

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: SB 1864

INTRODUCER: Environmental Preservation and Conservation Committee

SUBJECT: Ratification of Rules Implementing Total Maximum Daily Loads for Impaired Water Bodies

DATE: April 18, 2013

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hinton	Uchino		ep SPB 7154 as introduced
2.	Hinton	Phelps	RC	Pre-meeting
3.				
4.				
5.				
6.				

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## I. Summary:

SB 1864 provides for the legislative ratification of a set of rules establishing total maximum daily loads (TMDLs) by the Department of Environmental Protection (DEP) for various impaired waterbodies in the state. A Statement of Estimated Regulatory Costs (SERC) was produced for each rule and because they each have economic impacts that cross certain thresholds described below, they may not go into effect until they are ratified by the Legislature. The scope of the bill is limited to this rulemaking condition and does not adopt the substance of any rule into statute.

This bill only provides for the ratification of this set of rules and does not make any changes to Florida Statutes.

## II. Present Situation:

### Establishment of TMDLs by the DEP

Under the federal Clean Water Act (CWA), states are required to adopt water quality standards (WQS) for their navigable waters and to review and update those standards at least every three years. These standards must include:

- Designation of a waterbody's beneficial uses, such as water supply, recreation, fish propagation, or navigation;
- Water quality criteria that define the amounts of pollutants, in either numeric or narrative form, that the waterbody can contain without impairment of the designated beneficial uses; and

- Anti-degradation requirements.<sup>1</sup>

When a waterbody is unable to maintain its WQS, it is designated as impaired. For impaired waterbodies, the U. S. Environmental Protection Agency (EPA) or the state must set a TMDL establishing the maximum amount of a given pollutant the waterbody can accept while still meeting WQS associated with its designated use. In Florida, the DEP has the authority to establish TMDLs by the Watershed Restoration Act of 1999.<sup>2</sup> The DEP periodically submits to EPA a list of waterbodies or segments for which TMDL assessments will be conducted. If the assessments show that a particular waterbody is not meeting its WQS, the DEP is then required to set a TMDL, which is done through rulemaking.<sup>3</sup>

### **Adoption of TMDL Rules Submitted for Ratification**

The DEP develops a TMDL by:

1. assessing the quality of a particular waterbody;
2. determining if that waterbody falls short of the applicable WQS (and is thus “impaired”);
3. discerning which pollutant(s) may cause the impairment;
4. establishing the TMDL necessary to resolve that impairment; and
5. adopting that TMDL by rule.<sup>4</sup>

The DEP also prepares and makes available online a complete report supporting the determination of one or more TMDLs, depending on the affected waterbodies included in the report.<sup>5</sup>

The DEP organizes all TMDLs under a single chapter of rules.<sup>6</sup> The chapter is divided into sections representing the different water basins identified in the state, with one exception: Rule 62-304.900, F.A.C., is a new TMDL for mercury that applies statewide to all waterbodies. A TMDL for a particular waterbody is adopted as a subsection of the rule representing the water basin encompassing the particular water segment to which the TMDL applies. For each of the six rules below, the DEP used a single rulemaking proceeding to adopt the listed subsections. As part of each proceeding, the DEP prepared a single SERC showing the specified subsections would require legislative ratification. The following rules have been submitted for ratification during the 2013 Regular Session:

- Rule 62-304.300, “St. Marks River Basin TMDLs”: subsections (3) through (7) were adopted on March 2, 2012.
- Rule 62-304.330, “Pensacola Bay Basin TMDLs”: subsections (10) and (11) were adopted on February 7, 2013.
- Rule 62-304.520, “Indian River Lagoon Basin TMDLs”: subsections (14) through (20) were adopted on March 20, 2013.

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<sup>1</sup> 33 U.S.C. s. 1251, et seq.

<sup>2</sup> Section 403.067, F.S.

<sup>3</sup> Section 403.067(2), F.S.

<sup>4</sup> DEP, *Total Maximum Daily Loads Program*, <http://www.dep.state.fl.us/water/tmdl/index.htm>, (last visited Apr. 6, 2013).

<sup>5</sup> DEP, *Final TMDL Documents*, [http://www.dep.state.fl.us/water/tmdl/final\\_tmdl.htm](http://www.dep.state.fl.us/water/tmdl/final_tmdl.htm), (last visited Apr. 6, 2013); and DEP, *Draft TMDL Documents*, [http://www.dep.state.fl.us/water/tmdl/draft\\_tmdl.htm](http://www.dep.state.fl.us/water/tmdl/draft_tmdl.htm), (last visited Apr. 6, 2013).

<sup>6</sup> Chapter 62-304, F.A.C., “Total Maximum Daily Loads.”

- Rule 62-304.610, “Hillsborough River Basin TMDLs”: subsection (12), was adopted on August 20, 2012.
- Rule 62-304.645, “Springs Coast Basin TMDLs”: subsections (13) and (14), were adopted on March 8, 2013.
- Rule 62-304.900, “Statewide TMDLs.” The mercury TMDL was adopted on November 21, 2012.<sup>7</sup>

In the certification submitted to the Department of State when these rules were filed for adoption, the DEP stated that rules regarding TMDLs for Sykes Creek and Goat Creek (Marine Segment), adopted as part of the Indian River Lagoon Basin TMDLs, would not require legislative ratification.<sup>8</sup>

### **Rulemaking Authority and Legislative Ratification**

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms. Rulemaking authority is delegated by the Legislature through statute and authorizes an agency to adopt, develop, establish, or otherwise create a rule. Unless directed by the Legislature, agencies do not have discretion to engage in rulemaking. To adopt a rule an agency must have a general grant of authority from the Legislature to implement a specific law by rulemaking. The grant of rulemaking authority does not need to be detailed.<sup>9</sup> The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.<sup>10</sup>

An agency begins the formal rulemaking process by filing a notice of the proposed rule. The notice is published by the Department of State in the Florida Administrative Register and must provide certain information, including the text of the proposed rule, a summary of the agency’s SERC, if one is prepared, and how a party may request a public hearing on the proposed rule. Pursuant to s. 120.541(2), F.S., the SERC must include an economic analysis projecting a proposed rule’s adverse effect on specified aspects of the state’s economy or increase in regulatory costs.

The economic analysis mandated for each SERC under s. 120.541, F.S., must analyze a rule’s potential impact over the five year period from when the rule goes into effect. A rule meeting any of these three thresholds must be ratified by the Legislature before it becomes effective:

- If it is likely to have an adverse impact on economic growth, private sector job creation or employment, or private sector investment in excess of \$1 million in the aggregate within five years after the implementation of the rule;

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<sup>7</sup> E-mail from Katie Kelly, Deputy Legislative Affairs Director, DEP, (Apr. 8, 2013) (on file with the Senate Committee on Environmental Preservation and Conservation).

<sup>8</sup> Florida Department of State, *Florida Administrative Register: Proposed Rule 62-304.520*, <https://www.flrules.org/gateway/RuleNo.asp?title=TOTAL%20MAXIMUM%20DAILY%20LOADS&ID=62-304.520> (click on document link for ID 12652794) (last visited Apr. 7, 2013).

<sup>9</sup> *Save the Manatee Club, Inc.*, *supra* at 599.

<sup>10</sup> *Sloban v. Florida Board of Pharmacy*, 982 So.2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So.2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

- If it is likely to have an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation, in excess of \$1 million in the aggregate within five years after the implementation of the rule; and
- If it is likely to increase regulatory costs, including any transactional costs, in excess of \$1 million in the aggregate within five years after the implementation of the rule.

Present law distinguishes between a rule being “adopted” and becoming enforceable or “effective.”<sup>11</sup> Pursuant to s. 120.54(3), F.S., a rule must be filed for adoption before it may go into effect and cannot be filed for adoption until completion of the rulemaking process.

### **Impact of Rules**

Except for the statewide mercury TMDL, each rule creates the TMDL for one or more specific pollutants for a particular waterbody. While the implementation of each of these separate TMDLs is projected to increase regulatory costs by over \$1 million in the first five years of operation, the adoption of TMDLs by the DEP using a thorough scientific process maintains Florida’s overall compliance with the Clean Water Act and precludes the EPA from setting TMDLs in Florida.

### **III. Effect of Proposed Changes:**

The bill ratifies the included TMDL rules, allowing each to become effective.

**Section 1** provides for legislative ratification of the following rules:

- Rule 62-304.300, subsections (3) through (7), F.A.C.;
- Rule 62-304.330, subsections (10) and (11), F.A.C.;
- Rule 62-304.520, subsections (14) through (20), F.A.C.;
- Rule 62-304.610, subsection (12), F.A.C.;
- Rule 62-304.645, subsections (13) and (14), F.A.C.; and
- Rule 62-304.900, F.A.C. (the statewide mercury TMDL).

The bill expressly limits ratification to the rules listed. It also directs that the act shall not be codified in the Florida Statutes but only noted in the historical comments to each rule by the Department of State. Additionally, the bill directs that it does not alter rulemaking authority, does not constitute legislative preemption of or exception to any provision of law governing adoption or enforcement of the rules listed, and does not cure any rulemaking defect or preempt any challenge based on a lack of authority or a violation of the legal requirements governing the adoption of any of the cited rules.

**Section 2** provides the act goes into effect upon becoming a law.

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<sup>11</sup> Section 120.54(3)(e)6, F.S. Before a rule becomes enforceable, thus “effective,” the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

If the rules are ratified, the private sector will begin to bear the costs of compliance for the requirements of the TMDLs. This may be a positive result since the TMDLs will not be set by the EPA, but the effect is indeterminate.

**C. Government Sector Impact:**

If the rules are not ratified, the EPA may set TMDLs in Florida for these impaired waterbodies. It is beneficial for the state to maintain control of setting TMDLs in Florida instead of relying on the EPA to do so.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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