



*Florida Department of
Environmental Protection*



LEWIS, LONGMAN & WALKER, P.A. P.A.
ATTORNEYS AT LAW

Florida's State Lands Authorizations

Andrew J. Baumann, Esq.

Kelly Samek, Senior Assistant General Counsel



Sovereign Submerged Lands

- Lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines.
 - [Article X, s. 11, Florida Constitution.](#)
- The Board of Trustees holds title to sovereign submerged lands and uplands.
- Florida granted title to sovereign lands at the time of admission to the Union on March 3, 1845, subject to the Public Trust Doctrine, which protects certain traditional uses (boating, fishing, swimming).
- Uplands were obtained by a variety of means and are not subject to the Public Trust Doctrine, which means there is less restriction on regulation.





Peculiar Statute of Sovereign Submerged Lands

- Sovereign Submerged Lands:
 - Intended for public use
- Not intended for:
 - Sale,
 - Conversion, or
 - Reduction into several or individual ownership





Conveyances of Sovereign Submerged Lands

- Sovereign Submerged Lands cannot be conveyed without:
 - Clear intent, and
 - Authority
- Conveyances:
 - Must retain public use of the water.
 - Will be closely scrutinized by the courts.
 - Any doubt or ambiguity will be resolved against the grantee and in favor of the retention of the land's sovereign character.





Legislative Conveyances

- Since becoming a state, sovereign lands have been subject to a series of large-scale legislative conveyances.
 - Used state owned lands to finance railways.
- Florida's commerce, however, was constrained by geography and terrain.
 - Commerce was water dependant.
 - Wharfs, piers, harbors, and ports were needed to get goods into most areas.





Riparian Rights Act of 1856

- Passed by legislature to develop water-based infrastructure.
- Granted riparian owner full right to:
 - “Wharf out”, and
 - “Fill up the shore”
- If the riparian owner developed his waterfront:
 - *Riparian Act Automatically conveyed title to those filled or improved lands.*
- The Riparian Rights Act was repealed in 1921.





The Butler Act

- Passed in 1921 to replace the Riparian Rights Act.
- Owners who held title to high water mark were riparian owners.
 - Applied to all bodies of water, including non-tidal influenced water bodies.
- Gave title to owner who permanently improved the submerged lands abutting his property.
 - “Permanent Improvement” means
 - Filling area
 - Building docks and wharfs





Butler Act Continued:

- 1951
 - Butler Act repealed in most counties
- 1957
 - Some counties, including Palm Beach County, repealed the Act
- Butler Act Disclaimers
 - Are available from DEP upon demonstration that a permanent improvement predates the Act's repeal





The Public Trust Doctrine

- The Public Trust Doctrine:
 - Codified in Florida's Constitution as well as Chapter 253 of Florida's Statutes.
 - Dictates that lands beneath navigable waters be held in trust for the people to protect traditional public uses.
- Traditional public uses include:
 - Boating
 - Fishing
 - Swimming





Administration of the Public Trust Doctrine

- Board of Trustees of the Internal Improvement Trust Fund (i.e., the Governor and Cabinet)
 - Empowered by the Florida Constitution and the Legislature to hold title to and administer state lands and sovereign lands.
- Department of Environmental Protection
 - Serves as staff to the Board of Trustees.
 - Includes the Division of State Lands, Division of Recreation and Parks, Office of Greenways and Trails, and the Office of Coastal and Aquatic Managed Areas.





Public Trust Doctrine Case Law

- *Bucki v. Cone*, 6 So. 160 (Fla. 1889).
 - Navigability, except when determined by principles of common law and by statute, is a question of fact. The activity of floating logs to market was determined sufficient to establish navigability of a river.
- *Sullivan v. Richardson*, 14 So. 692 (Fla. 1894).
 - During the Spanish colonial era, only the Spanish sovereign (or an expressly authorized agent) could convey public trust lands, and the intent to convey them must have been expressly stated.
- *State ex rel. Ellis v. Gerbing*, 47 So. 353 (Fla. 1908).
 - Sovereign lands cannot be converted to private lands without some authority. Therefore, deeds issued to swamp and overflow lands did not convey the land beneath navigable waters.





Public Trust Doctrine Case Law Continued:

- *Broward v. Mabry*, 50 So. 826 (Fla. 1909).
 - Lake Jackson was determined navigable and therefore subject to sovereignty despite its habit to periodically drain through the openings of sinkholes in the lake bottom, leaving significant portions of the lakebed dry.
- *Clement v. Watson*, 58 So. 25 (Fla. 1912).
 - Determined that waters are not considered navigable merely because they are tidally influenced; therefore, such areas as mud flats, shallow inlets, and coves-- provided they do not immediately border navigable waters and are not ordinarily useful for navigation-- are not sovereign lands.





Public Trust Doctrine Case Law Continued:

- *Martin v. Busch*, 112 So. 274 (Fla. 1927).
 - The Swamp and Overflowed Land Grant Act of Congress of September 28, 1850 did not convey into private ownership the shores and lands beneath navigable waters beyond the ordinary high water line just because they may happen to be swamp or overflowed lands under the definition of the Act. Where an authority may reclaim land through drainage, the doctrine of reliction--which would allow a riparian owner to gain title to those reclaimed lands – does not apply. Meander lines are presumptively, though rebuttably, considered the boundary between sovereign lands and lands subject to private ownership.





Public Trust Doctrine Case Law Continued:

- *Odom v. Deltona Corporation*, 341 So. 2d 977 (Fla. 1977).
 - If meandered by government surveyors, water bodies are presumed to be navigable. Conversely, nonmeandered waterbodies are subject to a rebuttable presumption that they are non-navigable. The Marketable Record Title Act effective to extinguish claims of the Board of Trustees to sovereign.
- *Coastal Petroleum v. American Cyanamid*, 492 So.2d 339 (Fla. 1986).
 - Followed *Gerbing* in recognizing the principle that sovereign lands can only be conveyed expressly. Board of Trustees' deeds prior to 1919 could not convey sovereign lands as that authority only rested with the Legislature. Subsequent to 1919, Board of Trustees' deeds must state they are conveying sovereign lands if the intent is to do so.





The Public Interest Tests

- Public trust tests are used to evaluate private uses of sovereign lands.
- Proprietary Rules define public interest as:
 - Demonstrable environmental, social, and economic benefits accruing to the public at large because of a proposed action in such manner that exceeds all demonstrable environmental, social, and economic costs.
- Florida Law recognizes two public interest standards:
 - Not contrary to the public interest
 - Is the default standard in the proprietary realm
 - In the public interest
 - Becomes effective in proprietary realm where a project falls within the boundaries of a state Aquatic Preserve





Forms of Authorization

- Consent by Rule, (Rule 18-21.005(b), F.A.C.)
 - Activity is essentially exempt from obtaining proprietary authorization includes:
 - Minimal activities exempt from regulatory permitting under 403.813(2) such as:
 - Installation and repair of mooring pilings
 - Has 500 square feet or less of over-water surface area for a dock located in area designated as Outstanding Florida Waters or 1,000 square feet of over-water surface area for a dock located in an area which is not designated as Outstanding Florida Waters
 - Private single family docking facilities or small multi-family docks with three or less slips may qualify.
 - Must be outside of an Aquatic Preserve





Forms of Authorization Continued:

- Letter of Consent, (Rule 18-21.005(c), F.A.C.)
 - Written authorization granted to minor activities including:
 - Construction of minimum sized private single or multi-family docks
 - Private access channels
 - Activities exempt under s. 403.813, F.S.
 - Construction repair or replacement of certain
 - Bulkheads
 - Groins
 - Breakwaters
 - Jetties
 - Beach restoration
 - Artificial reefs
 - Some maintenance dredging





Forms of Authorization Continued:

- Sovereign Submerged Lands Lease, (Rule 18-21.005(d), F.A.C.)
 - Lease from the State of Florida is needed:
 - For commercial “revenue generating activities”
 - May be required for “non-revenue gathering activities” which because of size or impact do not qualify for a Letter of Consent.
- Aquaculture Leases, (Rule 18-21.005(e), F.A.C.)
 - Required for aquaculture activities occurring on submerged lands.





Forms of Authorization Continued:

- Easements, (Rule 18-21.005(f), F.A.C.)
 - Required for “right-of-way” type projects
 - Submerged utility projects
 - Submerged gas pipelines
 - Public navigation projects (other than public channels)
- Use Agreements, (Rule 18-21.005(g), F.A.C.)
 - Required for temporary activities such as geophysical testing.





General Proprietary Policies

- Activities on sovereign submerged lands must be “not contrary to public interest.”
- Sale of sovereign submerged lands must be “in the public interest.”
- All forms of consent approving activities must contain:
 - Terms
 - Conditions
 - Restrictions





General Proprietary Policies Continued:

- Activities on sovereign submerged lands are limited to water dependant activities.
 - Unless determined that it is in the public interest to grant an exception.
- Residential structures are prohibited.
- The use of sovereign submerged lands to provide road access to islands where none previously existed is prohibited.
- The use of sovereign submerged lands to provide road or utility access to unbridged, undeveloped coastal barrier island is prohibited.





General Resource Management Policies, Rule 18-21.004(2), F.A.C.

- Sovereign Submerged lands are considered single use lands.
 - **Managed primarily for:**
 - Maintenance of natural conditions
 - Propagation of fish and wildlife
 - Traditional recreational uses
- Activities resulting in significant adverse impacts to sovereign submerged lands will not be approved unless:
 - It is shown that there is no reasonable alternative.
 - Adequate mitigation has occurred.





General Resource Management Policies Continued:

- Biological assessment performed by DEP or other agency may be considered by Board of Trustees.
- All activities on sovereign submerged lands must be designed to minimize or eliminate the cutting, removal, or destruction of wetland vegetation.
- Reclamation activities will only be approved upon demonstration of erosion or avulsion.
- Vertical seawall construction is discouraged.
 - *Alternative forms of shoreline stabilization are to be used to the maximum extent possible.*





General Resource Management Policies Continued:

- Dredging is generally discouraged and approved only when shown to be:
 - The minimum amount necessary to accomplish a stated purpose.
 - Designed to minimize the need for maintenance dredging.
- Dredging to provide upland fill is prohibited unless:
 - No other reasonable source of materials is available, or
 - The activity is shown to be in the public interest.





Riparian Rights

- General Rights
 - Rights shared by the general public including the rights to:
 - Navigation
 - Commerce
 - Fishing
 - Bathing
 - Boating
- Special Rights
 - Right of access from the water to the riparian land including:
 - Right to wharf out to navigability
 - Right to take title to the property by accretion and reliction
 - Right to unobstructed view over the adjoining waters





Right to View and Right to Ingress and Egress

- *Hayes v. Bowman*
 - “An upland owner must in all cases be permitted a direct, unobstructed view of the channel and as well a direct, unobstructed means of ingress and egress over the foreshore and tidal waters to the channel.”
- *Freed v. Miami Pier Corp.*
 - Right to ingress and egress includes the right to erect wharves, piers, or docks in order to facilitate access to and the use of navigable waters.





Right to Accretion and Reliction

- Riparian owners have the common law right to receive accretions to their lands so long as the deposits were not caused by the riparian owner
- *Board of Trustees of the Internal Trust Fund v. Mederia Beach nominee, Inc.*
 - Recognizing the mean high water line as the dividing line rule between upland ownership and state sovereign land in the context of accretion and reliction stated that “[a]ny other rule would leave riparian owners continually in danger of losing access to water which is often the most valuable part of their property.”
- *Save our Beaches*
 - First District Court of Appeals found landowners are entitled to accretion if caused by the state.
- *Ford v. Turner*
 - Unless excepted, the title to accretion or reliction to soil passes with the title to the land to which accretions are appurtenant.





Determining Riparian Rights

- The Circuit Court
 - Has exclusive authority to determine the location and extent of an upland owner's riparian rights under s. 26.012, F.S.
- Rule 18-21.004(3), F.A.C. includes general criteria for issuance of an authorization to use submerged lands.
 - Cannot interfere with traditional, common law riparian rights of adjacent upland owners.
 - Structures such as docks and mooring pilings must be set back at least 25 feet from the nearest riparian line.

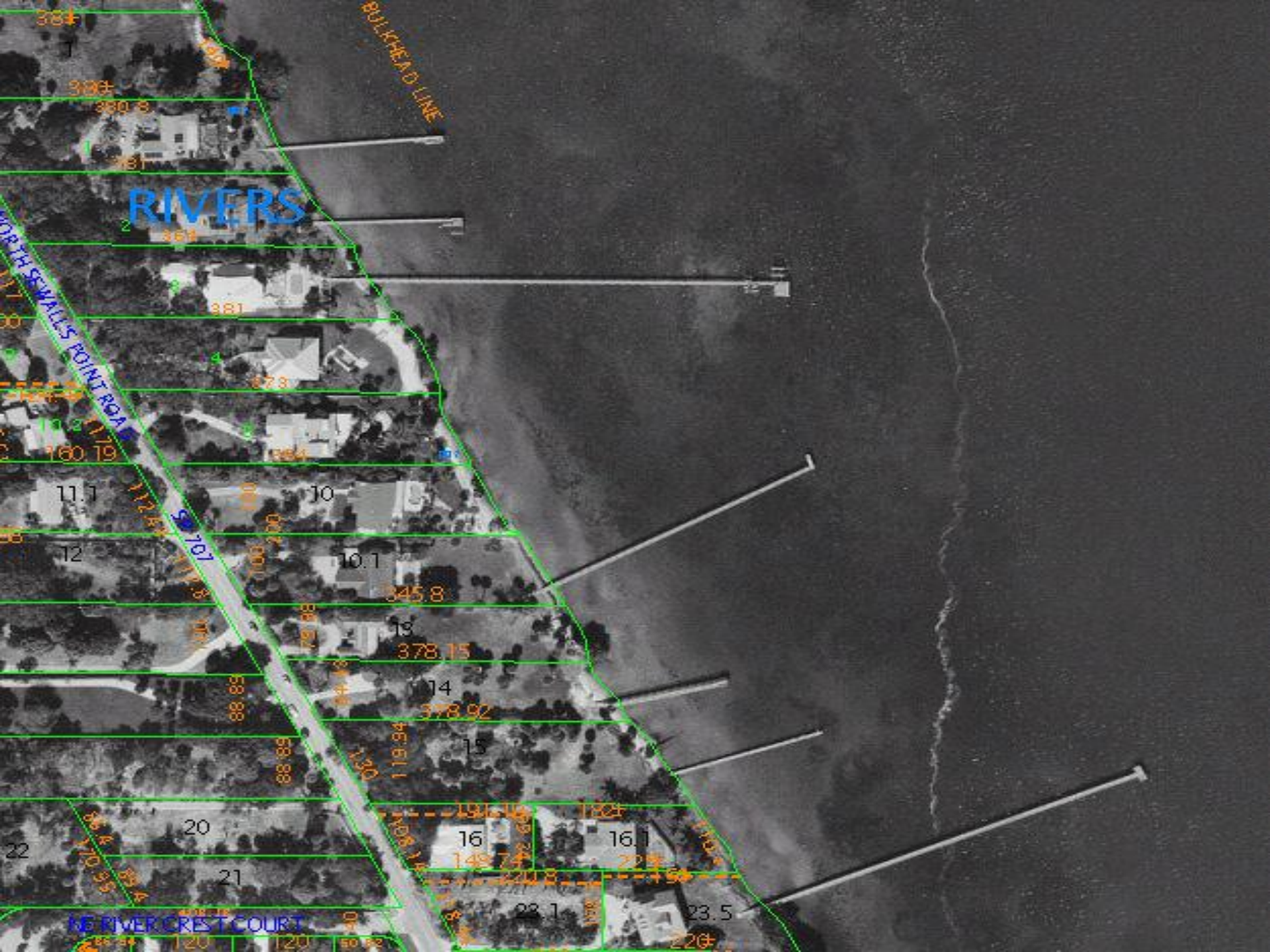




Departments Review of Riparian Rights:

- Department must determine if criteria met without determining or adjudicating a party's riparian rights.
- Application should be accompanied by some depiction of the proposed riparian lines of the adjacent property.
- Review confined to:
 - Whether depiction of the location and extent of riparian rights such as performed by a licensed surveyor, is professionally acceptable.
- In the event of a conflict
 - Department will refer parties to circuit court.







Aquatic Preserves

- More stringent criteria from chapter 18-20 control
 - More rigorous design criteria
 - Typically demand reduction in overall project scale and impact
 - No dock shall extend waterward of the mean high or ordinary high water line more than 500 feet or 20 percent of the width of the water body at that particular location, whichever is less.
 - Docking facilities shall be designed to ensure that vessel use will not cause harm to site specific resources.
 - Any wood planking used to construct the walkway surface of a facility shall be no more than eight inches wide and spaced no less than one-half inch apart after shrinkage. Walkway surfaces constructed of material other than wood shall be designed to provide light penetration which meets or exceeds the light penetration provided by wood
 - Must be elevated a minimum of five feet above mean or ordinary high water



Florida's Coastal and Aquatic Managed Areas





Aquatic Preserves Continued:

- Project must be shown to be “in the public interest.”
 - Must balance the costs and Benefits of the project
- Costs:
 1. Reduced/degraded water quality;
 2. Reduced/degraded natural habitat and function;
 3. Destruction, harm or harassment of endangered or threatened species and habitat;
 4. Preemption of public use;
 5. Increasing navigational hazards and congestion;
 6. Reduced/degraded aesthetics; and
 7. Adverse cumulative impacts.





Aquatic Preserves Continued:

- Examples of Specific Benefits
 1. Donation of land, conservation easements, restrictive covenants or other title interests in or contiguous to the aquatic preserve which will protect or enhance the aquatic preserve;
 2. Providing access or facilities for public land management activities;
 3. Providing public access easements;
 - beach access
 - boat ramps
 4. Restoration/enhancement of altered habitat or natural functions,





Benefits to Aquatic Preserves Continued:

5. Improving fishery habitat;
6. Providing sewage pumpout facilities;
7. Improvements to water quality;
 - Removal of toxic sediment
 - Increased flushing and circulation
8. Providing upland dry storage as an alternative to wet slip; and
9. Marking navigation channels to avoid disruption of shallow water habitats.





Biscayne Bay Aquatic Preserve

- Created by statute
- Has separate, more rigorous criteria
- Preemptive activities subject to showing of extreme hardship



LEWIS, LONGMAN & WALKER, P.A.
ATTORNEYS AT LAW



Regulatory Controls

- Environmental Resource Permit (ERP)
 - Chapter 40A through E, F.A.C. and Chapter 373, F.S.
- Consideration of the criteria included in the public interest test required as well as consideration of
 - adverse impacts to:
 - Water quality
 - Flooding
 - Wildlife
 - Requirements relating to the avoidance and minimization of impacts and mitigation.





Additional Criteria for Issuing an ERP

- South Florida Water Management District must balance whether the activity will:
 1. Adversely affect the public health, safety or welfare.
 2. Adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitat.
 3. Adversely affect navigation or the flow of water or cause harmful erosion or shoaling.





Additional Criteria for Issuing an ERP Continued:

- South Florida Water Management District must balance whether the activity will:
 4. Adversely affect fishing or recreational values or marine productivity.
 5. Be temporary or permanent in nature.
 6. Adversely affect or will enhance significant historical and archaeological resources under the provisions of Section 267.061.





Additional Criteria for Issuing an ERP Continued:

- South Florida Water Management District must balance whether:
 7. *The current condition and relative value of functions being performed by areas affected by the proposed activity:*
 - Will not cause unacceptable cumulative impacts on wetlands and other surface waters.
 - Located in, adjacent to, or in close proximity to Class II waters or located Class II waters or Class III waters.
 - Which constitute vertical seawalls in estuaries or lagoons, will comply with additional criteria provided by 4.2.6 of the Basis of Review.
- While this public interest test is distinct from the public interest review in 18-20 and 18-21, in practice there will be overlap in documentation and review.





The Federal Consistency Process

- “Federal Consistency”
 - Allows the state of Florida to Review federal actions for consistency with the state coastal management program
- Includes federal permitting decisions, such as the Army Corps’ Section 404 Clean Water Act Permit
- Florida’s Program is comprised of a network of 23 statutes including:
 - Chapter 253 (State Lands)
 - Chapter 258 (in part concerning Aquatic Preserves)
 - Chapter 373 (Water Resources)
- An agency with authority for carrying out or administering any of the 23 statutes has the authority to comment or object for the purposes of federal consistency review.





Federal Consistency and the ERP Process

- The ERP process fully embeds consistency review to avoid duplicative process
 - **See 373.428, Florida Statutes:** “When an activity regulated under this part is subject to federal consistency review under s. 380.23, the final agency action on a permit application submitted under this part shall constitute the state's determination as to whether the activity is consistent with the federally approved Florida Coastal Management Program. Agencies with authority to review and comment on such activity pursuant to the Florida Coastal Management Program shall review such activity for consistency with only those statutes and rules incorporated into the Florida Coastal Management Program and implemented by that agency. An agency which submits a determination of inconsistency to the permitting agency shall be an indispensable party to any administrative or judicial proceeding in which such determination is an issue; shall be responsible for defending its determination in such proceedings; and shall be liable for any damages, costs, and attorneys' fees should any be awarded in an appropriate action as a consequence of such determination.”





Why Do I, an Applicant or Applicant's Representative, Care?

- An objection from an agency can stop your project.
- Best practice is to take objections seriously and work to resolve them before the decision is due!
 - Most objections can and have been resolved before denial results.
- The Florida Coastal Management Program staff can help the parties communicate, so don't hesitate to ask for assistance.





For More Information:

- For more information regarding the Federal Consistency Process visit
 - <http://www.dep.state.fl.us/cmp/federal/index.htm>



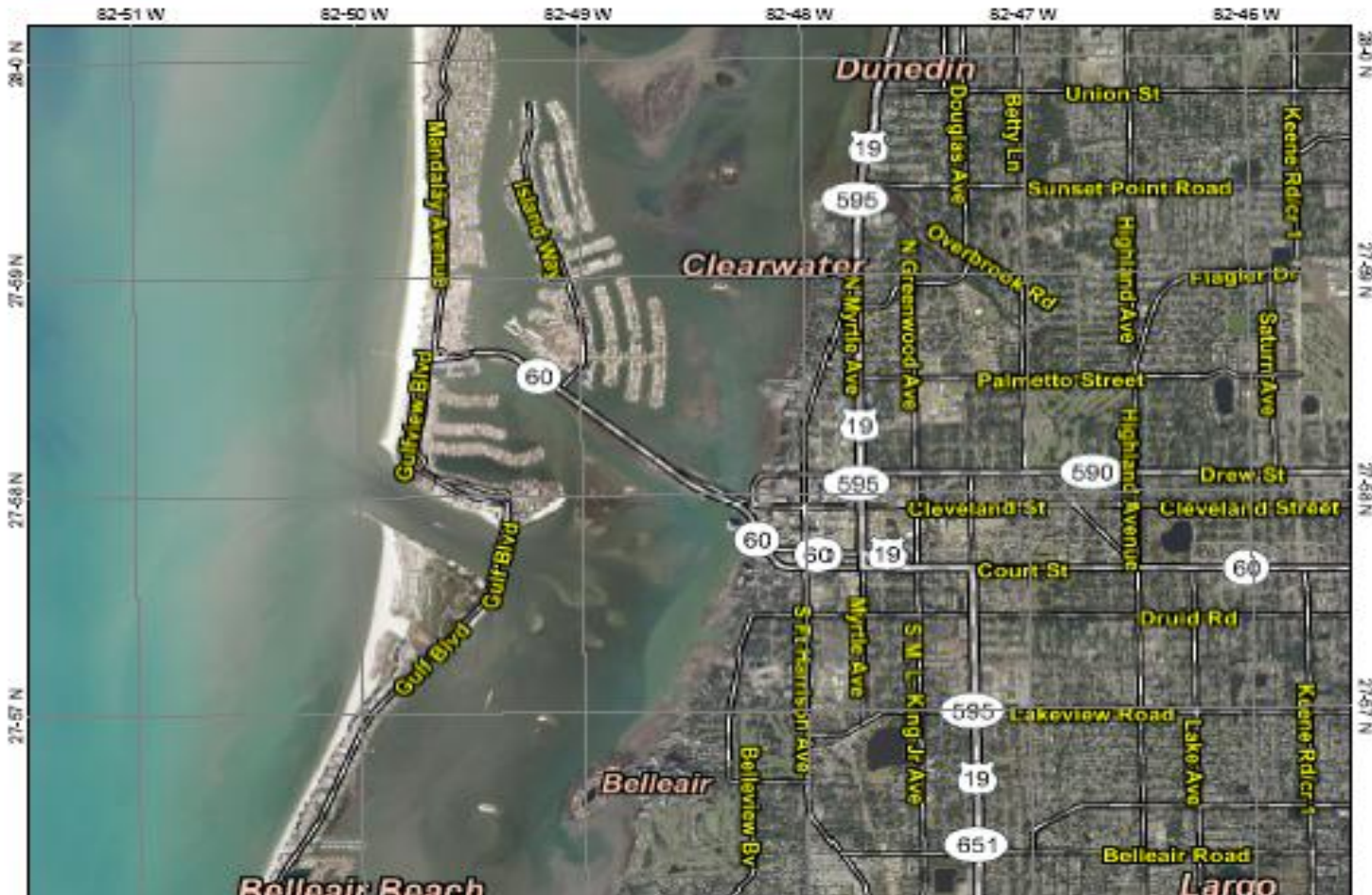
LEWIS, LONGMAN & WALKER, P.A.
ATTORNEYS AT LAW



Case Study: Clearwater Marina Project



Overview



Legend

- Interstates
- US Highways
- State Highways
- County Roads
- Local Roads
- Cities (census places)
- Counties (generalized)



Map center: 517682, 441549