MiamiDade.watch Wetlands Regulatory Report
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Legal Analysis: Third-Party Environmental Reports & DERM's Refusal to Acknowledge Scientific Evidence

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PLAINTIFF'S POSITION

Claim: Miami-Dade County's Division of Environmental Resources Management (DERM) **deliberately disregards scientifically valid third-party environmental studies**—such as wetland delineation reports or hydrological assessments prepared by certified professionals—as a tactic to monopolize regulatory authority, suppress contradictory evidence, and evade legal liability.

This pattern of conduct constitutes a **systematic denial of due process and fair administrative review** under both state and federal law.

1. Monopolization of Jurisdictional Authority

DERM frequently rejects environmental assessments not conducted by its own personnel or contracted affiliates, asserting exclusive jurisdiction over wetland delineations—even though **Florida law does not grant counties sole interpretive authority** over wetland science.

- Under **Rule 62-340, Florida Administrative Code (F.A.C.)**, delineation of wetlands must follow objective, science-based indicators (e.g., hydrology, vegetation, soils).
- Nowhere in Rule 62-340 is it required that these delineations be performed solely by a county agency. To the contrary, **the rule is methodologically neutral** and encourages use of "best available science" by **qualified professionals.**
- **§373.421(1), Florida Statutes (F.S.)** further supports this, stating that wetland determinations must follow state-adopted methodologies—not local interpretations.

DERM's rejection of compliant studies constitutes a **de facto monopoly on environmental classification**, which is **not supported by either statutory text or delegated regulatory authority.**

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2. Suppression of Legally Significant Evidence

Qualified professionals—including soil scientists, biologists, and environmental engineers—routinely submit peer-reviewed, GPS-referenced, and statutorily compliant reports under:

- **40 C.F.R. §312** (ASTM Phase I standards),

- **§373.421(1), F.S.**, and
- **Rule 62-340, F.A.C.**

By **failing to even acknowledge** these documents, DERM violates both:

- **Procedural due process** under the Florida Constitution (Art. I, §9),
- **The Administrative Procedure Act (APA), Chapter 120, F.S.**, which prohibits **arbitrary or capricious agency action** (§120.68(7)(e), F.S.).

Their silence is not technical noncompliance—it is **a denial of meaningful review**, an essential element of administrative fairness.

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3. Avoidance of Legal Liability Under the Bert J. Harris Act

The **Bert J. Harris, Jr. Private Property Rights Protection Act** (**§70.001, F.S.**) provides compensation when a government action "**inordinately burdens**" real property—without a formal taking.

- **If DERM acknowledges third-party scientific evidence** showing a wetland classification is flawed, it must either:
    1. Withdraw the enforcement action,
    2. Justify continued regulation (under strict scientific standards), or
    3. Face possible **liability for damages** under §70.001(6)(a), F.S.

Thus, DERM has a **perverse incentive**: **by ignoring outside evidence, it avoids triggering liability**.

DEFENDANT'S POSITION (DERM's Likely Defense)

While weak in statutory grounding, DERM may offer several procedural and administrative defenses:

1. Lack of Delegation = Discretion

DERM may argue that because **it is not a delegated ERP authority** under **§373.441, F.S.** and **Rule 62-344, F.A.C.**, it cannot legally "accept" third-party delineations in lieu of its own internal assessments.

They may claim:

- Any outside report must be ratified by a delegated state agency (i.e., FDEP or SFWMD) before DERM is compelled to consider it.
- Since they operate under county ordinances (Chapter 24, Miami-Dade County Code), DERM can set its own evidentiary standards unless/until preempted.

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2. Agency Expertise and Interpretive Deference

> While DERM might argue for deference under **Chevron U.S.A., Inc. v. NRDC (1984)**, recent Supreme Court decisions in 2024 have curtailed this doctrine significantly. Courts are now less likely to defer automatically to agency interpretations, particularly when statutory language is clear or the agency's interpretation raises significant legal or policy issues.
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> Therefore, the claim that judicial review should defer to DERM's wetland classifications or rejection of third-party studies is now weaker. Courts must independently assess whether agency decisions comply with statutory mandates and legal standards, reducing DERM's ability to shield questionable actions behind claims of "expertise" or discretionary interpretation.

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3. Procedural Invalidity of Submission

DERM might claim that third-party studies:

- Were **not submitted through formal permitting or appeal channels**, and
- Therefore **do not trigger administrative obligations** or response deadlines.

They may assert that unless accompanied by a complete ERP application or a formal agency request, such documents are "unsolicited" and non-binding.

REBUTTAL: Why the Plaintiff's Position Prevails

While DERM's defenses reflect standard administrative talking points, **they fail under closer legal and procedural scrutiny**.

Key Rebuttal Points:

1. Rule 62-340, F.A.C. and §373.421(1), F.S. are controlling authorities—not local ordinances.

DERM cannot override or narrow state-level scientific standards by refusing to acknowledge qualified external delineations that comply with Rule 62-340, F.A.C.

2. Chevron deference does not apply to ultra vires (unauthorized) actions.

If DERM lacks ERP delegation under **§373.441, F.S.**, it has **no jurisdictional foundation** to enforce ERP-related decisions. The Chevron doctrine only applies to **lawfully empowered agencies** interpreting **their own** rules—not to local departments applying state statutes without authority.

3. Ignoring evidence = arbitrary and capricious action.

Under **§120.68(7)(e), F.S.**, courts may overturn agency actions if they are:

> "Not supported by competent substantial evidence" or are "arbitrary, capricious, or a denial of due process."

A refusal to review contrary expert reports—submitted in compliance with governing statutes—meets this definition.

4. Suppression strengthens Bert Harris liability.

Willfully avoiding review of qualified, statutorily relevant evidence **increases the inordinate burden** under **§70.001(3)(e), F.S.**, and may be interpreted as **bad faith regulatory abuse**.

Strategic Takeaway for Landowners

Landowners and their counsel should:

- **Submit all third-party reports in writing**, with proof of delivery;
- **Cite Rule 62-340, §373.421(1), and §120.68** in correspondence;
- Document all refusals as **potential evidence** of Bert Harris Act liability;
- **Request public records** under Chapter 119, F.S., to reveal internal justifications or lack thereof;
- Consider filing a **pre-suit notice of claim** under §70.001, F.S., referencing the agency's failure to act on competent evidence.

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