

STORAGE NAME: h1321.wrm
DATE: March 23, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
WATER & RESOURCE MANAGEMENT
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: HB 1321

RELATING TO: Water resources development

SPONSOR(S): Representative Bitner

STATUTE(S) AFFECTED: Amends sections 373.016, 373.019, 373.042 and 373.223, Florida Statutes (F.S.) Creates sections 373.038 and 373.0421, F.S. Repeals sections 373.019(16), 373.036, 373.039 and 402.061(33), F.S.

COMPANION BILL(S): SB 1428 (s), HB 715 (c), HB 1339 (c), SB 1338 (c) and SB 1562 (c)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) WATER & RESOURCE MANAGEMENT
 - (2)
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I. SUMMARY:

HB 1321 makes a distinction between “water resource development” and “water supply development.” It specifies that water resource development is a fundamental mission of Florida’s five water management districts (WMDs), and lists a number of activities that the WMDs’ development projects must include. The primary goal of water resource development is to ensure safe, adequate, dependable and affordable water for all current and projected water users who meet the statutory test of reasonable-beneficial use. The bill recognizes that while water supply development is primarily the responsibility of local governmental entities, public utilities and regional water supply authorities, the WMDs are expected to contribute funding and other assistance to them, pursuant to existing state law.

Building upon 1996 legislation, HB 1321 also addresses the establishment and implementation of minimum flows and levels (MFLs), which basically represent the point at which further withdrawals of water would cause significant harm to the resource. All five districts would be required to establish priority lists of waterbodies and watercourses where MFLs would be set. An affected party could seek scientific peer review of the data, models, assumptions and methodologies which any WMD used in establishing an MFL. Currently, only the Southwest Florida WMD is required to develop priority lists and participate in scientific peer review, and only when setting MFLs for waterbodies and watercourses in Hillsborough, Pasco and Pinellas counties.

HB 1321 lists six factors which the WMDs must recognize when establishing MFLs -- currently the statutes are silent on what information WMDs use to set MFLs. Where a waterbody’s actual flow or level is below its MFL, the WMDs (or the Department of Environmental Protection) would be required to implement a recovery program for the waterbody, and to develop additional water supplies to offset any adverse impacts to existing permitted or other legal users caused by the adoption or implementation of an MFL. A similar response on the part of WMDs would be required if a reservation of water for environmental purposes adversely impacted existing permitted or other legal users.

The fiscal impact of HB 1321 is indeterminate, but likely would result in greater expenditures for the WMDs, whose operations are largely funded by ad valorem tax revenues.

HB 1321 takes effect upon becoming a law.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

History of the development of water law

Prior to the 1950's, the most common method of managing water in Florida was to create special single-purpose districts. Examples of special districts which were legislatively created include irrigation districts, water supply districts, sewer districts and water control districts. Florida enacted its first major multi-purpose water management district, the Central and Southern Florida Flood Control District, in 1949 in response to a major flood that had occurred two years earlier. Other multi-purpose districts were created in the mid-1950's, but no single entity was able to supervise or oversee their projects and operations.

Recognizing that Florida's fragmented approach to handling water issues was incapable of providing a long-term framework for responding to future problems, the Florida Legislature in 1955 created the Florida Water Resources Study Commission. This commission made recommendations that led to the passage of the first major piece of legislation related to water, the 1957 Florida Water Resources Act (the 1957 Act). The 1957 Act established a statewide administrative agency housed within the State Board of Conservation to oversee the development of Florida's water resources. This agency was authorized to issue permits to allow for the capture and use of excess surface and groundwater. It also allowed the agency to establish rules to mandate water conservation in areas of the state where withdrawals were endangering the resource due to the resulting saltwater intrusion.

Despite the the 1957 Act, Florida's water resource problems -- saltwater intrusion, water shortages, destruction of wetlands, and deterioration of water quality -- continued to grow through the 1960's and early 1970's. In the early 1970's a group of water law experts at the University of Florida drafted a Model Water Code for Florida. The Code took provisions of the western states' prior appropriations system and provisions of the eastern states' riparian system of water law and melded them to create a hybrid system of administrative water regulation. In 1972, a Governor's task force on resource management recommended that the Legislature adopt the Code. In 1972 the Legislature passed the Florida Water Resources Act (the 1972 act) which included much of the Model Water Code. This act, incorporated in Chapter 373, F.S., marked the beginning of the modern era of water management for Florida and remains largely unchanged as part of Florida law.

The 1972 Act created a two-tiered administrative structure. The former Department of Natural Resources (and later the former Department of Environmental Regulation) was given responsibility for administering Chapter 373, F.S., at the state level, with the day-to-day management functions to be carried out by five regional WMDs: the Northwest Florida, South Florida, Southwest Florida, St. Johns River and Suwannee River WMDs.

Currently, the Department of Environmental Protection (DEP), created in 1993 through a merger of the former departments of Natural Resources and Environmental Regulation, is responsible for water protection at the state level. Section 373.016(3), F.S.,

expresses the Legislature's intent to vest in the DEP "the power and responsibility to accomplish the conservation, protection, management, and control of the waters of the state . . . with sufficient flexibility and discretion to accomplish these ends through delegation of appropriate powers to the various water management districts." Section 373.016(3), F.S., strongly encourages DEP to delegate this power "to the greatest extent practicable" to the governing boards of the WMDs, but retains general supervisory authority in DEP. In order to utilize and conserve the waters of the state, DEP also must coordinate, with local governments and other state agencies created to deal with water issues. This bifurcation of responsibility reflected the Legislature's understanding of the importance of the establishment of a statewide policy, but also its awareness of the diversity of water problems in different regions of the state and the variety of solutions to those problems.

In 1982, the Legislature provided legislative intent "that future growth and development planning reflect the limitations of the available ground water or other available water supplies" (s. 373.0395, F.S.). To that end, the Legislature mandated that the WMDs develop a groundwater basin resource availability inventory (commonly called a "safe yield study"). This inventory, once completed, must be given to each affected municipality, county, and regional planning agency. These agencies in turn are required to review the inventory for consistency with local government comprehensive plans and consider the inventory in future revisions of the plans. Each WMD has completed at least some portion of the required inventory.

Part II of Chapter 373, F.S., provides the statutory framework for consumptive use permitting, now called water use permitting. This regulatory system, enacted in 1972, was intended to supplant the common law doctrine of judicially determined water rights. It created what the Florida Supreme Court described as a "comprehensive administrative system of regulation, resource protection and water use permitting." (See Osceola County v. St. Johns River Water Management District, 504 So.2d 385 (1987)).

The law specifically recognizes state policy to "preserve natural resources, fish and wildlife" (s. 373.016(2)(e), F.S.). This policy can be achieved under Part II of Chapter 373, F.S. through the water use permitting system which regulates human activities that might adversely affect these resources. Each WMD was required by 1983 to implement a consumptive use permit program (s. 373.216, F. S.), which is now called a water use permit (WUP) program. District rules can impose reasonable conditions "to assure that [a] use is consistent with the overall objectives of the district or department and is not harmful to the water resources of the area" (s. 373.219, F.S.). This program does not apply to domestic consumption of water by individual users, or to wells under certain sizes.

In defining the criteria under which a WUP may be issued, the Legislature drew on the common law "reasonable use" test. It adopted a slightly revised standard known as "reasonable-beneficial use," which was incorporated into the law as one of three criteria to be used by the districts in issuing permits. The law defines reasonable-beneficial use as "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" (s. 373.019(4), F.S.).

Section 373.223, F.S., sets forth the standards to be applied in issuing a permit, known as the three-prong test. Any applicant for a permit must establish that the proposed use of water:

- Is a reasonable-beneficial use as defined in section 373.019(4), F.S.;
- Will not interfere with any presently existing legal use of water; and
- Is consistent with the public interest.

When the WUP system was instituted, all existing water users who sought permits within two years after the applicable district adopted its rules were automatically given permits (s. 373.226, F.S.). All new applicants were subject to the three-prong test before being issued permits.

Establishment and Implementation of MFLs:

A major feature of the 1972 Act was the establishment of MFLs (s. 373.042, F.S.). MFLs are a tool for managing water resources in a manner that preserves the integrity of the hydrologic system while allowing appropriate uses of surface water and groundwater. MFLs are designed to help determine the amount of water a particular source can provide without causing "significant harm" to the water resource, and to facilitate a planning process in which projected demands can be compared to the available supply.

Until recently, the WMDs had established very few MFLs for surface and groundwater sources. In its 1996 session the Legislature required the Southwest Florida WMD (SWFWMD) to establish MFLs for priority water bodies (Chapter 96-339, Laws of Florida). SWFWMD has made significant progress in setting MFLs, and SWFWMD is on schedule to meet the statutory deadline of October 1, 1997. Additionally, the Governor's Executive Order 96-297 directed the WMDs to establish MFLs by the end of Fiscal Year 1999 for priority water bodies outside the geographic area specified in Chapter 96-299. Staff of the five WMDs say they expect to meet this deadline as well.

To date, MFLs generally have been implemented through WUPs, conservation measures, and occasionally through water shortage restrictions implemented in times of severe drought. Generally, WUP allocation levels are set to prevent "harm" to the water resource (s. 373.219, F.S.). MFLs prevent "significant harm" to the water resource (s. 373.042, F.S.), and emergency water shortage measures are taken to prevent "serious harm" to the water resource (s. 373.246, F.S.).

Concerns exist among some water users regarding what impact the establishment of MFLs will have on existing legal uses. These concerns focus on the issue of whether the limits set by MFLs will be implemented in a manner that will result in cutbacks in permitted withdrawals. Some argue that existing uses should be considered when the MFLs are established, thus protecting existing uses. Conversely, there is concern that if existing uses are taken into account, those uses that already have had an adverse impact on water resources or the ecology would continue, and the establishment of MFLs would not serve the purpose of preventing significant harm.

Chapter 96-339, Laws of Florida, also required that prior to the establishment of MFLs for waters in Hillsborough, Pasco, and Pinellas counties, and prior to filing any petition

for administrative hearing, scientific or technical data and methodologies in dispute, at the request of a substantially affected person, is subject to independent scientific peer review. Within 60 days of receipt of such a request, a panel must be selected by agreement among the parties in interest. The panel must conduct at least one public hearing prior to submission of its final report to the district governing board, and must submit the final report within 120 days of the panel's selection. The cost of the peer review will be borne equally by all parties. The final report is admissible in any administrative challenge to an MFL filed under section 120.57, F.S.

Water Resource and Supply Development:

The 1972 Act assigned planning a key role in managing the state's water resources and required adoption of a comprehensive plan for the development and use of the state's water resources - the State Water Use Plan. DEP has undertaken development of the plan on three separate occasions but a comprehensive water use plan has not been adopted.

However, water resources planning has not been lacking. In 1979, DEP offered for public comment a "state water use plan" based upon individual water management plans developed by the WMDs. However, that plan was never formally "adopted" as called for in Chapter 373, F. S., and DEP instead attempted to guide water resources planning through adoption of a "state water policy" by rule (Chapter 17-40 now Chapter 62-40, Florida Administrative Code). DEP recently completed the Florida Water Plan, incorporating some requirements of the State Water Use Plan. The Florida Water Plan is based largely upon the WMD water management plans. These plans are the result of a five-year planning effort that also has produced needs and sources assessments, designation of water use caution areas, progress towards establishing MFLs, and other water planning initiatives, including development of regional water supply plans by the South Florida WMD.

To date, the WMDs' primary role in regard to water supply development has been to regulate water use pursuant to Part II, Chapter 373, F.S., and, to a lesser extent, to engage in water supply planning. Section 373.1961, F.S., authorizes, but does not specifically require, the WMDs to engage in a much broader range of water supply activities, including the authority to develop and operate water production and transmission facilities for the purpose of supplying water to counties, municipalities, private utilities, and regional water supply authorities. Generally, the WMDs have not exercised such authority, although the South Florida WMD's operation of the Central and Southern Florida Flood Control Project could be considered a water supply distribution system. The WMDs' role has more typically consisted of water supply planning and technical assistance and, in some cases, financial assistance. For instance, SWFWMD has invested substantial sums of money into water resource development projects through its New Water Source Initiative program, which matches district and basin board ad valorem tax revenues with local and federal dollars. SWFWMD projects spending at least \$398 million by FY 2007.

B. EFFECT OF PROPOSED CHANGES:

HB 1321 would:

- ◆ Make part of Florida's water policy that an adequate, safe, dependable and affordable supply of water be made available for all existing and projected reasonable-beneficial users.
- ◆ Establish water resource development as a fundamental mission of the WMDs, and emphasize that its purpose is to ensure that water is available to sustain all existing and projected reasonable-beneficial users, as well as maintain natural systems.
- ◆ Specify in statute the type of information and activities the WMDs would use to develop water resource programs.
- ◆ Specify that while water supply development is the responsibility of local governments, public utilities, regional water supply authorities and special taxing districts, the WMDs would be expected to help fund or provide other types of assistance to the entities in their endeavors.
- ◆ Direct the Northwest Florida, South Florida, St. Johns River and Suwannee River WMDs to develop priority lists of waterbodies and watercourses for the establishment of MFLs, as the Southwest Florida WMD already is required to do.
- ◆ Extend scientific peer review to the establishment of MFLs in all counties within all WMDs, not just to three counties within the Southwest Florida WMD.
- ◆ Specify the following conditions which the WMDs must recognize when establishing MFLs: existing permitted uses of the land which cannot be reasonably altered; hydrologic changes that have occurred as a result of alterations to waterbodies and watercourses, and the effect such alterations have had on their hydrology; fluctuations in water flows and levels; flood protection needs; and recreational and other legal uses of waterbodies and watercourses.
- ◆ Require the WMDs to initiate a recovery plan for a waterbody or watercourse whose flow or level is below its MFL, and to fund and develop additional water supply to offset any adverse impacts to existing permitted or legal users prior to adoption or implementation of the MFL. WMDs also would be required to offset any adverse impacts of existing permitted or legal users created by a reservation of water for environmental purposes or for public health and safety.
- ◆ Prohibit the establishment of MFLs for waterbodies that are less than 25 acres in area.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes. Section 3 of the bill directs the WMDs to initiate rulemaking under Chapter 120, when necessary, to implement water resource development programs.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Somewhat. Although Chapter 373, F.S., makes references to the role of the WMDs in water resource development and water production, it has only been in recent years that one or two WMDs have become involved in such projects. HB 1321 would direct all the WMDs to place more emphasis -- and funding -- on these types of projects.

(3) any entitlement to a government service or benefit?

HB 1321 does not create an "entitlement" to water in the strictest legal sense. However, the language in sections 5 and 6 requiring the WMDs to fund and develop "sufficient water supply to offset any loss of consumptive use" by permitted and other legal users before implementing MFLs or reservations could be construed, at the least, as a step in that direction.

b. If an agency or program is eliminated or reduced:

Not applicable.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

Not applicable.

(2) what is the cost of such responsibility at the new level/agency?

Not applicable.

(3) how is the new agency accountable to the people governed?

Not applicable.

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

Not specifically. However, if the WMDs are required to bear the cost of ensuring water is available for all existing and future reasonable-beneficial uses these costs will be borne by the landowners in the WMDs through ad valorem taxes. The WMDs which do not already levy their maximum ad valorem tax rate have the authority to raise property taxes to pay for these additional costs.

- b. Does the bill require or authorize an increase in any fees?

No.

- c. Does the bill reduce total taxes, both rates and revenues?

No.

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

Not applicable.

4. Individual Freedom:

Not applicable.

5. Family Empowerment:

Not applicable.

D. SECTION-BY-SECTION ANALYSIS:

Section 1: Amends s. 373.016, F.S., to include as legislative declaration of state water policy that an adequate, safe, dependable and affordable supply of water for all existing and projected reasonable-beneficial uses in the state, and to promote replenishment, recapturing and enhancement of water resources. Declares that DEP and the WMDs shall construe and apply all of the policies in subsection (2) of this section as a whole. Specifies that it also is state policy that water resource development is a fundamental mission of the WMDs, and it must be initiated immediately and continually to ensure that an adequate, safe, dependable and affordable supply of water is available to all existing and projected reasonable-beneficial users in the state. Specifies that water supply development is primarily the responsibility of cities, counties, public water utilities,

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regional water supply authorities and special taxing districts. Directs WMDs to provide funding and other assistance to entities involved in water supply development, in accordance with s. 373.1961, F.S.

Section 2: Amends s. 373.019, F.S., to add definitions for “water resource development,” “water supply development” and “natural system.”

Section 3: Creates s. 373.038, F.S., related to water resource development. Directs WMDs to carry out water resource development as defined in s. 373.019, F.S. Specifies that water resource development will use aquifers and watersheds as implementation areas. Specifies that water resource development must ensure that water is available to sustain all existing and projected reasonable-beneficial uses of water and of natural systems. Specifies that WMDs are responsible for the development, implementation and funding of water resource development programs. Directs the WMDs to develop these programs in coordination with public water utilities and other user groups. Specifies that water resource development must:

- ◆ Identify safe, affordable and dependable sources of water for all existing and projected beneficial-reasonable uses and the natural systems by the creation and completion of water source analyses that utilize the best available data and MFLs.
- ◆ Quantify water needs required to maintain the functions of natural systems, but recognizing meteorological events, surface alterations, and long-term and seasonal fluctuations in water levels within natural systems and proposed reservations of water pursuant to s. 373.233(3), F.S.
- ◆ Compile water supply needs of all existing and projected reasonable-beneficial uses, based on a 20-year planning horizon and using the best available information. Specifies a level of certainty for water availability to meet such user needs for a 1-in-10-year drought event without the imposition of water shortage restrictions.
- ◆ Identify water resource development projects including capital improvements and major public works, as well as reliable sources of WMD funding and a defensible cash-analysis of water resource development projects.
- ◆ Identify and correct existing WMD regulatory impediments to the implementation of water resource development projects, and propose corrective measures for each impediment that is beyond the control of the WMDs.

Specifies that water resource development programs are subject to review as an order under s. 120.59, F.S. Gives WMDs authority to adopt rules, as necessary, to implement these programs. Directs the WMDs, beginning January 1, 1998, to annually report to the Governor and the Legislature on their progress in implementing water resource development programs. Directs the WMDs, if requested, to provide assistance to regional water supply authorities, counties, cities, public water utilities, special taxing districts or other units of local government for water supply development.

Section 4: Amends s. 373.042, F.S., related to MFLs. Deletes “ecology” from the definition of an MFL for a surface watercourse. Deletes language related to how the

WMDs and DEP develop MFLs; more expansive language appears in another section of the bill. Expands current legislative directive that SWFWMD develop priority lists and schedules for MFLs to the other four WMDs. Expands current requirement for scientific peer review of MFL process from waterbodies and water courses in three counties within the boundaries of SWFWMD to all counties and WMDs. Deletes certain deadline requirements in existing peer review process. Prohibits the establishment of minimum levels for isolated wetlands or surface waterbodies less than 25 acres in area extent.

Section 5: Creates s. 373.0421, F.S., related to the establishment and implementation of MFLs. Directs DEP and the WMDs to recognize, when setting MFLs:

- ◆ Existing permitted and other existing and projected legal uses;
- ◆ Existing uses of land that cannot reasonably be altered;
- ◆ Hydrologic changes that have occurred as a result of alterations to watersheds, surface watercourses, aquifers and surface waters, and the effects such alterations have placed on the hydrology of the affected watershed, watercourse, aquifer, or surface waters;
- ◆ Natural, seasonal and long-term fluctuations in water flows and levels;
- ◆ Flood protection needs; and
- ◆ Other uses made of the surface watercourse, aquifer or surface water, including recreation, navigation and other nonpermitted legal uses.

Directs DEP and the WMDs to take action to achieve recovery of a waterbody when its MFL is below the minimum established pursuant to this section and s. 373.042, F.S. Specifies such action shall be taken to achieve recovery as soon as practicable. Directs DEP and the WMDs to offset any adverse impact to the water supply of an existing permitted or other legal user caused by the adoption or implementation of an MFL, or the adoption or implementation of a change in source or operation, by developing and funding sufficient water supply to compensate for the loss of consumptive use. Specifies that such compensation shall be accomplished before the implementation of the MFL or change in source of operation. Specifies that establishment of MFLs does not limit or require enhancement or restoration of the natural system.

Section 6: Amends s. 373.223, F.S., to require DEP and the WMDs to offset any adverse impact to the water supply of an existing permitted or other legal use caused by a reservation of water, by developing and funding sufficient water supply to offset any loss of consumptive use prior to implementation of the reservation.

Section 7: Repeals ss. 373.019(16), 373.026(10), 373.036, 373.039 and 403.061(33), F.S., related to references to the state water use plan and state water policy.

Section 8: Provides that this act shall take effect upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Indeterminate. HB 1321's water resource development provisions, as well as the development and funding of water supplies to offset adverse impacts to current users, under certain circumstances, could have a significant recurring fiscal impact on the WMDs. The size of the fiscal impact cannot be determined at this time, in part because this proposed legislation does not specify who will bear the cost of these projects. The WMDs would have the option of either establishing budget priorities to accomplish these new projects within existing revenues, or raising ad valorem tax rates.

3. Long Run Effects Other Than Normal Growth:

Indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Indeterminate. If the WMDs are required to bear the cost of ensuing water is available for all existing and future reasonable-beneficial uses, and to offset adverse impacts by supplying additional water sources under certain conditions, these costs will be passed on to landowners in the WMDs through ad valorem taxes. The

WMDs which do not already levy their maximum ad valorem tax rate may raise property taxes to help pay for these projects.

2. Direct Private Sector Benefits:

HB 1321 expresses legislative policy to "provide an adequate, safe, dependable and affordable supply of water for all existing and projected reasonable-beneficial uses in the state." In effect, water would always be plentiful to practically anyone who needs or wants it.

Also, the provisions requiring the WMDs to develop and fund water supply projects to offset adverse impacts to permitted and other legal users from the implementation of MFLs or water reservations seemingly would ensure availability of water for consumers.

3. Effects on Competition, Private Enterprise and Employment Markets:

Indeterminate.

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The mandates provision is not applicable to an analysis of HB 1321 because the bill does not require cities and counties to expend funds or to take actions requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

Not applicable.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

Not applicable.

V. COMMENTS:

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

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VII. SIGNATURES:

COMMITTEE ON WATER & RESOURCE MANAGEMENT:

Prepared by:

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