

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 1087 Environmental Control  
**SPONSOR(S):** Stansel  
**TIED BILLS:** **IDEN./SIM. BILLS:**

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Environmental Regulation Committee		Kliner	Kliner
2) Agriculture Committee			
3) State Resources Council			
4) _____			
5) _____			

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**SUMMARY ANALYSIS**

The bill grants express authorization to the Department of Environmental Protection (DEP) to cooperate with the Department of Agriculture and Consumer Services (DACS) in the implementation of Best Management Practices (BMPs) consistent with statutory guidelines for alternative or innovative methods of resource protection expressed in Florida Statutes sections 373.4595 (Lake Okeechobee Protection Program), 403.067 (Establishment and implementation of total maximum daily loads), 576.045 (Nitrogen and phosphorus), and 597.004 (Aquaculture).

In addition, the bill encourages and authorizes alternative or innovative methods of resource protection (i.e., BMPs), specifically ratifies the January 1999 Agreement in Principle on Nutrient Management in the Suwannee River Basin, and ratifies any subsequent dairy administrative agreements entered into prior to January 1, 2004.

The fiscal impact is indeterminate.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Limited Government.** The bill seeks to preserve the DEP's authority to promote, encourage and implement Best Management Practices (BMPs) (voluntary participation rather than regulatory) in the agricultural community, regulated and unregulated entities alike.

**Lower Taxes.** The bill seeks to encourage voluntary participation in the control of non-point source (NPS) pollution – especially in the case of non-regulated industries - rather than add additional regulation which might necessitate new funding sources to pay for the implementation of the new regulations.

**Promote personal responsibility.** The bill seeks to preserve the DEP's authority to promote, encourage and implement Best Management Practices. The Suwannee River partnership, for example, captures the voluntary cooperation of regulated and non-regulated entities to mitigate non-point source pollution.

**Empower families.** For the reasons stated above, the amelioration of non-point pollution through the voluntary participation of groups as in the Suwannee River Partnership not only gives citizens ownership in the ecological preservation of their own land and water, but also such activity will escalate the drive to clean the waters affected by NPS pollution, providing cleaner water for drinking and recreation.

#### B. EFFECT OF PROPOSED CHANGES:

##### Present Situation

The federal Clean Water Act (CWA) is the cornerstone of surface water quality protection in the United States. While the CWA does not deal directly with groundwater or with water quantity issues, the statute employs a variety of regulatory and nonregulatory tools to sharply reduce direct pollutant discharges into waterways, finance municipal wastewater treatment facilities, and manage polluted runoff.

As authorized by the CWA, the National Pollutant Discharge Elimination System (NPDES) Permit Program controls water pollution by regulating **point sources** that discharge pollutants into waters of the United States. Point sources are discrete conveyances such as pipes or man-made ditches. The CWA requires anyone who discharges waste by a point source to have a permit.

The Florida Department of Environmental Protection (DEP) is authorized to administer the NPDES Program in the state pursuant to an agreement between the state and the United States Environmental Protection Agency (EPA). Individual homes that are connected to a municipal system, use a septic system, or do not have a surface discharge do not need an NPDES permit; however, industrial, municipal, and other facilities must obtain permits if their discharges go directly to surface waters. Typically, the solutions to mitigate point source pollution are highly technological.

**Nonpoint source** (NPS) pollution, unlike pollution from industrial and sewage treatment plants, comes from many sources. NPS pollution is caused by rainfall moving over and through the ground. As the runoff moves, it picks up and carries away natural and human-made pollutants, finally depositing them into lakes, rivers, wetlands, coastal waters, and even our underground sources of drinking water. The technological solutions that accompany point source pollution issues generally are not applicable to NPS pollution. The CWA was amended in 1987 to establish the Nonpoint Source Management Program (CWA Section 319). CWA Section 319 created a grant program to provide funding for states to administer NPS pollution education and monitoring projects. Typically, the solutions to mitigate NPS pollution are very low-tech, for instance, storing waste product from poultry operations on concrete and

under a covering so that rainwater does not allow nutrients to leach into the ground, and waste generated by the agricultural industry is generally regarded as NPS pollution. The NPDES Program, however, applies to some agricultural producers, particularly operators of larger or higher risk animal feeding operations. For most agricultural producers, a variety of voluntary programs provide the technical and financial assistance to help producers meet technical standards and remain economically viable.

### **Federal Treatment of Concentrated Animal Feed Operations (CAFO)**

In February 2003, the EPA issued revised regulations for concentrated animal feeding operations (CAFOs). For the first time, the regulations require all large CAFOs, including beef, dairy, swine, and poultry operations, to obtain CWA permits from the states or EPA, regardless of whether they discharge only during large storms. CAFOs are point sources, as defined by the CWA [Section 502(14)]. The permits issued by EPA and states require large livestock operations to develop nutrient management plans that ensure manure is properly managed and applied to land in ways that assure utilization of nutrients by crops. To be considered a CAFO, a facility must first be defined as an Animal Feeding Operation (AFO).

Animal Feeding Operations (AFOs) are agricultural operations where animals are kept and raised in confined situations. AFOs generally congregate animals, feed, manure, dead animals, and production operations on a small land area. Feed is brought to the animals rather than the animals grazing or otherwise seeking feed in pastures. Animal waste and wastewater can enter water bodies from spills or breaks of waste storage structures (due to accidents or excessive rain), and non-agricultural application of manure to crop land. AFOs that meet the regulatory definition of a CAFO have the potential of being regulated under the NPDES Permitting Program.

An operation must meet the definition of an AFO before it can be defined or designated as a CAFO. Previous EPA regulations based the definition of CAFOs on the number of "animal units" confined. EPA no longer uses the term "animal unit," but instead refers to the actual number of animals at the operation to define a CAFO.

### **State Flexibility**

The EPA's final rule maintains important flexibility for states that allows them to focus resources and ensures that federal programs complement existing state efforts. EPA has retained the existing structure of when medium and small operations may be subject to the regulations. EPA has recommended that states use voluntary and incentive programs to help small and medium operations avoid water pollution problems that would make them subject to these new regulations.

The final rule also maintains a variety of flexibilities to accommodate state program implementation including:

- Flexibility for states to tailor their permit programs to address specific needs. For example, states retain the authority to determine the type of permit, general or individual, to be issued to a given operation. This enables states to develop permits that take into account the size, location, and environmental risks that may be posed by an operation.
- State authority to determine that specific CAFOs have no potential to discharge pollutants under any circumstances, and hence, do not need permits. This flexibility recognizes the geographic diversity and climatic variations that can exist.
- States have substantial flexibility to tailor nutrient management for CAFOs.
- States can authorize alternative performance standards for existing and new CAFOs that will help promote innovative technologies.

## **Nonpoint Source Pollution, Water Quality, and Best Management Practices (BMP)**

The DEP is authorized by statute to explore alternatives to traditional methods of regulatory permitting, provided that such methods will not allow a material increase in pollution emissions or discharges (Section 403.0611, F.S.). This statute authorizes the DEP to investigate and encourage cutting edge methodologies with permitted operations. For industry that is not otherwise permitted, the federal, state, regional, and local governments, as well as industry, work together as partners to develop BMPs to control NPS pollution. The state takes a very active role in promoting best management practices, from restricting the use of pesticides near water bodies for homeowners, to innovative irrigation practices for the state's largest row crops.

The DEP's Nonpoint Source Management Program is responsible for the implementation of the State of Florida's NPS management programs. These programs are implemented cooperatively by the DEP, Florida's water management districts, other state agencies (i.e., DACS and the Department of Health), local governments, and by the public. Within the section, agricultural NPS pollution issues are primarily addressed by a non-regulatory agricultural engineer. The goal is to reduce adverse impacts on the environment and help the agricultural sector to comply with environmental regulations while sustaining a vigorous and profitable agricultural industry in Florida. This is accomplished through development and dissemination of BMPs, cost-share funding of demonstration projects using Federal 319 grant funds, and consultation and discussion with the agricultural community.

The Nonpoint Source Management Program works closely with the Florida Department of Agriculture and Consumer Services; researchers at the University of Florida and Florida Agricultural and Mechanical University; county extension offices; the United States Department of Agriculture-Natural Resources Conservation Service; and various agricultural groups throughout the state.

### **Use of BMPs in North Florida Agriculture**

Generally stated, BMPs represent a model for environmental protection that takes a comprehensive rather than piece meal approach to problem-solving. In short, BMPs embrace market-based incentives that link environmental and economic objectives. According to the Environmental Protection Agency website, BMPs also provide better information and meaningful opportunities for public involvement in decision-making. In Florida, BMPs represent a cooperative effort between industry, environmental groups, and state and federal agencies. One such example is the Suwannee River Partnership (Partnership).

Table A, below, lists the 53 entities comprising the membership in the Suwannee River Partnership.

Table A: Current Membership in the Suwannee River Partnership		
Suwannee River Water Management District Florida Dept. of Agriculture and Consumer Services Florida Dept. of Environmental Protection Florida Dept. of Community Affairs USDA-Natural Resources Conservation Service University of Florida's Institute of Food and Agricultural Sciences U.S. Environmental Protection Agency U.S. Geological Survey Florida A&M University's Center for Water Quality Florida Dept. of Health Florida Cattlemen's Association Florida Farm Bureau Florida Fertilizer and Agrichemical Association Florida Forestry Association Florida Onsite Wastewater Association Florida Poultry Federation Florida Rural Water Association Goldkist, Inc	Sunshine State Milk Producers Alachua Soil and Water Conservation District Gilchrist Soil and Water Conservation District Jefferson Soil and Water Conservation District Lafayette Soil and Water Conservation District Levy Soil and Water Conservation District Madison Soil and Water Conservation District Santa Fe Soil and Water Conservation District Suwannee County Conservation District Suwannee River Resource Conservation and Development Council Dixie Soil and Water Conservation District Alachua County Commission Bradford County Commission Columbia County Commission Dixie County Commission Gilchrist County Commission Hamilton County Commission Lafayette County Commission	Levy County Commission Madison County Commission Suwannee County Commission Union County Commission Alachua City Commission Town of Bell City of Fanning Springs City of High Springs City of Lake City City of Newberry City of Starke City of Trenton Santa Fe Springs Working Group Adopt-a-River PCS Phosphate - White Springs Dannon Water Nestlé Waters North America Inc.

Responding to increasing nitrate levels in the Middle Suwannee and Santa Fe river basins, various state, federal, and regional agencies, local governments, and private industry representatives formed a coalition to work together to reduce nitrate levels in the surface waters and groundwater within the basins or watersheds through the introduction and voluntary implementation of BMPs. This approach to conservation has “captured,” through voluntary participation, both regulated and non-regulated entities, from CAFOs to ordinary citizens. For instance, the Partnership created a program called the “Quality Communities Program” to help small rural communities protect water resources and, at the same time, improve their quality of life by offering technical expertise and funding needed to complete critical water quality and community infrastructure projects for wastewater treatment, stormwater drainage, and potable (drinking) water supplies. Since the Quality Communities Program began, the Suwannee River Water Management District has assisted communities to:

- eliminate street and residential flooding,
- buy land for water holding areas,
- buy land for the protection of wellheads from potential contamination sources,
- pay for pre-engineering or feasibility studies for project cost estimates, and
- provide leverage for other available grants and funds.

Initially, the Partnership's efforts were limited to the Middle Suwannee River Basin. In 2003, the Partnership expanded its work to include the Santa Fe River Basin.

**Monitoring Water Quality**

In 2002, the Partnership developed “reasonable assurance” documentation to demonstrate that its watershed management programs address water quality concerns in the basin through the use of non-regulatory programs. The documentation was sent to the DEP and the EPA for review. DEP Secretary David Struhs and DEP accepted the documentation and designated the Suwannee River as having this special program in place to address water quality concerns. In early 2003, EPA Region 4 concluded it could not remove the Suwannee River from the Total Maximum Daily Load list but did agree the approach being taken by the Partnership is the best approach for addressing nonpoint source pollution concerns. The EPA has committed to help promote the Partnership’s approach and programs to help achieve water quality and other mutual goals.

The Partnership developed a strategy to monitor groundwater and surfacewater on a regional basis to identify trends in water quality over time. The surfacewater quality component of the Water Assessment Regional Network (WARN) Program was established in 1989 to assess ambient surfacewater quality in the District's priority water bodies as identified in the Surface Water Improvement and Management (SWIM) Program. It also serves as an early warning system to identify changing conditions in water quality.

The network provides water quality analysis based on water chemistry and aquatic biological samples. The information collected is used to identify seasonal variations and long-term trends in water quality and to help determine if land use practices affect water quality and aquatic communities.

The network includes a total of 76 stations for baseline water chemistry sampling. The network is sampled in the following manner: 76 stations for water chemistry, 20 stations for aquatic biology, and 58 stations for bacteria.

### **The Lawsuit Against DEP**

In 2001, the DEP was sued by three corporations and an individual, alleging that the agency did not have the authority to contract with the members of the Suwannee Partnership in lieu of its federal and state obligation to administer the NPDES Program specifically as it relates to CAFOs. The Circuit Court found in favor of the plaintiffs, and the First District Court of Appeal affirmed the judge's ruling without an opinion. The Circuit Court judge interpreted the duties and obligations of the DEP as expressed in the statutes and imposed the following directives to the DEP in an order that:

- Requires the DEP to administer an NPDES permitting program for dairy CAFOs in the state; requiring all dairy AFOs maintaining more than 700 mature cattle to apply for an NPDES permit or demonstrate an exemption from the program.
- Enjoins the DEP from relying on the Partnership in lieu of permits to control pollution from all dairies that may be a source of groundwater pollution.
- Requires the DEP to require all dairy operations to file reports concerning their operations that contain information as outlined in s. 403.061(13), F.S.
- Requires the DEP to develop and enforcement action to identify and bring action to control water pollution from unpermitted CAFOs.
- Enjoins the DEP from relying on s. 403.0611, F.S., as authority to use alternative schemes to traditional regulatory permitting for dairies and any other industrial operation that are required to be regulated pursuant to the NPDES Program.
- Requires the DEP to file a report to the Legislature outlining any future projects undertaken pursuant to s. 403.0611, F.S., prior to initiating the project.
- Requires the DEP to pay the plaintiffs' attorneys fees and courts costs.

The judge's ruling is likely to have dramatic implications for the DEP, as well as for agricultural industries (such as dairies that are not identified as CAFOs) that are not required under federal law to apply for an NPDES permit. Requiring the DEP to permit all dairies that "may be a source for groundwater pollution" and requiring the same dairies to file reports pursuant to s. 403.061(13), F.S., will add a layer of work and expense to both groups that is indeterminate at this time but could be detrimental to dairy operations that operate on a thin margin and may disrupt the DEP's mission elsewhere if additional employees and funds are needed to comply with the court's ruling. For example, s. 403.061(13), states:

**Department; powers and duties.**—The department 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:

\* \* \*

(13) Require persons engaged in operations which may result in pollution to file reports which may contain information relating to locations, size of outlet, height of outlet, rate and period of emission, and composition and concentration of effluent and such other information as the department shall prescribe to be filed relative to pollution.

### **Effect of Proposed Changes**

The bill grants express authorization to the DEP to cooperate with the DACS in the implementation of BMPs consistent with statutory guidelines for alternative or innovative methods of resource protection expressed in Florida Statutes sections 373.4595 (Lake Okeechobee Protection Program), 403.067 (Establishment and implementation of total maximum daily loads), 576.045 (Nitrogen and phosphorus), and 597.004 (Aquaculture). This bill provides specific statutory authorization to the DEP to encourage and promote alternative methodologies to ameliorate pollution in these specific areas, in addition to the general grant of authority provided in s. 403.0611, F.S.

In addition, the bill encourages and authorizes alternative or innovative methods of resource protection (i.e., BMPs), specifically ratifies the January 1999 Agreement in Principle on Nutrient Management in the Suwannee River Basin, and ratifies any subsequent dairy administrative agreements entered into prior to January 1, 2004. This section expressly contradicts the Circuit Court order which enjoins the DEP from relying on the Partnership in lieu of permits to control pollution "from all dairies that may be a source of groundwater pollution." However, codifying these agreements in statute will provide the DEP necessary authority to continue its mission in promoting good stewardship of the land with continued education, innovation, and BMPs.

In regard to the court's ruling, the bill does not address the issue of requiring the DEP to permit all dairies that may be a source of groundwater pollution, nor does the bill address the issue of requiring all dairies to file a report in accordance with s. 403.061(13), F.S. According to DEP and based on milk permits, there are 180 dairies in the state that this may affect. Finally, the bill does not address the requirement that the DEP file a report to the Legislature outlining any future projects undertaken pursuant to s. 403.0611, F.S., prior to initiating the project.

#### **C. SECTION DIRECTORY:**

- Section 1 Amends s. 403.061, F.S., adding language to grant express authorization to the DEP to cooperate with the DACS in the implementation of BMPs consistent with statutory guidelines for alternative or innovative methods of resource protection expressed in Florida Statutes sections 373.4595 (Lake Okeechobee Protection Program), 403.067 (Establishment and implementation of total maximum daily loads), 576.045 (Nitrogen and phosphorus), and 597.004 (Aquaculture). This section adds language to encourage and authorize alternative or innovative methods of resource protection (i.e., BMPs), and specifically ratifies the January 1999 Agreement in Principle on Nutrient Management in the Suwannee River Basin, and ratifies any subsequent dairy administrative agreements entered into prior to January 1, 2004, and renumbers subsequent sections.
- Section 2 Amends subsections (2), (3), and (6), of s. 311.105, F.S., correcting cross-references.
- Section 3 Amends subsection (1) of s. 316.272, F.S., correcting a cross-reference.
- Section 4 Amends subsection (9) of s. 373.414, F.S., correcting cross-references.
- Section 5 Amends paragraph (c) of subsection (5) of s. 380.06, F.S., correcting a cross-reference.
- Section 6 Amends subsection (7) of s. 403.0882, correcting a cross-reference.
- Section 7 Provides an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not address the Circuit Court ruling (a) enjoining the DEP from relying on the Partnership in lieu of permits to control pollution from all dairies that may be a source of groundwater pollution, and (b) requiring the DEP to require all dairy operations to file reports concerning their operations that contain information as outlined in s. 403.061(13), F.S.

Consequently, the court mandates will likely result in an indeterminate increase in permitting fees to the DEP.

#### 2. Expenditures:

For the reasons state above, the DEP will be required to expend an indeterminate amount of funds to implement permitting processes.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None anticipated.

#### 2. Expenditures:

None anticipated.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill ratifies the January 1999 Agreement in Principle on Nutrient Management in the Suwannee River Basin, and ratifies any subsequent dairy administrative agreements entered into prior to January 1, 2004, which will continue the benefits enjoyed by the industries affected by the Partnership Agreement and other agreements of a like nature. However, the bill does not address the issue of requiring the DEP to permit all dairies that may be a source of groundwater pollution nor does the bill address the issue of requiring all dairies to file a report in accordance with s. 403.061(13). F.S. Those issues are likely to have a dramatic, negative impact on the private sector.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require cities or counties to spend funds or take actions requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

#### 2. Other:

None.

B. RULE-MAKING AUTHORITY:

No rulemaking authority is required to implement the provisions of this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**