

Surface Water Protection Ordinance Issues Identified by Staff

At the request of the Surface Water Working Group (Group), NRMO staff compiled a list of issues that the Group may wish to consider during this process. These issues were compiled from a variety of sources including citizens, staff, and industry comments as well as observations during application of the code. The identified issues are written from a code application perspective. The Group may find additional issues when considering a Comp Plan perspective. Please note that some of the identified issues have overlapping solutions/goals. **Also note that any solutions/ideas presented herein are conceptual and that any code language that the Group proposes must be consistent with the Comprehensive Plan (Comp Plan).**

Issue #1 (Comp Plan/code conflict): Exemption of residential canals in Section 62-3668. Section 62-3668 states:

The following regulations shall apply to development in and adjacent to class II waters, Outstanding Florida Waters, aquatic preserves, conditionally approved class III shellfishing waters and class III waters excluding existing canals within residential neighborhoods:

The underlined phrase exempts canals in residential neighborhoods from the criteria in Section 62-3668 (shoreline protection buffers, etc.). This is in direct conflict with the Comp Plan and resolution of this conflict should be considered a priority.

Potential Solution: The conflicting language should be stricken. The Group can then consider new language that complies with the Comp Plan. In general, dredged residential canals can be considered to have impacted buffers. As such, some of the criteria applied to systems along natural water bodies (e.g., IRL) may be unduly restrictive. Staff recommends looking at development on dredged canals from a water quality perspective when possible.

Issue #2 (Comp Plan/code inconsistency): Reference to “best public interest.” Section 62-3667(2) states:

Alteration within the shoreline protection buffer other than that which is permitted under this division shall be prohibited, unless it is shown to be in the best public interest and does not adversely impact water quality and natural habitat...

Section 62-3668(3) states:

Alteration or construction within the shoreline protection buffer other than that which is permitted under this division shall be prohibited, unless it is shown to be in the best public interest and does not adversely impact water quality and natural habitat.

The Comp Plan Glossary defines “best public interest:”

Best Public Interest means public projects which clearly demonstrate a net benefit to the public, as determined by the Board of County Commissioners, and which adequately mitigate adverse environmental impacts.

This is more restrictive than the corresponding Comp Plan Policies 3.2.F, 3.3.D, and 3.4.D) that refer to “public interest:”

Policy 3.2.F (Class I Waters)

Prohibit alteration within the shoreline protection buffer unless it is in the public interest...

Policies 3.3.D & 3.4.D (Class II & III Waters, Aquatic Preserves, & Outstanding FL Waters)

Prohibit shoreline alteration other than that allowed for reasonable access or approved accessory uses, unless the alteration is in the public interest...

Section 62-3661 of the Surface Water Protection ordinance defines “public interest:”

Public Interest means 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. In determining the public interest in a request for use, sale, lease, or transfer of interest in sovereignty lands or severance of materials from sovereignty lands, the board shall consider the ultimate project and purpose to be served by said use, sale, lease, or transfer of lands or materials.

Potential Solution: While this issue reflects an inconsistency between the Comp Plan and code, it is not a direct conflict. Because the code language is more restrictive, the Group may wish to revise code language to reflect Comp Plan language. However, the Group may also elect to keep the same code language.

Issue #3 (Jan. 22, 2008 Board direction): Replacement bulkheads on lots with no structures. In the County, there are bulkheads that exist on lots with no primary structure. Section 62-3666(1)d states:

On those lots where replacement bulkheads may be permitted and the existing bulkhead cannot be safely removed without causing structural damage to the existing residence, the waterward extension of the new bulkhead shall meet the least waterward extension of these criteria:

- (1) No more than twelve (12) inches from the existing bulkhead; or*
- (2) Shall be located parallel and in line with adjacent existing and legally permitted bulkheads; or*

(3) Shall be located no more than twelve (12) inches waterward of the lot's recorded property line.

This means that on lots with no residence, existing bulkheads that are eligible for replacement must be removed, and the new bulkhead be constructed in accordance with current code. In a regular Board meeting of January 22, 2008, a citizen appealed a staff denial of an application to place a replacement seawall in front of an existing dilapidated one. The Board acknowledged that the appeal could not be granted under current code and directed NRMO staff to explore code language options regarding replacement of bulkheads waterward of original bulkhead foundations where there is no residence. The Board did not state a preference as to how to proceed, but wanted to explore options for consideration. The applicant withdrew his application and will construct the new bulkhead in accordance with current code.

Potential Solution: Because this was a specific request by the Board, the Group should discuss this issue. The Group may decide to develop code language (consistent with the Comp Plan) that allows the replacement of bulkheads waterward of original bulkhead foundations where there are no residences. The Group may also decide to retain current code language or explore other options.

Issue #4 (May 6, 2008 Board direction): Marine permitting.

During the public comment portion of the May 6, 2008 regular meeting, Mr. Steven Webster, Executive Director of Florida Marine Contractors Association, addressed the Board regarding marine permitting. The discussion was fairly involved, therefore; the full minutes of Mr. Webster's comments and Board discussion are included herein. However, the end result was Board direction for staff to submit a report regarding marine permitting issues. Specific identified goals included: (1) simplified permitting, (2) the need to require licensed contractors, and (3) the protection of the public and waterways.

Potential Solution: Because this was a specific request by the Board, the Group should discuss the issues as they apply to the goals of this process. Most of the issues will likely be part of other issues identified herein. Some of the items discussed at the Board meeting may be outside the purview of this Group.

Issue #5: Minimal standards in code for marine construction (bulkheads, revetments, etc.).

There are minimal construction standards within the Surface Water Protection ordinance. This can lead to inconsistent standards within the County. Property owners and their neighbors should feel confident that all marine construction protects property and the water quality of County waterways.

Potential Solution: Develop construction standards for marine construction. Standards should be consistent with other regulatory agencies (e.g., FDEP) as much as possible. Staff will research State standards and provide this information. The Group can consider more restrictive standards if it feels that would provide benefit, such as protection of safety of citizens. Some items for the Group to consider:

General:

- Who should do the work
- When does repair end and replace start
- How should staff view required work in the buffer associated with shoreline hardening (e.g., tie-backs, dead men, returns)
- Stormwater management
- Vegetation

Revetments:

- Slope
- Materials (e.g., coquina, clean concrete, construction debris)
- Rock/material size
- Filter fabric
- Tie-ins/returns

Bulkheads:

- Materials
- Tie-backs/returns
- Habitat creation (e.g., timber wale, revetment)
- Asbestos wall removal (e.g., Due to the hazardous nature of asbestos, staff has allowed the placement of new bulkheads in front of old asbestos walls. Is this a valid approach? Should there be special standards/requirements if an asbestos wall is removed?)
- Clarify and/or revise existing standards (e.g., Where permissible, the current standard allows a new bulkhead to be placed no further than 12 inches in front of the old. How is this measured? Is this realistic? Should it be dependent on existing and proposed materials?)
- When is appropriate to remove a wall in favor of a revetment (natural waters vs. canals)
- Maximum height of bulkhead above grade

Issue #6: Unpermitted/poor quality/illegal work.

Unpermitted/poor quality/illegal work has been an ongoing complaint by citizens, contractors, and staff alike. Unlicensed contractors in particular are taking work from legitimate businesses and often cause citizens to end up in Code Enforcement situations. Unlicensed work can also pose a health and safety risk.

Potential Solution: Develop construction standards for marine construction (see Issue #5). Require licensed marine contractors for permissible work. Hold unlicensed contractors liable for unpermitted/substandard/illegal work.

Issue #7: Limited guidance on redevelopment within the shoreline protection buffer.

Section 62-3666(10) states:

For structures that existed prior to the effective date of the ordinance from which this division is derived, remodeling and other types of development which do not

increase the amount of impervious surfaces within or threaten the integrity of the shoreline protection buffer will be allowed.

Strict code interpretation allows redevelopment of structures within the surface water protection buffer that existed prior to September 8, 1988, provided that the activities are achieved solely on the existing development footprint(s). Any pervious areas in the buffer must remain so. NRMO often encounters situations where the ability to employ flexibility to the current interpretation of Section 62-3666(10) would provide benefit to both the environment (specifically the Indian River Lagoon system) and the applicant.

In April 2008 the Board approved staff's request to allow additional impervious for proposed redevelopment in the surface water protection buffer according to net environmental benefit. Assessment criteria of net environmental benefit would include at a minimum;

- The maintenance or reduction of impervious surfaces,
- Net contiguous buffer increase, and
- Stormwater management.

Additionally the Director may determine that additional criteria be considered, based on unique site characteristics.

Potential Solution: Codify the Board-approved policy.

Issue #8: Limited or unclear guidance regarding allowable development within the shoreline protection buffers of Class II & III Waters, Aquatic Preserves, and Outstanding FL Waters.

Potential Solution: The Group may wish to establish more specific standards for allowable development within the surface water protection buffer.

Issue #9: Comp Plan language regarding channelization and dredging is not adequately codified. Policies 3.3.E, 3.5, and 3.7 address dredging:

Policy 3.3.E

Prohibit channelization, dredging and filling, and impoundment of natural waters of the State unless the activity is clearly in the public interest and does not adversely impact water quality, natural habitat and adjacent shoreline uses.

Dredging shall not be permitted in or connected to Class II Waters, Outstanding Florida Waters (OFWs), Aquatic Preserves, areas that contain ten percent (10%) seagrass or more, and conditionally approved shellfish harvesting waters unless the activity is a federal navigation project, in the public interest, such as approved maintenance dredging of existing public or private navigational channels, or where dredging may improve water quality by removing accumulated silt or improving circulation, or for maintenance of existing structures and utility structures and utility crossings, or for shoreline hardening as allowed by this element.

Policy 3.5

All dredging activities must be done with effective turbidity controls. Where turbidity screens or similar devices are used, they should be secured and regularly monitored to avoid manatee entrapment.

Policy 3.7

New man-made canals connected to the Indian River Lagoon system are prohibited. The expansion (widening and/or deepening) of existing ditches, drainage right-of-ways, drainage easements and stormwater facilities connected to unless it is in the public interest, as defined in the glossary, and does not adversely impact-the Indian River Lagoon to accommodate boat traffic shall be prohibited unless the activity is an approved maintenance dredging on existing public navigational channels, private or public canals, or an existing marina's maintenance dredging.

Potential Solution: Codify Comp Plan policies regarding dredging.

Issue #10: Protection of water quality by stormwater management. Section 62-3663, entitled Purpose and intent, states:

It is the purpose and intent of this division to improve the quality of surface waters within the county, and protect and enhance the natural functions of these waters. It is also the intent of this division to apply the standards set out in this division for development in and adjacent to class I, II and III waters, Outstanding Florida Waters and aquatic preserves.

Staff has the ability to require stormwater management only in certain instances (e.g., new seawall constructions or allowable development within the buffer). However, there are other situations when stormwater management may be appropriate. For instance, lot grading may result in stormwater runoff carrying pollutants to the waters, even if the development is located outside of the buffer. If there is no mechanism (such as native vegetative) to slow or capture this runoff, the untreated stormwater directly discharges to the waterway.

Additionally, there are many parcels in the County that have highly or completely impacted surface water protection buffers. Sod lawns are usually amended with fertilizers, pesticides, and herbicides. Lawn irrigation and storms transport these harmful additives into the water with devastating effects, such as algae blooms. Strengthening existing language regarding new development and developing language regarding retrofitting of stormwater management will provide a large environmental benefit relative to the cost and effort required.

Potential Solution: Strengthening requirements and developing standards for stormwater management both for new construction and redevelopment will help protect the water quality of Brevard County's waterways; one of the prevailing intents of the Surface Water Protection ordinance. The Group may also want to address other discharges that are often observed, including:

- Irrigation
- Draining of pool water
- Dumping of rubbish, hazardous and household chemicals, oils, etc. (general pollution)
- Dumping of yard wastes (contribute to nutrient loading)

Issue #11: Inconsistent or outdated references.

There are a number of references in the Surface Water Protection ordinance that over the years have become inconsistent or obsolete. These include State and Federal regulation references and the use of some terms (e.g., mean high water line). Staff will provide a document highlighting these items.

Potential Solution: The Group may not be able to resolve some of the inconsistencies and obsolete references (e.g., mean high water line) due to corresponding Comp Plan language. However, there are likely some that can be stricken or revised.

Issue #12: Marinas and the Brevard County Manatee Protection Plan (MPP).

Brevard County and the Brevard Marine Advisory are currently conducting meetings to develop a Comprehensive Maritime Management Master Plan (CM3P). While this process will guide the County's vision and goals; the Comp Plan, Surface Water Protection code, and MPP provide specific regulations regarding marinas. This includes criteria regarding siting, bulkheads, boat slips, boat ramps, access, and other associated operations that occur in the buffer. Currently, applicants must navigate all three documents when preparing for permit applications. Additionally, staff must consult all three documents when reviewing marina development applications.

Potential Solution: Staff suggests codifying marina/manatee protection criteria in the Comp Plan within the Surface Water Protection ordinance in order to streamline the collection of information that staff and applicants must refer to regarding marina permitting. Because the MPP is a very large document, staff suggests that the Group focus its effort on the Comp Plan.

Issue #13: Marinas and working waterfronts.

Over the last decade, Brevard County has lost valuable working waterfront, and thus public water access, due to economic and other factors. Working waterfronts have been lost in favor of condominiums and private marina facilities. As stated above, Brevard County is developing a CM3P to establish vision and goals for our waterways.

By nature of their operations, marinas must often utilize the entire surface water protection buffer. To date staff has been able to work within existing code to make possible marina redevelopment. However, current restrictions within the code could deter applicants from developing new working waterfront facilities.

Potential Solution:

Staff suggests that the Group explore possible code language that would promote the County's support of working waterfronts by develop criteria that are more consistent with this diminishing industry. Meeting this goal while maintaining consistency with the Comp Plan could prove a challenge. Therefore, staff suggests prioritizing other issues above.