, 503 (1999); Thomas Linzey, Esq. et al., *A Phoenix From the Ashes: Resurrecting A Constitutional Right of Local, Community Self-Government in the Name of Environmental Sustainability*, ARIZ. J. ENV'T L. & POL'Y 1, 4 (2014); Cf. *Preemption of County Authority in Florida*, FLA. ASS'N OF COUNTIES, <http://faca.fl-counties.com/sites/default/files/2021-09/Preemption.Whitepaper.61421%20FINAL.pdf> (last visited May 10, 2024) (listing dozens of subjects where preemption impacted local authority).

lawmakers expressly preempted the local law.¹⁰² Similarly, the Legislature banned local government efforts to regulate the “use or sale of polystyrene products.”¹⁰³ Local efforts to grant rights to nature have been stymied by legislation as well.¹⁰⁴

Additionally, the basic “home rule” powers of municipalities and counties to address local environmental problems can be quickly removed by the Legislature, either expressly or impliedly.¹⁰⁵ In 2023, one bill attempted to eliminate any meaningful local government role in land and water management by prohibiting counties and municipalities from adopting laws, regulations, rules, or policies relating to water quality; water quantity; pollution control; pollutant discharge prevention or removal; and wetlands.¹⁰⁶ These types of threats to local government home rules in Florida have become so frequent that the Florida Association of Counties has set up expert commissions to study the problem.¹⁰⁷ The mere threat of preemption also creates a chilling effect, dissuading local governments from engaging in innovative leadership at all.¹⁰⁸

Drop #4: Procrastination

Sometimes, even when the problem is known, the solutions are available, and the regulatory efforts are permissible, Florida law offers another obstacle: procrastination. Invoking financial concerns or other policy justifications, the government recognizes the problem and yet openly delays the implementation of the solution.

Consider sewage treatment, a long-known problem of environmental law and an important aspect of the Clean Water Act of 1972.¹⁰⁹ Yet in Florida,

102. See FLA. STAT. § 576.181 (empowering the Department of Agriculture with exclusive authority to adopt rules for fertilizers and expressly preempting such regulation of fertilizer to the state).

103. See, e.g., *id.* § 500.90 (2021) (showing the state’s desire to preempt the sale of these plastics); Fla. Retail Fed’n, Inc. v. City of Coral Gables, 282 So. 3d 889, 896 (Fla. Dist. Ct. App. 2019) (upholding the state’s preemption of single-use plastics ordinances by local governments).

104. FLA. STAT. § 403.412(9)(a) (2020) (preempting all local governments within Florida from granting rights to any waterways).

105. James R. Wolf & Sarah Harley Bolinder, *The Effectiveness of Home Rule: A Preemption and Conflict Analysis*, 83 FLA. BAR J. 92, 92 (2009).

106. See FLA. LEAGUE OF CITIES, LEGISLATIVE SESSION ’23 FINAL REPORT 34 (2023) <https://www.floridaleagueofcities.com/docs/default-source/advocacy/2023-legislative-final-report-6-30-23.pdf> (discussing HB 1197 and SB 1240).

107. *Presidential Select Committee on Preemption*, FLA. ASS’N OF COUNTIES 4, <https://www.fl-counties.com/wp-content/uploads/2023/05/LegislativeSession-Final-Report-2023-Final.pdf> (last visited May 10, 2024) (discussing HB 1197 and SB 1240).

108. Lydia Bean & Meresa Strano, *Punching Down How States are Suppressing Local Democracy*, NEW AM. (2019), <https://www.newamerica.org/political-reform/reports/punching-down/>; Don Hazen & Steven Rosenfeld, *The Other Right-Wing Tidal Wave Sweeping America: Federal and State Preemption of Local Progressive Laws*, SALON (2017), https://www.salon.com/2017/02/28/the-other-right-wing-tidal-wave-sweeping-america-federal-and-state-preemption-of-local-progressive-laws_partner/.

109. 33 U.S.C. § 1301.

even though there is a nutrient excess, and even though a BMAP requires public sewage-treatment systems to be implemented, the Legislature pushed the date by which entities must comply with the law to July 2025.¹¹⁰ Similarly, for many decades, septic systems have been known to be pervasive sources of nutrient pollution because Florida's ground water often connects with surface waters.¹¹¹ Human waste is unquestionably polluting Florida's springs,¹¹² waters,¹¹³ and estuaries.¹¹⁴ Yet Florida has been slow to create a comprehensive regulatory system to address this known problem, and while the administrative agencies (with their limited resources)¹¹⁵ may have authority to issue permits for commercial facilities¹¹⁶ and to handle enforcement for known problems,¹¹⁷ the cumulative problem of small residential systems remains. In fact, the inspection system for residential homes is optional,¹¹⁸ and even when problems are found, hardship variances are allowed¹¹⁹—as demonstrated by the monthly FDEP meetings issuing hardship variances for sewage-related pollution.¹²⁰

Admittedly, at times, delays are needed to allow time for project implementation and to encourage compliance.¹²¹ For example, as part of the implementation of a consent decree requiring actions to benefit the

110. FLA. STAT. § 403.067 (7)(a)(9)(a)(II) (“The wastewater treatment plan must be adopted as part of the basin management action plan no later than July 1, 2025. A local government that does not have a domestic wastewater treatment facility in its jurisdiction is not required to develop a wastewater treatment plan unless there is a demonstrated need to establish a domestic wastewater treatment facility within its jurisdiction to improve water quality necessary to achieve a total maximum daily load.”); *id.* § 403.067 (7)(a)(9)(b)(II) (“The department shall adopt the onsite sewage treatment and disposal system remediation plan as part of the basin management action plan no later than July 1, 2025[.]”); *id.* § 403.086 (1)(c)(1)(b) (delaying sewage treatment solutions for Indian River Lagoon until 2025).

111. THOMAS J. BICKI ET AL., UNIV. OF FLA., *IMPACT OF ON-SITE SEWAGE DISPOSAL SYSTEMS ON SURFACE AND GROUND WATER QUALITY: REPORT TO FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES UNDER CONTRACT NUMBER LC1702, 93–95* (1984).

112. Mary Lusk et al., *Septic Systems and Spring Water Quality: An Overview for Florida*, UNIV. OF FLA. (2020), <https://edis.ifas.ufl.edu/publication/SS693>.

113. Joey Pellegrino, *Septic Systems Contributing to Lee County's Water Quality Issues*, WINK NEWS, <https://winknews.com/2023/02/16/septic-systems-contributing-to-lee-countys-water-quality-issues/> (May 3, 2023).

114. *See, e.g.*, L.W. Herren et al., *Septic Systems Drive Nutrient Enrichment of Groundwaters and Eutrophication in the Urbanized Indian River Lagoon, Florida*, MARINE POLLUTION BULL., Nov. 2021, at 1, 10 (noting septic waste eventually contaminates and degrades water quality); Brian E. Lapointe et al., *Septic Systems Contribute to Nutrient Pollution and Harmful Algal Blooms in the St. Lucie Estuary, Southeast Florida, USA*, HARMFUL ALGAE, Dec. 2017, available at <https://pubmed.ncbi.nlm.nih.gov/29169565/>.

115. *See* FLA. STAT. § 381.0065(3)(c) (providing that the department must audit only 25% of the private inspections).

116. *Id.* § 381.0065(3)(m).

117. *Id.* § 381.0065(3)(h).

118. *Id.* § 381.0065(8).

119. *Id.* § 381.0065(4)(g)(2)(b).

120. *Variances*, FLA. DEP'T OF ENV'T PROT. (Feb. 27, 2024), <https://floridadep.gov/water/onsite-sewage/content/variances>.

121. Anne J. O'Connell & Jacob Gersen, *Deadlines in Administrative Law*, 156 UNIV. OF PA. L. REV. 923, 925 (2008).

Everglades, the state adopted a default water quality standard for phosphorus when it passed the Everglades Forever Act (EFA) in 1994.¹²² If the procedures were not completed in time, then the new standard automatically took effect.¹²³ The looming default standards helped to expedite the otherwise-slow scientific research process.¹²⁴ But in other instances, these “deadlines” and delays can be viewed as permission slips, allowing polluters who were insufficiently regulated for decades to do so yet again.

Furthermore, procrastination is not always so obviously presented as a delayed deadline. Sometimes, it is created by byzantine procedures and the time-consuming nature of agency rulemaking or litigation. Indeed, the “solutions” created in Florida law often take decades to evolve, shaped by years of arduous litigation.¹²⁵ The legal system, in other words, already includes abundant opportunity for delay and procrastination, allowing the pollution to continue unabated.¹²⁶ Future deadlines merely add to the delay.

B. Hidden Deregulation

Drop #5: Discretion

Florida’s statewide regulatory approach to water management and water quality is also supplemented by statutes that focus on specific projects or ecosystems, such as the EFA, which mandates the construction of specific projects and enhanced monitoring.¹²⁷ Nevertheless, Florida law delegates vast discretion to the agency decision-makers.

122. FLA. STAT. § 373.4592(4)(e)(2) (setting the allowable phosphorus criterion at 10 parts per billion in the Everglades Protection Area).

123. *Id.*

124. Keith Rizzardi et al., *Implementing Legally Mandated Science and Peer Review in Support of the Everglades Restoration Program*, SSRN 21, 27 (2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1925038.

125. *See, e.g.*, Consent Decree at 1–2, *Fla. Wildlife Fed’n, Inc. v. Browner* (N.D. Fla. 1999) (4:98CV356-WS) (indicating EPA will set Total Maximum Daily Loads for waters under the CWA); THE FLA. SENATE, REVIEW OF PROGRESS IN IMPLEMENTING THE TOTAL MAXIMUM DAILY LOAD (WATER QUALITY IMPROVEMENT) PROGRAM BY THE DEPARTMENT OF ENVIRONMENTAL PROTECTION 1 (2003).

126. Letter from 23 State Senators to Joseph Biden, President of the United States (Jan. 30, 2023).

127. FLA. STAT. §§ 373.0363, 373.1502, 373.4134, 373.4135, 373.4137, 373.41492, 373.4592, 373.4595, 373.4599, 373.69. The 2019 Executive Order by Governor DeSantis encapsulates Florida’s approach to water quality: on the one hand, a meaningful collection of information and data by a Chief Science Officer is required, but on the other hand, a specific, ecosystem-by-ecosystem and project-oriented approach is emphasized, with references to the Everglades, Lake Okeechobee and the Caloosahatchee and St. Lucie Rivers, reservoir projects to be implemented with the U.S. Army Corps of Engineers, and septic conversion and remediation grant program with local governments. OFF. OF GOVERNOR, EXEC. ORD. NO. 19-12 (2019); *Executive Order: Less Than 48 Hours After Being Sworn into Office, Governor Ron DeSantis Issued an Executive Order Outlining His Bold Vision for Florida’s Environment*, PROTECTING FLA. TOGETHER (Jan. 10, 2019), <https://protectingfloridatogether.gov/about/executive-order>.

Sometimes, officials charged with authority refuse to even acknowledge the laws they administer.¹²⁸ The decision not to enforce the law can be a form of deregulation.¹²⁹ In some cases, such conduct might be a breach of duty or a violation of the public trust.¹³⁰ But in most cases, the law is far more nuanced—perhaps by design—and water law routinely gives broad discretion to public officials who can decide to do as much or as little as possible.

Consider the historic EFA, for example, in which Florida requires a peer-reviewed “Everglades research and monitoring program.”¹³¹ The statute includes instructions to “monitor all discharges” and to determine “compliance with state water quality standards” in the Everglades Protection Area, tributary waters, and nearby canals in the Everglades Agricultural Area.¹³² Research and monitoring must consider phosphorus,¹³³ assess the effectiveness of agricultural BMPs,¹³⁴ and “optimize the design and operation” of the regional wetland treatment systems known as Stormwater Treatment Areas (STAs).¹³⁵ For Lake Okeechobee¹³⁶ and its downstream tributaries,¹³⁷ a similar statutory scheme requires implementation of a research and monitoring program¹³⁸ and a BMAP. Although less specific

128. Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. UNIV. L. REV. 601 (2013).

129. Daniel T. Deacon, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 796 (2010).

130. Regina A. Kardash, “A Public Office is a Public Trust” *Examination of the Implementation of Constitutional Amendments Governing the Abuse of Public Office*, 51 STETSON L. REV. 447, 449–50 (2022).

131. FLA. STAT. § 373.4592(4)(d)(5).

132. *Id.* § 373.4592(4)(d)(1)–(2).

133. *Id.* § 373.4592(4)(d)(4).

134. *Id.* § 373.4592(4)(f), (2)(b). Recognizing the impact of agricultural runoff on the Everglades, the Everglades Forever Act also requires a monitoring program to evaluate agricultural best management practices, which are economically and technologically efficient and effective means of improving water quality in agricultural discharges, with specific instruction to consider phosphorus. *Id.*; but see also *infra* Part II(C) (highlighting how citizens are inhibited from helping solve state problems through legal and regulatory obstacles); see generally Keith W. Rizzardi, *Translating Science into Law: Phosphorous Standards in the Everglades*, 17 J. LAND USE & ENV'T L. 149, 150 (2001) (explaining how agricultural run-off is letting phosphorous into the Everglades); Mary Beth Erwin, *Agricultural Pollution and the Everglades: A Clean Water Act Solution*, 10 VA. ENV'T L. J. 165, 183 (1990).

135. FLA. STAT. § 373.4592(4)(d)(3).

136. *Id.* § 373.4595(3)(b).

137. *Id.* § 373.4595(4)(a)(2) (“Caloosahatchee River Watershed Research and Water Quality Monitoring Program.—The district, in cooperation with the other coordinating agencies and local governments, shall implement a Caloosahatchee River Watershed Research and Water Quality Monitoring Program that builds upon the district’s existing research program and that is sufficient to carry out, comply with, or assess the plans, programs, and other responsibilities created by this subsection.”). See also *id.* § 373.4595(4)(c)(2) (“St. Lucie River Watershed Research and Water Quality Monitoring Program.—The district, in cooperation with the other coordinating agencies and local governments, shall establish a St. Lucie River Watershed Research and Water Quality Monitoring Program that builds upon the district’s existing research program and that is sufficient to carry out, comply with, or assess the plans, programs, and other responsibilities created by this subsection.”).

138. *Id.* § 373.4595(3)(a)(2).

than the EFA, these programs also require procedures to measure and reduce phosphorus.¹³⁹

The ultimate objective of these laws, however, is uncertain, and success is open to debate. The programs must be “sufficient to evaluate whether reasonable progress in pollutant load reductions is being achieved over time,”¹⁴⁰ and the monitoring should occur at “representative sites to verify the effectiveness of agricultural nonpoint source [BMPs].”¹⁴¹

Presumably, when implementing these provisions, the agencies must assess water quality, from both point sources and nonpoint sources, in a manner that protects public health.¹⁴² But how much pollution risk is too much?¹⁴³ Without a specific standard, the law allows the agency experts to conclude that “reasonable progress” is being made—or that the BMPs are “effective”—without guidance as to what those terms truly mean.

Similarly, from a procedural perspective, questions remain over how to measure progress and effectiveness. Water quality samples must be taken, but there are no instructions as to when, where, or how. Samples could be taken hourly, daily, weekly, or monthly; though monthly testing is cheaper, it is also less informative. Technology offers help, such as autosamplers that periodically take measures, but the legislation does not require that agencies use particular methods.¹⁴⁴ In practice, water quality monitoring means whatever the agency says it means, and monitoring efforts remain highly discretionary even when the agency knows pollution exists.

Ultimately, EPA expects states to implement the CWA by adopting numeric water quality standards that allow for measurement and evaluation

139. *Id.* The Lake Okeechobee monitoring includes specific requirements to evaluate phosphorus in the Lake Okeechobee watershed, to develop a water quality baseline, and to measure compliance with water quality standards for phosphorus. It also requires the development of a water quality model that reasonably represents the phosphorus dynamics of the watershed, monitoring to determine contribution of phosphorus from identifiable and upstream sources, the development of recommendations related to water quality considerations, and an assessment of the water volumes and timing from the Lake Okeechobee watershed. *Id.*

140. *Id.* § 373.4595(3)(b).

141. *Id.* § 373.4595(3)(b)(9).

142. *See, e.g., id.* § 403.063(2) (monitoring of groundwater shall exist to determine the “degree of danger to the public health” and the “susceptibility of each site to contamination”); *id.* § 403.853; *id.* § 403.8532 (requiring monitoring related to drinking-water standards); *id.* § 403.086 (sewage disposal facilities); *id.* § 403.087; *id.* § 403.0855 (biosolids); *id.* § 403.121(3)(g) (enforcement and procedures for petroleum storage tanks); *id.* § 403.0882 (discharge of demineralization concentrate); *id.* § 403.707 (permits for solid waste management facilities); *id.* § 403.721 (standards governing generators and transporters of hazardous waste and owners and operators of hazardous waste facilities).

143. *See generally* Li Lin et al., *Effects of Water Pollution on Human Health and Disease Heterogeneity: A Review*, 10 FRONTIERS ENV'T SCI. 1, 2 (2022) (demonstrating the effects and risks associated with water pollution in the human system).

144. JOHN T. TURK & WATER DIPPER INC., FIELD GUIDE FOR SURFACE WATER SAMPLE AND DATA COLLECTION 15 (2001).

of whether a watershed complies with the specific unit of measurement.¹⁴⁵ But in reality, discretion is exercised by adopting narrative and non-numeric standards, which also have deregulatory consequences.¹⁴⁶ For many decades, Florida used a narrative standard for nutrients, providing that “[i]n no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna.”¹⁴⁷ The vague standard, requiring case-by-case and site-by-site information, proved nearly impossible to enforce, in effect leaving the nutrient regulations meaningless.¹⁴⁸ Meanwhile, the Everglades and other watersheds continued to degrade due to nutrient pollution.

Change came through litigation. First, in the Everglades, a consent decree led to passage of the EFA, and the state conducted a research program to determine the point of imbalance and adopted new phosphorus standards.¹⁴⁹ Yet Florida refused to apply that knowledge elsewhere. It continued to accept the “known unknowns”: knowing that pollution was contributing to an excessive amount of nutrients but leaving the amount unknown and undefined. Eventually, exercising its authority under the CWA, EPA acknowledged the severity of Florida’s problems and directed the state to make changes.¹⁵⁰ More litigation followed, leading to another consent decree.¹⁵¹ Thereafter, EPA unilaterally set new standards for nutrients in Florida’s lakes and flowing waters,¹⁵² which eventually forced FDEP to implement new, more meaningful standards for nutrients.¹⁵³

145. Memorandum from Geoffrey Grubbs, Dir., Off. of Sci. & Tech., to the Water Directors, Region I-X (Nov. 14, 2001); *see generally* EPA, NATIONAL RECOMMENDED WATER QUALITY CRITERIA TABLES, <https://www.epa.gov/wqc/national-recommended-water-quality-criteria-tables> (last visited Apr. 22, 2024) (offering recommended criteria for related to aquatic life, human health, nutrients, toxics and other categories).

146. Grubbs, *supra* note 145.

147. FLA. ADMIN. CODE. § 62-302.530(47)(b).

148. NAT. RES. COUNCIL, *Progress Toward Restoring the Everglades: Appendix E: Status of Numerical Nutrient Water Quality Criteria for the State of Florida*, THE FOURTH BIENNIAL REVIEW 1, 231 (2012); *see, e.g.,* *Cleaning up Fouled Florida Waters Can't Wait*, TAMPA BAY TIMES (Feb. 12, 2010) <https://www.tampabay.com/archive/2010/02/12/cleaning-up-fouled-florida-waters-can-t-wait/> (showing further support of the case-by-case nature and vagueness of the Florida standard).

149. Rizzardi, *supra* note 134, at 153; Rizzardi et al., *supra* note 124, at 27.

150. EPA, Letter from Benjamin Grumbles to Michael Sole (Jan. 14, 2009) (“Despite Florida’s widely recognized efforts, substantial water quality degradation from nutrient over-enrichment remains a significant challenge in the State and one that is likely to worsen with continued population growth and environmental and land-use changes. EPA has determined that numeric nutrient water quality criteria are necessary for the State of Florida to meet the CWA requirement to have criteria that protect applicable designated uses. Additionally, numeric nutrient criteria will create clear water quality goals and easily measurable quantitative baselines to support stronger collaboration and more effective partnerships with both point and nonpoint source dischargers of nutrient pollution.”).

151. Consent Decree, *Fla. Wildlife Fed’n, Inc. v. Jackson* (N.D. Fla. 2009) (No. 4:08-cv-00324-RH-WCS).

152. 40 C.F.R. § 131 (2010).

153. FLA. DEP’T OF ENV’T PROT., IMPLEMENTATION OF FLORIDA’S NUMERIC NUTRIENT STANDARDS 1–3 (2013).

Florida's experience with implementing environmental-restoration statutes demonstrates the significance of agency discretion. When implementing their water laws, states make choices. Sometimes they choose to do more than the federally required minimums.¹⁵⁴ Other times, even for known problems, they choose not to act. In theory, as water pollution problems mount, the CWA will eventually force states to respond, either by adopting TMDLs or BMAPs. But these actions, too, permit significant agency discretion, raising serious questions as to their effectiveness.

Consider the TMDL program. If a waterbody is deemed "impaired," the state must develop a TMDL.¹⁵⁵ This quantifiable, scientifically determined TMDL must reflect the maximum amount of a given pollutant that a surface water can absorb and still meet the water quality standards that protect human health and aquatic life.¹⁵⁶ TMDLs must then be incorporated into regulatory permits to ensure that discharges from point sources comply with and achieve water quality goals.¹⁵⁷ Setting that number, however, is once again an exercise of discretion, leaving vast room for officials to set insufficiently protective standards. Even when a number is set, the agency has discretion to issue variances or "moderating provisions," thereby using a less protective standard.¹⁵⁸

Similarly, for nonpoint sources, when a watershed is impaired, pollution control programs are required. In Florida, FDEP produces BMAPs, which require local and state commitments to reduce pollutant loading through current and future projects and strategies. Potentially useful pollution control measures may include additional permit limits on wastewater facilities, urban and agricultural BMPs, and conservation programs designed to achieve pollutant reductions.¹⁵⁹ The theory seems plausible, but in practice it might never become reality. Ominously, Florida law recognizes that FDEP's ability to monitor the watershed is "[s]ubject to appropriation."¹⁶⁰ Moreover,

154. John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN. ST. L. REV. 1007, 1009 (2011) ("State legislators also advance state interests by enacting state statutes in areas where the federal government has not yet acted or by enacted states policies that exceed federal requirements.").

155. 33 U.S.C. § 1313 (2023).

156. FLA. ADMIN. CODE § 62-302.200(39). The setting of a TMDL also helps monitoring efforts, because once a TMDL is calculated, it becomes easier for FDEP to determine whether excess nutrients exist, and thus helps to indicate whether a watershed is impaired. *Id.* § 63-303; FLA. STAT. § 403.067(2).

157. FLA. DEP'T OF ENV'T PROT., 2022 INTEGRATED WATER QUALITY ASSESSMENT FOR FLORIDA 66 (2022).

158. FLA. ADMIN. CODE § 62-302.200(42).

159. FLA. DEPT. OF ENV'T PROT., *Basin Management Plans (BMAPs)*, <https://floridadep.gov/dear/water-quality-restoration/content/basin-management-action-plans-bmaps> (last visited Apr. 22, 2024).

160. FLA. STAT. § 403.0616(1) ("real-time water quality monitoring program").

FDEP's efforts merely need to be "sufficient" to evaluate "reasonable progress" and only "as appropriate."¹⁶¹

The success and impact of the TMDL and BMAP programs thus depend greatly upon the discretion exercised by public officials. Furthermore, even when numbers are established, Florida law openly allows for variances from its water quality criteria. After finding that strict application of rules "can lead to unreasonable, unfair, and unintended results in particular instances," the Florida Legislature authorized its agencies to grant variances and "provide relief to persons subject to regulation."¹⁶² Simply put, environmental protection in Florida depends significantly upon the political will of state agencies.

In sum, Florida's water laws often grant public officials wide discretion to act subject to limited public scrutiny—if any. Sometimes, interested citizens and concerned organizations can become aware of internal agency efforts, either through agency reports¹⁶³ or other legally required transparency measures allowing public citizens to ask for information.¹⁶⁴ But at best, these transparency measures reveal only information that a citizen requests or that the agency voluntarily provides. Unfortunately, that leaves the community with a blind spot. Unaware of what they do not know, citizens assume, perhaps mistakenly, that the government sufficiently protects their watersheds.

C. Deregulation Through Blindness

Perhaps worst of all, the law creates obstacles that prevent Floridians who know better from convincing their officials to solve state problems. Even when people know that a problem exists, and even when the public recognizes that its own government has failed or refused to fix or consider the problem, legal doctrines related to judicial restraint, litigant standing, and attorney's fees *inhibit* individuals who seek to force governmental action.

161. *Id.* § 403.067(7)(a)(6) ("The basin management action plan must include milestones for implementation and water quality improvement, and an associated water quality monitoring component sufficient to evaluate whether reasonable progress in pollutant load reductions is being achieved over time. An assessment of progress toward these milestones shall be conducted every 5 years, and revisions to the plan shall be made as appropriate.").

162. *Id.* § 120.542(1) ("These variances require the person subject to the rule to "demonstrates that the purpose of the underlying statute will be or has been achieved by other means" while simultaneously allowing the agency to consider whether the rules "create a substantial hardship or would violate principles of fairness.").

163. *See, e.g.*, Kimberly Richer, *Chapter 1: Introduction to the Overall Report and Volume I*, in 1 2023 SOUTH FLORIDA ENVIRONMENTAL REPORT (2024), at 1-1 to 1-2 (showing how agency reports can inform the public).

164. *See, e.g.*, FLA. STAT. § 119 (explaining the availability of public records).

Florida's political power belongs to the people,¹⁶⁵ who possess an explicit right to “instruct their representatives” and petition the government for grievances.¹⁶⁶ Similarly, Florida guarantees its citizens a right to witness open and noticed public meetings of state officials.¹⁶⁷ On rare occasions, agencies and decision-makers might even allow the public an opportunity to speak at a public hearing.¹⁶⁸ Yet in most instances, agencies can typically choose whether to hear from the public.¹⁶⁹ The average citizen has limited capacity to impact the Legislature, boards, public officials, or legal system through lobbying or political influence.¹⁷⁰

Instead, to meaningfully enforce the Florida Constitution and its protection of natural resources,¹⁷¹ citizens pursue litigation and seek access to the courts.¹⁷² Florida law allows citizens to bring suits against governments and administrative agencies to challenge decisions that violate environmental laws.¹⁷³ Courts and judges are then supposed to provide independent judicial review of the executive and legislative branches.¹⁷⁴ Even deregulation can be judicially reviewed.¹⁷⁵ Deregulation has been achieved in Florida by limiting the exercise of judicial power, making the government—and justice itself—willfully blind.

Drop #6: Judicial Restraint

Demonstrating a priority of the people, the Florida Constitution declares that “[i]t shall be the policy of the state to conserve and protect its natural

165. FLA. CONST. art. I, § 1.

166. *Id.* art. I, § 5.

167. *Id.* art. I, § 24.

168. *See, e.g.*, FLA. STAT. §§ 373.036, 373.139, 373.453 (requiring public hearings on water management, real property, and surface water management plans); *id.* § 373.0397 (public hearings on Biscayne Bay aquifers); *id.* §§ 403.532–403.537 (governing the siting of electrical transmission lines)

169. *See, e.g., id.* § 373.026 (“Adequate opportunity shall be afforded for participation at the conference by interested members of the general public.”); *see, e.g., id.* § 373.0695(1) (“The various boards shall be responsible for discharging the following described functions in their respective basins: (a) the preparation of engineering plans for development of the water resources of the basin and the conduct of public hearings on such plans.”).

170. *See generally* Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131 (2016) (arguing that lobbying would be better characterized as a hidden form of deregulation, because it is known to the government officials, but not the people, and sometimes it is done in the open – perhaps even brazenly so. Either way, the results of the lobbying are eventually codified, and probably through one of the ten drops discussed in this article); *see, e.g.*, Susan Webb Yackee, *Invisible (and Visible) Lobbying: The Case of State Regulatory Policymaking*, 15 STATE POL. & POL’Y Q. 322 (2015).

171. FLA. CONST. art. II, § 7.

172. *Id.* art. I, § 21.

173. FLA. STAT. §§ 120, 403.412(a).

174. FLA. CONST., art. V, § 21 (“In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency’s interpretation of such statute or rule, and must instead interpret such statute or rule de novo.”).

175. James T. O’Reilly, *Judicial Review of Agency Deregulation: Alternatives and Problems for the Courts*, 37 VANDERBILT L. REV. 509, 509 (1984).

resources and scenic beauty.”¹⁷⁶ Furthermore, the state Constitution also explicitly states that “[t]he courts *shall* be open to every person for redress of any injury, and justice *shall* be administered without sale, denial or delay.”¹⁷⁷ By emphatically codifying this right in their Constitution’s Declaration of Rights, Floridians arguably intended to make a powerful statement.¹⁷⁸ But in reality, the various statutes, rules, and judicial doctrines inhibit citizen access to the courts.

The Everglades provides an instructive example of the problem. After years of litigation over water quality in the Everglades, Florida adopted the EFA. This statute imposed a tax increase on citizens, coupled with an agricultural privilege tax, to pay for the construction of a massive system of wetlands known as STAs.¹⁷⁹ The taxes were controversial, however, and in 1996, the people of Florida amended the state Constitution to apply the “polluter pays” principle with respect to Everglades restoration: “Those in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area or the Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution.”¹⁸⁰

Despite the constitutional amendment, the Florida Legislature declined to modify the EFA. Instead, faced with difficult implementation questions of who pays and how much, the Florida Governor turned to the Florida Supreme Court for an advisory opinion.¹⁸¹ The Court concluded that the language of the constitutional amendment was not self-executing “because it fails to lay down a sufficient rule for accomplishing its purpose” and further stated that “the voters expected the legislature to enact supplementary legislation to make it effective.”¹⁸² The Court and Governor thus evaded any need to further respond to the citizen initiative.

A few years later, a citizen opposed the EFA and its formula for allocating tax burdens, challenging the law as unconstitutional and contrary to the constitutional “polluter pays” principle. The citizen argued that he was paying the costs of abating agricultural pollution that should be borne by others in the Everglades Agricultural Area.¹⁸³ This time, the majority opinion upheld the EFA, deferring to the Legislature, and in a concurring opinion,

176. FLA. CONST. art. II, § 7(a).

177. *Id.* art I, § 21 (emphasis added).

178. Judith A. Bass, *Article I, Section 21: Access to Courts in Florida*, 5 FLA. ST. UNIV. L. REV. 871, 872 (1977).

179. FLA. STAT. § 373.4592.

180. FLA. CONST. art. II, § 7(b).

181. Advisory Opinion to the Governor – 1996 Amendment 5 (Everglades), 706 So.2d 278 (Fla. 1997).

182. *Id.* at 281, 282.

183. *Barley v. S. Fla. Water Mgmt. Dist.*, 823 So.2d 73, 74 (Fla. 2002).

one justice even suggested the Court lacked authority to compel the Legislature to act.¹⁸⁴

The two cases demonstrate the difficulty faced by citizens who pursue environmental change. A court may ignore even a constitutional clause under the guise of judicial restraint. By initially deferring to the Legislature so it could act and later deferring to the Legislature's inaction, the Court effectively nullified the ballot initiative.

Other constitutionally based lawsuits have encountered similar judicial reluctance. In a well-publicized case, a group of young activists sued the State of Florida for violating the natural-resources and public trust provisions of its own Constitution.¹⁸⁵ The detailed complaint plainly explained its ambitious efforts to confront climate change and demanded compliance with constitutional rights, invoking the history of the civil rights movement:

This case challenges Defendants' systemic, affirmative ongoing conduct, persisting over decades in creating, controlling, and perpetuating a Fossil Fuel Energy System despite long-standing knowledge of the resulting harm to these young Plaintiffs. Our Nation's most celebrated cases include decisions approving declaratory and broad-based injunctive relief to remedy systemic constitutional violations like those at issue here. *See, e.g., Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (systemic racial injustice in school systems); *Hills v. Gautreaux*, 425 U.S. 284 (1976) (systemically segregated public housing system created by state and federal agencies); *Brown v. Plata*, 563 U.S. 493 (systemically unconstitutional conditions across state prison system).¹⁸⁶

The complaint documented the massive harms climate change had caused the seven young plaintiffs, describing rising greenhouse gas emissions and their harmful consequences, such as elevated temperatures; declining physical and mental health; rising seas; intensifying storms; dying coral reefs; and other catastrophic and irreversible impacts.¹⁸⁷ Despite the many detailed factual assertions and the constitutional rights at stake, the Florida trial court dismissed the case as nonjusticiable:

184. *Id.* at 84 (Wells, C.J., concurring).

185. Chelsea Greenwood, *Florida Governor Rick Scott is Getting Sued by Teens for His Environmental Policies*, TEEN VOGUE (Apr. 18, 2018) <https://www.teenvogue.com/story/florida-governor-rick-scott-sued-by-teens-for-environmental-polices>; Zachary Sampson, *Florida Children's Climate Lawsuit Against State Leaders Set for Key Hearing Monday*, TAMPA BAY TIMES (May 28, 2020) <https://www.tampabay.com/news/environment/2020/05/28/florida-childrens-climate-lawsuit-against-state-leaders-set-for-key-hearing-monday/>.

186. Order Granting Motions to Dismiss with Prejudice at ¶ 3, *Reynolds v. Florida*, 316 So.3d 813 (Fla. Dist. Ct. App. 2021).

187. *Id.* at ¶¶ 54, 64, 69, 70, 84, 141.

The claims are inherently political questions that must be resolved by the political branches of government. Further, because this Court has found that the relief requested involves non-justiciable political questions and separation of powers, the Complaint's flaws cannot be corrected by amendment and therefore the amended complaint should be, and hereby is, DISMISSED WITH PREJUDICE.¹⁸⁸

On appellate review, the District Court of Appeal did not even bother writing an opinion. Instead, the *per curiam* order simply cited another case, with a parenthetical explanation rejecting the lawsuit for "raising nonjusticiable political questions."¹⁸⁹ Together, these cases should remind environmental lawyers of a hard truth once spoken by Justice Charles Evans Hughes: "We are under a Constitution, but the Constitution is what the judges say it is."¹⁹⁰

Drop #7: Standing Barriers

Even assuming that a judge is willing to engage in judicial review, it does not necessarily mean an individual may effectively bring a lawsuit. Courts have a long tradition of limiting judicial review based on doctrines of standing. The notion of constitutional standing, flowing from the U.S. Constitution's Case or Controversy Clause, suggests that a public interest advocate cannot bring a suit unless they can show an injury in fact, causation, and redressability.¹⁹¹ Florida courts also abide by a "special injury" rule, insisting that a private party suing to abate a public nuisance "must have suffered some special damage, differing not only in degree, but in kind, from the damages sustained by the community at large."¹⁹² These barriers to courtroom standing can be notoriously difficult for environmental litigants.¹⁹³ Additional doctrines of "prudential standing" suggest that the courts may delay review of a case based on other considerations, such as

188. Reynolds v. Florida, Case No. 2018-CA-819 at ¶ 3 (Fla. 2d Cir. Ct. 2021).

189. Reynolds v. State, 316 So.3d 813, 814 (Fla. Dist. Ct. App. 2021).

190. Charles Evans Hughes, COLUMBIA250, https://c250.columbia.edu/c250_celebrates/remarkable_columbians/charles_hughes.html (last visited Apr. 1, 2024).

191. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); see also Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L. J. 1141, 1150 (1994) (describing Article III's case or controversy requirement).

192. Jacksonville, Tampa, and Key W. Ry. Co. v. Thompson, 16 So. 282, 283 (Fla. 1894).

193. Jan G. Laitos, *Standing and Environmental Harm: The Double Paradox*, 31 VA. ENV'T L. J. 55, 82 (2013).

whether the facts are developed enough to be sufficiently ripe for judicial review.¹⁹⁴

Florida's historic efforts to empower citizen advocacy have waned as well. When it was first established, the Florida Administrative Procedure Act (APA) was intended to allow citizens to obtain meaningful review of agency actions by appearing before an administrative law judge.¹⁹⁵ Since its enactment in 1974 in its "modern" form, there have been periodic adjustments to the Florida APA by the Florida courts and the Legislature aimed at limiting review.¹⁹⁶ Most notably, litigants must have "substantial interests" at stake and Florida citizenship or residency.¹⁹⁷ Economic injury is not enough to raise a claim because the injury alleged by the litigant must be of the type or nature that the proceeding is designed to protect.¹⁹⁸ Furthermore, even if a litigant does have substantial injuries at stake, the lawsuit must be filed within a certain timeline; in Florida, those timelines are shockingly short. Often, if an agency's action is not challenged within 21 days of the agency providing notice—which can be done by publication—an agency's proposed rule¹⁹⁹ or other form of preliminary decision²⁰⁰ becomes final. And perhaps most remarkably, some forms of relief, such as a petition for declaratory statement, are of limited availability, and by law, a third party cannot seek a declaratory statement that a permit or order issued by the agency violates the law.²⁰¹

Drop #8: Disincentivizing Citizen Suits

Even in the instances where the judiciary might allow a citizen suit to proceed in an effort to protect water resources, the Legislature is making that

194. Nora Coon, *Ripening Green Litigation: The Case for Deconstitutionalizing Ripeness in Environmental Law*, 45 ENV'T L. 811, 813; Micah J. Revell, *Prudential Standing, the Zone of Interests, and the New Jurisprudence of Jurisdiction*, 63 EMORY L. J. 221, 261 (2013).

195. See FLA. STAT. §§ 120.50–120.82 (outlining the process of citizen review under the Florida Administrative Procedures Act).

196. Robert C. Downie II, *Florida Administrative Procedures Act Remedies Survey*, FLA. BAR J., July/Aug. 2007, at 56, <https://www.floridabar.org/the-florida-bar-journal/florida-administrative-procedures-act-remedies-survey/>.

197. *Id.*

198. *Agrico Chem. Co. v. Dep't of Env't Regul.*, 406 So.2d 478, 481 (Fla. Dist. Ct. App. 1981); see also Richard M. Ellis, *Standing in Florida Administrative Proceedings*, FLA. BAR J. (Jan. 2001), <https://www.floridabar.org/the-florida-bar-journal/standing-in-florida-administrative-proceedings/> (describing the two-part test for substantial interest).

199. FLA. STAT. § 120.56(2)(b) ("A petition alleging the invalidity of a proposed rule shall be filed within 21 days after the date of publication of the notice required by s. 120.54(3)(a). . . .").

200. See FLA. ADMIN. CODE r. 28-106.111 (1997) ("Unless otherwise provided by law, persons seeking a hearing on an agency within 21 days of receipt of written notice of the decision.").

201. *Id.* r. 28-105.001 (2007) ("A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority . . . [and] is not the appropriate means for determining the conduct of another person.").

possibility less likely through fee-shifting. Citizens who use the state APA to challenge governmental decisions but then lose may be held responsible for paying the government's attorney's fees.²⁰² Interestingly, if a citizen challenges a *local* government action adopting a land-use or environmental-protection law and prevails on the grounds that the local government action is preempted or otherwise arbitrary or unreasonable, the citizen may recover attorney's fees.²⁰³ In both scenarios, litigation intended to protect the environment is disincentivized.

In some instances, a role perhaps remains for local governments to protect the environment, especially when there is a uniquely local risk or concern.²⁰⁴ But for better or worse, environmental advocacy in Florida has become a high-risk and financially consequential endeavor, and the Florida Legislature's adoption of fee-shifting statutes dramatically alters litigation risks and incentives.²⁰⁵ For low-income and risk-averse individuals in Florida, the right to access the courts has effectively been denied.²⁰⁶ Perhaps in some cases these statutes will create incentives to benefit the environment, but the opposite conclusion seems more likely. Local governments will hesitate to take environmentally protective measures because of the threat of well-financed lawsuits by industrial actors.²⁰⁷ And less affluent individual citizens and non-profit groups will hesitate to challenge an environmentally harmful measure for fear of paying the government's attorney's fees.²⁰⁸ In

202. FLA. STAT. § 120.595 (allowing an award of reasonable costs and attorney's fees to the prevailing party if the administrative law judge determines the non-prevailing adverse party to have participated in the proceeding for an improper purpose).

203. See generally Chris Marr, *Also Bigger in Texas: The State's Preemption of Local Ordinances*, BLOOMBERG (May 30, 2023), <https://news.bloomberglaw.com/daily-labor-report/also-bigger-in-texas-the-states-preemption-of-local-ordinances> (explaining state-local preemption in Texas and Florida); FLA. STAT. § 57.112(2)–(3).

204. Shannon M. Roesler, *Federalism and Local Environmental Regulation*, 48 U.C. DAVIS L. REV. 1111, 1163 (2015); Robert H. Freilich & Neil M. Popowitz, *Oil and Gas Fracking: State and Federal Regulation Does Not Preempt Needed Local Government Regulation: Examining the Santa Fe County Oil and Gas Plan and Ordinance as a Model*, 44 URB. LAW. 533, 535 (2012).

205. See generally DEBORAH J. LAFETRA, FEE AWARDS TURNED UPSIDE DOWN: A THREAT TO PUBLIC-INTEREST LITIGATION (2019) (critiquing California's fee-shifting policy); see generally Michel Lee, *Attorneys' Fees in Environmental Citizen Suits and the Economically Benefited Plaintiff: When Are Attorneys' Fees and Costs Appropriate?*, 26 PACE ENV'T L. REV. 495 (2009) (providing an overview of federal fee-shifting policies).

206. FLA. CONST. art. I, § 21.

207. Jesse Scheckner, *Senate Passes Bill Enabling Businesses to Sue Local Governments, Halt 'Arbitrary or Unreasonable' Ordinances*, FLA. POL. (Mar. 8, 2023), <https://floridapolitics.com/archives/593973-senate-passes-bill-enabling-businesses-to-sue-local-governments-halt-arbitrary-or-unreasonable-ordinances/>; *Editorial: Legislature's Bill a Severe Blow to Home Rule in Palm Beach*, PALM BEACH DAILY NEWS (May 14, 2023), <https://www.palmbeachdailynews.com/story/opinion/editorials/2023/05/14/palm-beach-editorial-legislatures-sb-250-is-strike-across-bow-at-home-rule-in-florida/70211389007/>.

208. Kerry D. Florio, *Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?*, 27 B.C. ENV'T AFF. L. REV. 707, 732 (2000) (citing *Friends of the Earth v. Chevron Chem. Co.*, 885 F.Supp. 934, 939 (E.D. Tex. 1995)).

sum, even when Florida's environment is harmed, and even when environmental laws are violated, Florida law prevents solutions by suppressing the likelihood that anyone will be willing and wealthy enough to confront the problem.

D. Deregulation by Accepting Unknowns

Drop #9: Appropriations and Other Structural Disruptions

The last quadrant of the Johari Window accepts that there are many unknowns. Some things evade the awareness of both the government and the public. And in the struggle to regulate water pollution, Florida sometimes accepts these unknowns. Meanwhile, through the budgetary process, Florida's governors and legislators have insisted that water managers make do with fewer resources. A smaller budget has countless effects: a shrinking agency staff spreads its time more thinly, meaning that permits receive less scrutiny, enforcement efforts decline, and some laws are reduced to unfunded mandates.²⁰⁹

Similar forms of such "structural deregulation" might include occupying an agency with busywork or issuing official pronouncements designed to damage an agency's reputation.²¹⁰ And in so doing, Florida's legal system embraces this lack of information. Deregulatory goals are achieved by default, and the extent of the changes and the consequences are unknowable.

CONCLUSION: TOO MANY DROPS

Solutions to pollution are difficult, and the tragedy of Florida's declining environmental conditions may evade solutions.²¹¹ But the legal system need not make the problem worse. Periodically, EPA asks each state to engage in a long-term vision process and to establish new goals for CWA implementation and watershed management.²¹² Florida's ideal response to this EPA initiative would be to reconsider its entire legislative scheme. Self-destructive laws cannot solve the watershed pollution crisis, and at least four sweeping changes are needed:

209. Rizzardi, *supra* note 35, at 47.

210. Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 585 (2021); Lucia Geng, *Yes, Rick Scott Did Cut \$700 Million from Florida's Water Management Districts*, POLITIFACT (Aug. 14, 2018), <https://www.politifact.com/factchecks/2018/aug/14/florida-democratic-party/yes-rick-scott-did-cut-700-million-floridas-water-/>.

211. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1245 (1968).

212. Memorandum from Acting Dir. Brian Frazer, Off. of Wetlands, Oceans, & Watersheds to Water Div. Dir. 1-10 (Mar. 29, 2023) (on file with the U.S. EPA); *The Vision for the Clean Water Act Section 303(d) Program*, EPA, <https://www.epa.gov/tmdl/Vision> (Jan. 3, 2024).

Eliminate the loopholes. The Legislature and agency officials must reconsider and repeal many of the statutory and regulatory exemptions that allow pollution to remain wholly unaddressed and further revisit, amend, or reverse the presumptions and procrastinating deadlines that illogically reduce concerns about pollution despite evidence to the contrary.

Embrace local solutions. Rather than preempting local government action on environmental issues, the Legislature should empower it—perhaps even offering matching funds as an incentive.

Set specific goals. Rather than giving agencies and public officials ill-defined discretion, legislators need to enact more precise laws, with clear priorities and science-based numeric directives.

Empower citizen suits. To honor the state Constitution, protect the environment, and respect the rights of the public, the Legislature should explicitly waive sovereign immunities to ensure that citizens retain meaningful rights to sue without facing burdensome standing doctrines and fee-shifting statutes. And instead of professing restraint, the judiciary should acknowledge the realities of environmental harms, both by awarding declaratory relief and by considering other meaningful remedies when litigants prove harm to natural resources.

Arguably, Florida's entire system of water law is an illogical mess.²¹³ At a macro level, an overarching framework of regulatory statutes and permitting schemes attempts to protect our waters, supplemented by an ad hoc cluster of state statutes that further declare charismatic places like the Everglades and Lake Okechobee to be state priorities. But the handful of publicly funded projects associated with these laws offer only partial solutions to massive state water quality problems. The pollution persists. Through a combination of openly codified exemptions, presumptions, preemptions, and procrastination, coupled with the hidden exercise of official discretion, the blindness of the judiciary towards the citizen advocate, and

213. Consider this example: it is a felony of the third degree to cause pollution that harms people, property, or wildlife. FLA. STAT. § 403.161(1), (3) (2020) ("It shall be a violation of this chapter, and it shall be prohibited for any person: (a) To cause pollution, except as otherwise provided in this chapter, so as to harm or injure human health or welfare, animal, plant, or aquatic life or property."); *see id.* § 859.01 (detailing that, under Florida law, willfully adding chemical compounds into any spring, well, or reservoir of water with intent to injury is a felony of the first degree). Yet counterintuitively, failing to look for pollution in the first place is inconsequential. Even if a person should "falsify, tamper with, or knowingly render inaccurate any monitoring device or method required to be maintained" pursuant to Florida law, it is merely a non-criminal infraction. *See id.* § 373.430 (2023) (describing prohibitions, violation, penalty, intent). The law is a nonsensical embrace of ignorance. It is criminal to pollute, yet intentionally preventing the discovery of pollution is not a crime.

the unknown effects of defunding and other systematic changes, Florida has deregulated its water resources. Thus, Florida law promises sweeping ecosystem restoration while simultaneously choosing to ignore the many water pollution problems causing ecosystem decline.

Admittedly, massive reforms seem unlikely. Any legal initiative seeking to pursue widespread reform of Florida water law would inevitably confront the well-organized opposition of Florida's powerful political forces—especially agriculture,²¹⁴ industry,²¹⁵ and land-use development.²¹⁶ But the pollution will surely continue until the law improves. If nothing more, then perhaps this Article can generate understanding of the use and misuse of information in regulation and deregulation.

214. Marcus Stern & Meryl Kornfield, *Polluted by Politics*, INVESTIGATIVE RSCH. WORKSHOP (June 5, 2020), <https://investigativereportingworkshop.org/investigation/polluted-by-politics/>; Kyle Rabin, *Nutrient Pollution from Industrial Farms Is a Major Factor in Florida's Toxic Algae Crisis*, FOODPRINT, <https://foodprint.org/blog/toxic-algae/> (Nov. 13, 2023); Maya Wei-Haas, *Red Tide Is Devastating Florida's Sea Life. Are Humans to Blame?*, NAT'L GEOGRAPHIC (Aug. 8, 2018), <https://www.nationalgeographic.com/environment/article/news-longest-red-tide-wildlife-deaths-marine-life-toxins>; Editorial Board, *Stop Letting Florida Agriculture Dictate Clean-Water Policy*, SUN-SENTINEL (Jan. 2, 2020), <https://www.tcpalm.com/story/opinion/editorials/2019/12/31/stop-letting-florida-agriculture-dictate-clean-water-policy-opinion/2783720001/>; Erwin, *supra* note 134, at 183.

215. *Polluters Dumping into Florida Waterways*, ENV'T FLA. (Mar. 29, 2018), <https://environmentamerica.org/florida/media-center/polluters-dumping-into-florida-waterways/>; Curt Anderson, *Pollution from Florida's Phosphate Mining Industry a Concern with Hurricane Ian*, FOX13 TAMPA BAY (Sept. 28, 2022), <https://www.fox13news.com/news/pollution-florida-phosphate-mining-industry-hurricane-ian>; Steve Patterson, *Pollution Persisted at St. Johns River Industrial Sites, Report Says*, FLA. TIMES UNION (Mar. 29, 2018), <https://www.jacksonville.com/story/news/2018/03/29/pollution-persisted-at-st-johns-river-industrial-sites-report-says/12878323007/>; Corey G. Johnson et al., *Poisoned*, TAMPA BAY TIMES (Dec. 2, 2021), <https://projects.tampabay.com/projects/2021/investigations/lead-factory/pollution-fallout/>.

216. *See generally Nonpoint Source Pollution Education*, FLA. DEP'T OF ENV'T PROT., <https://floridadep.gov/wra/319-tmdl-fund/content/nonpoint-source-pollution-education> (Jan. 25, 2024) (outlining some nonpoint pollution sources in Florida); *see generally* George Xian et al., *An Analysis of Urban Development and its Environmental Impact on the Tampa Bay Watershed*, 85 J. ENV'T MGMT. 965 (2007) (analyzing the environmental effect of urban population concentration in Tampa Bay); *see also* E.R. GERMAN, ANALYSIS OF NONPOINT-SOURCE GROUND-WATER CONTAMINATION IN RELATION TO LAND USE: ASSESSMENT OF NONPOINT-SOURCE CONTAMINATION IN CENTRAL FLORIDA (1996) (analyzing nonpoint source pollution in central Florida); *see also* Kevin DeGood, *A Call to Action on Combating Nonpoint Source and Stormwater Pollution*, CTR. FOR AM. PROGRESS (Oct. 27, 2020), <https://www.americanprogress.org/wp-content/uploads/sites/2/2020/10/WaterQuality-report.pdf> (detailing algal blooms in Florida and their relation to poor water quality standards); *see* Daniel R. Mandelker, *Controlling Nonpoint Source Water Pollution: Can It Be Done?*, 65 CHI.-KENT L. REV. 479, 482 (1989) (assessing the success and feasibility of controlling nonpoint sources).