IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

Case No. 2021-CA-004420-O

WILDE CYPRESS BRANCH, BOGGY BRANCH, CROSBY ISLAND MARSH, LAKE HART, LAKE MARY JANE, and ALL OTHER AFFECTED ORANGE COUNTY WATERS, and CHARLES O'NEAL, in his official capacity as President of SPEAK UP WEKIVA, INC., and on behalf of the Waters of Orange County,

Plaintiffs,

v.

BEACHLINE SOUTH RESIDENTIAL, LLC, and NOAH VALENSTEIN, in his official capacity as Secretary of the FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants.

DEFENDANT BEACHLINE SOUTH RESIDENTIAL, LLC'S
MOTION TO DISMISS AMENDED COMPLAINT

In an attempt to circumvent Florida law and the Administrative Procedure Act ("APA"), Charles O'Neal, in his capacity as president of an environmental activist group and on behalf of bodies of water located in Orange County, argues that an expressly preempted amendment to Orange County's charter allows him to collaterally attack Beachline's application to the Florida Department of Environmental Protection ("FDEP") for a wetlands permit. Beachline, in accordance with state and federal law, has obtained[1] the necessary permit for a proposed residential and commercial development. Beachline

[1] Although not reflected in the Amended Complaint, FDEP has now determined that Beachline's application meets all applicable laws and regulations, and FDEP has issued the permit for Beachline's proposed development. Plaintiffs did not challenge FDEP's decision in any way, and the time for doing so has expired.

has complied with FDEP's requirements pursuant to its exclusive permitting authority. Among other things, Beachline has avoided or mitigated any adverse effects on Florida's wetlands, such that the development will balance environmental and economic concerns and benefit the public. FDEP's procedures afford several opportunities, including judicial review, for substantially affected persons to challenge permits issued by FDEP, but Plaintiffs have chosen not to avail themselves of any of these opportunities, and the time to do so has expired.

Apparently not satisfied with the comprehensive regulatory scheme enacted by the Legislature and implemented by FDEP, O'Neal now attempts to use this Court to usurp FDEP's exclusive authority using a provision of a local charter that purports to create new legal rights in and for bodies of water, but which conflicts with and is thus preempted by general state law.

O'Neal, purporting to act on behalf of bodies of water, filed the original Complaint in April 2021, and FDEP and Beachline each filed motions to dismiss, highlighting the pleading's numerous deficiencies. O'Neal then filed the Amended Complaint, keeping the original counts and adding frivolous claims that the preemptory state law is unconstitutional and seeking injunctive relief based on a separate lawsuit with separate parties and separate claims pending in a federal court in Washington D.C. Like the original complaint, the Amended Complaint fails for multiple reasons.

First, the body-of-water Plaintiffs lack standing because they are not legal persons, and the Orange County Charter provision purporting to confer standing on them is preempted by general state law. And, even under the Orange County Charter, O'Neal, who states he is acting "in his official capacity as President of Speak Up Wekiva, Inc." lacks

standing because the Orange County Charter does not confer standing to corporate persons like Speak Up Wekiva, Inc. (*See* Am. Compl. at 1, 6.)

Second, the charter provision Plaintiffs attempt to enforce has been expressly preempted. The Legislature has created an elaborate regulatory scheme to regulate wetlands and vested FDEP with exclusive authority to administer it. Consistent with this comprehensive, state-wide approach, general state law—which is supreme over local laws—specifically prohibits local laws that purport to confer legal rights on bodies of water or create new rights relating to such bodies of water. This is exactly what the local charter provision on which all of Plaintiffs' claims are based attempts to do, so it is preempted by general state law, and all of Plaintiffs' claims fail.

Desperate to avoid this straightforward result, Plaintiffs conjure a medley of misguided constitutional challenges to the preemptory state law in their new count 5. Plaintiffs hope to make up for their lack of any competent legal authority for these challenges with creativity (including citations to the Mayflower Compact, Declaration of Independence, and out-of-date versions of the Florida Constitution), but each claim is meritless and cannot defeat the Legislature's exercise of its constitutional authority to preempt the local charter on which Plaintiffs rely.

Third, Plaintiffs' claims also fail because Plaintiffs have failed to exhaust all administrative remedies. As noted above, Plaintiffs failed to take advantage of their opportunities to administratively challenge FDEP's issuance of the permit to Beachline, and the time for doing so has expired. While Plaintiffs argue that administrative remedies would be futile because the Orange County Charter does not apply to FDEP, this allegation flies in the face of all of Plaintiffs' claims, which presume that, by issuing the permit to Beachline, FDEP has violated the Orange County Charter. If, as Plaintiffs' claims assume, the

Orange County Charter has any impact on FDEP's determination whether to issue the permit to Beachline, Plaintiffs were required to present those arguments to the FDEP in an administrative proceeding. If, on the other hand, as Plaintiffs argue when asserting futility, the Orange County Charter does not apply to FDEP, Plaintiffs' claims make no sense. Plaintiffs cannot have it both ways. Either way, Plaintiffs' effort to use a lawsuit to circumvent the administrative process prescribed by the Legislature violates the separation of powers, robs the parties of FDEP's technical expertise, and therefore fails.

In addition, even if Plaintiffs' claims were not fatally flawed in the ways set forth above, the primary jurisdiction doctrine would still require the Court to decline to consider issues already reviewed by FDEP and squarely within FDEP's technical expertise.

Finally, Plaintiffs' new request for injunctive relief in count 6 fails for multiple reasons, including that it is based on separate claims asserted by separate parties in a separate lawsuit. Plaintiffs therefore cannot show, as they must, that the injunction they seek is an appropriate remedy for any violation they allege in *this action*, nor can they establish the requisite likelihood of success because their request is based on someone else's claim.

For all of these reasons, Plaintiffs' Amended Complaint should be dismissed in its entirety, and, because Plaintiffs' claims clearly lack any support in law or fact, Beachline should be awarded its attorneys' fees expended in defending this action.

BACKGROUND[2]

I. Statutory Framework

A. Florida comprehensively regulates water pollution through its designated agency, the FDEP.

The FDEP is the state agency vested by the Legislature with "the power and the duty to control and prohibit pollution of air and water in accordance with the law and rules adopted and promulgated by it." § 403.061, Fla. Stat. Consistent with this duty, FDEP "[a]pprove[s] and promulgate[s] current and long-range plans developed to provide for air and water quality control and pollution abatement" and "[s]ecure[s] necessary scientific, technical, research, administrative, and operational services" needed for this purpose. *Id.* § 403.061(1), (4). FDEP may promulgate standards that apply to "the state as a whole" or to "any part thereof." *Id.* § 403.061(11).

By statute, FDEP's regulation of water pollution in Florida is comprehensive. Any local pollution control program must be approved by FDEP, and FDEP has the "exclusive authority and power to require and issue permits." *Id.* § 403.182(1)(a), (2). The Legislature has also specifically required FDEP to "[d]evelop a comprehensive program for the prevention, abatement, and control of the pollution of the waters of this state." *Id.* § 403.061(11). Included among the many aspects of FDEP's comprehensive program are:

- "grouping . . . the waters into classes," *id.* § 403.061(10),
- "establish[ing] reasonable zones of mixing for discharges into waters," *id.* § 403.061(11),
- "establish[ing] water quality criteria for wetlands," *id.* § 403.061(11)(c),
- "[c]aus[ing] field studies to be made and samples to be taken . . . from the waters of the state . . . so as to determine the . . . quality of the waters of the

[2] Consistent with the applicable standard, Beachline accepts the well-pleaded allegations in the Amended Complaint as true for purposes of this motion only. (*See* LEGAL STANDARD, *infra*.)

state" and "determin[ing] the source of the pollution" when water of low quality is detected, *id.* § 403.061(12),

- "[e]stablish[ing] and administer[ing] a program for the restoration and preservation of bodies of water within the state," *id.* § 403.061(26),
- "[e]stablish[ing] rules . . . for a special category of water bodies within the state, to be referred to as 'Outstanding Florida Waters,' which . . . shall be worthy of special protection" and may require "stricter permitting and enforcement," *id.* §§ 403.061(28), 403.061(35),
- "adopt[ing] rules necessary to obtain approval from the United State Environmental Protection Agency to administer the Federal National Pollution Discharge Elimination System . . . permitting program in Florida under . . . the federal Clean Water Act," *id.* § 403.061(32), and
- "[e]stablish[ing] a permit system whereby a permit may be required for the operation, construction, or expansion of any installation that may be a source of . . . water pollution," *id.* § 403.061(15).

See also Flo-Sun, Inc. v. Kirk, 783 So. 2d 1029 (Fla. 2001) (describing Florida's "detailed and exhaustive regulatory system to address . . . protection of the environment"). Separate sections of Chapter 403 provide for groundwater quality monitoring, *id.* § 403.063, reuse of reclaimed water, *id.* § 403.064, implementation of total maximum daily loads, *id.* § 403.067, wastewater grants, *id.* § 403.0673, public education about pollution, *id.* § 403.037, ecosystem management, *id.* § 403.0752, public notice of pollution, *id.* § 403.077, among many others. *See generally* §§ 403.011, *et seq.*, Fla. Stat.

Some of FDEP's duties parallel those of federal agencies under the Clean Water Act ("CWA"), adding a national dimension to FDEP's coordination of Florida's statewide environmental and pollution-control efforts. *See, e.g.*, *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 907–09 (11th Cir. 2007) (discussing federal regulations on impaired waters and total maximum daily load). Indeed, pursuant to section 373.4146, Florida Statutes, and 40 C.F.R. part 233, FDEP has assumed the dredge and fill permitting program established

under section 404 of the CWA. It is in connection with this assumption of a federal CWA program that Beachline's application was transferred to FDEP. (*See* Part II, *infra*.)

B. The Administrative Procedure Act provides procedures for interested parties to obtain review of FDEP's decisions.

The APA affords interested parties an opportunity to challenge FDEP's actions in fulfilling its duties. *See* §§ 120.51, *et seq.*, Fla. Stat. FDEP has promulgated procedural rules that set out detailed procedures for providing notice of decisions determining substantial interests and for the filing and resolution of petitions challenging such decisions. *See* Fla. Admin. Code R. 62-110.106. Judicial review is also available, but only once the agency has made a final decision or on a showing that review of a final decision would not provide an adequate remedy as to a preliminary, procedural, or intermediate order by the agency. *See* § 120.68, Fla. Stat.; *see also* Fla. Admin. Code R. 62-110.106(12). The APA and FDEP's rules promulgated thereunder thus provide a clear point of entry for parties to obtain administrative review of FDEP's decision and, if the administrative remedies prove unsatisfactory, judicial review of a final decision.

C. The Legislature amends section 403.412 to expressly preempt local laws purporting to create new rights in the natural environment.

Consistent with its comprehensive regulation of pollution in Florida through the FDEP, the Legislature has amended the Environmental Protection Act to expressly preempt local laws, including county charters, that purport to create new rights in or for the natural environment. *See* Laws of Fla., Ch. 2020-150, § 24. Specifically, effective July 1, 2020, the Legislature amended section 403.412, Florida Statutes, as follows:

> A local government regulation, ordinance, code, rule, comprehensive plan, charter, or any other provision of law may not recognize or grant any legal rights to a plant, an animal, a body of water, or any other part of the natural environment that is not a person or political subdivision as defined in s.

> 1.01(8) or grant such person or political subdivision any specific rights relating to the natural environment not otherwise authorized in general law or specifically granted in the State Constitution.

§ 403.412(9)(a), Fla. Stat. Thus, the Legislature has exercised its supremacy over local law to expressly preempt local laws that (1) grant rights to bodies of water, or (2) grant persons new, specific rights relating to bodies of water. *Id.*

D. Defying the Legislature, Orange County amends its charter to purport to grant specific rights to and in bodies of water.

Only months after section 403.412(9)(a) went into effect, Orange County enacted an amendment to its charter, adding section 704.1 ("Section 704.1"). Section 704.1 purports to do precisely what section 403.412(9)(a) forbids. That is, Section 704.1 purports to grant to the Wekiva River, Econlockhatchee River, and all other waters in Orange County, "a right to exist, Flow, to be protected against Pollution[,] and to maintain a healthy ecosystem." Orange Cty. Charter § 704.1(A)(1). Section 704.1 also purports to grant "[a]ll Citizens of Orange County . . . a right to clean water by having the Waters of Orange County protected against Pollution." *Id.* § 704.1(A)(2). And Section 704.1 purports to prohibit "any governmental agency" from "intentionally or negligently pollut[ing] the Wekiva River and Econlockhatchee Rivers within the boundaries of Orange County, or any other Waters within the boundaries of Orange County." *Id.* § 704.1(C). While Section 704.1 does not provide for damages, *id.* § 704.1(D), it authorizes injunctive relief as a remedy for violations of Section 704.1, and it allows a party, including a defendant, to recover attorneys' fees for frivolous or vexatious actions. *Id.* § 704.1(D)(1)–(2).

II. Factual Background

Plaintiffs allege Beachline applied to the U.S. Corps of Engineers for a wetlands dredge and fill permit on November 9, 2020, and that the application was transferred to

FDEP on January 8, 2021. (Am. Compl. ¶¶ 18–20, 28–29.) Plaintiffs allege the application, if granted, would result in the dredging and filling of certain wetlands and the disruption of ecological balance. (*Id.* ¶¶ 21–24, 32–35, 52, 65.) Plaintiffs claim this would violate Section 704.1. (*Id.* ¶¶ 58, 71.) Although Plaintiffs do not allege it, FDEP has now granted the permit to Beachline, and the time to administratively challenge this decision has lapsed.[3]

III. Procedural History

In their original Complaint, Plaintiffs asserted four claims, all arising under Section 704.1, seeking (1) an injunction prohibiting Beachline from completing the project and prohibiting FDEP from issuing the permits based on violation of Section 704.1(A)(1), (2) an identical injunction based on violation of Section 704.1(A)(2), (3) a declaration "that [FDEP] deny the permit applications" based on violation of Section 704.1(A)(1), and an identical declaration based on violation of Section 704.1(A)(2).[4] (*Id.* at 12–16.)

FDEP and Beachline each filed motions to dismiss, but, shortly before the motions were heard, Plaintiffs filed their Amended Complaint. (*See* Am. Compl.) Plaintiffs added allegations that the exhaustion of administrative remedies was futile (*id.* at 12–15), but, otherwise, counts 1 through 4 stayed mostly the same. (*id.* at 15–22.) Plaintiffs also added count 5, which seeks a declaration that section 403.412(9) is unconstitutional for seven

---

[3] Issuance of the Beachline permit is a fact of which the Court may take judicial notice. § 90.205(5), Fla. Stat.; *see also, e.g.*, *Freimuth v. State*, 272 So. 2d 473, 475 (Fla. 1972) ("[C]ourts may take judicial notice of official records of administrative agencies . . . ."); *Wencel v. State*, 915 So. 2d 1270, 1272 (Fla. 4th DCA 2005) ("The trial court can take judicial notice of the official actions of the legislative, executive, and judicial branches of government.").

A copy of the Beachline permit is attached as **Exhibit A**.

[4] Despite requesting only equitable relief in each of its six causes of action, Plaintiffs base their jurisdiction on an allegation that the amount in controversy in this matter exceeds $30,000. (Am. Compl. ¶ 7.)

reasons (*id.* ¶¶ 75–169), and count 6, which seeks a temporary injunction under Section 704.1(D)(1) based on a separate case, involving different parties and different claims, that is currently pending in federal court in the District of Columbia (*id.* ¶¶ 170–80).

For the reasons below, the Amended Complaint should be dismissed in its entirety.

LEGAL STANDARD

In ruling on a motion to dismiss, the Court accepts the plaintiff's well-pleaded allegations as true and evaluates whether they are legally sufficient to state a cause of action. *Messett v. Cohen*, 741 So. 2d 619, 621 (Fla. 5th DCA 1999). Conclusory allegations and formulaic recitations of elements are insufficient. *See, e.g.*, *Turnberry Vill. N. Tower Condo. Ass'n, Inc. v. Turnberry Vill. S. Tower Condo. Ass'n, Inc.*, 224 So. 3d 266, 267 (Fla. 3d DCA 2017); *Stein v. BBX Capital Corp.*, 241 So. 3d 874, 876 (Fla. 4th DCA 2018). In addition, allegations containing "conclusions of law or unwarranted deductions of fact are not admitted." *Ellison v. City of Fort Lauderdale*, 175 So. 2d 198, 200 (Fla. 1965); *see also Esposito v. Horning*, 416 So. 2d 896, 898 (Fla. 4th DCA 1982) (citing cases and holding that "conclusions of law" and "opinions of the pleader" are not admitted when testing a complaint's sufficiency). In considering motions to dismiss, courts may take judicial notice of official agency actions, such as issuance of a permit. *See Wencel*, 915 So. 2d at 1272.

ARGUMENT

All of Plaintiffs' claims fail for at least four reasons: (I) lack of standing; (II) express preemption; (III) failure to exhaust administrative remedies; and (IV) the primary jurisdiction doctrine. Plaintiffs' medley of arguments on the constitutionality of section 403.412(9) are all meritless, so their attempt to avoid preemption fails, as does their claim for declaratory relief in count 5. (*See* Part II.A.2, *infra*.) Plaintiffs' freestanding request for injunctive relief also fails because it is not tied to any claim in *this* action (*see* Part VI,

infra). Because Plaintiffs' claims are frivolous, Beachline should be awarded its attorneys' fees. (*See* Part VII, *infra*).

I. Plaintiffs lack standing.

Plaintiffs are a collection of bodies of water and an individual, O'Neal, who purports to act on behalf of bodies of water and a Florida not-for-profit corporation. None of these Plaintiffs has standing to assert the claims set out in the Amended Complaint.

Ordinarily, only persons (natural or corporate) have standing to sue or be sued. *See, e.g.*, *Cetacean Cmnty. v. Bush*, 386 F.3d 1169, 1176–79 (9th Cir. 2004) (asking whether Congress had conferred standing on cetaceans by statute); *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, (D. Mass. 1993) (explaining that courts should not lightly infer intent "to take the extraordinary step of authorizing" things other than "people and legal entities to sue."). Bodies of water are not "persons" and therefore have no standing to sue absent to valid authorization. Here, Plaintiffs rely on Section 704.1 as the basis for standing in the bodies of water (Am. Compl. ¶ 1), but, as explained below, Section 704.1 has been preempted. (*See* Part II, *infra*.) There is therefore no basis to find that the body-of-water Plaintiffs have standing to sue, and they should be dismissed from the litigation.

As for Plaintiff O'Neal, he sues in his individual capacity as a citizen of Orange County but "on behalf of" bodies of water (which lack standing for the reasons above) and a Florida corporation. (*See* Am. Compl. at 1.) However, he asserts claims under Section 704.1, and Section 704.1 confers standing only on "Orange County, municipalities within Orange County, any other public agency within Orange County, and all Citizens of Orange County." Orange Cty. Charter § 704.1(B). Speak Up Wekiva clearly is not Orange County, a municipality within Orange County, or a public agency within Orange County, nor is it

a "citizen" of Orange County, because Section 704.1 defines a "citizen" as "an adult resident of Orange County with legal residence in the United States who has resided within the county for at least one year." *Id.* § 704.1(F)(1). Speak Up Wekiva therefore lacks standing under Section 704.1, and O'Neal, inasmuch as he purports to sue on behalf of bodies of water and a corporation that is not "an adult resident of Orange County," lacks standing as well. O'Neal must therefore be dismissed, leaving no Plaintiffs remaining in the action.

II. Section 403.412(9)(a) expressly preempts Section 704.1 and is constitutional, despite Plaintiffs' meritless medley of challenges.

The Florida Constitution provides that counties operating under county charters "have all powers of local self-government *not inconsistent with general law*." Art. VIII, § 1(g), Fla. Const. (emphasis added). Plaintiffs' allegations run contrary to Florida law, as "[t]he respective counties of this State do not possess any indicia of sovereignty; they are creatures of the legislature, created under Art. VIII, § 1, of the State Constitution, and accordingly are subject to the legislative prerogatives in the conduct of their affairs." *Weaver v. Heidtman*, 245 So. 2d 295, 296 (Fla. 1st DCA 1971). Otherwise "political subdivisions would have the power to frustrate the ability of the Legislature to set policies for the state"—an unworkable outcome the Florida Supreme Court has specifically rejected. *Metro. Dade Cty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 504 (Fla. 1999).

A county charter is therefore unenforceable if it is inconsistent with general law—i.e., if the charter "interferes with the operation of a statute" or "cannot coexist" with it, *Emerson v. Hillsborough Cty.*, 312 So. 3d 451, 457 (Fla. 2021), or if "the Legislature 'has expressly preempted a particular subject area,'" *Classy Cycles, Inc. v. Bay Cty.*, 201 So. 3d 779, 783 (Fla. 1st DCA 2016) (quoting *Sarasota Alliance for Fair Elections, Inc. v. Brown-*

ing, 28 So 3d 880, 886 (Fla. 2010)). "In brief, the Florida Constitution prohibits any charter county from supplanting or overriding state law through either an ordinance or a charter provision." *Emerson*, 312 So. 3d at 457. In this case, the Legislature has exercised its power to preempt Section 704.1 through sections 403.412 and 403.183, Florida Statutes.

A. Section 403.412, as amended, is a valid exercise of the Legislature's authority to expressly preempt Section 704.1.

The Legislature has expressly preempted Section 704.1 by way of section 403.412. (*See* Part II.A.1, *infra*.) Plaintiffs' various constitutional challenges to section 403.412 are all meritless. (*See* Part II.A.2, *infra*). As a result, Plaintiff's claims under Section 704.1 (counts 1–4 and 6), and their claim challenging section 403.412 (count 5) all fail.

1. The amendment to section 403.412 makes the Legislature's intent to preempt local laws like Section 704.1 abundantly clear.

By way of amendment effective July 1, 2020, *see* Laws of Fla., Ch. 2020-150, § 24, the Legislature has made clear that local laws purporting to grant legal rights to bodies of water or to grant new, specific rights to persons relating to bodies of water are preempted. Specifically, the Legislature amended section 403.412 to provide:

> A local government . . . charter . . . may not recognize or grant any legal rights to a . . . a body of water, or any other part of the natural environment that is not a person or political subdivision . . . or grant such person or political subdivision any specific rights relating to the natural environment not otherwise authorized in general law or specifically granted in the State Constitution.

§ 403.412(9)(a) (2020).

Section 704.1 is plainly inconsistent with—and thus expressly preempted by—section 403.412(9)(a). In conflict with section 403.412(9)(a), Section 704.1, a provision in a local charter, purports to grant rights to bodies of water—specifically, "a right to exist, Flow, to be protected against Pollution[,] and to maintain a healthy ecosystem." Orange

Cty. Charter § 704.1(A)(1). Section 704.1 also purports to grant new, specific rights to persons relating to the natural environment (i.e., to bodies of water in Orange County) by granting Orange County citizens "a right to clean water by having the Waters of Orange County protected against pollution." *Id.* § 704.1(A)(2). These rights "cannot coexist" with section 403.412(9)(a), which expressly forbids their creation by way of a local charter. *Emerson*, 312 So. 3d at 457. It is hard to imagine how the Legislature could have been any clearer in manifesting its intent to preempt local laws like Section 704.1. *See Classy Cycles*, 201 So. 3d at 784 ("In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the Legislature intended."). Because general state law is supreme over the charters of counties—which "do not possess any indicia of sovereignty," *Weaver*, 245 So. 2d at 296—Section 704.1 is preempted, and all of Plaintiffs' claims based on it (i.e., counts 1–4 and 6) fail as a matter of law.

2. Plaintiffs' assorted challenges to section 403.412 are meritless.

Despite being well aware of section 403.412(9) and its fatal effect on their claims,[5] Plaintiffs completely ignored it in their first complaint. After receiving Defendants' motions to dismiss and realizing this "head in the sand" approach wouldn't work, Plaintiffs filed the Amended Complaint with a new count 5, lobbing a series of misguided challenges to section 403.412 in hopes that something might stick; however, each challenge fails.

[5] Plaintiffs had already filed two ill-fated lawsuits attacking section 403.412(9) at the time they filed their original complaint in this action. *See Speak Up Wekiva, Inc. v. DeSantis*, No. 7:20-cv-1173 (M.D. Fla.) (complaint, Order to Show Cause and voluntary dismissal), and in *Speak Up Wekiva, Inc. v. DeSantis*, No. 2020 CA 001479 (Fla. 2d Cir.) (complaint and voluntary dismissal), attached as **Composite Exhibit B**.

(a) A purported right of local community self-government does not render section 403.412(9) unconstitutional.

Plaintiffs' first challenge to section 403.412(9) is perhaps their most frivolous. Plaintiffs conjure a previously unknown right to "local community self-government" and attempt to use it to completely reverse the well-established supremacy of general state law over local county charters. (*See* Am. Compl. ¶¶ 90–104.) Despite citing no Florida law or case referencing this newly minted "right," Plaintiffs claim it is "fundamental," "deeply rooted in American history," and "necessary to ordered liberty." (*Id.* ¶¶ 92–94.) One cannot help but wonder why Plaintiffs cannot find any mention of a right so deeply rooted and necessary in more than a century of Florida jurisprudence, leaving Plaintiffs to grasp at the Mayflower Compact (*id.* ¶ 94), the Declaration of Independence (*id.* ¶ 95), the Ninth and Fourteenth Amendments to the U.S. Constitution (*id.* ¶¶ 96–97), and the outdated 1838 Florida Constitution (*id.* ¶¶ 98) as its sources. Put simply, there is no fundamental right to "community self-government"—least of all one that would give local governments supremacy over general state law—and none of the sources Plaintiffs cite says otherwise.

First, setting aside that neither document actually says anything about "local community self-government," neither the Mayflower Compact nor the Declaration of Independence provide Plaintiffs with any rights, *see, e.g.*, *Jones v. DeSantis*, 410 F. Supp. 3d 1284, 1300 (N.D. Fla. 2019) ("The Declaration of Independence is aspirational, not the law . . . ."), nor have they ever been recognized as a source of Florida law. Plaintiffs' reliance on them is misleading and frivolous.

Equally frivolous and misleading is Plaintiffs' reliance on the Ninth Amendment of the U.S. Constitution and the analogous Article 1, section 1 in the Florida Constitution.

(Am. Compl. ¶¶ 96, 99.) The Ninth Amendment states: "The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. Article 1, section 1 of the Florida Constitution is similar: "All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people." Neither one says anything about "local community self-government." Rather, they refer to right of "the people." It is unclear how Plaintiffs believe these reservations of rights to "the people" empower Orange County, a governmental body, to impose extraordinarily broad environmental regulations on "the people" and grant rights to bodies of water. Regardless, it is well settled that these sorts of reservations of rights to the people are "not an independent source of individual rights" but rather "'rule[s] of construction.'" *Jenkins v. Comm'r of Internal Revenue*, 483 F.3d 90, 92 (2d Cir. 2007).[6] Plaintiffs cite no case interpreting either the Ninth Amendment or Article 1, Section 1 of the Florida Constitution as creating a right of "local community self-government" or making county laws supreme over general state law. (*See generally* Am. Compl.) To the contrary, it remains well-settled law, binding on this Court, that "counties . . . are subject to the legislative prerogatives in the conduct of their affairs." *Weaver*, 245 So. 2d at 296.

Plaintiffs' reliance on the Fourteenth Amendment's Due Process Clause is similarly misplaced. Plaintiffs cannot cite any authority for their conclusory allegation that a right

[6] *See also, e.g.*, *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1075 (7th Cir. 2013) (describing the Ninth Amendment as "a rule of interpretation rather than a source of rights"); *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991) ("[T]he ninth amendment does not confer substantive rights in addition to those conferred by other portions of our governing law."); *Wohlford v. U.S. Dep't of Agric.*, No. 87–2043, 1988 WL 24281, at *1 (4th Cir. 1988) (unpublished) ("[T]he ninth amendment creates no constitutional rights."); *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986) ("[T]he ninth amendment has never been recognized as independently securing any constitutional right . . . .").

to "community self-government" is among those so "deeply rooted in this nation's history and tradition" or "fundamental to our scheme of ordered liberty" as to be protected by the Due Process Clause. (Am. Compl. ¶ 97.) No such right has ever been included among those recognized as fundamental. *See, e.g.*, *Williams v. King*, 420 F. Supp. 2d 1224, 1229-31 & nn.20–35 (N.D. Ala. 2006). Because there is no fundamental right to "community self-government," section 403.412(9) could be unconstitutional only if its passage was arbitrary, or conscience shocking, in a constitutional sense," *Neal ex rel. Neal v. Fulton Cty. Bd. of Educ.*, 229 F.3d 1069, 1074 (11th Cir. 2000), or it was "undertaken for improper motive and by means that were pretextual, arbitrary and capricious, and without rational basis," *Hoefling v. City of Miami*, 811 F.3d 1271, 1282 (11th Cir. 2016) (internal quotation marks omitted). Of course, the Amended Complaint makes no such allegations, nor could it. Numerous rational bases exist for section 403.412(9), including the Legislature's sensible desire for comprehensive and uniform regulation of Florida's waterways, which, by their very nature, frequently cross county lines.

Finally, Plaintiffs' reference to the 1838 Florida Constitution is frivolous and borders on absurd, as the 1838 Florida Constitution *no longer exists*, nor does it say what Plaintiffs claim it says.[7] (Am. Compl. ¶ 98.)

Plaintiffs have utterly failed to allege any basis to strike down section 403.412(9) due to a non-existent right to "local community self-government."

---

[7] Plaintiffs misleadingly allege that "[t]he 1838 Florida Constitution . . . provided that the right of local self-government shall 'forever remain inviolate; and that all laws contrary thereto . . . shall be void.'" (Am. Compl. ¶ 98 (quoting art. I, sec. 27, Fla. Const. (1838).) In reality, the words "local," "community," and "self-government" appear nowhere in section 27 or anywhere else in Article I of the Florida Constitution. Even allowing for zealous advocacy, it is unclear how Plaintiffs can represent to the Court in good faith that the 1838 Florida Constitution makes a right to local self-government inviolate when nothing approaching such a right appears anywhere in its text.

(b) The Florida Constitution explicitly makes the powers of charter counties subordinate to general state law.

Plaintiffs next allege that section 403.412(9) is unconstitutional under article VIII, section 1(g), and article VIII, section 2(b) of the Florida Constitution. (Am. Compl. ¶¶ 105–11.) In fact, these provisions of the Florida Constitution mean the exact opposite of what Plaintiffs claim. Article VIII, section 1(g) applies to charter counties and states that (1) they "shall have all powers of local self-government not inconsistent with general law"; and (2) "[t]he governing body of a county operating under a charter may enact county ordinances not inconsistent with general law." Art. VIII, § 1(g), Fla. Const. Article VIII, section 2(b) applies to municipalities and states that they "may exercise any power for municipal purposes except as otherwise provided by law." Art. VIII, § 2(b), Fla. Const.

Case law defines a general law as one that "operates universally throughout the state, or uniformly upon subjects as they may exist throughout the state, or uniformly within permissible classifications by population of counties or otherwise, or is a law relating to a state function or instrumentality." *State ex rel. Landis v. Harris*, 163 So. 237, 240 (Fla. 1934); *see also Orange Cty. v. Singh*, 268 So. 3d 668, 673–74 (Fla. 2019) (Florida Election Code); *Phantom of Brevard, Inc. v. Brevard Cty.*, 3 So. 3d 309, 314 (Fla. 2008) (statute that regulates fireworks). Importantly, even where "particular physical conditions exist in only a portion of the state, enactments with reference thereto may be general laws . . . ." *Harris*, 163 So. at 240 (providing as examples the regulation of fishing in certain Florida waters, even "though such waters do not exist universally in every part of the state"). Under these standards, there is no plausible argument under Florida law that section 403.412(9) is not a general law, nor is there any argument for this court to apply contrary law of another state (assuming any exists).

Because section 403.412(9) is plainly a general law, article VIII, section 1(g)[8]—the very provision on which Plaintiffs purport to rely—prohibits Orange County from enacting an inconsistent local law, like Section 704.1. Plaintiffs attempt to conjure a conflict between article VIII, section 1(g)'s prohibition of enacting local laws "inconsistent with general law," and section 403.412(9)'s prohibition on local governments granting legal rights to bodies of water unless "otherwise authorized in general law or specifically granted in the State Constitution," (Am. Compl. ¶ 107), but there is no conflict. Section 403.412(9) simply exercises the supremacy of general state law by prohibiting local laws within a specified subject matter *except* those otherwise authorized in general law. In other words, state laws that grant localities the power to enact laws that section 403.412(9)(a) would otherwise preempt take precedence. It defies all logic to argue, as Plaintiffs appear to, that section 403.412(9) could permissibly preempt *all* local laws in a given area but that section 403.412(9) is somehow unconstitutional because it preempts all local laws except those otherwise authorized by general state law. Again, Plaintiffs' argument, as best as Beachline can make sense of it, appears nonsensical.

(c) Section 403.412(9) does not violate the constitutional authority of Orange County electors.

Next, Plaintiffs contend that section 403.412(9)(a) is unconstitutional based on article VIII, section 1(c) of the Florida Constitution, which provides that "a county government may be established by charter which shall be adopted, amended or repealed only upon vote of the electors of the county in a special election called for that purpose." (Am. Compl. ¶¶ 112–25). Plaintiffs' novel theory seems to be that the Legislature violated this provision by preempting an amendment Orange County's electors were allegedly in the

[8] Article VIII, section 2(b) does not apply because Orange County is not a municipality.

process of considering. (*Id.*) Plaintiffs claim that by preempting Section 704.1 *before* it was enacted rather than *after*, the Legislature unduly interfered in the process by which Orange County electors amend the Orange County charter. (*Id.* ¶ 121.)

Again, Plaintiffs' argument is completely unsupported by any existing Florida law. To the contrary, well-settled case law that is binding on this Court makes clear that general state laws enacted by the Legislature are supreme over and preempt local charter amendments *regardless* of the relative timing of their enactments. *See, e.g.*, *Emerson*, 312 So. 3d at 457. The counties of Florida "do not possess any indicia of sovereignty," *Waver* 245 So. 2d at 296, so the Florida Legislature is free to supersede Orange County's charter amendments before, during, or after their passage. *See, e.g.*, *Neisel v. Moran*, 85 So.346, 349 (Fla. 1919) ("Anticipatory statutes are not forbidden; nor are they contrary to the letter or to the spirit of the state Constitution . . . ."). And while the Legislature does not, by passing general state law, interfere with county electors' subordinate right to pass certain local laws, Plaintiffs' argument, if accepted, would clearly interfere with the Legislature's constitutional right to pass general state law by empowering counties to take matters out of the Legislature's hands merely by bringing them under consideration for amendment. This is plainly an intolerable result. *Metro. Dade*, 737 So. 2d at 504.

(d) Section 403.412(9) does not violate Article II, Section 7(a) of the Florida Constitution.

Plaintiffs allege that section 403.412(9) is unconstitutional because it violates article II, section 7(a) of the Florida Constitution, which states: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources." Art. II,

§ 7(a), Fla. Const. Plaintiffs argue Article II, section 7(a) "creates a responsibility for all municipal and county governments" and that, "because the Natural Resources Provision not only authorized but requires local lawmaking to abate water pollution, the Florida legislature cannot preempt local governments from engaging in such lawmaking." (Am. Compl. ¶¶ 128, 132.) This argument fails because, as numerous cases recognize, Article II, section 7(a) addresses only *state* policy and therefore imposes an obligation on the Florida Legislature, not each and every local government throughout Florida. *See* art. II, § 7(a), Fla. Const., cmt. to 1998 Amend. ("Substantial amendment pared [section 7(a)] into a form mandating that *the Legislature* adequately address the conservation and protection of Florida's natural resources." (emphasis added); *see also, e.g.*, *Walton Cty. v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1110 (Fla. 2008) ("[T]he State has a constitutional duty [under section 7(a)] to protect Florida's beaches . . . ."); *United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, (11th Cir. 2014) ("By mandate of the Florida Constitution, the Florida Legislature must protect and conserve the State's natural resources, including its waters."); *Grimshaw v. S. Fla. Water Mgmt. Dist.*, 195 F. Supp. 2d 1358, 1363 (S.D. Fla. Feb. 7, 2002) ("This provision has been described by the Florida Supreme Court as a statement of policy and a mandate to the Florida Legislature." (emphasis added) (citing *Askew v. Cross Key Waterways*, 372 So. 2d 913, 914 (Fla. 1978)).

In addition, the Florida Supreme Court has been clear that constitutional provisions that require the State to make "adequate provision" for various subjects are not judicially manageable standards sufficient that the judiciary may intervene. *See Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 144 (Fla. 2019) (Canady, C.J., concurring) (rejecting the petitioners' attempts to have the judiciary determine what constitutes the "adequate provision" of education funding). Whatever article II, section 7(a),

requires, it clearly cannot require the Legislature to permit the sweeping and novel rights and regulations purportedly created by Section 704.1 as the only means of making "adequate provision" for the protection of natural resources. To the contrary, the official commentary to section 7(a) explains that, in adopting the current form of this provision, the Constitutional Revision Commission "understood that a direction to the Legislature to make 'adequate provision' by law had never been interpreted to mandate any particular law." Art. II, § 7(a), Fla. Const., cmt. to 1998 Amend. Instead, the Legislature's obligation is "simply that there be some reasonable level of legislative action." *Id.* "In other words, *the Legislature* is empowered to determine, within reason, what is adequate." *Id.* (emphasis added). Plaintiffs attempt to transform article II, section 7(a) into a mechanism to strip the Legislature of its constitutional authority to determine what constitutes adequate legislative action in favor of radical proposals of local governments flies in the face of section 7(a)'s plain text and the intent reflected in its official commentary.

(e) Section 403.412(9) is not void for vagueness.

Plaintiffs argue section 403.412(9) is unconstitutional because it is so "vague" and "incomprehensible" that it "cannot be understood by citizens or local government officials of ordinary intelligence" and thus violates the Fourteenth Amendment. (Am. Compl. ¶¶ 136–52.) Plaintiffs say that for a statute to be constitutional, "all potentially vague terms [must] be defined" and the statute must "state explicitly the practices that are required or prohibited." (*Id.* ¶ 136.) Again, Plaintiffs misstate the law.

As a threshold matter, it is unclear whether the vagueness doctrine even applies to section 403.412(9) because it is not a statute that imposes any punishment or penalties. While it is true that the vagueness doctrine applies to civil laws (albeit in a much less

stringent form), cases applying the doctrine in this way do so in the context of civil *penalties*. *See, e.g.*, *Tenney v. State Comm'n on Ethics*, 395 So. 2d 1244, 1246 (Fla. 2d DCA 1981) ("When there is a vagueness challenge . . . a court must impose a higher standard of definiteness where a violation of the statute would bring about a criminal *penalty* as contrasted to a civil one." (emphasis added)); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) ("[T]he Court has expressed greater tolerance of enactments with civil rather than criminal *penalties* because the consequences of imprecision are qualitatively less severe." (emphasis added and internal quotation marks omitted)); *City of S. Miami v. Desantis*, 408 F. Supp. 3d 1266, 1303 (S.D. Fla. 2019) ("[C]ourts must consider whether [a] law implicates civil *penalties* or criminal *penalties*, because the nature of the *penalty* affects the level of tolerance a court will have for the vague language." (emphasis added)). The doctrine has also been applied to restrictions on individual property rights. *See, e.g.*, *Sarasota Cty. v. Barg*, 302 So. 2d 737, 742 (Fla. 1974) (applying the vagueness doctrine to an "attempt to regulate the use of property" within a district).

Here, section 403.412(9) does not impose any penalties whatsoever or limit individual property rights. It is merely an exercise of the Legislature's authority to preempt local laws, which requires no advance warning to anyone. There is therefore no possibility that an individual will risk any penalty or punishment, criminal or otherwise, for violating 403.412(9) without fair warning, and the vagueness doctrine therefore does not apply.

Even if it did apply, the vagueness doctrine "does not require perfect clarity in the language of statutes." *Stardust, 3007 LLC v. City of Brookhaven*, 899 F.3d 1164, 1176 (11th Cir. 2018). Thus, "[t]he legislature's failure to define a statutory term does not in and of itself render a provision unconstitutionally vague." *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018). This is because courts

"cannot realistically require the legislature to dictate every conceivable application of the law down to the most minute detail." *Id.* (internal quotation marks and citation omitted). Rather, the Due Process Clause requires only "fair notice . . . sufficient to enable persons of ordinary intelligence to avoid conduct which the law forbids." *High Ol'Times, Inc. v. Busbee*, 673 F.2d 1225, 1229 (11th Cir. 1982); *see also Fraternal Order*, 243 So. 3d at 897 (holding that a statute is void for vagueness only if "persons of common intelligence must guess as to its meaning and differ as to its application" or "if it lends itself to arbitrary enforcement at an officer's discretion"). This is particularly true in the civil context, where the test for vagueness is much less severe. *See, e.g.*, *Tenney*, 395 So. 2d at 1246.

In addition, "[i]t is well settled that when a person has received fair warning from a criminal statute that certain conduct is prohibited, that person may not attack the vagueness of the statute simply because it does not give similar fair warning with respect to other conduct which might be within its broad and literal ambit." *State v. Cyphers*, 873 So. 2d 471, 472–73 (2d DCA 2004) (internal editing marks omitted). Thus, if Plaintiffs "engage[ ] in some conduct that is clearly proscribed," they "cannot complain of the vagueness of the law as applied to the conduct of others." *Stardust*, 899 F.3d at 1176 (internal quotation marks and citation omitted); *see also Cyphers*, 873 So. 2d at 472-73; *Ala. Educ. Ass'n v. State Superintendent of Educ.*, 746 F.3d 1135, 1139–40 (11th Cir. 2014).

Here, Plaintiffs' allegations fail as a matter of law because section 403.412(9), a non-penal statute, *clearly* proscribes Section 704.1 with no vagueness whatsoever. Section 403.419(9)(a) specifically prohibits county charters that "grant any legal rights to a . . . body of water," and Section 704.1 is a county charter provision that specifically grants "all . . . Waters within the boundaries of Orange County . . . a right to exist, Flow," etc. The

Amended Complaint itself acknowledges this inescapable conflict. (Am. Compl. at 1 (alleging that section 403.412(9) purports to preempt Charter Section 704.1) and 22 (alleging that section 403.412(9) was enacted to "nullify" Section 704.1). Plaintiffs therefore cannot allege in good faith that a reasonable person would be uncertain whether the enactment of Section 704.1 is prohibited. Plaintiffs understand full well that this is "conduct that is clearly proscribed" by section 403.412(9), so their vagueness challenge fails even if it were possible that section 403.412(9) could be found vague as to some other act.[9] *Stardust*, 899 F.3d at 1176; *Cyphers*, 873 So. 2d at 472–73.

(f) Section 403.412(9) is not invalid for a lack of clear preemptory intent.

Next in Plaintiffs' litany of frivolous challenges is the contention that section 403.412(9) is invalid because the statute contains no clear statement that the State "intended to have exclusive jurisdiction over any particular area or that it intended to occupy any particular area or field" and because "there is "no specific, clear statement that the Legislature intended to preempt local government as to any area or field, and because it fails to even describe clearly any area or field it could occupy." (Am. Compl. ¶¶ 156, 158.)

This strained argument is fatally undercut by Plaintiffs' own allegation that section 403.412(9) was enacted specifically to "nullify the proposed charter amendment"—i.e., Section 704.1. (Am. Compl. ¶ 120.) Regardless, "preemption need not be explicit so long as it is clear that the Legislature has clearly preempted local regulation of the subject." *Barragan v. City of Miami*, 545 So. 2d 252, 254 (Fla. 1989); *see also Masone v. City of*

[9] Plaintiffs' speculation about uncertainty that might arise from 403.412(9)(a) regarding, for example, requiring masks to prevent the spread of disease are not only irrelevant (given the statute's clear application to Section 704.1) but so far-fetched to not merit serious discussion.

Aventura, 147 So. 3d 492, 495 (Fla. 2014) (holding that regardless of the type of preemption, a local regulation "must not conflict with state law" (internal quotation marks and citation omitted)). There can be no doubt that Charter Section 704.1 flies in the face of and conflicts with section 403.412(9)(a)'s prohibitions, and the Legislature's intent to preempt charter provisions like Section 704.1 is unmistakable.

(g) The single-subject rule does not render section 403.412(9) unconstitutional.

Finally, Plaintiffs argue section 403.412(9)(a) is unconstitutional because Plaintiffs believe there is no logical connection between the prohibition in (9)(a) and the title, subject matter, and provisions of Senate Bill 712 (2020).

As a threshold matter, a single-subject challenge to section 403.412(9) is untimely. Once a legislative bill is adopted as a portion of the Florida Statutes, that bill is no longer subject to challenges alleging single-subject violations. *See, e.g.*, *Dep't of Highway Safety & Motor Vehicles v. Critchfield*, 805 So. 2d 1034, 1038 (Fla. 5th DCA 2002) (noting that "sections of the Florida Statutes need not conform to the [single-subject] requirement" once they have been incorporated via an adoption act); *Ellis v. Hunter*, 3 So. 3d 373, 381 (Fla. 5th DCA 2009) (noting a single-subject challenge was cured before when enacted).

Here, Senate Bill 712 (2020) was approved by the Governor on June 30, 2020 and became chapter 2020-150, Laws of Florida. Chapter 2020-150 was adopted into the 2021 statutes effective June 29, 2021. § 11.2421, Fla. Stat. Plaintiffs, however, did not raise their single-subject challenge in this Court until the filing of the Amended Complaint on October 24, 2021. Plaintiffs did not raise any alleged procedural error relating to Senate Bill 712 until long after the amendment to section 403.412(9) was already incorporated into

the 2021 statutes, which, as a matter of law, cured any alleged single-subject defects. *See Critchfield*, 805 So. 2d at 1038; *Ellis*, 3 So. 3d at 381.

Even if Plaintiffs weren't time barred from bringing a single-subject challenge, section 403.412(9) easily passes muster under the deferential three-part test, which asks: (1) does the law embrace one subject, (2) are any other included matters "properly connected" to the subject, and (3) is the subject briefly included in the title. *Indian Creek Country Club, Inc. v. Indian Creek Vill.*, 211 So. 3d 230, 237 (Fla. 3d DCA 2017). A legislative "'act may be as broad as the legislature chooses provided the matters included in the act have a natural or logical connection.'" *State v. Leavins*, 599 So. 2d 1326, 1334 (Fla. 1st DCA 1992) (quoting *Martinez v. Scanland*, 582 So. 2d 1167, 1172 (Fla. 1991)). All that is needed is "a reasonable explanation." *Franklin*, 887 So. 2d at 1078–79.

Here, Plaintiffs have failed to make even a plausible claim, much less show that the section 403.412(9) is invalid "beyond a reasonable doubt." *Ellis*, 3 So. 3d at 381. SB 712 was passed to comprehensively overhaul the State's approach to water quality, natural resources, and environmental-protection regulations. (Am. Compl. ¶ 162.) In the interest of maintaining uniformity in these areas, the Legislature thought it prudent to preclude counties and other localities from creating a patchwork of regulations across the state. This prohibition is naturally and logically related to SB 712's other provisions because they are all designed to protect Florida's waterways through a comprehensive, uniform system of regulation. Section 403.412(9)(a) also "tends to make effective" and to "promote the objects and purposes" of the rest of SB 712.

Because Plaintiffs have alleged no legal basis upon which this Court could determine that section 403.412(9) is unconstitutional, count 5 should be dismissed.

Conclusion on Constitutional Challenges to Section 403.412

Plaintiffs have lobbed every conceivable challenge to section 403.412(9)(a)—arguably shirking their good-faith obligation to the Court in doing so—but cannot escape its clear, unavoidable preemptory effect on Section 704.1. All of Plaintiffs' claims under Section 704.1 (counts 1–4 and 6) therefore fail, as does their claim seeking a declaration that section 403.412(9)(a) is unconstitutional (count 5). Moreover, because Section 704.1 is the sole basis asserted for the standing of bodies of water, Plaintiffs' assertion of standing also fails. (*See* Part I, *supra*.)

B. Section 704.1 is also preempted as a local pollution control program enacted without FDEP approval.

Even before section 403.412(9)(a) was amended, Florida law already expressly preempted Section 704.1 through section 403.182, which requires any "local pollution control program" enacted by a county to "[b]e approved by [FDEP]" and grants FDEP "exclusive authority and power to require and issue permits." § 403.182(1)(a), Fla. Stat.

Section 704.1 constitutes a local pollution control program because it purports to "set [water] quality standards which are stricter than those required by state or federal law." *Fla. Rock Indus., Inc. v. Alachua Cty.*, 721 So. 2d 741, 742 (Fla. 1st DCA 1998). That is, it grants rights to bodies of water in Orange County to exist, Flow, and be free from any Pollution. Orange Cty. Charter §§ 704.1(A), (C). As a local pollution control program, Section 704.1 must be approved by FDEP to take effect. *Fla. Rock*, 721 So. 2d at 743 n.3 (holding that a local ordinance setting air-quality standards "may not be enforced unless and until it is approved by [FDEP]"). Plaintiffs do not (and cannot) allege that FDEP has approved Section 704.1, so their attempt to enforce Section 704.1 necessarily fails.

Plaintiffs also allege Section 704.1 sets standards by which FDEP may issue permits. Indeed, they chastise FDEP for failing to acknowledge that it will "apply Section 704.1 in determining when a wetlands permit should be granted." (Am. Compl. ¶¶ 53, 66.) They claim FDEP cannot grant permits to Beachline because doing so would "unquestionably violate" Sections 704.1 (*id.* ¶¶ 58, 71) and, on the basis of Section 704.1, ask the Court to "enter an Order declaring," inter alia, that Beachline's project violates Section 704.1 and that FDEP's "issuance of the . . . wetlands permits to Defendant Beachline will violate [Section 704.1] by intentionally or negligently permitting illegal pollution." (*Id.* at 17, 20). Section 704.1 therefore clearly interferes with FDEP's exclusive permitting authority and is preempted by section 403.182.

Conclusion on Preemption

Section 704.1 is inconsistent with general Florida law, so it cannot be applied, and Plaintiffs' claims under it fail. Plaintiffs have no basis to challenge either FDEP's approval authority and exclusive permitting power under section 403.182, or the preemptive effect of section 403.412(9)(a), which is a valid exercise of the Legislature's supremacy and plainly applies to the sweeping new rights in and for bodies of water purportedly created by Section 704.1. For this additional reason, the Amended Complaint must be dismissed.

III. Plaintiffs' claims regarding Beachline's application to FDEP fail because Plaintiffs failed to exhaust their administrative remedies.

It is well settled that "one seeking judicial review of administrative action must first exhaust such administrative remedies as are available and adequate to afford the relief sought." *Fla. High Sch. Athletic Ass'n v. Melbourne Cent. Catholic High Sch.*, 867 So. 2d 1281, 1286 (Fla. 1st DCA 2004). The purpose of this "exhaustion doctrine" is "to assure that an agency responsible for implementing a statutory scheme has a full opportunity to

reach a sensitive, mature, and considered decision upon a complete record"; enforcing the doctrine "permits full development of the facts, allows the agency to employ its discretion and expertise, and helps preserve executive and administrative autonomy." *Fla. Dep't of Envt'l Protection v. PZ Constr. Co.*, 633 So. 2d 76, 79 (Fla. 3d DCA 1994) (internal quotation marks omitted); *see also Key Haven Associated Enters., Inc. v. Bd. of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982) ("Judicial intervention in the decision-making function of the executive branch must be restrained in order to support the integrity of the administrative process and to allow the executive branch to carry out its responsibilities as a co-equal branch of government.").

FDEP's decisions "are subject to review pursuant to the [APA], codified in chapter 120 of the Florida Statutes." *Kirk*, 783 So. 2d at 1034. "Under the APA, any person whose substantial interests are affected by agency action may petition the pertinent agency for a formal hearing, conducted by an independent administrative law judge from the Division of Administrative Hearings." *Id.* (citing § 120.569, Fla. Stat.). "[A]n agency's final action is also subject to judicial review in the district courts of appeal." *Id.* (citing § 120.68, Fla. Stat.). Since the enactment of the modern APA, the Florida Supreme Court has lauded the APA's "impressive arsenal of varied and abundant remedies for administrative error." *Id.* (internal quotation marks omitted). The Court has explained that the modern APA:

> [s]ubjects every agency action to immediate or potential scrutiny; which assures notice and opportunity to be heard on virtually every important question before an agency; which provides independent hearing officers as fact finders in the formulation of particularly sensitive administrative decisions; which requires written findings and conclusions on impact issues; which assures prompt administrative action; and which provides judicial review of final, even of interlocutory, orders affecting a party's interest.

Id. (internal quotation marks omitted). The Court has found that this comprehensive framework "requires judicial freshening" of the exhaustion doctrine and "greater judicial

deference to the legislative scheme." *Id.* (internal quotation marks omitted). This is especially true of claims involving "complexities of public health and environmental safety which fall squarely within [FDEP's] expertise." *PZ Constr.*, 633 So. 2d at 79.

Here, Plaintiffs assert that Section 704.1 prohibits FDEP from issuing a wetlands permit to Beachline (*see* Am. Compl. ¶¶ 52, 65, 81, 174), but Plaintiffs have never even attempted to assert these arguments before FDEP in accordance with the APA. By cutting FDEP out of the picture, Plaintiffs attempt to use the judiciary to defy the legislature and usurp the executive branch's role in wetlands permitting, thus divesting the FDEP of its "administrative autonomy" and depriving the court of the benefit of FDEP's technical and scientific expertise. *Id.* In short, plaintiffs do exactly what the exhaustion doctrine is meant to prevent. *PZ Constr.*, 633 So. 2d at 79; *Key Haven*, 427 So. 2d at 157.

There are narrow exceptions to the exhaustion doctrine, but Plaintiffs allege no basis to apply them here. Courts may decline to require exhaustion if a plaintiff shows that (1) administrative remedies are inadequate; (2) an agency has acted beyond its delegated powers; or (3) the case raises certain constitutional issues. *Dist. Bd. of Trustees of Broward Cty. v. Caldwell*, 959 So. 2d 767, 770 (Fla. 4th DCA 2007).

Plaintiffs argue they need not exhaust administrative remedies because "this is not an administrative law case," and "[t]he Court need not consider or apply administrative law to resolve this case." (Am. Compl. ¶ 37.) It is unclear what this means, but, suffice it to say, Plaintiffs cannot avoid their obligation to exhaust administrative remedies merely by bypassing those procedures, filing a judicial proceeding, and claiming that proceeding "is not an administrative law case." Plaintiffs are challenging an administrative agency's decision, and there are administrative remedies that might render this challenge moot.

This case is therefore undisputedly an "administrative law case" in the sense that Plaintiffs are required to avail themselves of administrative remedies before filing this action. *See, e.g.*, *Cent. Fla. Invs., Inc. v. Orange Cty. Code Enforcement Bd.*, 790 So. 2d 593, 597–98 (Fla. 5th DCA 2001).

Plaintiffs also argue they are excused from pursuing administrative remedies because those remedies are futile—FDEP is operating under "an illegal delegation of authority from the U.S. EPA," and "the delegation, whether illegal or not, allows [FDEP] to grant the permit without abiding by the local law considerations normally required by 33 CFR Section 320.4(j)."[10] (Am. Comp. ¶ 38.) Plaintiffs interpret this to mean that FDEP is not required "to consider or apply Charter Section 704.1." (*Id.* ¶ 48.) This astonishing concession flies in the face of the fundamental assumption underlying Plaintiffs' pleading—i.e., that Section 704.1 operates to prohibit FDEP from issuing a permit to Beachline. (*See id. at* 17 ("[I]ssuance of the CWA 404 wetlands permits to Defendant Beachline will violate County Charter Section 704.1A and C . . . .). When it is convenient to do so, Plaintiffs concede Section 704.1 does not even apply to FDEP's permitting decisions, but if that's the case, why is FDEP part of this lawsuit, and why do Plaintiffs' assert Section 704.1 as a basis to deny the permit? Put simply, if Section 704.1 has any bearing on FDEP's decision, as Plaintiffs' Amended Complaint plainly asserts, Plaintiffs should have asserted it before FDEP in an administrative proceeding for FDEP to consider in the first instance. If those claims would have been futile before the FDEP, they are futile here as well.

[10] Beachline notes that Plaintiffs cannot show Section 704.1 is a "local law" contemplated under sections 320.4(j)(1), which refers to required local authorizations and certifications, or (2), which refers to zoning and land-use matters. 33 C.F.R. § 320.4(j). Section 704.1 does not purport to impose any pre-authorization or certification requirement, nor is it a land-use or zoning regulation. Therefore, section 320.4(j) doesn't even apply. *See Council of the Lower Keys v. Charley Toppino & Sons, Inc.*, 429 So. 2d 67, 68 (Fla. 3d DCA 1983) (holding that "local zoning ordinances, land-use restrictions or long-range development plans" are not part of FDEP's permitting analysis).

As for Plaintiffs' claim that the delegation to FDEP is itself illegal, this assertion cannot relieve them of the exhaustion requirement because all that is required is that the agency have "*colorable statutory authority*." *Fla. Dep't of Agriculture & Consumer Servs., v. City of Pompano Beach*, 792 So. 2d 539, 546 (Fla. 4th DCA 2001) (internal quotation marks omitted). As long as "the agency's assertion of authority *has apparent merit*," the exhaustion requirement applies despite protests to the contrary. *Id.* FDEP clearly had at least "colorable" authority to issue Beachline's wetlands permit, so Plaintiffs were required to exhaust the remedies available from FDEP before filing this action.

Courts recognize that, "[w]here, as here, environmental permits must be obtained from [FDEP] as a condition to allowing [a] project to proceed, it is appropriate to defer to the Department on the matters which are within the agency's expertise." *Bal Harbour Vill. v. City of N. Miami*, 678 So. 2d 356, 364 (Fla. 3d DCA 1996). Plaintiffs' failure to do so provides yet another basis for dismissal of all of their claims.

IV. Even apart from its myriad other defects, the Court should decline to exercise jurisdiction in favor of FDEP's primary jurisdiction.

In addition to the fatal deficiencies discussed above, Plaintiffs' claims should also be dismissed pursuant to the Court's discretion under the primary jurisdiction doctrine. The Florida Supreme Court has explained that the primary jurisdiction doctrine:

> dictates that when a party seeks to invoke the original jurisdiction of a trial court by asserting an issue which is beyond the ordinary experience of judges and juries, but within an administrative agency's special competence, the court should refrain from exercising its jurisdiction over that issue until such time as the issue has been ruled upon by the agency.

Kirk, 783 So. 2d at 1036–37. Like the exhaustion doctrine, the primary jurisdiction doctrine applies with special force following enactment of the modern APA, *id.* at 1040, and it is also "bound up with constitutional imitations on the separation of powers." *S. Lake*

Worth Inlet Dist. v. Town of Ocean Ridge, 633 So. 2d 79, 82 (Fla. 4th DCA 1994). Unlike the exhaustion doctrine, which "applies where a claim cognizable in the first instance by an administrative agency alone," the primary jurisdiction doctrine "applies where a claim is originally cognizable in the courts" but "requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Kirk*, 783 So. 2d at 1037 n.5. As explained above, Plaintiffs' claims are cognizable only by FDEP through the APA in the first instance. (*See* Part III, *supra*.) But even if Plaintiffs' claims *could* be brought here, the Court should nevertheless decline to exercise jurisdiction because Plaintiffs clearly assert claims based on permitting relating to water pollution, which is squarely within FDEP's special competence.

As the Florida Supreme Court explained in another case involving pollution claims:

> [I]t is abundantly apparent that the comprehensive legislative scheme established to deal with environmental concerns is aptly suited to address the complex technical issues which may arise in this case. Specifically, the scheme now in force extensively controls pollutant discharge, requires comprehensive permitting, [and] establishes air and water quality standards . . . . This legislative scheme is implemented by numerous volumes of regulations containing extensively detailed, scientific criteria and is enforced by agencies having the required experience and expertise, such as [FDEP]. These are not simple, routine matters which may be easily understood by trial judges and juries.

Kirk, 783 So. 2d at 1040. Consistent with this reasoning, courts routinely apply the primary jurisdiction doctrine to pollution claims, *see, e.g.*, *Bal Harbour*, 678 So. 2d at 364, particularly as to requests for declaratory and injunctive relief, *see, e.g.*, *Coffie v. Fla. Crystals Corp.*, 460 F. Supp. 3d 1297, 1311 (S.D. Fla. 2020); *Lombardozzi v. Taminco US Inc.*, No. 3:15-cv-533, 2016 WL 4483856, at *5 (N.D. Fla. Aug. 24, 2016), which is all Plaintiffs seek here. Such claims "require [the] Court to develop the resources and special

expertise which [FDEP] possess[es] to control . . . water pollution and to protect the environment." *Kirk*, 783 So. 2d at 1033 (internal quotation marks omitted). "The simple fact is that the judicial branch is neither possessed of the technical expertise nor would it be appropriate for it to entertain" such claims. *Id.* (internal quotation marks omitted).

Like the exhaustion doctrine, the primary jurisdiction doctrine has exceptions, but none apply here. *Kirk*, 783 So. 2d at 1038. "[P]arties need not resort to administrative remedies where agency errors are . . . egregious or devastating,[11]" *id.*, but, given their concession that Section 704.1 does not even apply to FDEP, Plaintiffs cannot show FDEP has made *any* error in granting Beachline's wetlands permit, much less an egregious or devastating error. Plaintiffs therefore have not alleged any basis to avoid FDEP's primary jurisdiction over the permitting and pollution issues raised in their complaint.

Put simply, "the role of the judiciary is quite limited" in a case like this one. *S. Lake*, 633 So. 2d at 86. "An agency's primary jurisdiction cannot be transferred, in effect, to the judicial forum as an action for declaratory or equitable relief . . . ." *Id.* at 88. The Court should therefore decline to exercise jurisdiction over Plaintiffs' claims, even if jurisdiction were otherwise proper.

---

[11] In discussing "egregious or devastating" errors, the *Kirk* Court listed the following criteria that could invoke a court's jurisdiction despite the primary jurisdiction doctrine:

> (1) the complaint must demonstrate some compelling reason why the APA . . . does not avail the complainants in their grievance against the agency; or (2) the complaint must allege a lack of general authority in the agency and, if it is shown, that the APA has no remedy for it; or (3) illegal conduct by the agency must be shown and, if that is the case, that the APA cannot remedy that illegality; or (4) agency ignorance of the law, the facts, or public good must be shown and, if any of that is the case, that the Act provides no remedy; or (5) a claim must be made that the agency ignores or refuses to recognize related or substantial interests and refuses to afford a hearing or otherwise refuses to recognize that the complainants' grievance is cognizable administratively.

783 So. 2d at 1038. None of these criteria are met here.

V. Plaintiffs' standalone request for injunctive relief based on different claims brought by different parties in a different lawsuit fails.

In count 6, Plaintiffs seek injunctive relief under Section 704.1(D)(1) based on a separate lawsuit—*Center for Biological Diversity v. U.S. Envtl. Prot. Agency*, No. 1:21-cv-119 (D.D.C.) (the "D.C. Action")—challenging the federal government's delegation to wetlands permitting authority to the State of Florida. (Am. Compl. ¶¶ 170–80). This request should be denied, and count 6 dismissed, for numerous reasons.

As a threshold matter, Plaintiffs improperly assert their request for injunctive relief as a standalone claim rather than as a remedy for a properly pleaded cause of action. *See, e.g.*, *Kessler v. City of Key W.*, No. 19-cv-10030, 2021 WL 1146562, at *3 (S.D. Fla. Feb. 12, 2021) ("[R]equests for injunctive relief and specific performance are equitable remedies rather than stand-alone causes of action."); *N. Brevard Cty. Hosp. Dist. v. Metrus Energy-Atlantis, LLC*, No. 6:20-cv-547, 2020 WL 10459467, at *4 (M.D. Fla. July 10, 2020) ("Injunctive relief is not a standalone cause of action."). Because all of Plaintiffs' substantive claims are due to be dismissed for the reasons stated above, they have no basis to seek any remedy, injunctive or otherwise, and their request in Count 6 must be denied. At a minimum, Plaintiffs should be required to associate their request for injunctive relief with a specific cause of action rather than pleading it as a freestanding claim.

Moreover, Plaintiffs seek the injunction pursuant to Section 704.1(D)(1), but that provision purports to authorize injunctions as "[r]emedies for violations of this Section," not as a remedy for purportedly illegal delegations of authority or whatever other claims are being asserted in the D.C. Action. Orange Cty. Charter § 704(D)(1). Setting aside the fact that Section 704.1 is preempted and thus cannot form the basis for any cause of action or relief (*see* Part II, *supra*), Plaintiffs fail to tie their request for injunctive relief in count

6 to any alleged violation of Section 704.1, instead pointing to a completely separate issue (i.e., the EPA's delegation of permitting authority) raised in a separate lawsuit.

Turning to the elements required for injunctive relief, because Plaintiffs' request is tied to a separate lawsuit involving separate parties, Plaintiffs cannot establish the requisite "likelihood of success" to open the door to an injunction. *See, e.g., Colonial Bank, N.A. v. Taylor Morrison Servs., Inc.*, 10 So. 3d 653, 656 (Fla. 5th DCA 2009) ("Prior to issuing a temporary injunction, a trial court must be certain that the petition or other pleadings demonstrate a prima facie, clear legal right to the relief requested. It must appear that the petition has a substantial likelihood of success, on the merits." (internal citation omitted)). Plaintiffs themselves have nothing to succeed on, so it is logically impossible for them to have a likelihood of success. *Id.* Plaintiffs make a conclusory allegation that "Plaintiffs" have a likelihood of success on the merits, but it is unclear whether they refer to themselves or to the plaintiffs in the D.C. Action. (Am. Compl. ¶ 178.) Either way, they allege nothing that would allow this Court to predict how the D.C. Action will turn out. That this Court has no way to "be certain" that separate plaintiffs in a separate lawsuit have a substantial likelihood of success on separate claims than those before the Court is another reason Plaintiffs are not entitled to the injunctive relief sought in count 6.[12]

VI. Beachline is entitled to recover its reasonable attorneys' fees incurred in defending this action.

Section 704.1 provides that a court may award reasonable attorneys' fees to a defendant if it finds that an action brought under Section 704.1 "is frivolous, vexatious, or is

[12] Given that the permit has already been issued, Plaintiffs' requests for injunctive relief to enjoin its issuance are also moot and also fail because the requested injunction could not retroactively prevent the harm Plaintiffs allege would happen if the permit were issued. (*See* note 1, *supra*.)

brought solely for the purpose of harassing the defendant."[13] Section § 704.1(D)(2). For the reasons above, Plaintiffs' claims under Section 704.1 are frivolous.

Moreover, this is the *third* lawsuit Speak Up Wekiva has filed regarding Section 704.1, with the prior two having been voluntarily dismissed. (*See generally* Ex. B.) This pattern of prematurely asserting claims under an expressly preempted charter provision should be sanctioned to discourage Plaintiffs (at least those who are not bodies of water) from needlessly imposing further burdens on FDEP, private parties, and the judiciary.[14]

WHEREFORE, Beachline asks the Court to dismiss the Amended Complaint in its entirety and to award Beachline its attorneys' fees incurred defending this suit.

Dated: January 4, 2022

HOLLAND & KNIGHT LLP

/s/ Judith M. Mercier

Judith M. Mercier (Fla. Bar No. 32727)
judy.mercier@hklaw.com
200 South Orange Avenue, Suite 2600
Orlando, Florida 32801-3461
Telephone: (407) 244-5151
Facsimile: (407) 244-5288

Lawrence E. Sellers (Fla. Bar No. 300241)
larry.sellers@hklaw.com
315 South Calhoun Street, Suite 600
Tallahassee, Florida 32301-1872

Daniel Mahfood (Fla. Bar No. 94879)
daniel.mahfood@hklaw.com
50 North Laura Street, Suite 3900
Jacksonville, Florida 32202

Counsel for Beachline South Residential, LLC

[13] Although portions of Section 704.1 have been preempted, Section 704.1 has a severability clause that preserves its attorneys' fee provision. *See* Section § 704.1(G).

[14] Beachline reserves the right to seek in the alternative an award of attorneys' fees under section 57.105, Florida Statutes, on the same grounds.

CERTIFICATE OF SERVICE

I hereby certify that, on January 4, 2022, the foregoing was filed via the Court's e-filing portal, which will cause a copy to be served on all counsel of record.

/s/ Judith M. Mercier
Judith M. Mercier

FLORIDA DEPARTMENT OF Environmental Protection

Central District Office
3319 Maguire Blvd., Suite 232
Orlando, Florida 32803

Ron DeSantis
Governor

Jeanette Nuñez
Lt. Governor

Shawn Hamilton
Secretary

Permittee/Authorized Entity:
Beachline South Residential, LLC
Attn: Jay Thompson
4901 Vineland Rd, Suite 450
Orlando, Florida 32811, Orange County

Meridian Park

Authorized Agent:
BioTech Consulting
Attn: Larry Medlin
3025 E South St
Orlando, Florida 32803
larry@bio-techconsulting.com

State 404 Program Individual Permit

Orange County
Permit No.: 0396955-001-SFI

Permit Issuance Date: November 4, 2021
Permit Expiration Date: November 4, 2026

Exhibit A

State 404 Program Individual Permit

Permittee: Beachline South Residential, LLC
Permit No: 0396955-001-SFI

PROJECT LOCATION

The activities authorized by this permit are located near 13131 Wewahootee Road in Orlando, FL 32832, Parcel ID: 32- 23-31-0000-00-002, southeast of the Beachline Expressway (SR-528) and the Central Florida Greenway (SR-417) interchange within Sections 2, 3, and 4, Township 24 South, Range 31 East; and Sections 33, 34, and 35, Township 23 South, Range 31 East, in Orange County, at Latitude 28.438208, Longitude -81.89430.

PROJECT DESCRIPTION

The permittee is authorized to construct the Meridian Park multimodal development project. The project will include single and multi-family housing units, with associated infrastructure (roadways and stormwater management facilities). The Waters of the United States (WOTUS) wetland direct impacts associated with this project total 40.88 acres, and secondary WOTUS wetland impacts total 17.21 acres. The associated impacts are to FNAI: Dome Swamp, Basin Marsh, and Wet Prairie. Authorized activities are depicted on the attached exhibits.

To offset direct impacts to the 40.88 acres of WOTUS wetlands and 17.21 acres of secondary impacts that will occur from these activities, the permittee shall purchase 30.12 federal mitigation credits from TM Econ Ranch Mitigation Bank before any construction commences. These mitigation activities shall fully offset the functional loss as determined by the Modified Wetland Rapid Assessment Procedure (M-WRAP).

AUTHORIZATIONS

Meridian Park

State 404 Program Individual Permit

The Department has determined that the activity qualifies for a State 404 Program Individual Permit. Therefore, the State 404 Program Permit is hereby granted, pursuant to Part IV of Chapter 373, Florida Statutes (F.S.), and Chapter 62-331, Florida Administrative Code (F.A.C.).

Other Authorizations

You are advised that authorizations or permits for this activity may be required by other federal, state, regional, or local entities including but not limited to local governments or municipalities. This permit does not relieve you from the requirements to obtain all other required permits or authorizations.

The activity described may be conducted only in accordance with the terms, conditions and attachments contained in this document. Issuance and granting of the permit and authorizations herein do not infer, nor guarantee, nor imply that future permits, authorizations, or modifications will be granted by the Department.

PERMIT CONDITIONS

The activities described must be conducted in accordance with:

- **The Specific Conditions**
- **The General Conditions**
- **The limits, conditions and locations of work shown in the attached drawings**
- **The term limits of this authorization**

You are advised to read and understand these conditions and drawings prior to beginning the authorized activities, and to ensure the work is conducted in conformance with all the terms, conditions, and drawings herein. If you are using a contractor, the contractor also should read and understand these conditions and drawings prior to beginning any activity. Failure to comply with these conditions, including any mitigation requirements, shall be grounds for the Department to revoke the permit and authorization and to take appropriate enforcement action. Operation of the facility is not authorized except when determined to be in conformance with all applicable rules and this permit and sovereignty submerged lands authorization, as described.

SPECIFIC CONDITIONS

1. All activities shall be implemented following the plans, specifications and performance criteria approved by this permit. This permit shall expire on November 4, 2021, pursuant to 62-331.090(2), F.A.C. Any deviations must be authorized in a permit modification in accordance with rule 62-331.080, F.A.C. Any deviations that are not so authorized may subject the permittee to enforcement action and revocation of the permit under chapter 373, F.S.

2. In the event the permittee files for bankruptcy prior to completion of work permitted and required by this permit, the permittee must notify the Department within 30 days of filing. The notification shall identify the bankruptcy court and case number and shall include a copy of the bankruptcy petition.

SPECIFIC CONDITIONS - PRIOR TO ANY CONSTRUCTION

3. To mitigate for direct impacts of 40.88 acres and secondary impacts of 17.21 acres to FNAI: Dome Swamp, Basin Marsh, and Wet Prairie, the permittee shall purchase 30.12 M-WRAP Federal mitigation credits from the TM Econ Ranch mitigation bank.

   Prior to any construction or impacts authorized by this permit, the permittee shall provide the Department with documentation that purchase 30.12 of Federal M-WRAP credits from the TM Econ Ranch mitigation bank has been finalized, and the credits have been deducted from the bank's ledger. (DEP permit number ST404_396955-001_SFI)

4. Best management practices for erosion control shall be implemented prior to construction commencement and shall be maintained at all times during construction to prevent siltation and turbid discharges in excess. Methods shall include, but are not limited to the use of staked hay bales, staked filter cloth, sodding, seeding, staged construction and the installation of turbidity screens around the immediate project site.

5. The applicant or designated agent will post educational posters in the construction office and throughout the construction site, including any access roads. The posters must be clearly visible to all construction staff. A sample poster is attached.

6. Prior to the onset of construction activities, the applicant/designated agent will conduct a meeting with all construction staff (annually for multi-year projects) to discuss identification of the eastern indigo snake, its protected status, what to do if a snake is observed within the project area, and applicable penalties that may be imposed if state and/or federal regulations are violated. An educational brochure including color photographs of the snake will be given to each staff member in attendance and additional copies will be provided to the construction superintendent to make available in the onsite construction office (a final brochure for Plan compliance, to be printed double-sided on 8.5" x 11" paper and then properly folded, is attached). Photos of eastern indigo snakes may be accessed on USFWS and/or FWC websites.

7. Construction staff will be informed that in the event that an eastern indigo snake (live or dead) is observed on the project site during construction activities, all such activities are to cease until the established procedures are implemented according to the Plan, which includes notification of the appropriate USFWS Field Office. The contact information for the USFWS is provided on the referenced posters and brochures.

SPECIFIC CONDITIONS – CONSTRUCTION ACTIVITIES

8. During initial site clearing activities, an onsite observer may be utilized to determine whether habitat conditions suggest a reasonable probability of an eastern indigo snake sighting (example: discovery of snake sheds, tracks, lots of refugia and cavities present in the area of clearing activities, and presence of gopher tortoises and burrows).

9. If an eastern indigo snake is discovered during gopher tortoise relocation activities (i.e. burrow excavation), the USFWS shall be contacted within one business day to obtain further guidance which may result in further project consultation.

10. Periodically during construction activities, the applicant's designated agent should visit the project area to observe the condition of the posters and Plan materials, and replace them as needed. Construction personnel should be reminded of the instructions (above) as to what is expected if any eastern indigo snakes are seen.

11. The permittee shall bear the responsibility of ensuring that all construction personnel have access to a copy of this permit and have read, understand, and agree to comply with the terms and conditions included herein.

12. Prior to construction, the following boundaries shall be clearly delineated on the site in a way which is visible and obvious to anyone performing work on-site, including someone operating heavy equipment. Orange construction fencing or tall flagged stakes along the construction limits are possible methods.
    a. Wetland and surface water areas;
    b. Wetland buffers;

c. Limits of approved wetland and other surface water impacts.

13. Prior to initiation of any work authorized by this permit, all wetlands, surface waters, and storm drains, outside the specific limits of construction authorized by this permit shall be protected from erosion, siltation, sedimentation, and/or scouring, including the placement of staked erosion control devices around the project area and staging area(s) that are located outside of any authorized impact areas.

14. Best management practices for erosion control shall be implemented prior to construction commencement and shall be maintained at all times during construction to prevent siltation and turbid discharges to adjacent wetlands and surface waters. Methods shall include but are not limited to the use of staked hay bales, staked filter cloth, sodding, seeding, staged construction and the installation of turbidity screens around the immediate project site.

15. The limits of construction shall be delineated by silt fencing. The permittee shall bear the responsibility of notifying all construction workers that silt fencing or turbidity barrier represents the limits of all construction activities. The permittee shall bear the responsibility of keeping all construction workers and equipment out of the adjacent wetlands and surface waters where work has not been permitted for impacts.

16. The permittee shall report any damage to the Department within 24 hours that occurs to any wetlands not authorized for impacts under this permit. If any damage occurs to wetlands or surface waters as a result of any construction activities, the permittee shall be required to restore the wetland area by re-grading the damaged areas back to the natural preconstruction elevations and planting vegetation of the size, densities, and species that exist in the adjacent areas pursuant to a consent order. The restoration shall be completed within 30 days of completion of the construction and shall be done to the satisfaction of the Department.

17. There shall not be any excess lumber, scrap wood, trash, garbage, etc. within wetlands or other surface waters.

18. Construction equipment shall not be repaired or refueled within wetlands or other surface waters.

19. Only excavated material that is suitable shall be used. Any fill material used shall be clean fill and free of vegetative matter, trash, garbage, toxic or hazardous waste or any other materials the Department considers unsuitable.

20. Construction shall be completed per the approved plan drawings. This permit does not authorize the construction of any additional structures or dredge/fill areas not illustrated on the permit drawings.

SPECIFIC CONDITIONS – MITIGATION

21. To mitigate for direct impacts of 40.88 acres and secondary impacts of 17.21 acres to FNAI: Dome Swamp, Basin Marsh, and Wet Prairie, the permittee shall purchase 30.12 M-WRAP Federal mitigation credits from the TM Econ Ranch mitigation bank.

Prior to any construction or impacts authorized by this permit, the permittee shall provide the Department with documentation that 30.12 of Federal M-WRAP credits from the TM Econ Ranch mitigation bank have been purchased. (DEP permit number ST404_396955-001_SFI)

SPECIFIC CONDITIONS - LISTED SPECIES

22. This permit does not authorize the permittee to cause any adverse impact to or "take" of state listed species and other regulated species of fish and wildlife. Compliance with state laws regulating the take of fish and wildlife is the responsibility of the owner or applicant associated with this project. Please refer to Chapter 68A-27 of the Florida Administrative Code for definitions of "take" and a list of fish and wildlife species. If listed species are observed onsite, FWC staff are available to provide decision support information or assist in obtaining the appropriate FWC permits. Most marine endangered and threatened species are statutorily protected and a "take" permit cannot be issued. Requests for further information or review can be sent to FWCConservationPlanningServices@MyFWC.com.

23. Wood Stork: The permittee shall comply with the approved wetland mitigation and monitoring requirements (within the same core foraging area or within the service area of a U.S. Fish and Wildlife Service approved mitigation bank and with a similar hydroperiod of the affected wetlands) specified by the Florida Department of Environmental Protection State 404 permit for the onsite wetland impacts.

24. Eastern Indigo Snake: The permittee shall comply with the U.S. Fish and Wildlife Service's "Standard Protection Measures for the Eastern Indigo Snake" dated August 12, 2013 (Attached). If an eastern indigo snake is encountered, the snake shall be allowed to vacate the area prior to additional site manipulation in the vicinity. Holes, cavities, and other snake refugia shall be inspected each morning before planned site manipulation of a particular area, and if occupied by an indigo snake, no work shall commence until the snake has vacated the vicinity of the proposed work.

25. Gopher Tortoise: Within 90 days prior to commencing any site preparation activities, a gopher tortoise burrow survey shall be conducted covering potentially suitable habitat on the subject property. Potentially suitable habitat may include, but is not limited to, sandhill, scrub, scrubby flatwoods, pine flatwoods, dry prairies, xeric hammock, mixed pine-hardwoods, old fields, agricultural lands, ruderal areas, and a variety of disturbed habitats and areas having relatively well-drained sandy soils. Surveys shall be conducted in accordance with the following methods.
    a. One or multiple observers shall systematically search for gopher tortoise burrows along evenly spaced, parallel belt transects.
    b. Sufficient distance shall exist between each observer to ensure that transects do not overlap. The width of each transect shall allow for 100% detection of burrows within the transect.
    c. The location of burrows observed within or partially within each transect shall be recorded with sub-meter accuracy GPS. Burrows shall be marked with flagging tape indicating its unique identifying label and burrow activity class.
        i. Potentially Occupied Burrows – burrows with obvious signs of use and minimal or no sign of use. These burrows appear in good repair with a half-moon shaped

entrance and may have tortoise tracks or scrapes clearly visible on the burrow floor or on the mound. The burrow floor may contain loose soil, or it may be hard-packed, and the mound may or may not have vegetation growing on it.

ii. Abandoned Burrows – these burrows lack the half-moon shaped entrance; appear unused or dilapidated with an entrance that is partially or completely collapsed; the burrow may also be partially or completely filled with soil or leaves.

d. If site preparation or other project activities do not commence within 90 days of the gopher tortoise burrow survey, an additional gopher tortoise burrow survey shall be conducted.

e. Gopher tortoise burrow surveys shall encompass any areas having potentially suitable habitat within 25 feet of all project activities, including habitats that extend onto adjacent properties. If lawful access cannot be achieved to adjacent properties, surveys may be conducted by visual inspection from the subject property boundary.

f. If gopher tortoise burrows are found, buffers of at least 25 feet, measured from the burrow opening, shall be established. To prevent gopher tortoises from entering the project site, temporary silt fencing shall be installed (buried at least 8 inches into the ground) around the project site and maintained for the duration of the project.

g. No site preparation, clearing, staging, or other project activities shall occur within the 25-foot buffer.

h. If maintaining the required buffer is not possible, the permittee shall contact the Florida Fish and Wildlife Conservation Commission Gopher Tortoise Program at (850) 921-1031 or GTPermits@MyFWC.com for additional information.

i. Injury of a gopher tortoise shall be immediately reported to the FWC Wildlife Alert Hotline at 888-404-3922 and the Gopher Tortoise Program Coordinator at (850) 921-1031.

26. Florida Sandhill Crane: If Florida sandhill cranes are observed onsite, nesting surveys shall be conducted within the project boundary during the breeding season (December 1 – August 30) within 30 days prior to commencing any clearing or project activities. Surveys shall include either one aerial survey or two ground surveys in accordance with the following methodologies.
    a. Aerial Surveys:
        i. Aerial transects shall cover 100% of the suitable nesting habitat.
        ii. Survey transects shall be conducted at a minimum altitude of 250 feet. Sandhill cranes may react differently to different types of aircraft, and altitude shall be adjusted to prevent disturbance.
    b. Ground Surveys:
        i. Surveys shall be conducted between dawn and 10 a.m. or between 4 p.m. and dusk.
        ii. The wet prairies, marshy lake margins, pastures, hydric flatwoods, and vegetated marshes shall be scanned along its periphery from as far away as practical in order to observe nesting areas without disturbing any sandhill cranes.
        iii. Observation points shall be spaced to provide approximately 100% coverage of suitable habitat.

c. If active Florida sandhill crane nests are found, a buffer of 400 feet (122 meters) shall be demarcated around each nest site. The buffer zone shall be clearly visible to all personnel associated with the project. The perimeter of the buffer zone shall be demarcated with material with an open design that allows ingress and egress for adult cranes and chicks. Examples of acceptable materials include 3-4 foot (91-122 cm) tall stakes with a single line of string or rope, suspended at least 18 inches (46 cm) off of the ground, or three strand barbed wire with the bottom wire at least 18 inches (46 cm) off the ground. Silt fencing is discouraged, but if it must be used, leave regularly-spaced gaps at least every 0.3-mile that are either: sized at least 24 inches (61 cm) wide or the silt fencing is staggered to allow passage by chicks.
d. No pedestrian traffic, vehicle operations, site preparation, staging, clearing, or project activities shall occur within the 400-foot (122-meter) buffer.
e. The buffer zone materials may be removed when the eggs have hatched and chicks are walking on their own.
f. If sandhill crane nesting is discovered after site activities have begun, or if any of the conditions above cannot be met, the permittee or permittee representative shall contact the Florida Fish and Wildlife Conservation Commission Protected Species Permit Coordinator at (850) 921-5990 or WildlifePermits@MyFWC.com for more information.

27. State-Listed Wading Birds: If state-listed wading birds are observed onsite, the permittee or permittee representative shall conduct surveys for wading birds prior to commencing any site preparation, staging, clearing, or project activities, including quarterly maintenance mowing. The surveys should be conducted in the shrubby wetlands located within or adjacent to the site during the appropriate survey timeframe indicated in Attachment 2 and in accordance with the following methodology:
    a. Direct count surveys shall be conducted of potential breeding sites that are narrow or small in which the observer can see all the way through the vegetation to identify all nests.
    b. Direct counts of all nests shall be made from a minimum distance of 330 feet (100 meters) from the shrubby wetlands located in the southern and southeast portion.
    c. If there is evidence of active nests, a buffer of 330 feet (100 meters) shall be established around the nesting area(s). A nest is considered active when supporting essential behavioral patterns, which occur from the point of nest building when a breeding pair exhibits courtship behavior, is carrying nest material, and/or engaging in construction or repair of a nest, until young of the season become capable of sustained flight or permanently leave the nest. The buffer zone shall be clearly visible to all personnel associated with the project.
    d. If wading bird nesting is discovered after site activities have begun, or if any of the conditions above cannot be met, the permittee shall contact the Florida Fish and Wildlife Conservation Commission Protected Species Permit Coordinator at (850) 921-5990 or WildlifePermits@MyFWC.com for more information.

28. Florida Pine Snake: The permittee shall adhere to the following conditions for Florida pine snake:
    a. Prior to commencing any site preparation or other project activities, and annually thereafter for multi-year projects, the permittee or designated agent shall conduct a meeting with all construction personnel associated with the project to discuss identification of the Florida pine snake, its protected status, and what to do if it is observed in the project area. Educational information including color photographs of the snake shall be provided and made available

in the onsite construction office. Other information can be found here: https://myfwc.com/conservation/you-conserve/wildlife/snakes/

b. If a pine snake is observed, all project activities in the area shall cease, and the snake shall be allowed to leave on its own accord without being harmed or captured and relocated in accordance with condition 4. The observation shall be reported to the FWC at https://public.myfwc.com/fwri/raresnakes/UserHome.aspx?id=. For purposes of documentation, Florida pine snakes may be briefly handled or photographed during relocation.

c. Occasionally Florida pine snake nests are found while excavating tortoise burrows. Pine snake nests are typically laid in the burrow chamber. If a Florida pine snake nest is observed, habitat modification activities should cease, and the nest should immediately be reported to FWC by contacting the Regional Office. An FWC biologist may respond to the site to document the nest and collect the eggs, or provide guidance to the on-site monitor to safely collect the eggs.

d. Injury or mortality of a Florida pine snake shall be immediately reported to the Florida Fish and Wildlife Conservation Commission's Wildlife Alert Hotline at 888-404-3922. The permittee shall also contact the FWC Regional Non-game Biologist for more information.

SPECIFIC CONDITIONS - CONSTRUCTION COMPLETION

29. Upon final completion of the project and upon reasonable assurance that the project is no longer a potential turbidity source, the permittee will be responsible for the removal of the temporary best management practices and turbidity control devices. All turbidity control devices shall be disposed of in an appropriate upland disposal area.

30. The permittee shall submit one set of signed, dated and sealed as-built drawings to the Department by mail at 3319 Maguire Blvd., Suite 232, Orlando, Florida 32803, or electronically at DEP_CD@dep.state.fl.us, for review and approval within 30 days of completion of construction. The as-built drawings shall be based on the Department permitted construction drawings and any pertinent specific conditions, which should be revised to reflect changes made during construction. Both the original design and constructed elevations must be clearly shown. The plans must be clearly labeled as "as-built" or "record" drawings. Surveyed dimensions and elevations required shall be verified and signed, dated and sealed by a Florida registered professional. As-builts shall be submitted to the Department regardless of whether or not deviations are present. In addition, the permittee shall submit the "As-Built Certification and Request for Conversion to Operation Phase" form (Ch. 62-330.310(1), F.A.C.).

GENERAL CONDITIONS FOR STATE 404 PROGRAM INDIVIDUAL PERMITS

(1) General Conditions under section 62-331.054, F.A.C.:

(a) The permittee shall comply with all conditions of the permit, even if that requires halting or reducing the permitted activity to maintain compliance. Any permit violation constitutes a violation of Part IV of Chapter 373, F.S., and this Chapter, as well as a violation of the CWA.

(b) The permittee shall take all reasonable steps to prevent any unauthorized dredging or filling in violation of this permit.

(c) The permittee shall timely notify the Agency of any expected or known actual noncompliance.
(d) Upon Agency request, the permittee shall provide information necessary to determine compliance status, or whether cause exists for permit modification, revocation, or termination.

(e) Inspection and entry. The permittee shall allow the Agency, upon presentation of proper identification, at reasonable times to:

1. Enter upon the permittee's premises where a regulated activity is located or where records must be kept under the conditions of the permit,

2. Have access to and copy any records that must be kept under the conditions of the permit,

3. Inspect operations regulated or required under the permit, and

4. Sample or monitor, for the purposes of assuring permit compliance or as otherwise authorized by the CWA, any substances or parameters at any location.

(2) Applicable General Conditions under section 62-330.350(1), F.A.C., modified to contain applicable references under Chapter 62-331, F.A.C. (remove those that are not applicable):

(a) All activities shall be implemented following the plans, specifications and performance criteria approved by this permit. Any deviations must be authorized in a permit modification in accordance with rule 62-331.080, F.A.C. Any deviations that are not so authorized may subject the permittee to enforcement action and revocation of the permit under chapter 373, F.S.

(b) A complete copy of this permit shall be kept at the work site of the permitted activity during the construction phase, and shall be available for review at the work site upon request by the Agency staff. The permittee shall require the contractor to review the complete permit prior to beginning construction.

(c) Activities shall be conducted in a manner that does not cause or contribute to violations of state water quality standards. Performance-based erosion and sediment control best management practices shall be installed immediately prior to, and be maintained during and after construction as needed, to prevent adverse impacts to the water resources and adjacent lands. Such practices shall be in accordance with the State of Florida Erosion and Sediment Control Designer and Reviewer Manual (Florida Department of Environmental Protection and Florida Department of Transportation, June 2007), and the Florida Stormwater Erosion and Sedimentation Control Inspector’s Manual (Florida Department of Environmental Protection, Nonpoint Source Management Section, Tallahassee, Florida, July 2008), which are both incorporated by reference in subparagraph 62-330.050(9)(b)5., F.A.C., unless a project-specific erosion and sediment control plan is approved or other water quality control measures are required as part of the permit.

(d) At least 48 hours prior to beginning the authorized activities, the permittee shall submit to the Agency a fully executed Form 62-330.350(1), "Construction Commencement Notice," (October 1, 2013), (http://www.flrules.org/Gateway/reference.asp?No=Ref-02505), incorporated by reference herein, indicating the expected start and completion dates. A copy of this form may be obtained from the Agency, as described in subsection 62-330.010(5), F.A.C., and shall be submitted electronically or by mail to the Agency. However, for activities involving more than one acre of construction that also require a NPDES stormwater construction general permit, submittal of the Notice of Intent to Use Generic Permit for Stormwater Discharge from Large and Small Construction Activities, DEP Form 62-621.300(4)(b), shall also serve as notice of commencement of construction under this chapter and, in such a case, submittal of Form 62-330.350(1) is not required.

(e) Unless the permit is transferred under rule 62-331.100, F.A.C., the permittee is liable to comply with the plans, terms, and conditions of the permit for the life of the project or activity.

(f) Within 30 days after completing construction of the entire project, or any independent portion of the project, the permittee shall provide the following to the Agency, as applicable:

1. For an individual, private single-family residential dwelling unit, duplex, triplex, or quadruplex – "Construction Completion and Inspection Certification for Activities Associated with a Private Single-Family Dwelling Unit" [Form 62-330.310(3)]; or

2. For all other activities – "As-Built Certification and Request for Conversion to Operation Phase" [Form 62-330.310(1)].

3. If available, an Agency website that fulfills this certification requirement may be used in lieu of the form.

(g) If the final operation and maintenance entity is a third party:

1. Prior to sales of any lot or unit served by the activity and within one year of permit issuance, or within 30 days of as-built certification, whichever comes first, the permittee shall submit, as applicable, a copy of the operation and maintenance documents (see sections 12.3 thru 12.3.4 of Volume I) as filed with the Florida Department of State, Division of Corporations, and a copy of any easement, plat, or deed restriction needed to operate or maintain the project, as recorded with the Clerk of the Court in the County in which the activity is located.

2. Within 30 days of submittal of the as-built certification, the permittee shall submit "Request for Transfer of Environmental Resource Permit to the Perpetual Operation and Maintenance Entity" [Form 62-330.310(2)] to transfer the permit to the operation and maintenance entity, along with the documentation requested in the form. If available, an Agency website that fulfills this transfer requirement may be used in lieu of the form.

(h) The permittee shall notify the Agency in writing of changes required by any other regulatory agency that require changes to the permitted activity, and any required modification of this permit must be obtained prior to implementing the changes.

(i) This permit does not:

1. Convey to the permittee any property rights or privileges, or any other rights or privileges other than those specified herein or in chapter 62-330, F.A.C.;

2. Convey to the permittee or create in the permittee any interest in real property;
3. Relieve the permittee from the need to obtain and comply with any other required federal, state, and local authorization, law, rule, or ordinance; or

4. Authorize any entrance upon or work on property that is not owned, held in easement, or controlled by the permittee.

(j) Prior to conducting any activities on state-owned submerged lands or other lands of the state, title to which is vested in the Board of Trustees of the Internal Improvement Trust Fund, the permittee must receive all necessary approvals and authorizations under chapters 253 and 258, F.S. Written authorization that requires formal execution by the Board of Trustees of the Internal Improvement Trust Fund shall not be considered received until it has been fully executed.

(k) The permittee shall hold and save the Agency harmless from any and all damages, claims, or liabilities that may arise by reason of the construction, alteration, operation, maintenance, removal, abandonment or use of any project authorized by the permit.

(l) The permittee shall notify the Agency in writing:

1. Immediately if any previously submitted information is discovered to be inaccurate; and

2. Within 30 days of any conveyance or division of ownership or control of the property or the system, other than conveyance via a long-term lease, and the new owner shall request transfer of the permit in accordance with rule 62-330.340, F.A.C. This does not apply to the sale of lots or units in residential or commercial subdivisions or condominiums where the stormwater management system has been completed and converted to the operation phase.

(m) Upon reasonable notice to the permittee, Agency staff with proper identification shall have permission to enter, inspect, sample and test the project or activities to ensure conformity with the plans and specifications authorized in the permit.

(n) If prehistoric or historic artifacts, such as pottery or ceramics, projectile points, stone tools, dugout canoes, metal implements, historic building materials, or any other physical remains that could be associated with Native American, early European, or American settlement are encountered at any time within the project site area, the permitted project shall cease all activities involving subsurface disturbance in the vicinity of the discovery. The permittee or other designee shall contact the Florida Department of State, Division of Historical Resources, Compliance Review Section (DHR), at (850)245-6333, as well as the appropriate permitting agency office. Project activities shall not resume without verbal or written authorization from the Division of Historical Resources. If unmarked human remains are encountered, all work shall stop immediately and the proper authorities notified in accordance with section 872.05, F.S. For project activities subject to prior consultation with the DHR and as an alternative to the above requirements, the permittee may follow

procedures for unanticipated discoveries as set forth within a cultural resources assessment survey determined complete and sufficient by DHR and included as a specific permit condition herein.

(o) Any delineation of the extent of a wetland or other surface water submitted as part of the permit application, including plans or other supporting documentation, shall not be considered binding unless a specific condition of this permit or a formal determination under rule 62-330.201, F.A.C., provides otherwise.

(p) The permittee shall provide routine maintenance of all components of the stormwater management system to remove trapped sediments and debris. Removed materials shall be disposed of in a landfill or other uplands in a manner that does not require a permit under chapter 62-331, F.A.C., or cause violations of state water quality standards.

NOTICE OF RIGHTS

This action is final and effective on the date filed with the Clerk of the Department unless a petition for an administrative hearing is timely filed under Sections 120.569 and 120.57, F.S., before the deadline for filing a petition. On the filing of a timely and sufficient petition, this action will not be final and effective until further order of the Department. Because the administrative hearing process is designed to formulate final agency action, the subsequent order may modify or take a different position than this action.

Petition for Administrative Hearing

A person whose substantial interests are affected by the Department's action may petition for an administrative proceeding (hearing) under Sections 120.569 and 120.57, F.S. Pursuant to Rules 28-106.201 and 28-106.301, F.A.C., a petition for an administrative hearing must contain the following information:

(a) The name and address of each agency affected and each agency's file or identification number, if known;
(b) The name, address, any e-mail address, any facsimile number, and telephone number of the petitioner, if the petitioner is not represented by an attorney or a qualified representative; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination;
(c) A statement of when and how the petitioner received notice of the agency decision;
(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
(e) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the agency's proposed action;
(f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and
(g) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wishes the agency to take with respect to the agency's proposed action.

The petition must be filed (received by the Clerk) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, or via electronic

correspondence at Agency_Clerk@dep.state.fl.us. Also, a copy of the petition shall be mailed to the applicant at the address indicated above at the time of filing.

Time Period for Filing a Petition

In accordance with Rule 62-110.106(3), F.A.C., petitions for an administrative hearing by the applicant and persons entitled to written notice under Section 120.60(3), F.S., must be filed within 21 days of receipt of this written notice. Petitions filed by any persons other than the applicant, and other than those entitled to written notice under Section 120.60(3), F.S., must be filed within 21 of publication of the notice or within 21 days of receipt of the written notice, whichever occurs first. You cannot justifiably rely on the finality of this decision unless notice of this decision and the right of substantially affected persons to challenge this decision has been duly published or otherwise provided to all persons substantially affected by the decision. While you are not required to publish notice of this action, you may elect to do so pursuant Rule 62-110.106(10)(a). The failure to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, F.S., or to intervene in this proceeding and participate as a party to it. Any subsequent intervention (in a proceeding initiated by another party) will be only at the discretion of the presiding officer upon the filing of a motion in compliance with Rule 28-106.205, F.A.C. If you do not publish notice of this action, this waiver will not apply to persons who have not received written notice of this action.

Extension of Time

Under Rule 62-110.106(4), F.A.C., a person whose substantial interests are affected by the Department's action may also request an extension of time to file a petition for an administrative hearing. The Department may, for good cause shown, grant the request for an extension of time. Requests for extension of time must be filed with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, or via electronic correspondence at Agency_Clerk@dep.state.fl.us, before the deadline for filing a petition for an administrative hearing. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

Mediation

Mediation is not available in this proceeding.

FLAWAC Review

The applicant, or any party within the meaning of Section 373.114(1)(a) or 373.4275, F.S., may also seek appellate review of this order before the Land and Water Adjudicatory Commission under Section 373.114(1) or 373.4275, F.S. Requests for review before the Land and Water Adjudicatory Commission must be filed with the Secretary of the Commission and served on the Department within 20 days from the date when this order is filed with the Clerk of the Department.

Judicial Review

Once this decision becomes final, any party to this action has the right to seek judicial review pursuant to Section 120.68, F.S., by filing a Notice of Appeal pursuant to Florida Rules of Appellate Procedure 9.110 and 9.190 with the Clerk of the Department in the Office of General Counsel (Station #35, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399-3000) and by filing a copy of the Notice of

Appeal accompanied by the applicable filing fees with the appropriate district court of appeal. The notice must be filed within 30 days from the date this action is filed with the Clerk of the Department.

Exhibit A

Permittee Signature

Pursuant to Rule 62-331.052(3)(a)1, a permit becomes effective when it is signed by both the applicant and the Department. Signing indicates, as permittee, you accept and agree to comply with the terms of this permit. You have **60 days after receipt of this proposed permit** with which to sign and return to the Department for final approval. Failure to return within this timeframe will result in administrative withdrawal of your permit application. After receipt of the signed proposal, the Department will return to you the final signed permit, listing the permit's effective date and expiration date.

(Permittee)

11/4/21
(Date)

JAY A. Thompson
(Permittee Name – Printed)

This permit becomes effective when the designated Department official has signed below.

Executed in Orlando, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Reggie Phillips
Program Administrator
Permitting and Waste Cleanup Program

Exhibit A

Attachments:
Project Drawings, 12 pages
Mitigation Reservation Letters, 1 Page
Standard Protection Measures for the Eastern Indigo Snake 2013
FWC Wading Bird Ranges, Breeding Seasons, and Recommended Survey Dates, by Zone
Construction Commencement Notice/Form 62-330.350(1)
As-built Certification and Request for Conversion to Operational Phase/ Form 62-330.310(1)
Request for Transfer to the Perpetual Operation Entity/Form 62-330.310(2)
Request to Transfer Permit/Form 62-330.340(1)

Copies furnished to:
John Miklos, Bio Tech Consulting, Inc, john@bio-techconsulting.com
FWC, FWCConservationPlanningServices@myfwc.com
Orange County, Neal.thomas@ocfl.net
SFWMD, epermits@sfwmd.gov
Alison Van Wyk, EPA, VanWyk.Alison@epa.gov
Angelica Sterner, FDEP, angelica.sterner@floridadep.gov
Teayann Duclos, FDEP, teayann.duclos@floridadep.gov
Reggie Phillips, FDEP, Reggie.Phillips@FloridaDEP.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this permit, including all copies, were mailed before the close of business on November 4, 2021, to the above listed persons.

FILING AND ACKNOWLEDGMENT

FILED, on this date, under 120.52(7) of the
Florida Statutes, with the designated Department Clerk,
receipt of which is hereby acknowledged.

Marcon Ruiz
Clerk

November 4, 2021
Date

Exhibit A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SPEAK UP WEKIVA, INC.

Plaintiff,

v.

GOVERNOR RONALD DeSANTIS, in his Official Capacity as Governor of Florida,

Defendant.

CASE NO.:

COMPLAINT

Plaintiff, Speak Up Wekiva, Inc., through undersigned counsel, files this Complaint against Defendant, Governor Ronald DeSantis, in his official capacity as governor of Florida. Plaintiff seeks declaratory and injunctive relief concerning Section 403.412(9)(a), Fla. Stat. (2020), which was part of Senate Bill 712, "Florida Clean Waterways Act," signed into law by Governor DeSantis on June 30, 2020. Section 403.412(9)(a) purports to preclude all Florida local governments from recognizing or granting any specific legal rights to any person, non-natural person, or political subdivision, "relating to the natural environment."

Composite Exhibit B

Plaintiff seeks a declaration that this statute is unconstitutional under the Ninth and Fourteenth Amendments to the United States Constitution by infringing upon Florida citizens' constitutional right to local, self-government; is unconstitutionally vague under the Fourteenth Amendment; violates Article I, Section 1, Article VIII, Section 1(g), and Article VIII, Section 2(b) of the Florida Constitution by infringing upon Home Rule Powers of counties and municipalities; has no preemptive authority because it fails to state a legislative intent to expressly preempt any field or area; and violates the "single-subject rule" of Article III, Section 6 of the Florida Constitution.

Further, Plaintiff seeks an injunction compelling Defendant to refrain from enforcing this unconstitutional preemptive statute, and for an order enjoining the Defendant from using provisions of that statute to interfere with a vote by Orange County residents on a proposed charter amendment on November 3, 2020—an amendment which would recognize heightened legal protections for Orange County waterways. In support of its complaint, Plaintiff asserts:

Parties

1. Plaintiff, Speak Up Wekiva, Inc. ("Speak Up Wekiva"), is a Florida not-for-profit corporation dedicated to conserving and protecting Florida's shared natural resource lands and waters held by the State of Florida in conservation for the people and the Greater Wekiva River Basin. Speak Up Wekiva has over 2,200 members and has a principal place of business in Orange County, Florida.

Speak Up Wekiva has a particular focus and concern with protecting the Wekiva River, its tributaries and springsheds, as well as other natural water bodies in Orange County and Central Florida. Speak Up Wekiva members enjoy recreating on the Wekiva River and other Orange County water bodies. Charles O'Neal, the president of Speak Up Wekiva, resides in Orange County, Florida and recreates on the Wekiva River.

2. Speak Up Wekiva and its members are negatively impacted by Section 403.412(9)(a) because this law may preempt and prohibit WEBOR, an Orange County Charter Review amendment which was proposed by Mr. O'Neal, approved by the Orange County Charter Review Commission on March 4, 2020, and which is to be placed on the ballot for Orange County voters on November 3, 2020.

3. Speak Up Wekiva members are further negatively impacted based upon a reasonable belief that state preemption of WEBOR would result in the continued degradation and collapse of the Wekiva River and its springshed, as well as the Econlockhatchee River and other Orange County natural water bodies.

4. Defendant, Ronald DeSantis ("Governor DeSantis"), is the governor of Florida and is sued in his official capacity.

Jurisdiction and Venue

5. This Court has subject-matter jurisdiction over Plaintiff's claims under 28 U.S.C. §§ 1331 and 1343.