

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 157 Water Management Districts

SPONSOR(S): Porter & Pilon

TIED BILLS: None **IDEN./SIM. BILLS:** SB 560

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|------------------|----------|--|
| 1) Agriculture & Natural Resources Subcommittee | 15 Y, 0 N, As CS | Deslatte | Blalock |
| 2) Rulemaking & Regulation Subcommittee | 15 Y, 0 N, As CS | Miller | Rubottom |
| 3) State Affairs Committee | | | |

SUMMARY ANALYSIS

Under current law, the state of Florida has regulatory authority over various activities that affect surface waters and wetlands, primarily through the Environmental Resource Permit (ERP) program. The program is implemented jointly by the Department of Environmental Protection (DEP) and the five water management districts (WMDs). Current law also grants the WMDs the authority to implement the water supply and planning policies of the state, and issue permits for the consumptive use of water. Each WMD also is responsible for water resource management and development. Each WMD governing board is required to include in its annual budget the amount needed for the fiscal year to implement water resource development projects, as prioritized in its regional water supply plans. When the geographic area of a project or local government crosses WMD boundaries, the affected WMDs are authorized to enter into an interagency agreement designating one WMD with regulatory responsibilities for the geographic area. However, the WMDs do not have the statutory authority to enter into similar agreements for non-regulatory resource management activities, studies or projects. In addition, a WMD may not fund resource management activities in another WMD even if some benefits inure to it from the activities.

Current law also requires the WMDs to establish minimum flows and levels (MFLs) for priority water bodies to prevent significant harm from water withdrawals. If the existing flow or level of a water body is below or projected in 20 years to fall below established MFLs, then a recovery strategy must be implemented to restore the system to the established MFLs or a prevention strategy implemented to prevent the system from falling below the established MFLs. MFLs are adopted by rule by the WMDs and are subject to challenges under chapter 120, F.S., the Administrative Procedure Act (APA).

The bill provides that when the geographic area of a resource management activity, study, or project crosses WMD boundaries, the affected WMDs are authorized to designate a single affected district by interagency agreement to conduct all or part of the applicable resource management responsibilities under this chapter, not including those regulatory responsibilities that are subject to s. 373.046(6), F.S. The bill also provides that if funding assistance is provided to a resource management activity, study, or project, the WMD providing the funding must ensure that some or all the benefits accrue to the funding WMD. This will not impair any interagency agreement in effect on July 1, 2012.

The bill requires the governing board of a WMD, in determining the effect of a proposed consumptive use of water on the water resources of an adjoining district, to apply, without adopting by rule, the reservations, minimum flows and levels, and recovery or prevention strategies adopted by rule after July 1, 2012, by the adjoining WMD. The bill also provides that the governing board cannot authorize a consumptive use of water that violates any reservation adopted, or any MFL adopted after July 1, 2012, unless the permit is issued in accordance with the recovery or prevention strategy adopted by rule by the adjoining WMD. The WMD may grant a variance from the recovery or prevention strategy if the applicant identifies an alternative strategy to assist with the recovery of or the prevention of harm to a water body. The bill provides that any rule applied pursuant to this subsection that is challenged under the APA, must be defended by the WMD that adopted the rule. This does not apply to and may not be considered for any permit issued before July 1, 2012, including a review of a compliance report submitted pursuant to s. 373.236, F.S. A WMD must consider the reservations, minimum flows and levels, and recovery strategies adopted by rule after July 1, 2012, by the adjoining WMD if a modification of a permit issued prior to July 1, 2012, is requested by the permittee to increase permitted quantities or to transfer of permitted quantities to a new or existing source.

The bill allows the governing board of a WMD to provide group insurance for its employees and the employees of another WMD in the same manner and with the same provisions and limitations authorized for other public employees.

The bill directs all WMDs to jointly develop the water supply development component of a regional water supply plan with the regional water supply authority.

The bill provides that cooperative funding programs are not subject to the rulemaking requirements of chapter 120. However, any portion of an approved program which affects the substantial interests of a party would be subject to the hearing procedures established under section 120.569, F.S.

The bill does not appear to have a fiscal impact on state government. The bill has a potentially positive fiscal impact on WMDs who enter into interagency agreements by reducing the duplication of services and promoting streamlining.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0157d.RRS

DATE: 1/25/2012

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Interagency Agreements

Current Situation

Under chapter 373, F.S., the state has regulatory authority over various activities that affect surface waters and wetlands, primarily through the Environmental Resource Permit (ERP) program. The program is implemented jointly by the Department of Environmental Protection (DEP) and the five water management districts (WMDs)¹. Operating Agreements between the DEP and the WMDs outline specific responsibilities to each agency for any given application. Under those agreements, the DEP generally reviews and takes actions on applications involving:

- Solid waste, hazardous waste, domestic waste, and industrial waste facilities;
- Mining;
- Power plants, transmission and communication cables and lines, natural gas and petroleum exploration, production, and distribution lines and facilities;
- Docking facilities and attendant structures and dredging that are not part of a larger plan of residential or commercial development;
- Navigational dredging conducted by governmental entities, except when part of a larger project that a District has the responsibility to permit;
- Systems serving only one single-family dwelling unit or residential unit not part of a larger common plan of development;
- Systems located in whole or in part seaward of the coastal construction control line;
- Seaports; and
- Smaller, separate water-related activities not part of a larger plan of development (such as boat ramps, mooring buoys, and artificial reefs).

The WMDs have regulatory authority over reviewing and taking action on all other applications, mostly larger commercial and residential developments. Chapter 373, F.S., also grants the WMDs with the authority to implement the water supply and planning policies of the state, and issue permits for the consumptive use of water. Each WMD is also responsible for water resource management and development. Section 373.705, F.S., provides that it is the intent of the Legislature that WMDs take the lead in identifying and implementing water resource development projects, and be responsible for securing necessary funding for regionally significant water resource development projects. The WMDs are encouraged to implement water resource development as expeditiously as possible in areas subject to regional water supply plans. Each WMD governing board is required to include in its annual budget the amount needed for the fiscal year to implement water resource development projects, as prioritized in its regional water supply plans.

Section 373.046(4), F.S., authorizes the DEP and the WMDs to modify the division of responsibilities and to enter into further interagency agreements by rulemaking, including incorporation by reference, pursuant to chapter 120, F.S., to provide for greater efficiency and to avoid duplication in the administration of part IV of chapter 373, F.S. (management and storage of surface waters), by designating certain activities which will be regulated by either the WMDs or the DEP. In developing the interagency agreements, the WMDs and the DEP must take into consideration the technical and fiscal ability of each WMD to implement all or some of the provisions of part IV of chapter 373, F.S.

¹ The five water management districts include: Northwest Florida Water Management District, Suwannee River Water Management District, St. John's River Water Management District, Southwest Florida Water Management District, and South Florida Water Management District.

Section 373.046(6), F.S., provides that when the geographic area of a project or local government crosses WMD boundaries, the affected WMDs may designate a single affected WMD by interagency agreement to implement in that area, under the rules of the designated WMD, all or part of the applicable regulatory responsibilities under this chapter. Interagency agreements entered into under this section, which apply to the geographic area of a local government, must have the concurrence of the affected local government.

WMDs do not have the statutory authority to enter into similar agreements for non-regulatory resource management activities, studies or projects. In addition, a WMD may not fund resource management activities in another WMD even if some benefits inure to it from the activities.

Effect of Proposed Changes

The bill creates s. 373.046(7), F.S., providing that when the geographic area of a resource management activity, study, or project crosses WMD boundaries, the affected WMDs are authorized to designate a single affected district by interagency agreement to conduct all or part of the applicable resource management responsibilities, not including those regulatory responsibilities that are subject to s. 373.046(6), F.S. Under the bill, if funding assistance is provided to a resource management activity, study, or project, the WMD providing the funding must ensure that some or all the benefits accrue to the funding WMD. This will not impair any interagency agreement in effect on July 1, 2012.

Conditions for Issuance of Consumptive Use Permits

Current Situation

For uses other than private wells for domestic use, the DEP or the WMDs may require any person seeking to use “waters in the state” to obtain a consumptive use permit (CUP). A CUP establishes the duration and type of water use as well as the maximum amount that may be used. Pursuant to s. 373.219, F.S., each CUP must be consistent with the objectives of the WMD and not harmful to the water resources of the area. Section 373.223, F.S., provides that to obtain a CUP, an applicant must establish that the proposed use of water satisfies the statutory test, commonly referred to as “the three-prong test.” Specifically, the proposed water use:

1. Must be a “reasonable-beneficial use” as defined in s. 373.019, F.S.²;
2. Must not interfere with any presently existing legal use of water; and
3. Must be consistent with the public interest.

Section 373.223(4), F.S., provides that a WMD governing board, by regulation, can “reserve” from use by permit applicants, water in such locations and quantities, and for such seasons of the year, as in its judgment may be required for the protection of fish and wildlife or the public health and safety. Such reservations must be subject to periodic review and revision in the light of changed conditions. However, all presently existing legal uses of water shall be protected so long as such use is not contrary to the public interest. To help ensure that permitted withdrawals do not harm surface or groundwater resources, WMDs are required to establish:

- Minimum flows for all surface watercourses in the area. The minimum flow for a given watercourse shall be the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area;³ and
- Minimum water level. The minimum water level is the level of groundwater in an aquifer and the level of surface water at which further withdrawals would be significantly harmful to the water resources of the area⁴.

² “Reasonable-beneficial use” means the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest.

³ Section 373.042(1)(a), F.S.

⁴ Section 373.042(1)(b), F.S.

The goal of establishing minimum flows and levels (MFLs) is to ensure there is enough water to satisfy the consumptive use of the water resource without causing significant harm to the resource. By establishing MFLs for non-consumptive uses, the WMDs are able to determine how much water is available for consumptive use. This is useful when evaluating a new CUP application. MFLs are adopted by rule by the WMDs and are subject challenges under the APA.⁵ MFLs are established using the best available data and are independently and scientifically peer reviewed. To date, 322 MFLs have been adopted statewide, and an additional 200 are included on the priority lists for future adoption. If the existing flow or level of a water body is below or projected in 20 years to fall below established MFLs, then a recovery strategy must be implemented to restore the system to the established MFLs or a prevention strategy implemented to prevent the system from falling below the established MFLs.⁶

The WMDs have been established along surface hydrological boundaries. As Florida's population has grown and groundwater pumping increased, withdrawals along the boundary of one WMD can cause significant harm to the resources in an adjoining WMD. Such effects are becoming more common as technological advances have provided better data on groundwater resources. While a WMD has the authority to protect all water resources, including water bodies in an adjacent WMD, a WMD is not required to apply the adopted reservations, MFLs, and recovery and prevention strategies of a neighboring WMD in determining the effect of a proposed consumptive use of water on the water resources of an adjoining WMD. To do so would require the WMD to go through its own rule making process to adopt the regulations of the adjoining WMD. The current statutory authority may result in duplication of effort and rulemaking activity when a withdrawal affects water bodies in adjoining WMDs. It can also create inconsistent and inequitable treatment of water use permit applicants.

Effect of Proposed Changes

The bill requires the governing board of a WMD, in determining the effect of a proposed consumptive use of water on the water resources of an adjoining district, to apply, without adopting by rule, the reservations, MFLs, and recovery or prevention strategies adopted by rule after July 1, 2012, by the adjoining WMD. The bill also provides that the governing board cannot authorize a consumptive use of water that violates any reservation or any MFL adopted after July 1, 2012, unless the permit is issued in accordance with the recovery or prevention strategy adopted by rule by the adjoining WMD. The WMD may grant a variance from the recovery or prevention strategy if the applicant identifies an alternative strategy to assist with the recovery of or the prevention of harm to a water body. The bill provides that any rule applied pursuant to this subsection that is challenged under ss. 120.56 or 120.569, F.S.,⁷ must be defended by the WMD that adopted the rule. This new subsection does not apply to and may not be considered for any permit issued before July 1, 2012, including a review of a compliance report submitted pursuant to s. 373.236, F.S. A WMD must consider the reservations, MFLs, and recovery or prevention strategies adopted by rule after July 1, 2012, by the adjoining WMD if a modification of a permit issued prior to July 1, 2012, is requested by the permittee to increase permitted quantities or to transfer permitted quantities to a new or existing source that increases the impact to the MFL or reservation.

Minimum Flows and Levels

Current Situation

DEP and each WMD are required to establish minimum flows for surface watercourses and minimum levels for ground water and surface waters within the district.⁸ "Minimum flow" is the limit at which

⁵ Section 120.56, F.S.

⁶ Section 373.0421(2), F.S.

⁷ Challenges to proposed or existing rules, or to policies which are alleged to be unadopted rules, are authorized under s. 120.56, F.S. Section 120.569, F.S., states the general procedures for all final agency decisions which determine the substantial interests of another party, and incorporates the procedures of s. 120.57(1), F.S., if factual disputes must be resolved, and s. 120.57(2), F.S., if there is no factual dispute. Section 120.57(1)(e), F.S., provides requirements for challenging policies, that affect substantial interests but which the agency has not adopted by rulemaking, in an action under s. 120.569, F.S.

⁸ Section 373.042(1), F.S.

further water withdrawals from a given watercourse would significantly harm the water resources or ecology of the area.⁹ “Minimum level” is the level of groundwater in an aquifer or the level of a surface water body at which further withdrawals will significantly harm the water resources of the area.¹⁰

A person who will be substantially affected by a proposed minimum flow or minimum level may request that DEP or the governing board of the WMD submit for independent scientific peer review all of the information and data on which the proposed flow or level is based. The request must be made in writing prior to the flow or level being established and prior to the filing of any petition for administrative hearing related to the flow or level.¹¹ The statute provides a process for conducting such review and that the final report is admissible in evidence in any subsequent administrative challenge to establishing the minimum flow or level.¹²

DEP has sole authority to review rules of WMDs to ensure consistency with DEP’s water implementation rule.¹³ This review is required to begin within 30 days of the adoption or revision of a rule by a WMD.

Effect of Proposed Changes

The bill authorizes additional recourse for those substantially affected by an adjoining WMD’s proposed establishment of a minimum flow or level, reservation, or recovery or prevention strategy under proposed s. 373.223(6), F.S., which is also created under the bill (see above analysis for Conditions for Issuance of Consumptive Use Permits). A substantially affected person may request a preliminary review by DEP of the proposed action (to be made by rule). The request must be made no later than 21 days from the publication by the adjoining WMD of the notice of proposed rulemaking.¹⁴ A timely-filed request will suspend the rulemaking for 30 days, during which DEP is to review the rule and provide comments to the governing board. This “pre-adoption review” is expressly stated as being separate from DEP’s rule review authority under s. 373.114(2), F.S.

However, the bill does not specify where the written request is filed or transmitted to DEP, does not specify how the affected WMD is notified of the request, provides no clear authority for DEP to adopt a process for receiving and rendering such reviews, provides no standards for DEP to apply in conducting such reviews, and makes no provision for the WMD to notice other parties of the filing of the request or the resumption of rulemaking upon receipt of DEP’s comments. The bill also does not compel DEP to review or comment; if DEP takes no action the WMD’s rulemaking would still resume after 30 days.

Group Insurance

Current Situation

Section 373.605, F.S., authorizes the governing board of a WMD to provide group insurance for their employees, and the employees of another WMD in the same manner. Each health care plan varies among the WMDs.

Effect of Proposed Changes

The bill allows the governing board of a WMD to provide group insurance for its employees and the employees of another WMD in the same manner and with the same provisions and limitations authorized for other public employees.

⁹ Section 373.042(1)(a), F.S.

¹⁰ Section 373.042(1)(b), F.S.

¹¹ Section 373.042(4)(a), F.S.

¹² Section 373.042(5), F.S. This subsection also requires the Administrative Law Judge to render the order within 120 days after the petition is filed.

¹³ Section 373.114(2), F.S. The Water Resource Implementation Rule is promulgated as Chapter 62-40, F.A.C.

¹⁴ This is the same period allowed to bring a challenge to proposed rulemaking. Section 120.54(3)(c)1., F.S.

Regional Water Supply Planning

Current Situation

Section 373.709, F.S., requires WMDs to conduct water supply needs assessments. A WMD that determines existing resources will not be sufficient to meet reasonable-beneficial uses for the planning period must prepare a regional water supply plan. The plans must contain:

- A water supply development component.
- A water resource development component.
- A recovery and prevention strategy.
- A funding strategy.
- The impacts on the public interest, costs, natural resources, etc.
- Technical data and information.
- Any MFLs established for the planning area.
- The water resources for which future MFLs must be developed.
- An analysis of where variances may be used to create water supply development or water resource development projects.

Currently, only the Southwest Florida WMD and a regional water supply authority within the boundary of the Southwest Florida WMD are required to jointly develop the water supply development component of a regional water supply plan.

Effect of Proposed Changes

The bill directs all WMDs to jointly develop the water supply development component of a regional water supply plan with the regional water supply authority.

Rules/Cooperative Funding Programs

Current Situation

WMDs have cost-share cooperative funding programs to foster the development of sustainable water resources, improve water quality, provide flood protection, and enhance conservation measures. It is not considered a regulatory program. Therefore, if a WMD needed to adopt rules for all of the procedures and policies in a cooperative funding program, it would be unable to adapt or modify the program as necessary. Section 373.171, F.S., authorizes WMDs to adopt rules or issue orders affecting the use of water; regulate the use of water; issue orders and adopt rules pursuant to chapter 120, F.S.

If a WMD proposes to take certain agency action within its jurisdiction that will affect the substantial interests of a party, that proposed action is subject to the hearing procedures in the APA.¹⁵

Effect of Proposed Changes

The bill amends s. 373.171, F.S., to provide that cooperative funding programs are not subject to the rulemaking requirements of chapter 120. However, any portion of an approved program which affects the substantial interests of a party would be made subject to the hearing procedures under section 120.569, F.S. These procedures incorporate the specific procedures available under s. 120.57, F.S.

¹⁵ A WMD comes within the definition of an agency. Section 120.52(1), F.S. The adoption of a rule or entry of a final order is “agency action” under s. 120.52(2), F.S. A party whose substantial interests are affected by the proposed agency action of a WMD is entitled to a hearing under the basic procedures set out in s. 120.569, F.S. and the specific hearing procedures provided in s. 120.57, F.S.

B. SECTION DIRECTORY:

Section 1. Amending s. 373.042, F.S., authorizing substantially affected persons to request DEP to review and comment on a minimum flow or level, reservation, or recovery or prevention strategy proposed by the governing board of an adjoining WMD. This process is separate from DEP's rule review authority under s. 373.114(2), F.S.

Section 2. Amending s. 373.046, F.S., authorizing WMDs to enter into interagency agreements for resource management activities under specific conditions; providing applicability.

Section 3. Amending s. 373.223, F.S., requiring WMDs to apply specified reservations, minimum flows and levels, and recovery and prevention strategies in determining certain effects of proposed consumptive uses of water; prohibiting WMDs from authorizing certain consumptive uses of water; providing an exception; providing requirements for the challenge of specified rules; providing applicability.

Section 4. Amending s. 373.605, F.S., authorizing a WMD to provide a group health insurance for its employees and the employees of another WMD; removing obsolete provisions.

Section 5. Amending s. 373.709, F.S., relating to regional water supply planning; removing a reference to the SWFWMD; requiring a regional water supply authority and the applicable WMD to jointly develop the water supply component of the regional water supply plan.

Section 6. Amending s. 373.171, F.S., exempting cooperative funding programs from certain rulemaking requirements but providing that a party whose substantial interests are affected by any portion of an approved program would be entitled to a hearing under the provisions of s. 120.569, F.S..

Section 7. Provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill has a potentially positive fiscal impact on WMDs who enter into interagency agreements by reducing the duplication of services and promoting streamlining.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill authorizes a water management district to apply the reservations, minimum flows and levels, and recovery or prevention strategies adopted by an adjoining district without having to adopt them by rule. The bill also provides that cooperative funding programs are not subject to the rulemaking requirements of chapter 120. However, a party whose substantial interests are affected by any portion of an approved program would be entitled to seek a hearing under the provisions of s. 120.569, F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill authorizes a substantially affected person to request DEP to review and comment on a minimum flow or level, reservation, or recovery or prevention strategy proposed by the governing board of an adjoining WMD. A timely request suspends the pending rulemaking for that proposal for 30 days to allow time for DEP to review and comment. However, the bill does not specify where the written request is filed or transmitted to DEP, does not specify how the affected WMD is notified of the request, provides no clear authority for DEP to adopt a process for receiving and rendering such reviews, provides no standards for DEP to apply in conducting such reviews, and makes no provision for the WMD to notice other parties of the filing of the request or the resumption of rulemaking upon receipt of DEP's comments. The bill also does not compel DEP to review or comment; if DEP takes no action the WMD's rulemaking would still resume after 30 days.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 24, 2012, the Rulemaking & Regulation Subcommittee amended and passed CS/HB 157 as a committee substitute for the committee substitute (CS/CS). The two amendments adopted did the following:

- Created a new Section 1 which amended s. 373.042, F.S., to provide a process for a person substantially affected by a minimum flow or level, reservation, or recovery or prevention strategy proposed by the governing board of an adjoining WMD to request DEP to review and comment on the proposal.
- Added language to Section 2 of CS/HB 157 (now renumbered as Section 3 in CS/CS/HB 157) to clarify the elements adopted by an adjoining WMD a governing board must consider when reviewing requested permit modifications which increase permitted quantities or transfer permitted quantities to a new or existing source.

This analysis is drawn to the Committee Substitute for CS/HB 157.