

STORAGE NAME: h3503.wrm
DATE: February 4, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
Water & Resource Management
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 3503
RELATING TO: Water resource management
SPONSOR(S): Representative Laurent
COMPANION BILL(S): SB 312 (c)

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

- (1) WATER & RESOURCE MANAGEMENT
 - (2)
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

Currently, s. 373.223(2), F.S., authorizes the Department of Environmental Protection (DEP) or the water management districts (WMDs) to permit the transfer of water beyond overlying lands, across county boundaries or outside the watershed in which the water source is located, provided the transfer conforms to the public interest. In addition to this public interest determination, the transfer of water must comply with the three statutory criteria outlined in s. 373.223(1), F.S.

HB 3503 amends s. 373.223(2), F.S., to incorporate a “local sources first” principle into Florida water law. Specifically, this bill modifies s. 373.223(2), F.S., to require the DEP or the WMDs to give significant weight to certain factors when evaluating transfers of water across counties or watersheds for consistency with the public interest. It also instructs these agencies to adopt rules to implement these factors and to assess such water use applications in a manner consistent with the legislative intent expressed in s. 373.016(4), F.S. HB 3503 places the burden on the applicant to comply with the new factors.

In s. 373.016, F.S., the bill codifies case law interpreting Chapter 373, F.S., to express legislative intent that water constitutes a public resource benefitting the entire state and to embody a state and regional approach to water management. HB 3503 directs the DEP and the WMDs to encourage the use of water from sources nearest the area of use or application, whenever practicable. However, HB 3503 acknowledges the need to transport water from distant sources for certain reasons.

Additionally, HB 3503 defines “donor area”; outlines the permitting information required for transfers of water between counties or watersheds; and corrects a number of cross-references.

HB 3329 would take effect upon becoming law.

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II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

"Local Sources First"

Among the many water policy issues facing the Legislature in recent years, the concept of "local sources first" often commands the most attention. The term refers to the principle that water users should first consume water sources within their immediate geographic area, including alternative water sources such as desalination and reclaimed water, before tapping into more remote water sources. Not surprisingly, "local sources first" sparks controversy in an era of growing populations and more expensive water.

The situation in Northern Tampa Bay exemplifies the controversy that surrounds the "local sources first" debate. Here, the residents of Pasco County have watched wetlands, lakes and wells dry up primarily because of pumping by the West Coast Regional Water Supply Authority, which serves as the wholesale water supplier for approximately 1.8 million people. The extent of the environmental damage encouraged Pasco County residents, as well as residents in neighboring counties, to demand that the developed counties use desalinated water or other alternative sources, rather than rely exclusively on groundwater. While cooperation appears possible, the controversy in Northern Tampa Bay over "local sources first" continues.

Because of the interest in "local sources first," Speaker Webster directed the staff of the House Committee on Water and Resource Management to prepare an interim project report on the subject. The report, entitled Discussion of a "Local Sources First" Water Policy for Florida, examines the policy and legal questions surrounding the adoption and implementation of a "local sources first" policy.

The Florida Water Resources Act of 1972

Although the Florida Water Resources Act of 1972, as set forth in Chapter 373, F.S., makes no mention of "local sources first," the act provides a regulatory scheme that addresses many of the environmental and economic considerations that undergird the "local sources first" debate. Under Chapter 373, F.S., the five regional water management districts (WMDs) regulate the consumptive use of water. In issuing consumptive use permits (or water use permits), the WMDs determine whether consumptive use applications meet the criteria in s. 373.223(1), F.S. This section requires that the proposed use of water comply with the following conditions: (a) is a reasonable-beneficial use; (b) will not interfere with any presently existing legal use of water; and (c) is consistent with the public interest. These criteria allow the districts to balance considerations such as environmental harm versus economic efficiency that go to the heart of "local sources first."

The statutory language of Chapter 373, F.S., itself reflects this balancing of water policy objectives. For instance, s. 373.196, F.S., recognizes the

need for “cooperative efforts,” including water transfers and the development of alternative water sources, between local governments and state agencies to supply rapidly urbanizing areas with adequate water. Yet, at the same time, s. 373.1961(1)(a), F.S., expresses a legislative policy to avoid environmental harm caused by excessive water withdrawals. This section requires the WMDs to engage in water supply planning “in such manner as will give priority ...[to] conservation and reducing adverse environmental effects of improper or excessive withdrawals of water from concentrated areas.” Finally, s. 373.1961(1), F.S., appears to forbid the WMDs from permitting water use in such a way as to deprive any county, where water is withdrawn, of the prior right to the reasonable and beneficial use of water.

Chapter 373, F.S., anticipates many of the difficult policy considerations that are driving the current debate over “local sources first.” However, Chapter 373, F.S., does not specifically address “local sources first.” In fact, Chapter 373, F.S., in its statutory language and as interpreted by the courts, embodies a state and regional approach to water management. See Section 373.016(1), F.S., (which states that “[t]he waters of the state are among its most basic resources ...[s]uch waters have not heretofore been conserved or fully controlled so as to realize their full beneficial use”). Moreover, in language that goes to the heart of the “local sources first” debate, the Florida Supreme Court in Osceola County v. St. Johns River Water Management District, 504 So. 2d 385, 388 (Fla. 1987) expounded on this state and regional approach:

Nothing in the Water Resources Act indicates a legislative intent that water management districts operate solely as independent provinces, without regard for statewide concerns ... Political boundaries are artificial divisions that may and sometimes should be transcended when planning for the most beneficial use of our state’s water resources.

Several statutory provisions providing for the transfer of water bolster the court’s conclusion that Chapter 373, F.S., contemplates a state and regional approach to water management. Section 373.223(2), F.S., for example, authorizes the WMDs or the DEP to allow a “holder of a use permit to transport and use ground or surface water beyond overlying land, across county boundaries, or outside the watershed from which it is taken” if the transfer serves the public interest. This same section prohibits local government regulation designed to interfere with such transfers.

Likewise, s. 373.2295, F.S., authorizes the issuance of permits for the transfer of water between the WMDs. Here, the districts would issue an interdistrict transfer permit if the application meets the requirements of Chapter 373, F.S., and if the needs of the area receiving the water and the specific area supply the water can be satisfied. In light of ss. 373.223(2) and 373.2295, F.S., and the relevant cases, Chapter 373, F.S., clearly establishes a state and regional approach to water management.

But state and regional water management does not necessarily preclude a "local sources first" policy. As suggested by the administrative law judge in Charlotte County v. Southwest Florida Water Management District, DOAH No. 94-574RP (Mar. 26, 1997), appeal docketed, No. 97-1626 (Fla. 2d DCA April 22, 1997) (also known as the "SWUCA case"), Chapter 373, F.S., requires the districts to take a state and regional approach to water management, but it also grants them the discretion to balance many environmental and economic factors. In this case, the administrative law judge struck down Southwest Florida WMD's proposed "local source first" rules. These rules required applicants to demonstrate that the proposed water use employed local resources to the "greatest extent practicable" and that the water resources near the place of demand were not feasible. Concluding that these rules exceeded statutory authority, the judge made the following observation about the district's local resources rules:

In sum, the water use permitting process necessarily involves a balancing of many important, yet sometimes conflicting goals. How much emphasize [sic] to place on the development of local resources before looking to remote sources can be part of the balancing. Chapter 373 accords the District some discretion in this regard ... [but] these local source provisions are invalid because they elevate this consideration to a conclusive criteria without any standards as to how it will be applied.

The Discussion of a "Local Sources First" Water Policy for Florida interim project report, prepared by the staff of the House Committee on Water and Resources Management, arrives at a similar conclusion. After reviewing the relevant case law, including the SWUCA decision quoted above, and the various statutory provisions in Chapter 373, F.S., this report concludes that a flexible policy of "local sources first" is consistent with current Florida water law.

B. EFFECT OF PROPOSED CHANGES:

HB 3503 amends s. 373.223(2), F.S., to incorporate a "local sources first" policy into consumptive use permitting. Existing law mandates that the proposed transfer meet the three criteria outlined in s. 373.223(1), F.S. (also known as the "three-prong" test). In addition to the "three-prong" test, HB 3503 requires the DEP or the WMDs to evaluate any transport and use of water across counties or outside watersheds under additional factors. Thus, applicants seeking permits for the transport of water between counties or watersheds would need to offer information on the following factors:

-- the proximity of the proposed water source to the area of use or application;

-- all water bodies geographically closer to the area of use or application than the proposed source and that are technically and economically feasible for the proposed transport and use;

-- all economically and technically feasible alternatives to the proposed source;

-- the potential environmental impacts that may result from the transport and use of water from the proposed source;

-- whether the transport and use of water from the donor area will jeopardize the current and future reasonable-beneficial needs of the donor area; and

-- consultations with local governments affected by the proposed transport and use.

The bill places the burden on the applicant to demonstrate that the proposed transfer meets these factors. Although HB 3503 directs the DEP or the WMDs to give significant weight to the above factors, it nevertheless leaves the discretion with these agencies as to whether a proposed transfer across counties or watersheds actually falls within the public interest. In other words, this bill simply spells out some -- but not all -- of the policies that the DEP or the WMDs should consider for such transfers.

To apply these factors, HB 3503 requires the DEP and the WMDs to adopt rules and assess water use applications in a manner consistent with the legislative intent expressed in s. 373.016, F.S. The bill amends s. 373.016, F.S., to declare that water constitutes a public resource for the benefit of the entire state. These changes to s. 373.016, F.S., call for a state and regional approach to water management but at the same time direct the DEP and the WMDs to encourage the use of water from sources nearest the area of use, whenever practicable. The bill defines such sources to include all naturally occurring water sources and all alternative water sources. Finally, while HB 3503 expresses a policy of encouraging "local sources first" whenever practicable, it nonetheless reaffirms the appropriateness of transporting water from distant sources for environmental, technical, or economic reasons.

In order to link the new considerations proposed by HB 3503 with permit applications, the bill amends s. 373.229, F.S. That section currently outlines the permit information required of applicants seeking consumptive use permits. HB 3503 amends s. 373.229, F.S., to require information on the factors added by the bill to s. 373.223(2), F.S. By amending s. 373.229, F.S., the bill ensures that the applicant proposing a transfer of water supplies the information necessary to evaluate whether such a transfer conforms to the public interest.

With regard to transfers of water between counties or watersheds, HB 3503 makes other significant changes to Chapter 373, F.S. Foremost, it

exempts the Central and Southern Florida Flood Control Project, which moves surface water over much of South Florida for direct consumption, groundwater recharge, and flood control, from the considerations added to an amended s. 373.223(2), F.S.

HB 3503 also incorporates the definition of "donor area" into s. 373.019, F.S. Under the changes proposed by HB 3503, the DEP or the WMDs must give significant weight to whether the transfer of water will jeopardize the current and future reasonable-beneficial needs of the donor area. The bill defines donor area to mean "the county or watershed wherein the proposed source of water for a transport and use regulated under s. 373.223(2) is located."

Aside from changes relating to transfers of water between counties or watersheds, HB 3503 provides for a number of other changes, mostly corrections to cross-references. However, at the request of Statutory Revision, the bill also reenacts s. 373.536(5)(c), F.S., to incorporate footnote language. This provision spells out requirements for WMD budgeting and related public hearings.

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. HB 3503 directs the DEP and the WMDs to promulgate rules in order to implement the proposed changes to s. 373.223(2), F.S.

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

Yes. The bill increases the responsibilities of the DEP or the WMDs by requiring these agencies to evaluate transfers of water across counties or watersheds under certain specified factors. As a result of these responsibilities, the DEP or WMDs must develop rules and permitting procedures to facilitate the evaluation mandated by HB 3503.

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

No.

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

Not applicable.

2. Lower Taxes:

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

No. However, because HB 3503 provides the DEP and the WMDs with additional factors to deny the use of existing water sources, this bill increases the likelihood that public water utilities may be forced to develop alternative water sources, leading to higher taxes in order to finance the construction of such capital infrastructure .

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

No. However, because HB 3503 may indirectly lead to the development of alternative water sources, local water rates may be increased to finance such capital expenditures.

- 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:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes. By requiring the DEP or the WMDs to evaluate transfers of water on the basis of new criteria, HB 3503 arguably increases the level of governmental interference with such transfers of water.

5. Family Empowerment:

Not applicable.

D. STATUTE(S) AFFECTED:

Sections 373.016, 373.019, 373.036, 373.196, 373.209, 373.223, 373.226, 373.229, 373.421, and 373.536(5)(c), F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Amends s. 373.016, F.S., to provide a new subsection to explain that water constitutes a public resource benefiting the entire state and that water is to be managed on a state and regional basis. Recognizes the need to allocate water throughout the state to meet all reasonable-beneficial uses and, yet, such allocations have in the past adversely affected certain areas of the state. Directs the DEP and the WMDs to encourage the use of water from sources nearest the area of use or application, whenever practicable. Provides that sources shall include all naturally occurring water sources and all alternative water sources. Recognizes that under certain circumstances that the need to transport water from distant sources may be necessary for environmental, technical, or economic reasons.

Section 2: Amends s. 373.019, F.S., to define "donor area." Renumbers existing definitions.

Section 3: Amends s. 373.196, F.S., to clarify that the WMDs and their basin boards are to engage in only those functions incidental to the exercise of their flood control and water management powers or that relate to water resource development pursuant to s. 373.0831, F.S.

Section 4: Amends s. 373.223, F.S., to correct a cross-reference. Provides that the WMDs or the DEP, when evaluating whether a potential transport and use of water across county boundaries or outside the watershed from which the water is taken is consistent with the public interest, shall give significant weight to the following factors.

- the proximity of the proposed water source to the area of use or application;

-- all water bodies geographically closer to the area of use or application than the proposed source and that are technically and economically feasible for the proposed transport and use;

-- all economically and technically feasible alternatives to the proposed source;

-- the potential environmental impacts that may result from the transport and use of water from the proposed source;

-- whether the transport and use of water from the donor area will jeopardize the current and future reasonable-beneficial needs of the donor area; and

-- consultations with local governments affected by the proposed transport and use.

Requires the DEP and the WMDs to adopt rules to apply this criteria to water use applications. Directs that the DEP or the WMDs assess water use applications for the transport and use of water between counties or watersheds in a manner consistent with the legislative intent expressed in s. 373.016(4), F.S. Provides that in any rules implementing s. 373.223(2), F.S., that the burden rests with the applicant to prove by a preponderance of the evidence that the proposed transport and use satisfies these criteria.

Section 5: Amends s. 373.229, F.S., to require certain information for all permit applications filed with the WMDs or the DEP that propose the transport and use of water across county boundaries or outside the watershed from which it is taken.

Section 6: Reenacts s. 373.536(5)(c), F.S., relating to district budgeting and budget hearings to incorporate a Statutory Revision footnote.

Sections 7-10: Corrects cross-references.

Section 11: Provides that this act shall take effect upon becoming law.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Indeterminate. However, because HB 3503 may potentially force the development of alternative water sources, local governments may seek annual funding from the state in order to develop such infrastructure.

3. Long Run Effects Other Than Normal Growth:

Indeterminate.

4. Total Revenues and Expenditures:

Indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

Indeterminate. HB 3503 may force some local governments to spend funds in order to develop the capital infrastructure associated with alternative sources of water.

2. Recurring Effects:

Indeterminate. HB 3503 may force some local governments to spend funds on the operation and maintenance of alternative water source information.

3. Long Run Effects Other Than Normal Growth:

Indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Indeterminate. HB 3503 may potentially lead to an increase in the overall cost of water, which would affect water dependent businesses (e.g., agriculture, mining, various technology industries, etc.). Also, for those proposed transfers of water between counties or watersheds, HB 3503 may increase the costs of permitting in the form of additional consultant/attorney fees.

2. Direct Private Sector Benefits:

Indeterminate. Because HB 3503 may potentially lead to a greater development of alternative water sources, those firms designing and constructing such infrastructure may experience increased business. HB 3503 may enhance the business for environmental engineers and others who advise on consumptive use permitting issues.

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

Indeterminate.

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

HB 3503 does not impose any mandatory condition on local governments and, therefore, does not invoke Article VII, Section 18 of the Florida Constitution.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the revenue raising authority of local governments.

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

This bill does not reduce the state tax shared with counties and municipalities.

V. COMMENTS:

The principle of "local sources first" stands at the center of a brewing controversy over the proper direction of Florida water law. "Local sources first" raises important legal and policy questions. Among the more significant questions, does the principle of "local sources first" conflict with the legislative intent expressed in Chapter 373, F.S., to provide a state and regional water management approach? HB 3503 appears to address this question by affirming that water constitutes a public resource to be managed on a state and regional basis. Along the same lines, although HB 3503 directs the DEP and the WMDs to encourage the use of sources nearest the area of use, it limits the application of the policy to whenever practicable, and explicitly reaffirms the need to transport water from distant sources under certain circumstances.

HB 3503 also brings into question the relationship between the principle of "local sources first" and the consumptive use criteria in s. 373.223(1), F.S. Section 373.223(1), F.S., requires that all consumptive uses -- including transfers proposed under an amended s. 373.223(2), F.S. -- constitute a reasonable-beneficial use, not interfere with existing water uses, and conform to the public interest. This "three-prong" test forms the centerpiece of consumptive use

permitting. Consequently, the question arises as to whether HB 3503 somehow upsets the pre-eminent position the "three-prong" test holds in regulating water use. Because HB 3503 merely refines the public interest determination for those transfers of water between counties or watersheds, it appears to recognize that the "three-prong" test applies with equal force to **all** water allocations.

Similarly, some think that HB 3503 may undermine the discretion of the DEP and the WMDs to determine what water uses best meet the "three-prong" test. Apparently, these concerns center on two issues. First, whether HB 3503 creates tension between the applicant's burden of proof standard and the significant weight that the DEP or WMDs must give to new factors outlined in the amended s. 373.223(2), F.S. While an applicant meeting the preponderance of evidence standard would probably in most cases receive a permit, HB 3503 does not overturn general administrative law. Under this law, agencies retain a basis to deny a permit upon a showing that they considered the factors and, that in their special policy expertise, an adequate reason exists for denial.

The second concern relates to the assumed proliferation in third-party opposition to the permitting of the transfers of water. Specifically, the concern stems from whether HB 3503 provides third parties with new grounds of standing to challenge the issuance of permits (e.g., preservation of future reasonable-beneficial uses). Given that Chapter 373, F.S., already may require that the WMDs consider the water needs of impacted areas, HB 3503 does not appear to provide a new basis for standing. Nevertheless, third parties may attempt to seize upon language requiring consideration of future reasonable-beneficial uses for the purpose of alleging standing.

Certain terms in HB 3503 may need further clarification. Perhaps most importantly, the term "watershed" may require more clarification because the term appears to lack a universally accepted meaning. Moreover, depending on the extent of the definition of "watershed," some transfers of water potentially not contemplated by HB 3503 may be subject to a "local sources first" analysis. But, in defining "watershed," thoughtful consideration must be given to its impact on other parts of Chapter 373, F.S. For instance, s. 373.403(12), F.S., defines "watershed" for purposes of environmental resource permitting under Part IV, Chapter 373, F.S.

Moreover, because HB 3503 exempts the Central and Southern Florida Flood Control Project from the evaluation required by the amended s. 373.223(2), F.S., it may be desirable to provide a definition for this infrastructure. Finally, the terms "affected local government", "alternative water sources", and "donor area" also may need additional clarification.

Because the five WMDs themselves constitute watersheds, HB 3503 potentially applies to the transfer of water between the WMDs. Section 373.2295, F.S., currently provides specific procedures and criteria for the transfer of groundwater between the WMDs. Depending on how "watershed" is defined, HB 3503 could impose additional permitting criteria on the inter-district transfer of water. Therefore, the question arises as to the relationship between HB 3503 and s. 373.2295, F.S.

Lastly, some concern has been raised about whether Chapter 70, F.S. (also known as the "Bert J. Harris, Jr., Private Property Rights Protection Act") may thwart the implementation of HB 3503. This act provides that where a specific governmental action inordinately burdens an existing use of real property, that the property owner is entitled to relief, including compensation for the actual loss of fair market value. Apparently, the concern stems from the fact that a WMD may, for instance, deny an applicant seeking a water use permit for a golf course on the basis of the proposed criteria in HB 3503. Such a denial could conceivably block or severely restrict that land use or even another reasonably foreseeable land use. While this scenario may be possible, it does not appear to result exclusively from the "local sources first" principle embodied in HB 3503. The same denial of a water use permit for the golf course could also result from application of the present "three-prong" test.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON Water & Resource Management:

Prepared by:

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