

**Lee County Board Of County Commissioners
Agenda Item Summary**

Blue Sheet No. 20040392

1. REQUESTED MOTION:

ACTION REQUESTED: Receive update/status of "water reservations" rule-making and/or legislation pending in Tallahassee. Consider opposing any proposals by the Association of Florida Community Developers that degrades the ability to receive water reservations for the environment.

WHY ACTION IS NECESSARY: The county has requested an environmental water reservation for the Caloosahatchee River and estuaries and desires to protect that prospective reservation.

WHAT ACTION ACCOMPLISHES: Conveys to the Legislature and Florida Department of Environmental Protection the county's support of environmental water reservations and opposition to proposals that would give development water reservations priority over the environment.

**2. DEPARTMENTAL CATEGORY:
COMMISSION DISTRICT #**

A1A

3. MEETING DATE:

04-13-2004

4. AGENDA:

- CONSENT ADMINISTRATIVE APPEALS
- PUBLIC WALK ON
- TIME REQUIRED:

**5. REQUIREMENT/PURPOSE:
(Specify)**

- STATUTE
- ORDINANCE
- ADMIN. CODE
- OTHER

6. REQUESTOR OF INFORMATION:

- A. COMMISSIONER
 - B. DEPARTMENT County Administration
 - C. DIVISION
- BY: Wayne Daltry
Smart Growth Director

7. BACKGROUND:

The Association of Florida Community Developers recently filed a legal challenge to the Florida Department of Environmental Protection's proposed rules expanding the definition of water reservations for the environment. That challenge is in abatement while DEP considers compromise language proposed by the Association. Concurrently, the Association also has introduced proposed legislation changes on water reservations (see attached). The Board of County Commissioners has been monitoring both of these actions to protect the county's interests and has requested a status update.

8. MANAGEMENT RECOMMENDATIONS:

9. RECOMMENDED APPROVAL:

A Department Director	B Purchasing or Contracts	C Human Resources	D Other	E County Attorney	F Budget Services				G County Manager
					OA	OM	Risk	GC	
<i>WD 4-1-04</i>	<i>N/A</i>	<i>N/A</i>	<i>N/A</i>	<i>[Signature]</i>	<i>N/A</i>				<i>[Signature] 4/1/04</i>

10. COMMISSION ACTION:

- APPROVED
- DENIED
- DEFERRED
- OTHER

MARCH 22, 2004 – RESERVATIONS LANGUAGE

Section I. Section 373.040 is created to read:

373.040 Reservations of Water

(1) The governing board or the department, by rule, may reserve water from use by permit applicants as may be required for the protection, enhancement or restoration of natural systems or the public health and safety. At a minimum, the reservation rule shall identify:

(a) the locations, quantities and seasonal variations of water to be reserved.

(b) the hydrologic regime based on varying rainfall patterns and other factors that affect water quantities to be reserved.

(c) where a reservation rule is adopted prospectively, the specific conditions precedent to implementing the reservation. A prospective reservation shall not be operational until sufficient water for the reservation has been made available consistent with those conditions precedent. Conditions precedent are those actions or projects needed to provide sufficient water to meet the reservation and to protect existing reasonable-beneficial uses identified under subsection (2). Each rule for a prospective reservation shall specify how the reserved quantity will be adjusted in the event that the quantity of water needed to meet the prospective reservation and protect existing reasonable-beneficial uses is not available at the point in time when the reservation is scheduled to be implemented.

(d) how and under what conditions reservations shall be considered in the allocation of water for existing and future reasonable-beneficial uses pursuant to Section 373.223, and management of water resources during droughts in accordance with the water shortage plan pursuant to Section 373.246.

(2) All presently existing legal uses of water shall be protected so long as such use is not contrary to the public interest.

(3) (a) As part of the development of a regional water supply plan or an update thereof each water management district that proposes establishment of reservations within the next five year period shall set forth in its regional water supply plan a priority list and schedule for the establishment of the proposed reservations, as well as an explanation of the reasons and conditions supporting the need for such reservations. The priority list and schedule shall also identify those reservations for which the district will conduct independent scientific peer review. Nothing herein shall be construed to prevent the District from adopting a reservation pursuant to this section that is not on the priority list and schedule.

(b) Upon written request to the department or the governing board by a substantially affected person, or upon election by the department or the governing board, prior to the adoption of a reservation rule, all scientific or technical data, methodologies, and models shall be subject to independent scientific peer review. "Independent scientific peer review" means a review by a panel of independent, recognized experts in the fields of hydrology, hydrogeology, limnology, biology and other scientific disciplines, to the extent relevant to the establishment of the reservation.

(c) If independent scientific peer review is requested in writing by a substantially affected person, it shall be conducted in a manner agreed upon by the department or governing board that is adopting the reservation and the person or persons requesting the peer review. If no agreement is reached, the department or the governing board shall determine the manner in which the peer review is conducted. Members of the peer review shall be selected within 60 days after acceptance of the written request. The time limitation may be waived upon the agreement of all the parties. If no waiver occurs, the department or the governing board may proceed to select the peer review panel. The cost of the peer review shall be borne equally by the district and each party requesting the peer review to the extent economically feasible.

(d) For reservations of water established pursuant to s.601 of the Water Resources Development Act of 2000, otherwise referred to as Comprehensive Everglades Restoration Program (CERP) reservations, if a substantially affected person requests the South Florida Water Management District to conduct a peer review, the district shall initiate such process pursuant to this section. For all CERP reservations, a written request for peer review must be submitted prior to the close of the initial public comment period for a project implementation report.

(e) The peer review panel shall submit a final report to the department or the governing board within 120 days after its selection unless the deadline is waived by agreement of all parties. Initiation of the peer review pursuant to this paragraph shall toll any applicable deadline under chapter 120 or any other law or district rule regarding permitting, rulemaking, or administrative hearings, until 60 days following submittal of the peer review panel's final report. Any such deadlines shall also be tolled until 60 days following a written withdrawal of the request. The department or the governing board shall give significant weight to the final report of the peer review panel when establishing the water reservation. The final report shall not be subject to challenge under Chapter 120, F.S.

(f) If the final data, methodologies and models, including all scientific and technical assumptions employed in each model upon which a water reservation is based, have undergone the peer review pursuant to this subsection, by decision of the department or the governing board, no further peer review shall be required with respect to that water reservation.

(g) No reservation of water adopted by rule or formally noticed for adoption on or before July 1, 2004, shall be subject to this subsection.

(4) Reservations shall be subject to periodic review at least every five years, in accordance with s.373.0361, as part of the development or update of regional water supply plans and revised if necessary in light of changed conditions.

Section 2. Section 373.0361, Florida Statutes, is amended to read:

373.0361 Regional water supply planning.—

(1) By October 1, 1998, the governing board shall initiate water supply planning for each water supply planning region identified in the district water management plan under s. 373.036, where it determines that sources of water are not adequate for the planning period to supply water for all existing and projected reasonable-beneficial uses and to sustain the water resources and related natural systems, including minimum flows and levels established under s.373.0421 and reservations of water established under s.373.040. The planning must be conducted in an open public process, in coordination and cooperation with local governments, regional water supply authorities, government-owned and privately owned water utilities, self-suppliers, and other affected and interested parties. A determination by the governing board that initiation of a regional water supply plan for a specific planning region is not needed pursuant to this section shall be subject to s. 120.569. The governing board shall reevaluate such a determination at least once every five years and shall initiate a regional water supply plan, if needed, pursuant to this subsection.

(2) Each regional water supply plan shall be based on at least a 20-year planning period and shall include, but not be limited to:

(a) A water supply development component that includes:

1. A quantification of the water supply needs for all existing and reasonably projected future uses within the planning horizon. The level-of-certainty planning goal associated with identifying the water supply needs of existing and future reasonable-beneficial uses shall be based upon meeting those needs for a 1-in-10-year drought event.

2. A list of water source options for water supply development including traditional and alternative sources from which local government, government-owned and privately owned utilities, self-suppliers, and others may choose, which will exceed the needs identified in subparagraph 1.

3. For each option listed in subparagraph 2, the estimated amount of water available for use and the estimated costs of and potential sources of funding for water supply development.

4. A list of water supply development projects that meet the criteria in s.373.0831(4).

(b) A water resource development component that includes:

1. A listing of those water resource development projects that support water supply development.

2. For each water resource development project listed:

a. An estimate of the amount of water to become available through the project.

b. The timetable for implementing or constructing the project and the estimated costs for implementing, operating and maintaining the project.

- c. Sources of funding and finding needs.
- d. Who will implement the project and how it will be implemented.
- (c) The recovery and prevention strategy described in s. 373.0421(2).
- (d) A funding strategy for water resource development projects, which shall be reasonable and sufficient to pay the cost of constructing or implementing all of the listed projects.
- (e) Consideration of how the options addressed in paragraphs (a) and (b) serve the public interest or save costs overall by preventing the loss of natural resources or avoiding greater future expenditures for water resource development or water supply development. However, unless adopted by rule, these considerations do not constitute final agency action.
- (f) The technical data and information applicable to the planning region which are contained in the district water management plan and are necessary to support the regional water supply plan.
- (g) The minimum flows and levels established for water resources within the planning region.
- (h) The reservations of water adopted within the planning region and the priority list of reservations anticipated to be adopted within the ensuing five years pursuant to section 373.040(3). If it is determined that there is inadequate water supply to meet the reservations of water adopted within the planning region and to allocate water under Part II for all existing and projected reasonable-beneficial uses identified pursuant to this section, then the district, as part of the requirements of paragraph (a) and (b) above, will include a specific timetable and cost estimates for the construction of water resource development projects and shall recommend water supply development projects and any other actions necessary to develop the required volumes of water.
- (i) An explanation of anticipated rule revisions or new rules necessary to implement recommendations in the regional water supply plan. Deviation by the governing board from any proposed rule language shall not require amendment of the regional water supply plan.

Section 3. Subsection (4) of section 373.0361, Florida Statutes, is amended to read:

(4) Governing board approval of a regional water supply plan shall not be subject to the rulemaking requirements of chapter 120. However, any portion of an approved regional water supply plan which affects the substantial interests of a party shall be subject to s. 120.569. When the data, modeling or analysis relied upon in a regional water supply plan is used as a basis for a rule or order, such data, modeling or analysis shall be subject to review in accordance with the applicable administrative proceeding conducted under Chapter 120 for challenging such rule or agency action.

Section 4. Section 373.223(4) is deleted in its entirety.

Section 5. This act shall take effect upon becoming law.