

# WIELDING THE STICK: ENFORCEABILITY OF BASIN MANAGEMENT ACTION PLANS IN FLORIDA

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## I. BACKGROUND

The Lower St. Johns River (LSJR) Basin is a 2,750 square mile drainage area that stretches the length of the river from the mouth of the Ocklawaha River to the Atlantic Ocean.<sup>1</sup> The surface waters along this span include riverine, lake, and estuarine environments, and the primary land uses within the basin are urban and built up, upland forest, wetlands, and agriculture.<sup>2</sup> The land in the freshwater reach is dominated by upland forests, but also includes water, wetlands, and agriculture.<sup>3</sup> Although agricultural uses cover only seven percent of the land within the freshwater reach, they have a significant effect on the water quality in the LSJR.<sup>4</sup> The land in the marine reach is primarily urban and built-up, but also includes large areas of water and wetlands, and small areas of agriculture, which had steadily decreased in size over the five to ten years preceding the passage of the LSJR Basin Management Action Plan (BMAP).<sup>5</sup>

Nutrient pollution was the most significant problem to be addressed by the LSJR BMAP, and the primary pollutants identified in the basin were nitrogen and phosphorus in the freshwater

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<sup>1</sup> ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, BASIN MANAGEMENT ACTION PLAN FOR THE LOWER ST. JOHNS RIVER MAIN STEM ix (Lower St. Johns River TMDL Executive Committee, October 2008), *at* [http://www.lsjr.org/pdf/LowerStJohn%20RiverBMAP\\_FINAL.pdf](http://www.lsjr.org/pdf/LowerStJohn%20RiverBMAP_FINAL.pdf) (last visited May 10, 2010).

<sup>2</sup> *Id.* at ix, 16.

<sup>3</sup> *Id.* at 16.

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

<sup>5</sup> *Id.* at 16-17.

areas and nitrogen in the marine areas.<sup>6</sup> The nutrient pollution had created an imbalance in the flora and fauna in the LSJR, which manifested itself in the form of algal blooms, low dissolved oxygen levels and fish kills, low benthic animal diversity, vegetation losses, poor fishing quality, and the presence of potentially toxic organisms.<sup>7</sup> The LSJR BMAP was developed to address the excessive nutrient pollutant levels, and was designed to improve the overall water quality in the basin.<sup>8</sup>

This paper analyzes the current state of the law in Florida regarding the assignment of reduction requirements in a BMAP to particular sources, and the authority of the Florida Department of Environmental Protection (DEP) and the water management districts (WMDs) to enforce the BMAP obligations of both point and nonpoint sources. It also discusses the challenges DEP and the WMDs will likely face when attempting to enforce BMAPs. Specific emphasis is placed on the BMAP for the LSJR – Main Stem, which was enacted in 2008.<sup>9</sup>

## II. INTRODUCTION

The federal Clean Water Act requires each state to identify waters within its borders for which the limitations on discharge of certain pollutants is not stringent enough to meet the applicable water quality standards, and to develop total maximum daily loads (TMDLs) – the maximum amount of each pollutant that the body of water can receive and still meet water quality standards for its designated use – to address the pollutants which contributed to the impairment.<sup>10</sup> States have been required to develop TMDLs by the Clean Water Act since it was

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

<sup>7</sup> ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, *supra*, note 1 at 20.

<sup>8</sup> *Id.* at x.

<sup>9</sup> *Id.* at ix.

<sup>10</sup> 33 U.S.C. § 1313(d)(1)(A)-(C) (2006). *See also* United States Environmental Protection Agency, *Overview of Impaired Waters and Total Maximum Daily Loads Program*, at <http://www.epa.gov/owow/tmdl/intro.html> (last visited May 10, 2010).

passed in 1972, but the United States Environmental Protection Agency (EPA) did not enforce the requirement against states which failed to adopt TMDLs until citizen groups began suing the EPA in the 1980s.<sup>11</sup>

TMDLs were not adopted by the state of Florida until a Consent Decree in *Florida Wildlife Federation v. Browner* led to a compromise agreement between the state and the EPA, whereby the state would be responsible for establishing TMDLs for the surface waters within its borders.<sup>12</sup> This consent decree gave rise to the legislature's passage of the Florida Watershed Restoration Act of 1999, which delegated authority over the TMDL program to the Florida DEP.<sup>13</sup>

The first step in the process that leads to the development of a BMAP is the testing of surface waters in the state for pollutants, and those waters that do not meet applicable water quality standards are placed on a verified list of impaired waters.<sup>14</sup> The verified list includes surface waters that fail to meet water quality standards due to the existence of pollutants, and excludes those waters which fail to meet water quality standards because of a natural condition or physical alteration not related to pollutants, because the latter are not likely to benefit from the development and passage of TMDLs and a BMAP.<sup>15</sup> For every body of water on the impaired list, DEP must assign a TMDL for each pollutant present in the water that is contributing to the

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<sup>11</sup> United States Environmental Protection Agency, *Summary of Litigation on Pace of TMDL Establishment*, at <http://www.epa.gov/owow/tmdl/lawsuit.html> (last visited May 11, 2010).

<sup>12</sup> *Florida Wildlife Fed'n v. Browner*, Case No. 4:98cv356-WS (N.D. Fla. Aug. 7, 1999) (Order approving consent decree).

<sup>13</sup> See Florida Department of Environmental Protection, *Background Information & History of the TMDL Program*, at <http://www.dep.state.fl.us/water/tmdl/background.htm> (last visited May 11, 2010); see e.g., FLA. STAT. § 403.067 (The Florida Watershed Restoration Act).

<sup>14</sup> FLA. ADMIN. CODE. R. 62-303.100(1)-(2) (2009).

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

impairment.<sup>16</sup> Then, a comprehensive BMAP is created and implemented to achieve the reduction levels established by the TMDL for each pollutant.<sup>17</sup>

BMAPs were formally established in the state by a 2005 amendment to the Florida Watershed Restoration Act, which delegated authority to create and implement BMAPs to DEP and the WMDs.<sup>18</sup> BMAPs are customized to each particular basin or watershed and provide a comprehensive strategy for pollution reduction through the use of existing permitting schemes, best management practices (BMPs), water quality monitoring, conservation programs, and additional measures designed to address funding shortfalls.<sup>19</sup>

The process for creating a BMAP brings together as many interested parties as is practicable, including state agencies and local governments, the WMDs, and point and nonpoint sources that contribute to pollutant loading within the basin.<sup>20</sup> The goal of this collaborative – and sometimes contentious – process is to reach equitable allocation of the burden of reducing pollution to meet the TMDLs for each pollutant within a particular basin.<sup>21</sup> Since the BMAP program was enacted in Florida, a total of six BMAPs have been adopted, including a second BMAP adopted in December 2009 for the LSJR that addresses fecal coliform issues in its tributaries.<sup>22</sup>

In addition to the six adopted BMAPs, a seventh completed BMAP Lake Jesup is awaiting adoption, and BMAP activities are underway in nine “Priority Areas” around the state, including such sensitive areas as the Indian River Lagoon, the Everglades West Coast, and the

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<sup>16</sup> FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, TMDL PROTOCOL 1-1 (June 2006), at [http://www.dep.state.fl.us/water/tmdl/docs/TMDL\\_Protocol.pdf](http://www.dep.state.fl.us/water/tmdl/docs/TMDL_Protocol.pdf) (last visited May 10, 2010).

<sup>17</sup> FLA. STAT. § 403.067(7)(a)1. (2009).

<sup>18</sup> *See id.*

<sup>19</sup> Florida Department of Environmental Protection, *Basin Management Action Plans*, at <http://www.dep.state.fl.us/water/watersheds/bmap.htm> (last visited May 11, 2010).

<sup>20</sup> FLA. STAT. § 403.067(7)(a)3. (2009).

<sup>21</sup> *Id.* § 403.067(7)(a)2.

<sup>22</sup> Florida Department of Environmental Protection, *supra*, note 19. The other four BMAPs that have been adopted are the Hillsborough River Basin (October 2009), Long Branch (May 2008), Orange Creek (May 2008), and the Upper Ocklawaha (August 2007). To view a map of Florida depicting adopted and pending BMAPs and their locations, *see* Florida Department of Environmental Protection, *TMDL Project Implementation Activities*, at [http://www.dep.state.fl.us/Water/watersheds/docs/bmap/bmap\\_activities.pdf](http://www.dep.state.fl.us/Water/watersheds/docs/bmap/bmap_activities.pdf) (last visited May 11, 2010).

Caloosahatchee River.<sup>23</sup> BMAP development will begin in five additional areas in late 2010 and early 2011.<sup>24</sup>

Once a BMAP has been implemented, the role of enforcing it falls upon DEP for point and nonpoint sources, and the respective WMDs for nonpoint sources.<sup>25</sup> DEP enforcement following violations by point source dischargers is relatively straightforward due to the existing permitting process and regulatory scheme and the ability of enforcement authorities to accurately measure the pollutant levels for each particular discharger.<sup>26</sup> In practice, enforcement following violations by point source dischargers included in a BMAP is no different than enforcement involving these sources was prior to the creation of BMAPs.

Enforcement of nonpoint source dischargers presents different challenges. Although the nonpoint source dischargers are governed by the BMAP regulatory scheme and the statute gives enforcement authority to DEP and the WMDs, actual enforcement of the BMAP obligations of nonpoint source dischargers may prove to be quite difficult.<sup>27</sup>

### III. BMAP IMPLEMENTATION

#### A. Point Sources

The EPA authorized the state of Florida to manage the National Pollutant Discharge Elimination System (NPDES) – a permitting scheme to regulate point source dischargers –

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<sup>23</sup> Florida Department of Environmental Protection, *TMDL Project Implementation Activities*, at [http://www.dep.state.fl.us/Water/watersheds/docs/bmap/bmap\\_activities.pdf](http://www.dep.state.fl.us/Water/watersheds/docs/bmap/bmap_activities.pdf) (last visited May 11, 2010). The “Priority Areas” not mentioned in the body for which BMAP activities are underway are the Upper Peace River & Winter Haven Lakes, Wekiva, Suwannee & Santa Fe, Bayou Chico, St. Lucie, and the LSJR Tributaries II.

<sup>24</sup> *Id.* These areas are Munson Slough & Lake Munson, Lake Monroe, Lake Harney & St. Johns Mainstem (upstream of Wekiva), Kissimmee, Tampa Bay Tributaries, and Springs Coast.

<sup>25</sup> See FLA. STAT. § 403.067(7) (2009).

<sup>26</sup> See *id.* § 403.067(7)(b) (2009).

<sup>27</sup> See *id.* § 403.067(7)(b)2.h. (2009).

within its borders and to issue permits to point source dischargers within the state.<sup>28</sup> This authority was delegated to the DEP, which is responsible for overseeing the NPDES program and the reduction requirements assigned to NPDES permit holders during the TMDL and BMAP processes.<sup>29</sup> A BMAP that has been adopted by DEP Secretarial Order triggers a series of events regarding permitted point source dischargers. First, the reduction requirements outlined in the TMDLs for NPDES permit holders must be incorporated into future permits as they are renewed.<sup>30</sup> DEP also has the authority to accelerate the implementation of the BMAP by opening permits prior to their expiration and immediately incorporating the BMAP reduction requirements.<sup>31</sup> Then, the permitted dischargers are required to implement the management strategies outlined in the BMAP and complete them within a defined period of time.<sup>32</sup> These steps create the mechanism for enforcement of the BMAP by incorporating the reduction requirements of the BMAP into the NPDES permits for each discharger.<sup>33</sup>

An example of this process can be seen in how point source dischargers are handled in the LSJR BMAP, where DEP's general approach for the thirty six permit holders in the basin is to add the reductions required by the BMAP into the permits for wastewater facilities as they expire.<sup>34</sup> However, if the permit is set to expire more than two years after the TMDL was set, the permit is reopened and updated with the reductions pursuant to the authority granted by section 403.067(7)(b)2. of the Florida Statutes.<sup>35</sup>

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<sup>28</sup> *Id.* § 403.0885.

<sup>29</sup> *Id.*

<sup>30</sup> *See* 40 C.F.R. § 122.44(d)(1)(vii)(B) (2009) (requiring that WLAs in NPDES permits must be “consistent with the assumptions and requirements” of the TMDL); *see also* FLA. STAT. § 403.067(7)(b)2. (2009); FLA. STAT. § 403.0885(2) (2009) (Florida is authorized by the EPA to be the NPDES permitting authority for the state, and the DEP is responsible for administering the NPDES program).

<sup>31</sup> FLA. STAT. § 403.067(7)(b)2.d. (2009).

<sup>32</sup> *Id.*

<sup>33</sup> *See id.* § 403.067(7)(b)2. (2009).

<sup>34</sup> ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, *supra* note 1, at 46.

<sup>35</sup> *Id.*; FLA. STAT. § 403.067(7)(b) (2009).

The end result is that the reduction requirements of the LSJR BMAP are incorporated directly into the permits for point source dischargers, and the dischargers are then required to meet the reduction goals set out in the BMAP. Incorporating the BMAP reduction requirements directly into the permits is a necessary condition precedent to the ability of DEP to enforce BMAP violations.

### *B. Nonpoint Sources*

Nonpoint sources are included in the BMAP program even though most are not directly regulated by the Clean Water Act.<sup>36</sup> In fact, inclusion in a BMAP brings many nonpoint sources under a regulatory scheme for the first time. Generally, if DEP and the WMD assign specific reduction requirements to both point and nonpoint sources rather than to a basin as a whole, the reduction requirements are allocated to nonpoint sources as a category, based on the particular pollutant addressed by each TMDL.<sup>37</sup> If a nonpoint source category is included in a BMAP, every member of each nonpoint source category must demonstrate compliance with the BMAP and the applicable pollutant reductions identified during the TMDL calculation through one of two methods defined in section 403.067 of the Florida Statutes.<sup>38</sup>

Specifically, each nonpoint source demonstrates compliance with the BMAP through implementation of best management practices (BMPs) or monitoring of water quality pursuant to DEP or WMD guidelines.<sup>39</sup> If a source chooses to demonstrate compliance by implementing BMPs but is still not meeting the reduction requirements set out in the BMAP, the source may

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<sup>36</sup> See FLA. STAT. § 403.067(7)(b)2.g. (2009).

<sup>37</sup> *Id.* § 403.067(7)(a)2.

<sup>38</sup> *Id.* § 403.067(7)(b)2.g. (2009).

<sup>39</sup> *Id.*

trade water quality credits to supplement the BMPs.<sup>40</sup> BMPs are sets of plans and procedures which are designed to be “the most effective and practicable on-location means, including economic and technological considerations, for improving water quality in agricultural and urban discharges.”<sup>41</sup> The BMPs for nonpoint source categories are developed by DEP, the WMDs, and interested parties and are specifically tailored to each category to achieve the pollution reduction goals of the BMAP.<sup>42</sup> Once BMPs are formally adopted by DEP Secretarial Order, they are enforceable.<sup>43</sup>

A nonpoint source that chooses to demonstrate BMAP compliance by implementing BMPs must adhere to the guidelines set out in the BMP or the source will be in violation of the BMAP.<sup>44</sup> If a nonpoint source chooses to not implement BMPs, the source must conduct water quality monitoring in the manner prescribed by DEP or WMD.<sup>45</sup> Failure to implement one of these two methods, or failure to adhere to the guidelines of a chosen method will subject the nonpoint source to enforcement action by DEP or the WMD.<sup>46</sup>

### *1. Agricultural Nonpoint Sources*

Agricultural nonpoint sources, including silvicultural sources, are incorporated into a BMAP as a land use category, rather than at the individual level, through cooperation between DEP and the Florida Department of Agriculture and Consumer Services (DACS).<sup>47</sup> DACS is responsible for creating and updating agricultural BMPs, which are specifically designed to meet the

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* § 373.4595.

<sup>42</sup> *Id.* § 403.067(7)(c)1. DACS is responsible for developing and promulgating BMPs for agricultural nonpoint sources.

<sup>43</sup> *Id.* § 403.067(7)(b)2.h.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* § 403.067(7)(c)2.

reduction requirements that have been allocated to each agricultural source category under the BMAP; DEP then adopts the BMPs by rule, which makes them enforceable under the BMAP.<sup>48</sup>

Individual agricultural sources within each category submit notices of intent (NOI) to demonstrate their commitment to implement the BMPs.<sup>49</sup> Once an agricultural source gives a NOI to implement BMPs, the source is then legally bound to implement the BMPs that have been incorporated by DACS as part of the BMAP or the source is in violation and is subject to enforcement by DEP or the WMD.<sup>50</sup>

## *2. Phase I MS4s and Regulated Phase II MS4s*

The BMAP process for Phase I municipal separate storm sewer systems (MS4s), and regulated Phase II MS4s is different than all other nonpoint sources because both are subject to the NPDES permitting program.<sup>51</sup> Phase I MS4 permits are not reopened prior to expiration because the two-part process for obtaining a Phase I permit is very complex.<sup>52</sup> Instead, a “TMDL clause” is added to Phase I permits that automatically requires the permit holder to comply with the TMDL requirements of the BMAP, which may involve modifications to its surface water management program (SWMP).<sup>53</sup> A similar self-executing clause requiring BMAP compliance is incorporated into generic permits for regulated MS4 Phase II areas, which

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* § 403.067(7)(b)2.g.-h.; *see also* ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, *supra* note 1, at 64.

<sup>51</sup> *See* 40 C.F.R. § 122.26(a) (2009); *see also* Fla. ADMIN. CODE ANN. R. 62-624.300 (2009). Phase I MS4s maintain the storm sewer systems in large and medium urban areas, and Phase II MS4s are those that do not meet the definition of a Phase I, but have been identified by DEP or the EPA as either violating water quality standards or being a significant contributor of pollutants to the waters of the state.

<sup>52</sup> *See* 40 C.F.R. § 122.26(d). (2009).

<sup>53</sup> ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, *supra* note 1, at 48; *see also* 40 C.F.R. § 122.26(d) (2009), which outlines the permitting process and requirements for MS4 Phase I dischargers.

requires that the source comply with the TMDL allocation, and, if necessary, modify its SWMP to comply with the reduction requirements outlined in the BMAP.<sup>54</sup>

### *3. Nonpoint Sources in the Lower St. Johns River Basin*

At the time the LSJR BMAP was implemented, the SJR WMD estimated that nonpoint sources generated by human activity contributed up to thirty-six percent of the total nutrient pollutant loading within the Basin.<sup>55</sup> The primary nonpoint sources identified and addressed by the BMAP were stormwater and on-site sewage treatment and disposal systems in the northern portion of the basin, and loading from agriculture and development in the southern portion.<sup>56</sup> The BMAP assigned specific load reductions to areas with urban lands, holding each respective county or city responsible for the reductions.<sup>57</sup> Load reductions were assigned to agriculture and silviculture sources as a general land use category rather than to individual property owners.<sup>58</sup> The Florida Department of Transportation (FDOT) was given the responsibility of reducing pollutant loading from public roads and highways, and from other areas under its management.<sup>59</sup> The end result is that all nonpoint sources contributing to pollutant loading within the basin were brought under the regulatory framework of the LSJR BMAP and assigned reduction goals that were equitable not only with other nonpoint sources, but also with point sources. Once the

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<sup>54</sup> ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, *supra* note 1, at 48; *see also*, Florida Department of Environmental Protection, *Generic Permit for Discharge of Stormwater from Phase II MS4s*, at 4-5, DEP Doc. 62-621.300(7)(a) (May 1, 2003). Generic permits are issued by DEP pursuant to FLA. STAT § 403.0885, and require that the regulated MS4 Phase II discharger develop a stormwater management plan (SWMP) with BMPs, including measurable goals, to implement control measures for Public Education and Outreach, Public Participation/Involvement, Illicit Discharge Detection and Elimination, Construction Site Runoff Control, Post-Construction Runoff Control, and Pollution Prevention/Good Housekeeping.

<sup>55</sup> ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, *supra* note 1, at 20.

<sup>56</sup> *Id.* at 21.

<sup>57</sup> *Id.* at 6.

<sup>58</sup> *Id.*

<sup>59</sup> ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, *supra* note 1, at 6.

BMAP is implemented, the nonpoint sources included in the BMAP are subject to enforcement by DEP or the WMD for failing to uphold their reduction requirements.<sup>60</sup>

#### IV. BMAP ENFORCEMENT

##### A. Point Sources

DEP, as part of its delegated authority to manage the NPDES program in Florida, has the responsibility of enforcing the laws governing permitted dischargers. If a point source discharger violates BMAP requirements that have been incorporated into its permit, DEP can take enforcement action as a result of the discharger's failure to comply.<sup>61</sup> The characteristics of all point sources allow DEP to directly monitor the sources for compliance and, if necessary, enforce the BMAP requirements.<sup>62</sup> Although the enforcement mechanisms previously available to DEP for point source dischargers are essentially unchanged by the introduction of the BMAP program, the incorporation of the BMAP management strategies into the existing permitting system allows DEP to directly enforce the reduction requirements of the BMAP that have been assigned to permitted point sources.

The LSJR BMAP mirrors this framework with regard to enforcement of permitted dischargers. The reduction allocations and their respective schedules for completion are binding on the sources once these allocations are incorporated into the BMAP, and a point source's failure to meet the reductions pursuant to the schedule "will lead to the appropriate enforcement actions as outlined in 40 C.F.R. 123.45 as well as Sections 403.061, 403.121, and 403.161,

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<sup>60</sup> *Id.* at 47.

<sup>61</sup> FLA. STAT. § 403.161(1)(b) (2009); *see also* FLA. ADMIN. CODE ANN. R. 62-650.300(4)(a)1. (2009) (giving DEP authority to institute an enforcement action when a discharge is not in compliance with the permit); *id.* R. 62-600.740(1)(a)2. (authorizing DEP to take action against domestic wastewater facilities based on sampling).

<sup>62</sup> *See* 33 U.S.C. § 1362(14) (2006) (Defining point sources as a "discernible, confined and discrete conveyance . . .")

[Florida Statutes], and Rule 62-650-300(4) [Florida Administrative Code].”<sup>63</sup> Before enforcement of the BMAP can take place, however, the BMAP must be implemented.

The biggest obstacle to implementation of the LSJR BMAP during 2009 was a system-wide lack of funding, causing some of the stakeholders to fall behind schedule for completion of BMAP projects.<sup>64</sup> Installation of a water quality monitoring system also took most of the year, meaning that accurate BMAP sampling was not conducted during 2009.<sup>65</sup> Addressing the implementation and monitoring issues will create the necessary environment for future enforcement of the BMAP. In addition, the fact that the DEP will be using familiar mechanisms and statutory authority for enforcement of the laws governing point sources will ensure that BMAP will be successfully enforced when necessary.

As is the case with other violations under its purview, DEP can discover a BMAP violation by a point source through a variety of means, including – but not limited to – inspection by DEP personnel and mandatory self-reporting by an NPDES permit holder after discovery of a violation during monitoring activities.<sup>66</sup> DEP could also discover a BMAP violation if a citizen of Florida initiates an administrative proceeding under section 403.412(7) of the Florida Statutes, but this would likely require that the citizen meet Article III standing requirements because the NPDES permit program is federally delegated by the EPA.<sup>67</sup>

Regardless of the mechanism of discovery, once DEP is aware of a violation, it has the burden of locating all the responsible parties and proving all the elements of the violation.<sup>68</sup>

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<sup>63</sup> ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, *supra* note 1, at 47.

<sup>64</sup> ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, 2009 PROGRESS REPORT FOR THE LOWER ST. JOHNS RIVER BMAP 36 (Lower St. Johns River TMDL Executive Committee, December 2009), at [http://www.lsjr.org/pdf/LSJR\\_BMAP\\_AnnualProgressReport\\_010610.pdf](http://www.lsjr.org/pdf/LSJR_BMAP_AnnualProgressReport_010610.pdf) (last visited Apr. 5, 2010).

<sup>65</sup> *Id.* at 40.

<sup>66</sup> FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *DEP Enforcement Manual* 21, at <http://www.dep.state.fl.us/legal/Enforcement/enforcement.htm> (last visited Apr. 5, 2010).

<sup>67</sup> FLA. STAT. § 403.412(7) (2009).

<sup>68</sup> FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *supra* note 66, at 21, 45.

While there is no record of a DEP enforcement action against a point source for violation of BMAP requirement, it is clear that the statutory authority to enforce the BMAP is available to DEP in the event it is needed.

## *B. Nonpoint Sources*

### *1. Nonpoint Sources – Generally*

The initial question of whether a nonpoint source is in compliance with the BMAP is to ask whether the source has implemented one of the two methods– implementing BMPs or conducting water quality monitoring – to demonstrate compliance.<sup>69</sup> If a nonpoint source has not demonstrated compliance with the BMAP by implementing one of these methods, DEP or the WMD can bring enforcement action to bring the source into compliance.<sup>70</sup>

A nonpoint source that has demonstrated compliance with the BMAP by implementing BMPs will be presumed by DEP and the WMD to be in compliance not only with the BMAP, but also with state water quality standards, and will then be released from liability for the particular pollutant addressed by the BMPs.<sup>71</sup> However, this presumption is rebuttable, because a nonpoint source that has chosen to demonstrate compliance by implementing BMPs and fails to properly follow the BMPs could also be subject to enforcement.<sup>72</sup>

The effect of this statutory language is that a nonpoint source can theoretically be subject to enforcement for failing to demonstrate BMAP compliance notwithstanding the possibility that no measurable pollution can be attributed directly to the particular source at that time. This is necessary because of the diffuse nature of pollutant loading from nonpoint sources, and the resulting inability attribute loading to a particular nonpoint source. A nonpoint source can also

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<sup>69</sup> FLA. STAT. § 403.067(7)(b)2.g. (2009).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* § 403.067(7)(c)3.

<sup>72</sup> *Id.* § 403.067(7)(b)2.h.

be subject to enforcement for failure to properly implement the method chosen to demonstrate compliance with the BMAP, be it BMPs or water quality monitoring.<sup>73</sup>

For example, if a nonpoint source elects to implement BMPs for its applicable category to demonstrate compliance with the BMAP, and fails to follow the guidelines of the BMPs, it could be subject to enforcement by DEP or the WMDs.<sup>74</sup> In the same sense, if the source implements water quality monitoring to demonstrate compliance, and fails to follow the guidelines as prescribed by DEP or the WMD, the source would be subject to enforcement.<sup>75</sup>

## *2. Agricultural Nonpoint Sources*

Agricultural nonpoint sources are held to the same general standard as nonagricultural sources for BMAP enforcement in that they must demonstrate compliance with the BMAP by adopting BMPs or conducting water quality monitoring, but the BMPs for agricultural nonpoint sources are developed and adopted by DACS in cooperation with DEP and the WMD.<sup>76</sup> DACS must also create a mechanism allowing agricultural nonpoint sources to file a notice of intent (NOI) to implement the BMPs, or alternatively to begin water quality monitoring.<sup>77</sup> Once a source has filed a NOI with DACS, it is presumed to be in compliance with state water quality standards regarding the particular pollutant covered by the BMP.<sup>78</sup> Therefore, agricultural nonpoint sources, like other nonpoint sources covered by the BMAP, are potentially subject to enforcement not only for failing to demonstrate compliance by sending a NOI to implement applicable BMPs or conduct water quality monitoring, but also for failing to properly implement BMPs or the monitoring program after implementation.

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<sup>73</sup> See *Id.* § 403.067(7)(b)2.h. (making nonpoint source dischargers subject to enforcement for not implementing BMPs, conducting monitoring, or trading credits to supplement BMPs).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* § 403.067(7)(c)2.

<sup>77</sup> *Id.* An example of the NOI for BMPs for cow/calf operations in Florida can be found at <http://www.doacs.state.fl.us/onestop/forms/01520.pdf> (last visited 4/8/2010).

<sup>78</sup> *Id.* § 403.067(7)(c)3.

### *3. Nonagricultural Nonpoint Sources Included in the LSJR BMAP*

Enforcement resulting from violations by nonagricultural nonpoint sources covered by the LSJR BMAP has thus far been handled largely at the municipal level, which is a direct result of nonpoint source reduction requirements of this type being assigned at the county or municipality level rather than at some lower subdivision. For example, the City of Jacksonville passed fertilizer and watering restriction ordinances to meet the BMP goals delegated to it under the BMAP for nutrient pollution, and trained fifty city inspectors to investigate violations of these ordinances.<sup>79</sup> The inspectors have since investigated 573 complaints and observed over 41 violations of the ordinances, and have the authority to issue citations and notices to correct to the responsible parties for violations.<sup>80</sup> A possible complication of allocating BMAP reductions at the county or municipal could arise if the city or county fails to meet its goals, because it is not clear that the WMD or DEP could maintain an enforcement action against the city or county if the matter proceeded to litigation, especially if the failure is due to the city or county not enforcing its own laws.<sup>81</sup> However, the “first step” enforcement options available to the DEP, such as a non-compliance letter, would create several opportunities for DEP to reach an amicable solution to such a conflict prior to any potential impasse.<sup>82</sup>

### *4. Agricultural Nonpoint Sources Included in the LSJR BMAP*

DEP, DACS and the SJR WMD are still in the process of implementing the BMP program for agricultural nonpoint sources, and there is no record that DEP or the WMD has taken enforcement action against an agricultural nonpoint source for a BMAP violation.<sup>83</sup> The BMP

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<sup>79</sup> ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, *supra* note 64, at 20-21.

<sup>80</sup> *Id.* at 21.

<sup>81</sup> *See* Heckler v. Chaney, 470 U.S. 821 (1985) (holding that the plaintiff must allege that a specific enforceable duty has been violated, and that, generally, failure to enforce violations does not qualify because enforcement is discretionary).

<sup>82</sup> FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *supra* note 66, at 16.

<sup>83</sup> ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, *supra* note 64, at 43.

implementation for agricultural sources in the LSJR Basin is planned to be completed by October 2011.<sup>84</sup> This includes vegetable, container nursery, sod, and cow/calf operations.<sup>85</sup> To assist in reaching this goal, the SJR WMD and DACS are working together to find ways to educate growers about their responsibility to either implement BMPs or conduct water quality monitoring.<sup>86</sup>

One example of a challenge faced during the process of BMAP implementation is that several vegetable growers in the LSJR basin were hesitant to submit NOIs to implement applicable BMPs because they erroneously believed that the fertilizer rate required under the BMPs would have a negative economic impact on their operations.<sup>87</sup> It is clear from this example that proper system-wide education of agricultural sources regarding BMAP requirements, especially the applicable BMPs, is vital to successful implementation of the BMAP.

To this end, DACS, the WMD, and the University of Florida – Institute of Food and Agricultural Sciences (IFAS) have responded by educating growers about the BMPs, and customizing the recommended activities and levels within each BMP based on regional needs.<sup>88</sup> While such alternative measures help foster an environment of cooperation, enforcement authority is still available to DEP or the WMD if a particular agricultural nonpoint source is not willing to demonstrate compliance with the BMAP by submitting a NOI to implement BMPs or monitor water quality, or if the source fails to adhere to the guidelines of the chosen method of compliance, post-implementation.<sup>89</sup>

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* Vegetable and container nursery operations have a target implementation date of July 2011, and sod and cow/calf operations have a target date of October 2011.

<sup>86</sup> ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, *supra* note 64, at 43.

<sup>87</sup> *Id.* at 39.

<sup>88</sup> *Id.*

<sup>89</sup> FLA. STAT. § 403.067(7)(b)2.h. (2009).

## V. CONCLUSION

Although the 2005 amendments to the Florida Watershed Restoration Act have provided a “stick” to DEP and the WMDs to enforce the BMAP program, questions remain about the practicality of enforcement action for violations and the specific procedures for doing so. Regardless, the enforcement authority gives DEP and the WMDs far greater leverage to obtain wider compliance with BMAPs, especially from the numerous nonpoint sources for which implementation of BMPs had previously been completely voluntary. Cooperation and education will greatly contribute to the implementation and operation of the BMAP program, but the ability of DEP or the WMD to enforce BMAPs provides the necessary strength to ensure the long term success of the program.

Though enforcement of the BMAPs obligations of point sources should not prove to be more difficult than enforcement of the obligations of this category of discharger was prior to the existence of the BMAP program, it is not completely without issue. This is primarily due to the difficult economic climate and the effect it has had on implementation of BMAP projects. Lack of funding was the most significant problem during 2009 in the LSJR BMAP area, and it led to several stakeholders having difficulties meeting their goals under the BMAP.<sup>90</sup> This raises the question of the practicality of enforcement against a source which is ready and willing to comply with the BMAP, but lacks the funding to practicably do so.

For example, the City of Green Cove Springs was allocated reduction requirements in the LSJR BMAP that required a \$1,800,000 to upgrade its wastewater treatment facility.<sup>91</sup> Due to funding shortfalls, the city was faced with the possibility of taking out a loan to pay for the

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<sup>90</sup> ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, *supra* note 64, at 36.

<sup>91</sup> *Id.*

project, which would result in a thirty to forty percent increase in the utility rates of their customers if grant money is unavailable to close the funding gap.<sup>92</sup> Difficult decisions such as the one faced by Green Cove Springs will undoubtedly be necessary during the course of BMAP implementation, just as they were necessary prior to the existence of the BMAP program, but the existence of enforcement authority should increase the overall level of BMAP compliance across the basin.<sup>93</sup>

Enforcement of the BMAP obligations of nonpoint sources will generally fall into one of two categories. The first is action by DEP or the WMD against nonpoint sources that initially fail to demonstrate compliance with the BMAP by implementing BMPs or conducting water quality monitoring. The second category is enforcement by DEP or the WMD against nonpoint sources that initially demonstrated compliance with the BMAP through one of the two methods, but are failing to properly perform the chosen obligation. Enforcement of the BMAP obligations of nonpoint sources is a powerful tool because it creates an enforceable regulatory scheme where none previously existed. However, the enforcement mechanism alone is not a panacea.

It is a relatively straightforward exercise for DEP or the water management district – and DACS in the case of an agricultural nonpoint source – to identify the stakeholders that choose not to implement BMPs or begin water quality monitoring and take enforcement action against them. However, it may be exponentially more difficult for these authorities to identify violations, especially violations of BMPs once they have been implemented. One reason for this difficulty is the general nature of BMPs.

For example, BMPs can include measures such as municipal street sweeping to collect excess fertilizer, routine maintenance of drainage systems, passage of local laws regarding proper lawn

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<sup>92</sup> *Id.*

<sup>93</sup> *See, e.g., id.* at 36-37. (providing examples of stakeholders reacting to problems with BMAP implementation).

watering and fertilizer use, and efforts to educate the local population regarding a particular pollutant or problem.<sup>94</sup> Some of the BMPs, such as street sweeping programs, are fairly easy to monitor, while others, such as proper system-wide fertilizer use, are more difficult, absent an army of enforcement personnel. This is why delegation to nonpoint sources at the municipal and county level, for example, is important to the success of BMAP enforcement. An additional method to enhance enforcement could come through the inclusion of BMPs in the Conditions, Covenants and Restrictions of homeowners associations created pursuant to Florida law, and the grant of third party right of enforcement to local governments and the WMDs.<sup>95</sup>

The City of Jacksonville's plan to incorporate BMPs through passage of city ordinances and enforce them using existing personnel could be a model of success if the enforcement is consistent and the ordinances effectively result in the city meeting its reduction requirements, but few other municipal or county sources included in the LSJR BMAP likely have the resources or personnel to do the same.<sup>96</sup> Further, even if every source is well funded and has ample personnel, enforcement of nonpoint sources will remain difficult because of the presumption of compliance which is raised when a stakeholder agrees to implement BMPs.<sup>97</sup> Specifically, an enforcement authority must witness or be made aware of a systemic failure by a source to properly implement BMPs before the source would be subject to enforcement action.<sup>98</sup>

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<sup>94</sup> ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, *supra* note 64, at 20-21. The City of Jacksonville has also partnered with local retailers such as the Home Depot to educate consumers in the area regarding proper fertilizer and watering techniques.

<sup>95</sup> See Thomas Ruppert & Thomas T. Ankersen, *Weathering the Storm(water): Implementing Low-Impact Development Stormwater Management for New Residential Development in Florida* (May 2008), <http://fyn.ifas.ufl.edu/materials/weathering.pdf>.

<sup>96</sup> *Id.* at 21.

<sup>97</sup> FLA. STAT. § 403.067(7)(c)3. (2009).

<sup>98</sup> *Id.* See also FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *supra* note 66 at 16. As previously discussed, *supra* note 66, it is also unclear here whether the citizen suit provision in section 403.412 of the Florida Statutes would apply to citizens who become aware of nonpoint sources who are violating the BMPs to which a stakeholder has committed.

Every agricultural nonpoint source included in the LSJR BMAP which had responded by the end of 2009 opted to implement BMPs rather than monitor water quality.<sup>99</sup> Though it is clearly positive that so many agricultural sources have committed to implementing BMPs to attain their reduction requirements under the BMAP, the large number of individual sources and the wide geographic area over which they are spread creates a challenging enforcement environment if any BMPs are violated after they have been adopted.<sup>100</sup>

DEP's current general enforcement statute, section 403.161, will presumably be used to enforce the BMAP obligations of both point and nonpoint sources, and the range of enforcement options available to DEP will allow it to respond to all levels of violations, through communication and compromise with the source, or enforcement if necessary.<sup>101</sup> As stated in the DEP Enforcement Manual:

Achieving compliance with the agency's rules and statutes through amicable means is always preferred, and the options explained in the previous chapter should be considered before proceeding with enforcement. Unfortunately, compliance cannot always be achieved using only compliance tools. When enforcement is the best tool for achieving compliance, it should be used.<sup>102</sup>

Creating the authority for DEP and the WMDs to enforce BMAP obligations was a necessary condition to ensure system-wide compliance with BMAPs. The most important reason for this is the fact that the BMAP reductions are equitably allocated across all sources in the basin, such that a BMAP could not fully attain its reduction goals absent the participation of all parties involved.

The success of the BMAP program will also be bolstered through voluntary cooperation of the stakeholders involved in the process. This point was recognized by the authors of the LSJR

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<sup>99</sup> *Id.* at 29.

<sup>100</sup> *See id.*

<sup>101</sup> FLA. STAT. § 403.161 (2009); *see also* FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *supra* note 66, at 16. (outlining the initial enforcement options available to DEP).

<sup>102</sup> FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *supra* note 66 at 16.

BMAP, who emphasized that: “[w]hile the BMAP is linked by statute to permitting and other enforcement processes that target individual entities, successful implementation *requires* that local stakeholders willingly and consistently work together to achieve adopted TMDLs.”<sup>103</sup>

The creation of a statutory enforcement mechanism gives DEP and the WMDs a stick to enforce BMAP compliance where – especially in the case of nonpoint sources – it had not existed before, but the more sparingly this stick is needed, the more successful Florida’s BMAP program will be. The authority to enforce BMAP obligations is available to DEP and the WMDs when and if it is required, but how real and how big the stick is will depend both on the level of commitment given to BMAP enforcement by DEP and the WMDs, and how consistently and aggressively these violations are enforced.

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<sup>103</sup> ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, *supra* note 1, at 92. (emphasis added)