MEMO

DE LA PARTE & GILBERT, P. A.
ATTORNEY AT LAW
101 E. Kennedy Blvd.
Suite 2000
Post Office Box 2350
Tampa, Florida 33601-2350

DATE: October 15, 2012

TO: North Florida Utility Coordinating Group

FROM: Edward P. de la Parte, Jr. EPD

SUBJECT: Florida Leaders Organized on Water (FLOW) Proposed Legislation

On October 8, 2012, the steering committee of the Florida Leaders Organized For Water (FLOW) voted to support a legislative concept document dealing with scientific hydrogeologic data, modeling, recovery and long-term protection of the Floridan Aquifer System, a copy of which is attached for your easy reference. We have been asked to address certain questions concerning this document.

What does the legislative concept document provide? The document proposes unspecified amendments to Chapter 373, Florida Statutes that would establish a program to restore the Floridan Aquifer System to a 1980 or earlier predevelopment baseline condition by 2023. According to the document, this program is needed because natural discharge and human induced withdrawals have exceed the Floridan Aquifer's net recharge capability, resulting in long-term declines in aquifer levels, reduced spring flows and irreparable harm to dependent natural systems. The cornerstone of this program is a mandate to the five water management districts to work with the U. S. Geologic Survey and the National Academy of Sciences to develop a Unified Floridan Aquifer Model by 2016. This model is to be funded from a combination of state and water management district funds starting with $2,000,000 taken from FY 2013 water management district funds ($400,000 per district) and starting in FY 2014 with $1,250,000 taken annually from state appropriations, district ad valorem taxes, penalties, the Water Protection and Sustainability Program Trust Fund and monies available for environmental preservation/mitigation within the State Transportation Trust Fund. Within six months of establishment of the Unified Floridan Aquifer Model and at least every 5 years thereafter, each water management is directed to review all consumptive use permit to determine whether they are causing or could cause an adverse impact to the Floridan Aquifer System or significant harm to springs, rivers, lakes and wetlands based on a 1980 baseline condition and immediately require mitigation or elimina-

tion of any adverse impacts within 5 years. Any necessary reductions in consumptive use permits shall be replaced with increased conservation and alternative water supplies.

Does this legislative concept conflict with current Florida Water Law? Yes. Florida Water Law is based on the Florida Water Resource Act of 1972, which established a framework for conserving and protecting Florida waters by creating a system of five water management districts supervised by the Department of Environmental Protection to manage water resources. The districts and the Department were given a broad mandate to oversee the water resources through variety of programs such as consumptive use permitting, minimum flows and levels, water reservations and regional water supply plans. However, the Florida Legislature did not prescribe the means and methods by which this mandate would be implemented. Instead, the districts and the Department were given wide latitude to manage the resource based on good science and the public interest as determined by the district governing board. FLOW's proposed legislative concept would reverse more than 40 years of water law by dictating scientific fact and policy to the districts and directing the implementation of a certain specific outcome by a set deadline.

Does this legislative concept represent good public policy? No. First, there is no scientific consensus that the safe yield of the Floridan aquifer has been exceeded justifying the radical action called for by the legislative concept document. While there are areas of concern in certain parts of the state, those problems are being dealt with through existing regional programs and plans. Second, redirecting $2,000,000 from current water management budgets and millions of dollars from future state and water management district appropriations to fund development of a Unified Floridan Aquifer Model will harm existing efforts to protect water resources such as the establishment of minimum flows and levels and Everglades Restoration. Third, 1980 water levels cannot represent a scientifically acceptable baseline condition for the Floridan Aquifer. Since water levels in the Floridan Aquifer are primarily influenced by rainfall, which varies naturally from year-to-year and by long-term cycles such as the Multi-Decadal Atlantic Oscillation, baseline conditions cannot be founded on water levels measured in any single year. Fourth, since water levels in the Floridan Aquifer are impacted by recharge and surface water runoff, it would not be possible to restore water levels without reversing many land use changes that have occurred during the past 32 years. Fifth, it would not be environmentally beneficial or desirable to return water levels in the Floridan Aquifer to pre-1980 water levels in all areas of the state. For example, 1980 water levels in the central Florida phosphate mining region were actually lower than current levels and in other portions of the state, where the Floridan aquifer is brackish such south Florida, this policy would prevent use of the aquifer as an alternative water supply to accomplish Everglades Restoration. Finally, even if it was environmental-

ly desirable to restore 1980 water levels, it would not be technically or economically feasible to accomplish this goal. Florida's resident population in 1980 was 9,746,961 and its resident population in 2011 is 19,057,542. Adequate alternative water supplies could not be developed to meet the water supply needs of over 9,000,000 persons in 20-30 years, much less the 10 years called for in the proposed legislative concept document.

Does the Florida Legislature have the legal authority to require the types of changes called for in the legislative policy document? Possibly. The Florida Legislature has broad power to enact statutory changes regarding water resource regulation. Since common law property rights in water were converted to permitted uses following enactment of the Florida Water Resources Act of 1972, water users no longer have a constitutionally protected property right in water, which cannot be taken by the state without just compensation. Instead, water users simply hold a consumptive use permit authorizing use of a set amount of water for a specified duration conditioned upon protection of the water resource from harm. If the Florida Legislature were to define harm as any deviation from 1980 water levels, it would be technically possible for water management districts and the Department to modify or even revoke permitted uses in order achieve restoration of 1980 water levels. However, if it could be shown that restoration of 1980 water levels could not be feasibly be accomplished without adversely impacting public health, safety and welfare, it may be possible to prove that the new law as applied would violate constitutionally protected due process rights.

What would be the implications of the legislative policy document on NFUCG's members? If this policy document were to become law, it would mean that the St. Johns River Water Management District and the Suwannee River Water Management District would be required to review all consumptive use permits, including those permits held by the NFUCG's members, within six months following completion of the Unified Floridan Aquifer Model in 2016. If the districts determine that a permittee's water use is causing harm to the water resource, which would be defined by law as water levels below those levels that existed in 1980, then the district would reduce permitted use to a quantity that would be expected to restore 1980 conditions. The NFUCG's members would be given a period of 7 years to replace this permitted use through conservation or alternative water supplies. Failure to comply with this mandate could subject NFUCG's members to a civil penalty not to exceed $10,00 per day per offense or a misdemeanor of the second degree, punishable as provided in Sections 775.082 or 775.083, Florida Statutes.

Enclosure

FLOW
Florida Leaders Organized For Water

Scientific Hydro-geologic Data, Modeling, Recovery, and Long-Term Protection of the Floridan Aquifer System

Title XXVIII

Natural Resources; Conservation, Reclamation, and Use

Chapter 373

Water Resources

373.___ Scientific Hydro-geologic Data, Modeling, Recovery, and Long-Term Protection of the Floridan Aquifer System

(1) The purpose of this section is to acquire, maintain, and advance an unbiased, comprehensive scientific and technical characterization of the Floridan Aquifer System including its geographic extent; its geologic properties and structures; its principal water sources and inputs both surface and subsurface; its water storage quantity and quality characteristics; its hydraulic and water flow attributes including interstitial and solution shafts, passages, cavities, caverns, and networks; and its principal water discharges, diffusive leakages, withdrawals and resurgences in accordance with the Florida State Constitution, Article II, Section 7. Recent scientific data indicate the combination of natural discharge and human induced withdrawals from the Floridan Aquifer System exceed its net recharge capability, resulting in long-term declines in aquifer levels, reduced spring flows, and causing irreparable harm to the aquifer and dependent natural systems. Evidence demonstrates the Floridan Aquifer System has lost a significant fraction of its natural discharge capability across vast regions of the Florida and neighboring states and the situation is broadening and worsening daily. Also, using all data and scientific evidence, whether existing or to be obtained, and models, whether existing or to be developed, this section's purpose is to establish a program that restores the Floridan Aquifer System to a pre-development baseline and permanently protects the Floridan Aquifer System including all surface and subsurface resources from future anthropogenic induced long-term declines.

(2) Anecdotal, photographic, empirical and scientific data related to the Floridan Aquifer System as set forth in section 373.026(1) have been gathered for more than a century. Although these data were not uniformly acquired throughout the State, they indicate that regional water resources have been in decline since 1980 and earlier. Accordingly for the purposes of this section, water resources as existing in 1980, unless earlier reasonable data including all of the above sources indicate otherwise, shall be used as the baseline for all mitigation and restoration strategies, plans, and implementations unless a minimum flow or level established pursuant to section 373.042 is more stringent.

(3) In order to address the purpose set forth in subsection (1) each Water Management District (i.e., the Northwest Florida Water Management District, the Suwannee River Water Management District, the St. Johns River Water Management District, the Southwest Florida Water Management District, and the South Florida Water Management District) is hereby authorized and directed to identify, gather, and consolidate any and all existing anecdotal, photographic, empirical and scientific data and analyses related to the State's water resources. Additionally, the Water Management Districts are authorized and directed to work with the National Academy of Sciences and or the U.S. Geologic Survey to identify shortcomings in the data records and to acquire new data and information related to both the State's surface and subsurface water resources and to maintain a program which continually updates and refreshes this information. As part of gathering data, beginning not later than 2015, each Water Management District shall take steps to obtain from Consumptive Use Permit holders real-time data on the quantities of water being withdrawn from all Consumptive Use Permit wells with a daily capacity to produce 100,000, or more, gallons per day of water.

(4) Further, in order to address the purpose set forth in subsection (1) each Water Management District is hereby authorized and directed to work jointly with the U. S. Geologic Survey to employ all known and to be acquired anecdotal, photographic, empirical and scientific data related to the Floridan Aquifer System whether surface or subsurface, to develop by 2016, maintain and continuously advance a single, unified ground and surface water flow model, including all existing or past first through third magnitude springs, rivers, lakes and streams, solution shafts, passages, cavities, caverns and other network piping featured individually, which would be an expanded version of the proposed North Florida, Southeast Georgia Model so that it includes all Water Management Districts in Florida as well as those portions of Alabama, Georgia and South Carolina where the Floridan Aquifer System, as defined by the U.S. Geological Survey in its Regional Aquifer System Analysis, exists as set forth in section 373.026(2). When completed, this model, to be known as the Unified Floridan Aquifer Model, is to be used by all Florida Water Management Districts to facilitate assessing, planning, managing all of the State's water resources to ensure that adequate resources are available to meet all legal existing and reasonably anticipated future requirements without the need for inter-district transfers of water resources and to establish a program that restores to a 1980 or earlier pre-development baseline and protects the Floridan Aquifer System including all surface and subsurface resources by 2023.

(5) In order to undertake the tasks set forth in subsection (1) each Water Management District is hereby authorized and directed to set aside, to pledge, and to make available in fiscal year 2013 the sum of $400,000 for a total of $2,000,000 and annually beginning in fiscal year 2014 the sum of $250,000 for a total of $1,250,000 from funds appropriated by the Legislature, and/or available from Basin Taxes levied pursuant to s. 9(b), Art. VII of the State Constitution, and/or available proceeds from the lease or sale of State lands, or interests in State lands, and/or available from penalties recovered and held in the Water Management Lands Trust Fund, and/or available from artesian well flow violations penalties pursuant to section 373.209, and/or available in the Water Protection and Sustainability Program Trust Fund pursuant to section 373.707(8)(b), and/or available from the Permit Trust fund, and/or monies available for environmental preservation/mitigation within the State Transportation Trust Fund. A minimum of eighty (80) percent of such sums shall be delivered to the National Academy of Sciences and or the U.S. Geologic Survey to be applied by the recipient organization to the tasks outlined in subsections (3 and 4) of this section with the remainder applied to the Water Management District's participation in

organization to the tasks outlined in subsections (3 and 4) of this section with the remainder applied to the Water Management District's participation in the effort described in this section. Provided however, that said sums authorized in this section for the Water Management Districts shall not prevent either of said Districts from providing additional amounts and/or other support to the National Academies to accelerate, expand, or enhance these tasks to achieve this Statute's purpose.

(6) To further accelerate the rate at which scientific data are acquired and the Unified Floridan Aquifer Model is developed and implemented as set forth in this section, any state agency, any county, any municipality, any drainage or reclamation or flood control district, any water utility, having funds available and organized under the laws of this state, any person, any firm or corporation is authorized to contribute to the costs of these tasks by depositing with the Florida Department of Environmental Protection any and all amounts as may be determined by the contributing entity.

(7) The Secretary of the Florida Department of Environmental Protection shall form a program management team composed of one individual each from the Florida Department of Environmental Protection, the Northwest Florida Water Management District, the Suwannee River Water Management District, the St. Johns River Water Management District, the Southwest Florida Water Management District, the South Florida Water Management District, and the Florida Geologic Survey. The Florida Department of Environmental Protection appointee shall be the program management team leader. The Secretary of the Florida Department of Environmental Protection shall fill vacancies on the program management team as they occur.

(8) The Secretary of the Florida Department of Environmental Protection is hereby authorized and directed to make such arrangements and enter into such agreements or contracts with the National Academy of Sciences and the U.S. Geological Survey as may be necessary to carry out the purposes of this section. The program management team set forth in subsection (7) shall work closely with the National Academies and the U.S. Geological Survey to ensure the scientific data acquired and the Unified Floridan Aquifer Model developed provide a sustainable groundwater yield consistent with the recovery of baseline conditions as of 1980 or earlier, unless a minimum flow or level established pursuant to section 373.042 is more stringent, where ever applied throughout all Water Management Districts to meet the most essential groundwater needs of current and future Floridians.

(9) The Secretary of the Florida Department of Environmental Protection is hereby authorized and directed to make available all scientific and other data acquired, including its analysis, on a periodic basis to all Water Management Districts, all drainage or reclamation or flood control districts, any state agency dealing with water issues, all counties, all municipalities, all water utilities, all consumptive permit holders with permits for 100,000 gallons per day or greater, and any private person, and any firm or corporation requesting access. Further, when completed, the Secretary of the Florida Department of Environmental Protection is hereby authorized and directed to make the Unified Floridan Aquifer Model available to all scientific data recipients and to implement the Unified Floridan Aquifer Model in all Water Management Districts as the basis for all assessments, plans, and management, including issuance of consumptive permits, of the State's water resources.

(10) Each Water Management District within six (6) months of the availability of the Unified Floridan Aquifer Model and not less than once every five years thereafter, are hereby authorized and directed to review and reassess regional water resources as well as the implications of all consumptive permits of 100,000 gallons per day or greater within their District. In the event, any Water Management District determines that any withdrawals associated with a consumptive use permit has caused, is causing, or could cause adverse impacts to the Floridan Aquifer System or significant harm to springs, rivers, lakes, and wetlands, whether locally or regionally, that Water Management District must address regional uses as well as enter into an agreement to develop and implement a plan with the consumptive use permit holder to begin jointly mitigating the impacts immediately and to jointly eliminate all adverse impacts with five years. Baseline conditions for the purposes of this legislation are defined as those that existed in 1980 or earlier where adequate data pursuant to subsections (2) and (3) are available. In this regard, the Water Management District is authorized and directed to make maximum use of mandatory conservation programs including widespread public education within two (2) years, implementation in all publicly owned facilities within five (5) years, and adoption in all new and replacement construction within ten (10) years pursuant to sections 373.227 and 373.228 on a regional basis, identify within two (2) years, acquire within five (5) years, and restore within ten (10) years recharge areas where ever located pursuant to sections 373.085 and 373.087, and develop alternative water supplies within seven (7) years pursuant to sections 373.705 and 373.707 whether individually or in concert with other Water Management Districts and or consumptive use permit holders to replace any necessary reductions in consumptive use permit withdrawals. In those situations where water resource uses, whether ground or surface, negatively impact more than one District, the affected Districts shall work cooperatively to mitigate negative impacts and restore baseline conditions.

(11) In order to address the activities set forth in subsection (10) each Water Management District is hereby authorized and directed to develop a mitigation and restoration plan for approval by the Secretary of the Florida Department of Environmental Protection. Upon approval the Water Management District, whether individually or in concert with an adjacent Water Management District, may issue bonds pursuant to the Florida Constitution Article VII, Section 14 and Florida Statutes section 373.584. The Water Management District shall operate any facilities created to recover its investments on a standard, but timely, basis.