



**2021-2022**

**CHARTER REVIEW COMMISSION AGENDA REPORT**

**MEETING DATE:**

**AGENDA ITEM NUMBER:**

**SUBJECT:**

**PETITIONER CONTACT:**

**REQUESTED ACTION:**

**SUMMARY EXPLANATION & BACKGROUND:**

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**SUMMARY EXPLANATION & BACKGROUND CONTINUED:**

# Brevard County Charter Amendment - Right to Clean Water

## Executive Summary

Brevard County residents and organizations respectfully request members of the Charter Review Commission (CRC) to consider amending the charter to ensure present and future generations are able to protect themselves and their interests from harm. The “Right to Clean Water” proposal creates a local cause of action for equitable (declaratory or injunctive) relief, which may include a “polluter pays” form of restorative relief. As the proposal’s ultimate design will depend on the will of the CRC members and public comments, [Attachment 1](#) is provided as a skeletal framework. [Attachment 2](#) provides the legal basis and argument that the County has the authority to enact this measure and that state preemption found in Fla. Stat. 403.412 (9)(a) does not apply.

This proposal starts off with the premise: **Brevard County has the power and duty to protect itself and its residents, businesses, visitors and economy from legalized harm.**

Legalized harm is caused by the action or inaction of federal and state governments, be it erratic definitions of health, harm, public interest, various scientific standards or environmental impact considerations or requirements; poor staffing, budgeting or resourcing decisions; substandard design or enforcement of basin action management plans or nutrient load limits; continued permitting of substandard or inappropriately located onsite septic systems; inappropriate use of fertilizers, herbicides; etc. Waters such as the Indian River Lagoon have suffered from and continue to be impacted by substandard but legal government harm. Missing from the current system is **the ability to effectively challenge such continued or planned harm**. We believe it is the people’s inherent right to question and stop such practices to better protect themselves, their families, their businesses, and their communities.

The problem isn’t a lack of strong environmental laws in Florida, nor is it due to a string of illegal pollution. The problem \*set\* is systemic and more like death by 1,000 papercuts, which is comprehensively difficult and expensive to remedy for large water bodies such as the Indian River Lagoon, much less to fully restore. To make sense of our hundreds-of-millions of taxpayer dollar investment, we must be able to establish a stopgap – a “do no (more) harm” mandate, and allow individuals, businesses and nonprofits to engage in the litigation to arrive at a better system. Courts will rule in equity, considering what’s possible, what harm is preventable, and declare certain actions or policies of inaction to be in violation of the Right to Clean Water. Courts may award declaratory or injunctive relief, to either prevent harm or, if sufficient evidence is presented, to restore waters to their condition just before the harm occurred. Outside of attorney’s fees and court costs (which can be awarded to prevailing plaintiffs), any money that changes hands will be applied (earmarked) directly to the restoration of waters. Courts have the power to ensure government agencies do what the law says they should do.

A no-cost, non-governmental solution to restore ecological balance for all to enjoy is a win-win opportunity. The only opponents to such a measure will be those who benefit and wish to continue to benefit from exacting harm on Brevard’s shared natural resources under the current system, and their banner will likely point to some property rights fear. This proposal only strikes at legalized “rights” to pollute or otherwise irresponsibly degrade waters, infringing on the rights and substantial interests of everyone else. This proposal provides Brevard County a way to pivot back to good while balancing all competing interests through courts of equity, justice and fairness.

Please consider this proposal and the hope it may bring those living, working and playing in Brevard County. It presents a chance for our leaders to show all other communities and states that it’s possible to have a thriving economy AND a thriving ecology, balanced for present and future generations, due to a small systemic tweak to establish and ensure a Right to Clean Water.

With esteem and anticipation,

(Please see a separate page for the current list of signatories.)

Recommended insertion in Article 5 of the Brevard County Charter, "Powers Reserved to the People,"

## **Section 5.7 - Right to Clean Water**

5.7.1. To protect substantial individual, group, economic, and environmental interests, residents that live in and governmental and nongovernmental organizations that operate in Brevard County have the right to clean water against any form of governmental harm and to seek enforcement and equitable relief from a violation of this right in a court of competent jurisdiction. Attorney's fees and costs of litigation shall be awarded to prevailing plaintiffs.

### 5.7.2. Definitions

*Clean water* means waters that are free of further governmental harm. The intent of this Section is to achieve waters that are safe for fish and native wildlife and human recreation and, for public drinking water sources, for human consumption; that have sufficient habitats, water filtering, and nutrient cycling to support thriving populations and diverse communities of native fish and wildlife; that have natural flow regimes, to include recharging groundwater, as possible; and that have other intact ecological processes and functions that support healthy aquatic ecosystems, as pertinent to the waters at issue.

*Governmental harm* means any law, regulation, rule, policy, or permit that, by action or inaction, negatively affects the health or safety of humans, fish or wildlife by either the pollution or degradation of waters. Water pollution includes the introduction of pathogens, contaminants, or toxins into waters. Degradation of waters includes, but is not limited to, chemical, biological or physical stressors that contribute to unnatural water levels or nutrient loads; that remove, fragment or degrade habitat; that disturb vegetation or soil near shorelines; that introduce exotic or invasive species; that obstruct or divert natural flow; and that overexploit native species.

*Waters* includes the aquatic ecosystems of all naturally occurring water bodies in the jurisdiction of Brevard County whether fresh, brackish, saline, tidal, surface, ground, or underground, and, for the purpose of this Section, includes all natural tributaries and artificial conveyances which impact these water bodies, whether in or outside the jurisdiction of Brevard County.

5.7.3. Harm prohibited. It shall be unlawful and a violation of this Section for any governmental entity to harm or threaten to harm waters of Brevard County by action or inaction.

5.7.4. Authority. The right to clean water is created pursuant to the Florida Constitution, Article II, Section 7(a), and general laws found in Florida Statutes Chapters 120, 376, 403, and elsewhere, which allow for the questioning of agency decisions and which direct the abatement of water pollution; the conservation and protection of waters; the liability of responsible parties to fund costs of removal, containment, and abatement of pollution and, when feasible, the restoration of damaged waters to their pre-damaged condition; that responsible parties bear the costs and not the public; and the ability for any person, natural or corporate, or governmental agency or authority to enforce against and remedy violations of substantial rights to clean water. Brevard County finds this right, enforceable through civil action for equitable relief, to provide a responsible and fair balance of competing rights and interests to shared waters.

5.7.5. Severability and conflicts. This Section should be interpreted, to the greatest extent possible, to be in harmony with any superior state or federal law governing the same rights and conduct. To the extent any provision of this Section of the Charter impermissibly conflicts with any superior state or federal law governing the same conduct, such provision shall be severable and all other provisions shall remain fully enforceable.

5.7.6. Effective date. This Section shall become effective upon passage, which is the date certified by the Supervisor of Elections, and shall not require further enabling legislation by the Brevard County Board of County Commissioners.

## Does Brevard County have the legal authority to amend its charter to establish and enforce the right to clean water?

Brevard County has “all powers of self-government not inconsistent with general law” “in the common interest of the people of the county,” to include “all implied powers necessary or incident to carrying out such powers enumerated.”

- Florida Constitution, Article VIII, Section 1(g) - “CHARTER GOVERNMENT. Counties operating under county charters shall have **all powers of local self-government not inconsistent with general law**, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.”
- Florida Statutes Section 125.01 “Powers and duties.— (1) The legislative and governing body of a county shall have the power to carry on county government. **To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to...**(j) Establish and administer programs of...conservation, flood and beach erosion control, air pollution control, and navigation and drainage and cooperate with governmental agencies and private enterprises in the development and operation of such programs. (k)1. Provide and regulate waste and sewage collection and disposal, water and alternative water supplies, including, but not limited to, reclaimed water and water from aquifer storage and recovery and desalination systems, and conservation programs....(w) **Perform any other acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law...**(3)(a) **The enumeration of powers herein may not be deemed exclusive or restrictive, but is deemed to incorporate all implied powers necessary or incident to carrying out such powers enumerated...**”

Is the right to clean water inconsistent or otherwise conflict with general law? No. In fact, it directly supports general law which contains a comprehensive scheme of water conservation and protection, as guided by constitutionally-established policy and clear statutory standards with robust amounts of legislative intent and guidance. State agencies may have the regulatory authority to control pollution and degradation of waters in accordance with legislation, but it is a legislative and chartered government function to determine standards of and enforcement measures against harm.

- Florida Constitution: Article II, Section 7(a) - “**It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.**”
- In Chapter 376:
  - “The discharge of pollutants into or upon any coastal waters, estuaries, tidal flats, beaches, and lands adjoining the seacoast of the state in the manner defined by ss. 376.011-376.21 is prohibited.”
  - “Any person discharging pollutants as prohibited by s. 376.041 shall immediately undertake to contain, remove, and abate the discharge to the department’s satisfaction...”
  - “Because it is the intent of ss. 376.011-376.21 to provide the means for rapid and effective cleanup and to minimize cleanup costs and damages, any responsible party who permits or suffers a prohibited discharge or other polluting condition to take place within state boundaries shall be liable to the fund for all costs of removal,

containment, and abatement of a prohibited discharge, unless the responsible party is entitled to a limitation or defense under this section..."

- "The Legislature finds that extensive damage to the state's natural resources is the likely result of a pollutant discharge and that it is essential that the state adequately assess and recover the cost of such damage from responsible parties. It is the state's goal to recover the costs of restoration from the responsible parties and to restore damaged natural resources to their pre-discharge condition. In many instances, however, restoration is not technically feasible. In such instances, the state has the responsibility to its citizens to recover the cost of all damage to natural resources. To ensure that the public does not bear a substantial loss as a result of the destruction of natural resources, the procedures set out in this section shall be used to assess the cost of damage to such resources. Natural resources include coastal waters, wetlands, estuaries, tidal flats, beaches, lands adjoining the seacoasts of the state, and all living things except human beings."

- In Chapter 403:

- "The department [of Environmental Protection] shall have the power and the duty to control and prohibit pollution of air and water in accordance with the law and rules adopted and promulgated by it and, for this purpose, to...[a]pprove and promulgate current and long-range plans developed to provide for air and water quality control and pollution abatement" and to "[e]xercise general supervision of the administration and enforcement of the laws, rules, and regulations pertaining to air and water pollution."

- "The department shall adopt rules to reasonably limit, reduce, and eliminate domestic wastewater collection and transmission system pipe leakages and inflow and infiltration." Also, it is to "[i]ssue such orders as are necessary to effectuate the control of air and water pollution and enforce the same by all appropriate administrative and judicial proceedings...Adopt a comprehensive program for the prevention, control, and abatement of pollution of the air and waters of the state, and from time to time review and modify such program as necessary....Develop a comprehensive program for the prevention, abatement, and control of the pollution of the waters of the state...Establish and administer a program for the restoration and preservation of bodies of water within the state...Perform any other act necessary to control and prohibit air and water pollution, and to delegate any of its responsibilities, authority, and powers, other than rulemaking powers, to any state agency now or hereinafter established...The department shall implement such programs in conjunction with its other powers and duties and shall place special emphasis on reducing and eliminating contamination that presents a threat to humans, animals or plants, or to the environment."

- "The pollution of the air and waters of this state constitutes a menace to public health and welfare; creates public nuisances; is harmful to wildlife and fish and other aquatic life; and impairs domestic, agricultural, industrial, recreational, and other beneficial uses of air and water.

- It is declared to be the public policy of this state to conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies, for the propagation of wildlife and fish and other aquatic life, and for domestic, agricultural, industrial, recreational, and other beneficial uses and to provide that no wastes be discharged into any waters of the state without first being given the degree of treatment necessary to protect the beneficial uses of such water.

- It is declared to be the public policy of this state and the purpose of this act to achieve and maintain such levels of air quality as will protect human health and safety and, to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of the people, promote the economic and social development of this state, and facilitate the enjoyment of the natural attractions of this state. In accordance with the public policy established herein, the Legislature further declares that the citizens of this state should be afforded reasonable protection from the dangers inherent in the release of toxic or otherwise hazardous vapors, gases, or highly volatile liquids into the environment.

- It is declared that local and regional air and water pollution control programs are to be supported to the extent practicable as essential instruments to provide for a coordinated statewide program of air and water pollution prevention, abatement, and control for the securing and maintenance of appropriate levels of air and water quality.

- It is hereby declared that the prevention, abatement, and control of the pollution of the air and waters of this state are affected with a public interest, and the provisions of this act are enacted in the exercise of the police powers of this state for the purpose of protecting the health, peace, safety, and general welfare of the people of this state.

- The Legislature finds and declares that control, regulation, and abatement of the activities which are causing or may cause pollution of the air or water resources in the state and which are or may be detrimental to human, animal, aquatic, or plant life, or to property, or unreasonably interfere with the comfortable enjoyment of life or property be increased to ensure conservation of natural resources; to ensure a continued safe environment; to ensure purity of air and water; to ensure domestic water supplies; to ensure protection and preservation of the public health, safety, welfare, and economic well-being; to ensure and provide for recreational and wildlife needs as the population increases and the economy expands; and to ensure a continuing growth of the economy and industrial development.
- The Legislature further finds and declares that the public health, welfare, and safety may be affected by disease-carrying vectors and pests. The department shall assist all governmental units charged with the control of such vectors and pests. Furthermore, in reviewing applications for permits, the department shall consider the total well-being of the public and shall not consider solely the ambient pollution standards when exercising its powers, if there may be danger of a public health hazard.
- It is the policy of the state to ensure that the existing and potential drinking water resources of the state remain free from harmful quantities of contaminants. The department, as the state water quality protection agency, shall compile, correlate, and disseminate available information on any contaminant which endangers or may endanger existing or potential drinking water resources. It shall also coordinate its regulatory program with the regulatory programs of other agencies to assure adequate protection of the drinking water resources of the state..."
- (This is a non-exhaustive list of legislative intent and state policy regarding the matter of harm caused by the pollution and degradation of Florida waters.)

Does general law restrict local governments from creating a cause of action? No. Though still novel, there is no constitutional or statutory language or judicial doctrine that restricts chartered counties from exercising their powers of self-government to create a more stringent standard against certain harm or a civil action to enforce it.

- [Orange County's Charter Amendment for the Right to Clean Water of 2020](#) for example.
- The existence of frustratingly narrow citizen causes of action (such as in Fla. Stat. 403.412) does not equate to a restriction against local governments from creating their own (more effective) causes of action.

Does general law preempt a local enactment of the right to clean water? No. Brevard County's right to clean water is able to "coexist" with the state's regulatory scheme of water protection and conservation without frustrating the purpose of relevant general laws.

- <https://www.floridabar.org/the-florida-bar-journal/the-effectiveness-of-home-rule-a-preemption-and-conflict-analysis/>
- While the state cause of action in Fla. Stat. 403.412 enables suits against violations of "any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state," this proposal looks to the right to protect substantial interests from harms caused by substandard laws, regulations, rules, policies and permits. Two distinct matters at issue, both aimed to protect and conserve waters in accordance with general law..
- The only point of foreseeable "frustration" will likely be within governmental entities that may be liable for harming Brevard County waters. I.e., they may not be thrilled about having to better comply with general law.

Does the "rights of nature preemption" pertain? No. While it was designed and enacted in direct response to Orange County's Charter Amendment, it does not apply here.

- The "state preemption" at issue is found in [Fla. Stat. 403.412 \(9\)\(a\)](#) which reads: "*A local government regulation, ordinance, code, rule, comprehensive plan, charter, or any other provision of law may not recognize or grant any legal rights to a plant, an animal, a body of water, or any other part of the natural*

*environment that is not a person or political subdivision as defined in s. 1.01(8) or grant such person or political subdivision any specific rights relating to the natural environment not otherwise authorized in general law or specifically granted in the State Constitution.”*

- As to the pertinent part (a person’s right TO clean water), by plain meaning, persons and political subdivisions already have the preexisting and enforceable “specific rights” related to the natural environment to expect:
  - The performance of government duties to specifically serve the public health and safety where the environment is concerned (see Fla. Stat. 381.006).
  - The performance of government duties to serve the general welfare and other interests of the people where the environment is concerned (see Fla. Stat. Title XXVIII and Chapter 403).
- Specific rights relating to the natural environment have been specifically granted in the State Constitution as noted above (see Florida Constitution Art II, Section 7a); the right to expect that the whole of state government would implement, enforce and comply with its clear mandates:
  - “It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.”
- Specific rights relating to the natural environment also exist in Fla. Stat. 403.412, the right to file suit against “any person, natural or corporate, or governmental agency or authority” that violates “any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state.” See also Fla. Stat. 120.56 which is often used in environmental litigation (“Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.”).
- As can be observed, the word, “right,” can have multiple meanings depending on context. It is unclear which context was intended in this subsection, whether the “specific right” was to be substantive or procedural, whole or derivative, fundamental, positive or negative. Surely, it cannot be construed to mean all “specific rights relating to the natural environment,” as it would have catastrophic effects on Brevard County’s home rule authority to enact any measure pertaining to the natural environment (which, again, is vague enough to include anything that might impact anything not human-made). The Florida Supreme Court has said, “a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision,” citing *Amente v. Newman*, 653 So.2d 1030, 1032 (Fla.1995) (“if possible, the courts should avoid a statutory interpretation which leads to an absurd result.”). So, if the absurdity is accounted for, what “specific rights relating to the natural environment” remain?
- The right to clean water is a measure of self-defense and protection against government harm. It, too, would be an absurd result to construe the preemption to restrict local government’s abilities and home rule powers to protect the substantial interests of its residents and businesses. As such an absurdity is unfortunately a current reality in Florida and yet to be fully challenged and resolved in the courts, if the CRC prefers to name this proposal “the right against government harm,” “civil action against government harm,” or “the ability of the people to protect themselves,” there are work-arounds.

Is the “rights of nature preemption” constitutional? Until it is challenged in court and determined otherwise, it is presumed to be constitutional. There are, however, multiple facial and as-applied problems that will likely render the preemption unconstitutional and eventually severed and removed from the statute.

- Florida’s Vagueness Doctrine. What is a right? What makes a right specific versus general? What relates and does not relate to the natural environment? As noted above, it is unclear what this apparent prohibition applies to, which is a problem.
- “A statute or ordinance is void for vagueness when, because of its imprecision, it fails to give adequate notice of what conduct is prohibited. Thus, it invites arbitrary and discriminatory enforcement. Art. I, § 9, Fla. Const.; *Southeastern Fisheries*. As the United States Supreme Court has noted: “Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.



Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Wyche v. State*, 619 So. 2d 231 (1993).

- Here, it is unknown and inconceivable how or why this preemption solves a local inconsistency with the state constitution or state statute, or otherwise serves the public interest pursuant to state police powers to protect public health, safety and welfare. At issue is the local implementation of rights enforcement, outside of "regulatory" pollution control functions or processes, despite both pertaining to clean water. To carry through the state's presumed claim to "all things natural or environmental," it again meets the absurd assertion that people do not have rights to protect themselves, their families, their homes or their community from government harm.
- An excerpt from an article published in the Florida Bar Journal, linked above, relates: "Cases in which the courts have found express state preemption are rare. Taxation is one of the areas in which there has been an explicit finding of express preemption. Based on the constitutional protections afforded local governments, any ambiguity on the issue of express preemption should be resolved in favor of the local government. Such a presumption is consistent with the voters' intent to provide broad home rule powers to cities and charter counties so that they may protect the welfare of their citizens. Accordingly, Florida courts have usually bowed to the voters' intent that local governments should be able to act barring a clear directive by the state not to allow the action." Again, the only preemption that would bar Brevard County from amending its charter to provide for the creation and enforcement of the right to clean water, whether the right is granted to persons, political subdivisions, waters or other natural elements or systems – would prohibit the right to not be harmed, and would be unconscionable. All things considered, the preemption should be challenged and removed from Florida law.