

**FLORIDA’S WATER RESOURCES ACT: “CONSISTENT WITH THE PUBLIC INTEREST”**

**CONSERVATION CLINIC**

**UNIVERSITY OF FLORIDA LEVIN COLLEGE OF LAW**

**COURTNEY MEYER & PHILIP SLIGER**

**STUDENT ASSOCIATES & J.D. CANDIDATES**

**THOMAS T. ANKERSEN, DIRECTOR**

**ABSTRACT**

The phrase “public interest” is not a new one, but the phrase is often considered to be amorphous, complex, and ill-defined in law. Florida water law is no exception. Florida Statute § 373.223(1), which lays out the requirements for obtaining a water-use permit, requires proposed uses of water be “consistent with the public interest.” Despite the requirement being a part of an infamous three prong test, the phrase “public interest” is not defined by the legislature or the Florida Department of Environmental Protection, and despite some water management districts and courts having broad definitions of the public interest, the enumerated standards are almost never properly applied. This failure to develop and apply a robust public interest test for § 373.223 water-use permits is concerning because it runs contrary to the legislature’s intent. When water management districts and the courts fail to evaluate and apply the three distinct requirements in § 373.223, they are failing to follow their legislative mandate. This Paper offers a thorough analysis of these problems by examining the legislative history of § 373.223, current definitions of the public interest test created by water management districts and courts, and reports attached to water-use permit applications to determine the status of the definition and application of the infamous public interest test in § 373.223. This Paper then offers an alternative to current methods, offering guiding principles the legislature, agencies, or courts should follow to define and apply the public interest test.

INTRODUCTION .....	3
I. THE PUBLIC INTEREST TEST IN WATER LAW .....	4
II. THE PUBLIC INTEREST TEST IN FLORIDA ENVIRONMENTAL LAW .....	4
<i>A. Florida Constitution</i> .....	4
<i>B. Sovereign Submerged Lands Act, Chapter 253</i> .....	4
<i>C. Environmental Control, Chapter 403</i> .....	5
<i>D. Surface Waters and Wetlands, Chapter 373 Part IV</i> .....	6
III. THE PUBLIC INTEREST TEST IN FLORIDA WATER LAW .....	7
<i>A. Water Resources, Chapter 373</i> .....	8
<i>B. Water Management District Rules</i> .....	9
<i>C. Water Management District Handbooks</i> .....	10
1. Suwannee River Water Management District .....	11
2. St. Johns River Water Management District .....	12
3. Southwest Florida Water Management District .....	13
4. Northwest Florida Water Management District .....	13
IV. APPLICATION OF PUBLIC INTEREST TEST .....	14
<i>A. Case Law</i> .....	14
<i>B. Water-use Permitting</i> .....	16
CONCLUSION AND RECOMMENDATIONS .....	18
APPENDIX A .....	22
APPENDIX B .....	24

Deleted: 9

Deleted: 10

## INTRODUCTION

Florida water law is unique because of its roots in both western and eastern water law and the Model Water Code.<sup>1</sup> However, Florida water law is not unique in that it contains a mix of strict mandates and broad undefined language. One example of a problematic use of broad undefined language can be found in Fla. Stat. § 373.223, which lays out the requirements for obtaining a water-use permit.<sup>2</sup> One of these requirements is that the proposed use of water be “consistent with the public interest.”<sup>3</sup>

The phrase “public interest” is not unique to Florida water law,<sup>4</sup> and the phrase is infamous for being amorphous and difficult to apply in many areas of practice. The phrase “public interest,” as used in § 373.223, is ill defined. The Florida legislature, the Florida Department of Environmental Protection (FDEP), the water management districts, and courts have all failed to adequately define and apply the public interest test in § 373.223.<sup>5</sup>

The water management districts and courts have attempted to define the public interest test in § 373.223 through rules, applicant guidance handbooks, and case law, but every definition is broad and provides little guidance as to how the test should apply.<sup>6</sup> The lack of definition has led to water management districts and courts giving the test short shrift or failing to apply the test at all. And when the test is applied, it is often conflated with other § 373.223 permitting requirements.

This failure of State agencies to develop and apply a robust public interest test for § 373.223 water-use permits is concerning because it runs contrary to the legislature’s intent. The legislature laid out three distinct requirements for determining whether a water-use permit should be issued.<sup>7</sup> When water management districts and the courts fail to evaluate and apply the three distinct requirements, they are failing to follow their legislative mandate.

This Paper describes the issues that arise with the public interest test in Florida water law by focusing on the four water management districts that contain Outstanding Florida Springs. Section I describes the history of the public interest test and its roots in both eastern and western water law. Section II describes the use of the public interest test in other Florida environmental statutes, illuminating the stark contrast between § 373.223’s public interest test and other environmental statutes’ public interest tests. Other environmental laws do provide significant context as to how the public interest test should apply while § 373.223 reveals very little. Section III describes § 373.223 and summarizes attempts to define the public interest test in rules and guidance documents. Section IV builds on these definitions and explains how they have or have not been applied in case law and water-use permits. Section IV illustrates the courts’ halfhearted attempts to apply the public interest test and water management districts’ complete failure to apply the public interest test consistently in permits. Finally, Section V concludes by offering

---

<sup>1</sup> See *infra* Part I.

<sup>2</sup> Fla. Stat. § 373.223.

<sup>3</sup> § 373.223(1)(c).

<sup>4</sup> See *infra* Part II.

<sup>5</sup> See *infra* Part III.

<sup>6</sup> See *infra* Part III.

<sup>7</sup> Fla. Stat. § 373.223(1).

recommendations for improving the definition and application of the public interest test in Florida water law.

#### I. THE PUBLIC INTEREST TEST IN WATER LAW

[The combination of reasonable and beneficial in historical water law]

#### II. THE PUBLIC INTEREST TEST IN FLORIDA ENVIRONMENTAL LAW

The concept of the public interest test is not a new one; the phrase is rampant in many areas of the law. This Section begins by detailing the use of the public interest test in the Florida Constitution and two major Florida environmental laws. The use and applications of the public interest test in this Section underscore the inadequacies in the public interest test in Florida water law as described in Section IV.

##### A. Florida Constitution

The Florida Constitution includes three references to the public interest but provides little guidance on what the term means. Article IV, Section 1(e) requires the governor to address the legislature at least once in each regular session to, among other things, “recommend measures in the public interest.”<sup>8</sup> Article X, section 11, which relates to sovereignty lands, declares that sale of sovereignty lands may be authorized by law, but only when “in the public interest.”<sup>9</sup> The section further declares that private use of sovereignty lands may be authorized by law, but only when not contrary to the public interest.<sup>10</sup>

##### B. Sovereign Submerged Lands Act, Chapter 253

Title 18, Chapter 253 of Florida Statutes<sup>11</sup> prescribes various duties on the Florida Department of Environmental Protection (FDEP), water management districts, Fish and Wildlife Conservation Commission, and Department of Agriculture and Consumer Services with respect to State Lands.<sup>12</sup> The chapter includes twenty-three references to the public interest. While the statute does not define “public interest,” several uses throughout the statute provide guidance on the legislature’s intent behind the term.

Regarding spoil disposal of material dredged from state sovereignty tidal lands or submerged bottom lands, the public interest is served when the removal and placement would rejuvenate a site for continued spoil disposal or would result in environmental restoration or enhancement of the placement site.<sup>13</sup> In this instance, the public interest is concerned with both environmental and economic impacts of the activity.

Regarding uses of state-owned lands acquired for conservation or recreation, the public interest is served by “protecting and conserving land, air, water, and the state’s natural resources,

---

<sup>8</sup> FLA. CONST., art. IV, § 1(e).

<sup>9</sup> FLA. CONST., art. X, § 11.

<sup>10</sup> *Id.*

<sup>11</sup> Fla. Stat. §§ 253.001–.90 (2020).

<sup>12</sup> § 253.002.

<sup>13</sup> § 253.03(10)(d)(2).

which contribute to the public health, welfare, and economy of the state.”<sup>14</sup> Further, such lands shall be managed to “ensure the survival of plant and animal species and the conservation of finite and renewable natural resources.”<sup>15</sup> Again, the public interest in this context focuses on both environmental and economic impacts.

The statute further sets forth certain actions, such as the sale of sovereignty submerged lands, that must be “in the public interest,”<sup>16</sup> as well as certain actions, such as the lease of submerged lands for aquaculture activities, that must “not be contrary to the public interest.”<sup>17</sup> While it is unclear how these two standards are evaluated, the former would seem to impose a burden on the actor to show that the activity furthers the public interest in some way, while the latter imposes a lesser burden of merely showing that the activity would not interfere with the public interest.

Finally, the statute expressly defines certain activities as being in the public interest. First, the statute grants interest to all tidally influenced land which had been permanently extended, filled, added to existing lands, or created prior to July 1, 1975 to the landowner having record of title to such land, and declares these grants to be in the public interest.<sup>18</sup> Second, the statute expressly and broadly declares aquaculture to be in the public interest.<sup>19</sup>

Interpreting Chapter 253, the FDEP Division of State Lands set forth a definition of “public interest” that included “demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action.”<sup>20</sup> The definition further requires that the Board of Trustees of the Internal Improvement Trust Fund consider the ultimate project and purpose served by any use, sale, lease, or transfer of sovereignty lands or materials.<sup>21</sup> This definition, similar to the statute, focuses on balancing the environmental, social, and economic impacts of a proposed action.

The Division’s rules also incorporated the various public interest standards employed by the statute. For approval of any activity on sovereignty submerged lands, such activities must not be contrary to the public interest, except for sales which must be in the public interest.<sup>22</sup> There is a direct connection between this rule and § 253.115(2).

### *C. Environmental Control, Chapter 403*

Title 29, Chapter 403 is Florida’s Environmental Control statute and provides legal authority to the FDEP for activities relating to pollution control, facility siting, resource recovery and management, environmental regulation, water supply, water treatment plants, and natural gas

---

<sup>14</sup> § 253.034(1).

<sup>15</sup> *Id.*

<sup>16</sup> § 253.115(2).

<sup>17</sup> § 253.68(1).

<sup>18</sup> § 253.12(9).

<sup>19</sup> § 253.68(2)(a).

<sup>20</sup> Fla. Admin. Code Ann. r. 18-21.003.

<sup>21</sup> *Id.*

<sup>22</sup> Fla. Admin. Code Ann. r. 18-21.004(1)(a).

pipeline siting.<sup>23</sup> The statute does not include a definition of “public interest” but uses the term twenty-one times.

The legislative findings declare that “it is in the public interest and serves a public purpose that [FDEP] take a leading role . . . in developing and implementing comprehensive ecosystem management solutions . . . which achieve[ ] positive environmental results in an efficient and cost-effective manner.”<sup>24</sup> The statute further enumerates other activities as being in the public interest, such as the demineralization of water,<sup>25</sup> the construction and operation of comprehensive central wastewater systems,<sup>26</sup> and effective and efficient regulation of discharge of pollutants into waters of the state.<sup>27</sup> Additionally, the statute finds it in the public interest to eliminate duplication of permitting programs by the United States EPA and FDEP, again signaling the legislature’s intent that the public interest encapsulate environmental, economic, and governmental interests.<sup>28</sup>

Interpreting Chapter 403, FDEP promulgated rules setting forth procedures for issuing permits for activities which will reasonably be expected to be a source of pollution. While “public interest” is not included in the rule’s definitions, the rules include several detailed factor tests by which the department must assess the public interest. Regarding anti-degradation permits, the public interest test includes four factors, including whether the proposed project is important to and is beneficial to the public health, safety, or welfare, and whether it will adversely affect conservation of fish and wildlife, water-based recreational values, or marine productivity.<sup>29</sup> This same section includes two additional factor tests for determining whether certain proposed discharges are “clearly in the public interest.”<sup>30</sup> Each of these tests requires the applicant to assess various alternative discharge solutions and demonstrate that those solutions would not be economically and technologically reasonable.<sup>31</sup>

#### *D. Surface Waters and Wetlands, Chapter 373 Part IV*

Title 28, Chapter 373, Part IV governs the management and storage of Florida’s surface waters and provides perhaps the most comprehensive guidance in Florida statutes on how agencies should assess the public interest. While the statute does not set forth an express definition of the public interest, it provides a balancing test to weigh whether proposed activities are clearly in the public interest or contrary to the public interest. The statute provides:

- (a) In determining whether an activity, which is in, on, or over surface waters or wetlands, [ . . . ] is not contrary to the public interest or is clearly in the public interest, the governing board or the department shall consider and balance the following criteria:

---

<sup>23</sup> See Fla. Stat. §§ 403.011–.973 (2020).

<sup>24</sup> § 403.075(3).

<sup>25</sup> § 403.0882(1).

<sup>26</sup> § 403.086(10).

<sup>27</sup> § 403.0885(1).

<sup>28</sup> *Id.*

<sup>29</sup> Fla. Admin. Code Ann. r. 62-4.242(1)(b) 1.-3.

<sup>30</sup> *Id.*

<sup>31</sup> Fla. Admin. Code Ann. r. 62-4.242(1)(c), (d)

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
5. Whether the activity will be of a temporary or permanent nature;
6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and
7. The current condition and relative value of functions being performed by areas affected by the proposed activity.<sup>32</sup>

This clear enumeration of factors leaves little to the discretion of the Department of Environmental Protection, and in fact, the agency adopted these factors verbatim when promulgating rules for the issuance of individual and conceptual environmental resource permits.<sup>33</sup>

This factor test balances a broad set of interests ranging from historical and environmental conservation to navigation and recreation, providing transparency into how the department, and ultimately a court, would analyze the public interest with regards to surface waters and wetlands under chapter 373. When challenges to environmental resource permits issued pursuant to this statutory test have made it to court, judges have had little trouble articulating their decision based on the enumerated factors.<sup>34</sup>

### III. THE PUBLIC INTEREST TEST IN FLORIDA WATER LAW

Chapter 373 of Florida statutes provides four distinct public interest standards, (1) “in the public interest,”<sup>35</sup> (2) “clearly in the public interest,”<sup>36</sup> (3) “consistent with the public interest,”<sup>37</sup> and (4) “not contrary to the public interest.”<sup>38</sup> Each of these standards poses a different burden upon an applicant seeking a permit for a proposed activity, although these burdens are often

---

<sup>32</sup> Fla. Stat. § 373.414(1).

<sup>33</sup> See Fla. Admin. Code Ann. r. 62-330.302(1)(a)1.-7.

<sup>34</sup> See *Matlacha Civic Assoc., Inc. v. City of Cape Coral*, 2020 WL 1693226, at \*61 (finding that the adverse impacts of a proposed project that fell under factors one, two, four, five, and seven outweighed any perceived benefits under factors one and three, and thus the project failed the public interest test), *Mid-Chattahoochee River Users v. Fla. Dept. of Env'tl. Protec.*, 948 So. 2d 794, 798 (Fla. 1st Dist. App. 2006) (finding that the appellant's competitive economic interests did not fall within the zone of protection that the agency was authorized to consider under chapter 373)

<sup>35</sup> See e.g. Fla. Stat. § 373.1502(2)(a).

<sup>36</sup> See Fla. Stat. § 373.414(1).

<sup>37</sup> See e.g. Fla. Stat. § 373.223(1)(c).

<sup>38</sup> See e.g. Fla. Stat. § 373.414(1).

undefined. Activities that the legislature seeks to discourage, such as those that would degrade Outstanding Florida Waters, must meet the highest burden and an applicant must provide reasonable assurance that the activity is clearly in the public interest.<sup>39</sup> Alternatively, activities that the legislature seeks to protect, such as existing legal uses of water, must meet the lowest burden of being deemed not contrary to the public interest.<sup>40</sup>

In addition to providing a hierarchical standard for assessing the public interest, the legislature has predetermined certain activities and projects, often those related to conservation efforts, to be in the public interest, taking all discretion away from agencies authorized under the statute. However, in some instances, the legislature has also determined it to be in the public interest to balance such conservation efforts against the adverse impacts those efforts may have on affected parties. Other activities and projects predetermined to be in the public interest are those that pertain to public safety, health, and welfare, such as those aimed at achieving state water quality standards.

This Section details the public interest test as used in Florida water law. Unlike Chapters 253 and 403, Chapter 373 does not provide a clear definition of “public interest”, and its implementing rules and guidance documents do little to clarify the term. This Section begins by describing the water-use permitting process laid out in Chapter 373 and the implementing rules and guidance documents used to determine when water-use permits are “in the public interest.” This Section then analyzes the case law and permits in the four water management districts which contain Outstanding Florida Springs<sup>41</sup>: Suwannee River Water Management District (SRWMD), St. Johns River Water Management District (SJRWMD), Southwest Florida Water Management District (SWFWMD), and Northwest Florida Water Management District (NFWMD). This Section ultimately concludes that the “consistent with the public interest” test is rarely, if ever, applied as the legislature and the statutory scheme likely intended.

#### *A. Water Resources, Chapter 373*

Florida water law revolves around Chapter 373.<sup>42</sup> Chapter 373 was first adopted in 1972 and was largely based off the Model Water Code.<sup>43</sup> Chapter 373, or the Florida Water Resources Act, was intended to promote “the conservation, replenishment, recapture, enhancement, development, and proper utilization of surface and groundwater” and “[t]o preserve natural resources, fish, and wildlife.”<sup>44</sup> Chapter 373 references “public interest” forty-six times but does not define the term.<sup>45</sup>

---

<sup>39</sup> Fla. Stat. § 373.414(1).

<sup>40</sup> Fla. Stat. § 373.223(4).

<sup>41</sup> Fla. Stat. § 373.802(4) (defining an “Outstanding Florida Spring” as “all historic first magnitude springs, including their associated spring runs, as determined by the department using the most recent Florida Geological Survey springs bulletin, and the following additional springs, including their associated spring runs : (a) De Leon Springs; (b) Peacock Springs; (c) Poe Springs; (d) Rock Springs; (e) Wekiwa Springs; and (f) Gemini Springs”).

<sup>42</sup> Florida Water Resources Act of 1972, §§ 373.012–.813.

<sup>43</sup> See *supra* Section II; Christine A. Klein, Mary Jane Angelo, & Richard Hamann, *Modernizing Water Law: The Example of Florida*, 61 FLA. L. REV. 403, 421 (2009).

<sup>44</sup> § 373.016(3)(b), (g).

<sup>45</sup> See § 373.019.



Section 373.223 establishes a three-prong test for obtaining a water-use permit:

[T]he applicant must establish that the proposed use of water: (a) Is a reasonable-beneficial use as defined in s. 373.019; (b) Will not interfere with any presently existing legal use of water; and (c) Is consistent with the public interest.<sup>46</sup>

The only term defined in § 373.223 is “reasonable-beneficial use,”<sup>47</sup> which is defined as “the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest.”<sup>48</sup> Part of the reason agencies and judges have trouble applying and defining the public interest test is the fact that the “consistent with the public interest” standard appears twice in the three-prong test used to evaluate water-use permits—in both the definition of the first prong and in the third prong itself. Because of the repeated language, the reasonable-beneficial and public interest prongs in § 373.223 are often conflated by both judges and the water management districts.<sup>49</sup>

Section 373.223 also allows the water management districts and FDEP to reserve water from permit holders where the board or department determines the reservation is needed for the “the protection of fish and wildlife or the public health and safety.”<sup>50</sup> The districts have used this authority to mandate that proposed uses of certain water bodies are not in the public interest.<sup>51</sup> In addition, § 373.223 certifies that “alternative water supply project[s] as described in the regional water supply plan” where the applicant “provides reasonable assurances of the applicant’s capability to design, construct, operate, and maintain the project” are presumed to be in the public interest under § 373.223(1)(c).<sup>52</sup>

#### *B. Water Management District Rules*

FDEP and the water management districts are tasked with issuing rules to create a permitting scheme that complies with § 373.223.<sup>53</sup> FDEP began by issuing Rule 62-40, which is applicable to all water management districts. Most of the rules developed by the water management districts mirror the language of 62-40.401.<sup>54</sup> For example, rule 40[A, B, C, and D]-2.301 details the condition for issuance of water-use permits<sup>55</sup> and include FDEP’s factors for applying the reasonable-beneficial test.<sup>56</sup> None of the rules, including 62-40, define public interest. However, all the rules promulgated by the water management districts incorporate the

---

<sup>46</sup> § 373.223(1).

<sup>47</sup> See § 373.019.

<sup>48</sup> § 373.019(16).

<sup>49</sup> See *infra* Section IV.D.

<sup>50</sup> § 373.223(4).

<sup>51</sup> See *infra* Section IV.B.

<sup>52</sup> § 373.223(5).

<sup>53</sup> Fla. Admin. Code Ann. r. 62.40.410 gives a factor list to determine if a water use is a reasonable-beneficial use. Each water management district creates its own rules which are easy to differentiate by looking to the assigned letter in the rule number. For water management district rules, 40A is Northwest, 40B is Suwannee, 40C is St. Johns, and 40D is Southwest.

<sup>54</sup> FDEP, 62-40.401.

<sup>55</sup> Fla. Admin. Code Ann. r. 40A-2.301; 40B-2.301; 40C-2.301; 40D-2.301.

<sup>56</sup> *Id.*

“Applicant Handbooks”<sup>57</sup> (with the included definitions of public interest) by reference. The handbook standards and definitions are explained further in the next section.

Several water management districts provide for reservations – or areas where water-use permits are never in the public interest. NFWFMD provides several reservations, including the main stem of the Apalachicola River and the Chipola River and Chipola Cutoff.<sup>58</sup> SJRWMD reserves from use surface water flow through Prairie Creek and the Camps Canal, both of which drain into Payne’s Prairie.<sup>59</sup> SWFWMD limits the amount of water that can be taken from Morris Bridge Sink and reserves from use the water in Lake Hancock.<sup>60</sup>

The most notable guidance on applying the public interest test can be found in NFWFMD’s rules. Rule 40A-2.802 provides that “[n]ew and expanded uses of the Floridan Aquifer System for golf course, recreation, or landscape irrigation, or other non-potable uses, are determined not to be consistent with the public interest and are prohibited.”<sup>61</sup> Exemptions are considered if the applicant provides additional information such as why another source isn’t feasible and whether other conservation measures are identified.<sup>62</sup> No other water management district provides the same guidance in their rules on how the public interest test should be applied.

### *C. Water Management District Handbooks*

To further clarify and implement § 373.223, and to provide water-use applicants with needed guidance, each water management district has created an “Applicant’s Handbook” modeled after the applicant handbooks governing environmental resource permits under § 373.4131.<sup>63</sup> Each of these handbooks handle the public interest test in § 373.223(1)(c) differently. All of the water management districts incorporate the handbooks by reference into their rules. Incorporation by reference is the “practice of codifying material published elsewhere by simply referring to it in the text of a regulation.”<sup>64</sup> The handbooks are thus binding on parties. Because the handbooks with their different standards are incorporated by reference into the rules, inconsistent results often occur when applying the public interest test even if the water management districts’ rules use the same language. Because the reasonable-beneficial and public interest tests are often conflated in permitting and case law, we provide background on how the handbooks handle each test.

---

<sup>57</sup> See *infra* Section III.C.

<sup>58</sup> Fla. Admin. Code Ann. r. 40A-2.223(5), (6).

<sup>59</sup> Fla. Admin. Code. Ann. r. 40C-2.302.

<sup>60</sup> Fla. Admin. Code. Ann. r. 40D-2.302.

<sup>61</sup> Fla. Admin. Code Ann. r. 40A-2.802(b).

<sup>62</sup> *Id.*

<sup>63</sup> § 373.4143(9).

<sup>64</sup> Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL’Y 131, 133 (2013).

## 1. Suwannee River Water Management District

SRWMD's Handbook defines "public interest" as "[b]road-based interests and concerns that are collectively shared by members of a community, or residents of the District or the State."<sup>65</sup> The definition for "reasonable-beneficial" mirrors the definition found in § 373.019.<sup>66</sup>

SRWMD's Handbook is unique in that it has a separate section for evaluation of water-use permits where the applicant is seeking water for beverage processing use. A beverage processing use, as defined in the Handbook, is the sealing of any drinkable liquids including bottled water, or other containers intended for human consumption.<sup>67</sup> The Handbook states that:

In determining whether a proposed beverage processing use is *reasonable-beneficial and consistent with the public interest*, the Governing Board will consider the following information:

- (a) Whether there is a need for the requested amount of water;
- (b) The location of the withdrawal;
- (c) The location of the beverage processing facility;
- (d) Plan to convey water from withdrawal facility to beverage processing facility;
- (e) A site plan for the beverage processing facility;
- (f) Existing land use and zoning designations;
- (g) A market analysis;
- (h) Schedule for completion of construction of the beverage processing facility;
- (i) Contractual obligation to provide water for beverage processing;
- (j) Other evidence of physical and financial ability to process the requested amount;  
and
- (k) Other documentation necessary to complete the application.<sup>68</sup>

While it is ambiguous, it is likely that this factor test is intended to be used for both the reasonable-beneficial and public interest prongs in § 373.223 because if the italicized language in the above quote was only referring to the public interest test found within the reasonable-beneficial use standard, the public interest language would be superfluous. The drafters of the Handbook appear to require that the reasonable-beneficial and public interest standards found in

---

<sup>65</sup> SRWMD Handbook, 1.1(44).

<sup>66</sup> SRWMD Handbook, 1.1(47).

<sup>67</sup> SRWMD Handbook, 1.1(13).

<sup>68</sup> SRWMD Handbook, 2.3.4.1 (emphasis added).

§ 373.223 be conflated in the context of beverage processing permits.<sup>69</sup> Further, this conflation is inconsistent with the Handbook definition of public interest because the above factor test only consider economic and business factors, not the “broad based interests and concerns that are collectively shared by members of a community, or residents of the District or the State.”<sup>70</sup>

Previous versions of the Handbook defined public interest more thoroughly than the current Handbook. Through our research on water-use permit applications<sup>71</sup> we found that two of the four substantive permit denials in SRWMD were on applications requesting water for aesthetics purposes, such as filling a pond on a golf course. These applications were denied because at the time they were considered, the use of water for aesthetic purposes was defined by the handbook as not being in the public interest.<sup>72</sup> This stipulation is not in the current handbook.

Overall, SRWMD’s Handbook gives little guidance on what it means for a water use to be consistent with the public interest outside of the beverage processing context. The public interest definition, both the general definition and the beverage processing definition, do not explicitly consider the impact on water resources or the environment.<sup>73</sup> In addition, the Handbook does not differentiate between the public interest test found in the reasonable-beneficial test prong and the public interest test found in the 373.223(1)(c).

## 2. St. Johns River Water Management District

SJRWMD’s Handbook defines public interest as “those rights and claims on behalf of people in general.”<sup>74</sup> The Handbook further states that “[i]n determining the public interest in water-use permitting decisions, the District will consider whether an existing or proposed use is beneficial or detrimental to the *overall collective well-being of the people* or to *the water resource in the area*, the District and the State.”<sup>75</sup>

The handbook definition of reasonable-beneficial use again mirrors the definition found in Chapter 373.<sup>76</sup> However, SJRWMD provides a robust list of requirements for determining whether a proposed water use is a reasonable-beneficial use.<sup>77</sup> The reasonable-beneficial requirements do include a focus on the impact of the permit on the water resource.

Similar to SRWMD’s Handbook, SJRWMD’s Handbook gives little guidance on the public interest test. Notably, SJRWMD’s Handbook also does not differentiate between the public interest test in § 373.223(1)(c) and the one found in the reasonable-beneficial definition in

---

<sup>69</sup> Sevem Springs Water Company v. Suwannee River Water Management District, DOAH Case No. 20-3518 (Warren Zwanka Deposition), [https://www.doah.state.fl.us/DocDoc/2020/003581/20003581\\_237\\_09242020\\_16302640\\_e.pdf](https://www.doah.state.fl.us/DocDoc/2020/003581/20003581_237_09242020_16302640_e.pdf).

<sup>70</sup> SRWMD Handbook, 1.1(47).

<sup>71</sup> See *infra* Part III.

<sup>72</sup> SRWMD Permit No. 2-095-3386-3; 20-095-67143-1.

<sup>73</sup> The impact on water resources or the environment could well be a broad-based concern shared by members of the community if in fact the District actually took its definition of “public interest” seriously.

<sup>74</sup> SJRWMD Handbook, 3.10.

<sup>75</sup> SJRWMD Handbook, 3.10 (emphasis added).

<sup>76</sup> SJRWMD Handbook, 1.1(n).

<sup>77</sup> SJRWMD Handbook, 2.3.

§ 373.019(16). However, unlike the other handbooks, SJRWMD's Handbook requires permit evaluators give great consideration to the best interests of the water resource.<sup>78</sup>

### 3. Southwest Florida Water Management District

Unlike the other districts, SWFWMD's handbook does not define the public interest and does not provide a detailed definition of reasonable-beneficial. The only indication of how the reasonable-beneficial test should be applied is found in a section setting restrictions on existing permit renewals or modifications in areas where the water resource is below minimum flows or levels in a Water Use Caution Area (WUCA).<sup>79</sup> The section states, "[w]hen evaluating the reasonable-beneficial use of the water, emphasis will be given to reasonable water need, water conservation and use of [alternative water supplies]."<sup>80</sup> However, the section also notes that the water resource being a part of a WUCA strategy cannot be a basis for denial "because the . . . Recovery Strategy taken as a whole is intended to achieve recovery to the established minimum flows and levels as soon as practicable."<sup>81</sup> A similar definition is also imposed on renewal permits for crop protection.<sup>82</sup> SWFWMD's Handbook prescribes specific rules for permits for golf courses but does not describe how water use on a golf course would affect the public interest or reasonable-beneficial analysis.<sup>83</sup> Overall, SWFWMD provides the thinnest definition of public interest and provides little background for reasonable-beneficial.

### 4. Northwest Florida Water Management District

In its handbook, NFWWMD does not define public interest and adopts the statutory definition of reasonable-beneficial use along with a list of requirements an applicant must demonstrate for a water use to be a reasonable-beneficial use.<sup>84</sup> This list includes many of the factors the legislature likely intended to be considered under both the reasonable-beneficial test and the public interest test.

Another important aspect of the NFWWMD Handbook is that, like the rules, it specifically categorizes some withdrawals as likely not being in the public interest. The Handbook states, "[t]he use of groundwater to augment surface waters during times of drought, normal climatic variability or for purely aesthetic purposes is generally not consistent with the public interest."<sup>85</sup> The Handbook doesn't say that these uses will never be in the public interest,

---

<sup>78</sup> SJRWMD Handbook, 3.10 (emphasis added).

<sup>79</sup> SWFWMD Handbook, 3.9.2.6.2.2.1.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> SWFWMD Handbook, 3.9.4.2.2. ("When evaluating the reasonable-beneficial use of the water, emphasis will be given to reasonable water need, water conservation, use of AWS, and use of alternative crop protection methods.")

<sup>83</sup> SWFWMD Handbook, 2.4.7.1.5.

<sup>84</sup> NFWWMD Handbook, 2.4 (Some of the factors include: "[i]s a quantity that is necessary for economic and efficient use; for a purpose and occurs in a manner that is both reasonable and consistent with the public interest; . . . Will not cause harm to the water resources of the area in any of the following ways: Will not cause harmful water quality impacts to the water source resulting from the withdrawal or diversion; Will not cause harmful water quality impacts from dewatering discharge to receiving waters . . . Will not cause harmful hydrologic alterations to natural systems, including wetlands or other surface waters; and Will not otherwise cause harmful hydrologic alterations to the water resources of the area; Is in accordance with any minimum flow or level and implementation strategy established . . .") (emphasis added)

<sup>85</sup> NFWWMD Handbook, 2.3.8.

just that “such a use would only rarely meet the conditions of issuance.”<sup>86</sup> Aesthetic uses include the supplementation of water for fountains, waterfalls, landscape lakes and ponds where such uses are “ornamental and decorative” such as a pond on a golf course.<sup>87</sup>

Arguably, NFWFMD has the most robust test for evaluating water-use permits even though the public interest is not defined, and the reasonable-beneficial and public interest prongs are likely conflated. The Handbook specifically states that water for aesthetic purposes is not within the public interest and defines reasonable-beneficial in a way that requires permit evaluators to consider the impact on the water resources. More than other districts, NFWFMD considers the best interests of the water resource.

\* \* \*

The different handling of the public interest tests in the different handbooks makes it clear why interpreting and applying the public interest and reasonable-beneficial tests has been difficult. The two tests are often conflated and mean very different things in each district. Further, some districts hardly define (or do not define at all) the public interest test, leaving courts and permit evaluators with little guidance as to how the public interest test should apply.

#### IV. APPLICATION OF THE PUBLIC INTEREST TEST

As illustrated in Section IV, for almost fifty years, a clear definition of public interest in Florida water law has been elusive. Typically, broad definitions in statutes and rules leads to robust definitions created through adjudications and cases. However, through an examination of both the case law and permits surrounding the public interest test in § 373.223(1)(c), we discovered the public interest is rarely, if ever, addressed by the water management districts or the courts.

##### A. Case Law

Case law also provides little guidance to determine how the public interest test should apply but it does suggest why the water management districts fail to define the public interest test. Notable cases and trends are discussed in turn below.

The Florida Department of Administrative Hearings (DOAH) has only defined the public interest in case law in the context of SJRWMD water-permit challenges. DOAH, applying SJRWMD standards, clarified that the public interest test in the reasonable-beneficial test is not the same as the public interest test in § 373.223(1)(c). DOAH held under Section 373.223(1)(c) that water management districts usually consider “the impact of the use on water resources.”<sup>88</sup> Further, Florida’s Fifth District Court of Appeal, in *Marion County v. Green* (applying SJRWMD standards), held that when evaluating the public interest test in § 373.223(1)(c), the districts traditionally consider “whether the use of water is efficient, whether there is a need for the water requested, and whether the use is for a legitimate purpose.”<sup>89</sup> DOAH also held, in a SJRWMD permit challenge, that economics and financial gain are not a part of the §

---

<sup>86</sup> NFWFMD Handbook, 2.3.8.

<sup>87</sup> NFWFMD Handbook, 2.3.8.

<sup>88</sup> *Marion Cty. v. Greene*, 5 So. 3d 775, 779 (Fla. Dist. Ct. App. 2009).

<sup>89</sup> *Id.*

373.223(1)(c) analysis.<sup>90</sup>In *Gardiner v. Sleepy Creek*, DOAH held that the definition of public interest in SJRWMD's handbook is limited to the reasonable-beneficial public interest test.<sup>91</sup> *Sleepy Creek* and *Green* are the only cases that extensively discuss the public interest test found in § 373.223(1)(c).

Water management districts do not have their own courts; all permit appeals are taken to DOAH.<sup>92</sup> Consequently, if DOAH issues an order interpreting a statute such as § 373.223 the holding is binding on all of the water management districts even if the challenge was brought in reference to a permit challenge from a specific district. Arguably in the above cases, DOAH's holding regarding the public interest test in § 373.223(1)(c) is binding on all the water management districts; however, the court phrased its holdings in a peculiar way. The opinion sounds like DOAH was reiterating how the water management districts *actually* interpret the public interest test, not how they *should* interpret the public interest test.<sup>93</sup> As such, the language is likely not binding on the other districts, but if it was, the water management districts and courts have completely failed to uphold the intent of § 373.223(1)(c).

Several cases out of SWFWMD provide insight into why water management districts may refuse to define the public interest. In the 1980's SWFWMD was subjected to several rules challenges where petitioners claimed the public interest definitions were arbitrary and capricious. An old version of 40D-2.301 stated:

Among other factors to be considered by the Board in determining whether a particular use is consistent with the public interest will be: [1] the maximum amount to be withdrawn of a single day; [2] the average amount to be withdrawn during a single week, during a typical growing (or irrigation) season, during an extreme cold season, during a year of extreme drought and during the term of the proposed permit; [3] the amount to be withdrawn in relationship to amounts being withdrawn from adjacent or nearby properties; [4] the proximity of withdrawal points to location of points of withdrawal by others; [5] the total amounts presently permitted from the entire basin, or other hydrologic unit; and [6] the change in storage that such withdrawal and use will cause.<sup>94</sup>

While the rule was upheld, a later case struck down another portion of the same rule that also tried to constrain permit evaluators' discretion. The rule that was struck down attempted to establish a presumption of compliance with the permit conditions if the withdrawal averaged less

---

<sup>90</sup> See *Marion Cnty. v. C. Ray Greene, III; Angus S. Hastings; and St. Johns River Water Mgmt. Dist.*, Case No. 06-2464 (Fla. DOAH Jan. 9, 2007; SJRWMD Mar. 23, 2007) (recommended order).

<sup>91</sup> See *St. Johns Riverkeeper; Florida Defenders of the Environment; Silver Springs Alliance; and Alice Gardiner v. Sleepy Creek Lands, LLC; and St. Johns River Water Management District*, Case No. 17-0119 (Fla. DOAH Nov. 17, 2017) (recommended order).

<sup>92</sup> See *Administrative Appeals*, PRO SE HANDBOOK: THE APPELLATE PRACTICE SECTION OF THE FLORIDA BAR, <http://prose.flabarappellate.org/chapter-15-administrative-appeals/>.

<sup>93</sup> *Marion Cty. v. Greene*, 5 So. 3d 775, 779 (Fla. Dist. Ct. App. 2009).

<sup>94</sup> *West Coast Regional Water Supply Authority, Petitioner, Pinellas County Intervenor, Southwest Florida Water Management District, Respondent.*, No. 80-1004RP, 1980 WL 142640, at \*3.

than 1,000 gallons per day.<sup>95</sup> Two other rules were invalidated by courts that set other restrictions on water withdrawals.<sup>96</sup> While not specific to the public interest test, these invalidations may have chilled water management districts from further constraining permit evaluators' discretion in the context of the public interest.

No other rules defining the public interest in Florida have been challenged, but the strict defining language shown above was dropped from the SWFWMD rules and handbooks we see today.<sup>97</sup> Perhaps these cases indicate the water management districts' frustrations with defining the public interest test. If they define public interest, the rules are subject to challenges, whereas if they leave the language broad, courts have been willing to leave the discretion with the water management districts. This conclusion is also supported by the fact that SJRWMD is the only water management district to provide a robust definition of the public interest, but it is also the only district that we found where the public interest determination was challenged.

### *B. Water-use Permitting*

A search of the permit databases for SRWMD, SJRWMD, NWWMD, and SWWMD confirms our hypothesis that the water management districts in their evaluation of water permit applications do not consider the public interest prong in Fla. Stat. § 372.223(1)(c). To test our hypothesis, we used each water management district's permitting portal to download all water-use permit applications decided between 10/05/2000 and 10/05/2020. We then read the Technical Staff Reports for all substantive denials available (including those older than 20 years) to see if any permits were denied for being inconsistent with the public interest under § 372.223(1)(c). Our findings<sup>98</sup> confirm our hypothesis: the public interest test is rarely, if ever, considered.

There are two kinds of permit denials. Administrative denials are generally due to incomplete applications or lack of response from applicants. Substantive denials those based on the merits of the application. In SJRWMD, 89.47% of permits were approved, 0.53% were administratively denied, and 0.04% were substantively denied. In SRWMD, 92.16% of permits were approved, 0.08% of permits were administratively denied, and 0.11% of permits were

---

<sup>95</sup> Charlotte County; Pinellas County; Environmental Confederation of Southwest Florida, Inc.; Desoto county; Hardee county; Polk county; GBS Groves, Inc., and Citrus Grower Associates, Inc., Petitioners, v. Southwest Florida Water Management District, No. 94-5742RP, 1997 WL 1071322, at \*21 ("In 1980, the District proposed rule revisions that (a) listed several factors that the District would consider in determining whether a proposed withdrawal would be 'in the public interest' and (b) established a rebuttable presumption that a proposed use of less than 1,000 gallons-per-acre-per-day would be consistent with the public interest.")

<sup>96</sup> Pinellas County v. Southwest Florida Water Management District, West Coast Regional Water Supply, No. 79-2325RX, 79-2392RX, 1980 WL 142922, at \*8 (invalidating rule that stated "issuance of a permit will be denied if the amount of water consumptively used will exceed the water crop of lands owned, leased, or otherwise controlled by the applicant"); West Coast Regional Water Supply Authority; Pinellas County v. Southwest Florida Water Management District; Pasco County; and Florida Citrus Mutual, No. 88-0693RX, 1988 WL 617756, at \*1 (invalidated rule stating "the withdrawal of water (b) Must not cause the level of the potentiometric surface under lands not owned, leased, or otherwise controlled by the applicant to be lowered more than five feet (c) Must not cause the level of the water table under lands not owned, leased, or otherwise controlled by the applicant to be lowered more than three feet (d) Must not cause the level of the surface of water in any lake or other impoundment to be lowered more than one foot unless the lake or impoundment is wholly owned, leased, or otherwise controlled by the applicant").

<sup>97</sup> See *supra* Section II.B, C.

<sup>98</sup> See Appendix A & B for the charts representing the results of our search.



substantively denied. In SWFWMD, 80.65% of permits were approved, 1.24% were administratively denied, and 0.001% were substantively denied. In NFWMD, 95.06% of permits were approved, 3.74% were administratively denied, and 0.095% were substantively denied. See Appendix A and B for the charts representing the results of our search.

Eighteen percent of permit applications assessed by SWFWMD were withdrawn during the period examined.<sup>99</sup> The other districts also had withdrawn permits, but in lesser percentages. There is a possibility that permits that were preliminarily denied were permanently withdrawn or withdrawn and refiled. For example, in the Lily Springs case in SRWMD, the bottling permit was denied, but the record comes up as withdrawn instead of a substantive denial.<sup>100</sup> More of these examples may exist. Regardless, it is clear that the overwhelming majority of permits in each district are approved and very few are denied.

Upon a deeper dive into the Technical Staff Reports, all of the substantive denials in SRWMD were due to a failure to satisfy 40B-2.101, or the rule governing the content of the permit applications. None of the denials referenced § 373.223(1)(c) and arguably these denials are not substantive denials. SJRWMD denials told a different story.

While SJRWMD only had four substantive denials, all of them considered the public interest test found in § 373.223(1)(a). Despite not addressing 373.223(1)(c), the TSRs gave us a glimpse as to how the public interest test might apply. Two of the four substantive denials were on applications requesting water for aesthetics purposes, such as filling a pond on a golf course. These applications were denied because the use of water for aesthetic purposes was not in the public interest.<sup>101</sup> However, as mentioned above, an old version of the applicant's handbook contained a rule that stated the pulling of water for solely aesthetic purposes was not in the public interest—a criterion since removed from the handbook. One of the other denials was because the water requested was not being used in an efficient way. The water was transferred from a well to a pond. The TSR stated that the use was not in the public interest because the water use was not efficient, and the site might result in a discharge of pollutants.<sup>102</sup> The last denial was due to the application's failure to "demonstrate that the use of ground water from the Floridan aquifer to augment the lakes would result in economic benefits to offsite properties."<sup>103</sup>

Out of more than 8,000 water-use permit applications assessed by SWFWMD during the period, 118 denials were issued. Ten of these denials were for failure to meet the criteria of Rule 40D-2.301, the rule which includes both the reasonable-beneficial and public interest tests. While these denials referenced Rule 40D-2.301, they were nevertheless procedural in nature, the issue being that the applicant failed to provide documentation that enabled an analysis of the Rule 40D-2.301 provisions. As such, no denials in the SWFWMD were issued because the applicant failed to show that the proposed use was in the public interest.

NFWMD denied 80 permit applications during the period, 78 of which were listed as administrative denials and two of which were listed as substantive denials. One of the

---

<sup>99</sup> See Appendix A.

<sup>100</sup> SRWMD Permit No. 2-041-220468-1.

<sup>101</sup> SRWMD Permit No. 2-095-3386-3; 20-095-67143-1.

<sup>102</sup> SRWMD Permit No. 20-069-68138-1.

<sup>103</sup> SRWMD, Permit No. 2-095-3276-9.

substantive denials was recommended due to lack of completeness, while the other did not include a TSR to show its basis for denial.

Overall, water management districts do not adequately consider the public interest test in permitting, nor in any other place we considered above. A table outlining where the public interest test in § 373.223(1)(c) is considered for each water management district can be found below.

Water Management District	Defined in § 373.223	Defined in Rules	Defined in Handbook	Defined in Case Law	Defined in Permits
SRWMD	No	No	Yes	No	No
SJRWMD	No	No	Yes	Yes	No
SWFWMD	No	No	No	No	No
NWFWMD	No	Partially	Partially	No	No

#### CONCLUSION AND RECOMMENDATIONS

The lack of guidance defining the public interest is troublesome. The broad definitions provided by some of the districts in their rules, handbooks, and case law are problematic and have led to the districts and courts giving the test short shrift or neglecting to apply the test at all. If the public interest test is applied, it is often conflated with the reasonable-beneficial use test which contravenes the legislature’s intent to have the districts consider three distinct requirements when evaluating permits.

As the test stands right now, it is open to challenges on several fronts. First, one could file suit against the state and argue that the legislature’s lack of definition for public interest in § 373.223 is a violation of the nondelegation clause. The nondelegation clause is rooted in the separation of powers doctrine and states that a legislative branch may not delegate its legislative power to another branch.<sup>104</sup> The nondelegation doctrine does not prevent a legislature from seeking help from another branch, as long as the legislature lays out an “intelligible principle.”<sup>105</sup> Recently, other state courts have determined that broad words in a statute, such as “emergency,” can violate the nondelegation doctrine.<sup>106</sup> The phrase “public interest” is similar to “emergency” in that it could include many situations and factors. Unlike the other Florida environmental statutes, § 373.223 does not give any indication as to what factors the legislature intended the districts to consider when evaluating water-use permits, thus one could argue the lack of definition and intelligible principle for the public interest test violates the nondelegation doctrine.

<sup>104</sup> *Touby v. United States*, 500 U.S. 160, 165 (1991).

<sup>105</sup> *Id.*

<sup>106</sup> *In re Certified Questions From United States Dist. Court, W. Dist. of Michigan, S. Div.*, No. 161492, 2020 WL 5877599, at \*8 (Mich. Oct. 2, 2020) (emphasis added).

Second, one could file suit against the districts in DOAH and could argue that the districts, by failing to define the public interest test in regulations and handbooks and by failing to apply the public interest test in § 373.223(1)(c), are not adhering to their legislative mandate to consider the three distinct requirements in § 373.223. The legislature clearly wrote a three prong test to evaluate permits and the districts, by failing to consider a factor the legislature intended them to consider, are acting arbitrarily and capriciously.<sup>107</sup> A clear definition of the public interest could prevent these challenges.

Perhaps the most direct way to pressure the districts into clarifying the public interest would be through a petition to initiate rulemaking.<sup>108</sup> Per chapter 120, section 54 of Florida Statutes, “any person regulated by an agency or having substantial interest in an agency rule may petition an agency to adopt, amend, or repeal a rule.”<sup>109</sup> The petition must specify the proposed rule and action requested.<sup>110</sup> The agency, not later than thirty days following the filing of the petition, must either (1) initiate rulemaking proceedings, (2) otherwise comply with the requested action, or (3) deny the petition with a written statement of its reasons for the denial.<sup>111</sup> Thus, while a petition to initiate rulemaking is not guaranteed to result in a clarifying rule, it would require the districts to publish a statement in the Florida Administrative Register explaining its reasoning.<sup>112</sup> This statement would then be forwarded to the legislative committees with primary oversight jurisdiction of the agency. These committees may hold hearings directed to the statement and could recommend introducing legislation to make the rule a statutory standard or to limit the authority of the agency.<sup>113</sup> If the agencies did resolve to initiate rulemaking, it is likely that any proposed rule that clarifies or defines the public interest, due to its impact on regulatory costs, would end up in front of the legislature for ratification.<sup>114</sup> While this ratification process has been routinely carried out with dispatch since its adoption in 2010, it would subject any proposed public interest test to the potentially contentious political processes of a legislative session.<sup>115</sup>

Regardless of who takes up the mantle, whether the Districts, FDEP, or the legislature, an attempt should be made to clarify what the public interest means in § 373.223(1)(c). Scholars have identified five common approaches used to define the public interest, (1) process, (2) majority opinion, (3) utilitarian, (4) common interest, and (5) shared value.<sup>116</sup> The *process* approach does not take a position on the outcomes of decisions, but rather focuses on the procedures that lead to those decisions and determines the outcomes to be in the public interest

---

<sup>107</sup> See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2867, 77 L. Ed. 2d 443 (1983).

<sup>108</sup> Fla. Stat. § 120.54(7).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> § 120.541.

<sup>115</sup> <https://www.floridabar.org/the-florida-bar-journal/legislative-rule-ratification-lessons-from-the-first-four-years/>

<sup>116</sup> See Leslie A. Pal and Judith Maxwell, *Assessing the Public Interest in the 21st Century: A Framework* (2004); Mark Squillance, *Restoring the Public Interest in Western Water Law*, 2020 Utah L. Rev 627, 632–33.

so long as the appropriate procedure has been followed.<sup>117</sup> This approach focuses on things like “due process, transparency, fairness, . . . adequate distribution of information to the public, equitable representation of different interests, funding for intervener groups, and so on.”<sup>118</sup>

The *majority opinion* and *utilitarian* approaches require an analysis of people’s actual preferences and focus on achieving the greatest possible satisfaction through outcomes.<sup>119</sup> The *common interest* and *shared value* approaches focus on interests shared by everyone, whether or not they are aware they have these interests or values in common.<sup>120</sup> These five approaches are by no means mutually exclusive, and in fact are often used simultaneously or sequentially in determining the public interest.<sup>121</sup> As such, they can serve a useful guide for the development of an enumerated public interest test for the consumptive use of water in Florida.

With regards to the process for defining the public interest, Chapter 120, Section 54 of Florida Statutes provides a transparent and participatory procedure by which agencies must promulgate rules, which would address many of the concerns of the *process* approach discussed above.<sup>122</sup> This rulemaking process makes the agencies, whether the Water Management Districts or FDEP, the optimal place to define the public interest. Beyond the process to be used, the agencies must also determine the substance of the public interest test. Courts have done some of the work in defining, or constraining, the substance of a potential public interest test, ruling that the Districts consider “the impact of the use on water resources”<sup>123</sup> and “whether the use of water is efficient, whether there is a need for the water requested, and whether the use is for a legitimate purpose.”<sup>124</sup> However, the court in *Marion County* made no reference to a rule or statute that supported this determination, and it can be argued that the court was merely interpreting the historical conduct of the District, rather than a rule to which all the districts must adhere. As such, the districts should not feel constrained to limiting a defined public interest test to the parameters defined above.

Instead, the districts should draw upon public interest tests that exist elsewhere in Florida Statutes, as well as those used in other states for regulating water resources, and should seek to develop a uniform factor test that reduces subjectivity and discretion. Such an endeavor should lead to the development of a public interest test that not only considers the impact on water resources, but also on the health, safety, and general welfare of the public. Further, per Chapter 373, sustainability is a primary policy objective for management of water resources in Florida.<sup>125</sup> Thus, any public interest test should seek to meet the present reasonable-beneficial needs without compromising the ability of future generations to do the same. As such, any public interest test

---

<sup>117</sup> *Id.* at 4.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 6.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Fla. Stat., § 120.54.

<sup>123</sup> *Marion Cty. v. Greene*, 5 So. 3d 775, 779 (Fla. Dist. Ct. App. 2009).

<sup>124</sup> *Id.*

<sup>125</sup> Fla. Stat. § 373.016(2), (3)(b)

should weigh heavily in favor of conservation, replenishment, recapture, enhancement, development, and proper utilization of those resources.

An effective public interest test should, like the factor test in Chapter 373, Section 414, allow for a clear articulation of the interests being weighed such that the districts, applicants, and the general public are apprised of how the public interest impacts present and future water rights.<sup>126</sup> The test should seek to minimize or eliminate the ambiguity of the current test which currently affords political and legal cover to the agencies that neglect to apply it.<sup>127</sup> In addition to the sustainability goals discussed above, the test should weigh in favor of communal, not private, interests. Finally, the test should emphasize the State's authority to control and regulate water rights in favor of the public interest so that the districts might actually do so. Because crafting an effective public interest test will require tailoring of requirements to specific jurisdictions' needs, we offer a set of guiding principles, many of which mirror the Declaration of Policy in the Model Water Code, to begin the process.

A public interest test should be developed through a transparent and participatory process and include several factors to be weighed with an emphasis on sustainability. Factors considered should include:

- Cumulative impacts of the water use, taken together with all existing appropriations and uses.
- Protection and procreation of fish and wildlife.
- Availability of sufficient water for all existing and future reasonable-beneficial uses for the long-term sustainability of our natural systems.
- Preservation and enhancement of waters of the state for navigation, public recreation, municipal uses, and public water supply.
- Maintenance of proper ecological balance and scenic beauty.
- Shared interests of the members of the surrounding community.

**Formatted:** Indent: First line: 0"

**Deleted:** Our suggested definition below represents an effort to achieve these aims. However, as discussed above, a public interest test for consumptive uses of water in Florida should be elucidated by members of the public through the transparent and participatory rulemaking process. ¶

¶ *In determining whether a proposed use of water is consistent with the public interest, the district shall consider the cumulative impacts of the use, taken together with all existing appropriations and uses, and shall determine.* ¶

¶ *Whether the proposed use will adversely affect the availability of sufficient water for all existing and future reasonable-beneficial uses for the long-term sustainability of our natural systems;* ¶

¶ *Whether the proposed use, taken together with all other activities associated with the proposed use, will adversely affect the quality of water for all existing and future reasonable-beneficial uses for the long-term sustainability of our natural systems;* ¶

¶ *Whether the proposed use will adversely affect current beneficial uses being made of the unappropriated water in the basin of origin;* ¶

¶ *Whether the proposed use will adversely affect the public health, safety, or general welfare or property of others;* ¶

¶ *Whether the use is to augment surface waters during times of drought, normal climatic variability, or for purely aesthetic purposes. The use of groundwater to augment surface waters during times of drought, normal climatic variability or for purely aesthetic purposes is generally not consistent with the public interest;* ¶

¶ *The extent to which the proposed use serves the shared interests of the members of the surrounding community;* ¶

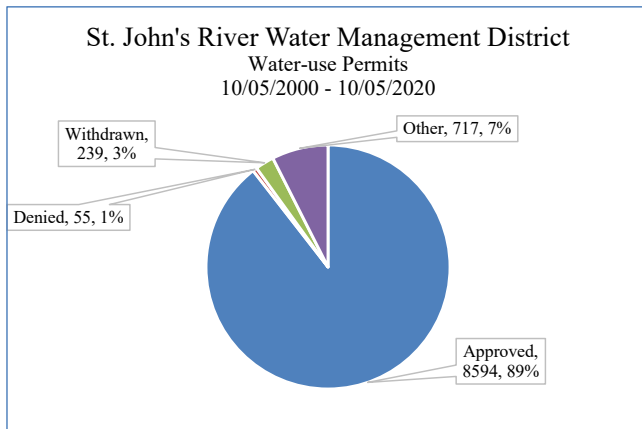
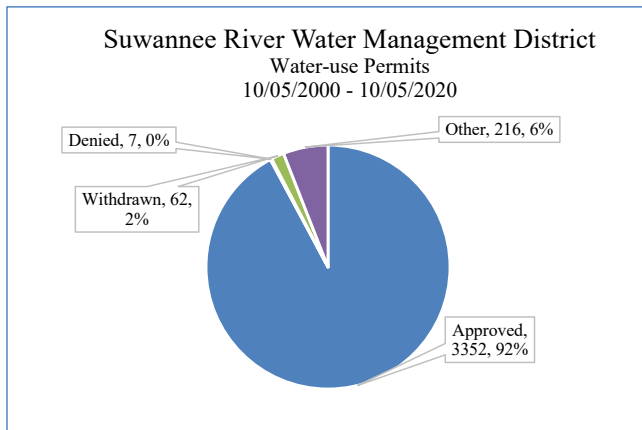
¶ *To the extent that the District receives public comment in opposition to a proposed consumptive use permit, the District shall publish a statement of its reasons for issuance of the permit and shall make said statement available along with all other public application documents.* ¶

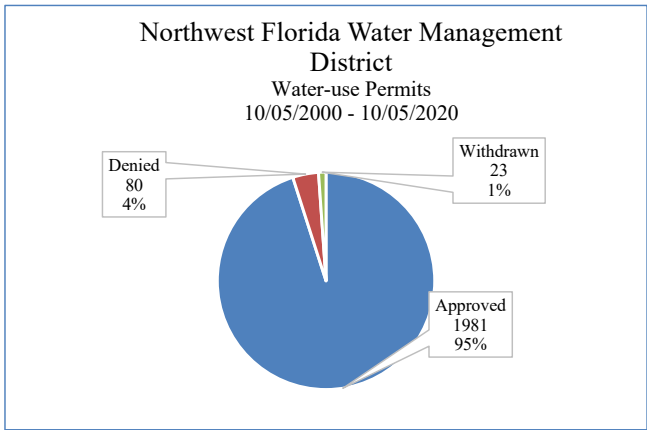
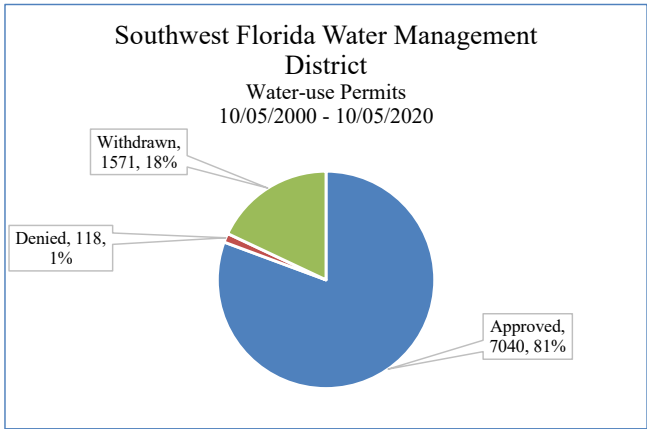
<sup>126</sup> Squillace supra note 117 at 676.

<sup>127</sup> *Id.* at 683.

APPENDIX A

These figures showcase the relative numbers of approvals, denials, and withdrawals among water-use permits in each district. The other categories in the SJRWMD and SRWMD include cases where no permit was required or cases where permits went to DOAH, were administratively closed, fell under a rule exemption, or were referred to another agency.





APPENDIX B

This Appendix displays the distribution of denials between substantive and administrative denials in the water management districts.

