

STORAGE NAME: h2069s1.grr

DATE: April 14, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL RULES AND REGULATIONS
ANALYSIS**

BILL #: CS/HB 2069 (PCB WRM 99-03)

RELATING TO: The Florida Watershed Restoration Act

SPONSOR(S): The Committee on Governmental Rules and Regulations, the Committee on Water and Resource Management, Representatives Alexander and others

COMPANION BILL(S): SB 2282 (s)

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

- (1) WATER AND RESOURCE MANAGEMENT YEAS 10 NAYS 0
 - (2) GOVERNMENTAL RULES AND REGULATIONS YEAS 6 NAYS 0
 - (3) GENERAL GOVERNMENT APPROPRIATIONS
 - (4)
 - (5)
-

I. SUMMARY:

CS/HB 2069 outlines a process for restoring Florida's waters through the establishment of total maximum daily loads (TMDLs) for pollutants of impaired water bodies as required by the federal Clean Water Act. Specifically, the bill addresses development of the 303(d) list and TMDL assessment, calculation, allocation and implementation. The bill calls for the TMDL process to be integrated with existing state, federal and local protection and restoration programs, and for coordination with state agencies and affected parties.

The implementation of CS/HB 2069 over the next decade will have a substantial fiscal impact that cannot be accurately determined at this time.

This act will take effect upon becoming law.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The federal Water Pollution Control Act of 1972 (commonly referred to as the Clean Water Act, CWA) set forth the basic framework for pollution control in the nation's water bodies. Its goal was "fishable and swimmable water for every American." By setting national standards and regulations for pollution discharge, the CWA sought to restore and protect the health of the nation's water bodies. National water-quality standards were strengthened; pollution could no longer be discharged without a permit; the use of best available technologies for pollution control were encouraged; and monies for building and improving sewage treatment plants were provided.

Section 305(b) of the CWA requires states to submit to Congress a biennial report on the water quality of their lakes, streams, and rivers. Those waters that qualify as "impaired" (i.e. don't meet the specific pollutant limits for their designated uses) must be submitted to the US Environmental Protection Agency (EPA) under section 303(d) of the CWA. States must then develop total maximum daily loads (TMDLs) for each pollutant that exceeds the legal limits for that water body. If states fail to develop TMDLs, then EPA is required to do so. Section 303(d) and TMDL development were largely ignored for 20 years until lawsuits filed against the EPA in various states brought them renewed attention.

Approximately 30 lawsuits are active nationwide. On April 22, 1998, Earthjustice filed a civil action on behalf of the Florida Wildlife Federation, Inc.; Environmental Confederation of Southwest Florida, Inc., and Save Our Creeks, Inc. The complaint alleged that the defendants, EPA and its Secretary, Carol Browner, have not enforced Florida's adherence to the CWA. In particular, the lawsuit alleged that EPA had not required Florida to comply with section 303(d) of the CWA in generating a list of impaired waters and subsequent TMDL development for those waters.

There are three basic components of the lawsuit: 1) a tighter completion schedule for TMDLs by the DEP, 2) specific concerns regarding the priority of TMDL development for Lake Okeechobee, the Indian River Lagoon, and the Suwannee River, and 3) for Florida to implement a watershed management approach. On September 22, 1998, DEP briefed EPA and Earthjustice on their proposed 13-year schedule for TMDL development, its priority for TMDL development for the named waters, and its planned adoption of a watershed management approach. Settlement talks are ongoing, and EPA is optimistic that a settlement can be reached with Earthjustice.

As discussed above, section 303(d) of the CWA requires states to submit a list of waters that do not meet relevant water quality standards and to prioritize TMDL development and implementation for those waters. The 303(d) list is updated every two years and lists not only impaired water bodies, but the pollutants that violate water quality standards and a prioritized schedule for TMDL development for all waters on the list, noting those scheduled for development over the next two years.

The DEP submitted its first 303(d) list in 1992 simply using the listed SWIM water bodies. In 1994, the DEP submitted its first "true" 303(d) list which combined the SWIM list with "poor" waters from the 305(b) report. In the 305(b) report, state waters were categorized as good (i.e. met all designated uses), fair (i.e. partially met all designated uses), and poor (i.e. do not meet designated uses). Approximately 320 water segments were listed, and the proposed schedule for TMDL development was two per year. The 1996 303(d) list had approximately the same number of water segments listed, but the TMDL development schedule was accelerated to eight per year.

The 1998 303(d) list was first submitted to the EPA based on waters rated as "poor." However, the EPA then stated that not only should the "poor" waters from the 305(b) report be included on the list, but the "fair" waters as well since they failed to "meet all designated uses." With the addition of the "fair" waters, the 1998 list included more than 750 water segments. The DEP then re-evaluated the "fair" waters and re-submitted the list, now with 709 water segments, to the EPA on April 1, 1998 and finally received approval in late November. The proposed TMDL schedule was again accelerated to a total of 13 years for TMDL development and implementation.

TMDLs will be developed by the DEP using a basin/watershed management approach. The DEP has drafted a general framework document for their Watershed Management Approach. Pollution load reduction goals, if established by the water management districts, may be used as the basis for the TMDL. In preparation for TMDL development, the DEP is currently working on pilot projects and

refining computer models with a focus on nonpoint source modeling. TMDLs have already been established for Tampa Bay, Lake Thonatosassa, the Halifax River, and the Manatee River. However, there is currently no acknowledgment in state statutes of either the TMDL program or the procedure for TMDL development and adoption.

B. EFFECT OF PROPOSED CHANGES:

CS/HB 2069 outlines a process for restoring Florida's waters through the establishment of total maximum daily loads for pollutants of impaired water bodies as required by the federal Clean Water Act. Specifically, the bill addresses development of the 303(d) list, TMDL assessment, calculation, allocation, and implementation. The bill calls for the TMDL process to be integrated with existing protection and restoration programs in the State and for coordination with state agencies and affected parties.

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?

CS/HB 2069 authorizes the DEP to promulgate rules relating to the methodology for TMDL assessment, delisting water bodies from the subsidiary list, the administration of funds, and for pollutant trading procedures. The DEP secretary is authorized to adopt rules relating to TMDL calculations and allocations. The DEP is authorized to adopt by order a subsidiary list from the 303(d) list.

The DEP and the water management districts are authorized to promulgate rules relating to measures necessary to achieve the pollution reduction targets established by the TMDL for non-agricultural nonpoint sources of pollution.

The Department of Agriculture and Consumer Services (DACS) is authorized to promulgate rules relating to measures necessary to achieve the pollution reduction targets established by the TMDL for agricultural nonpoint sources of pollution.

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

CS/HB 2069 establishes the DEP as the lead agency in administering the TMDL program and provides for coordination with local governments, water management districts, DACS, local soil and water conservation districts, environmental groups, regulated interests, other state agencies and affected pollution sources.

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

No.

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

No agency or program is eliminated or reduced.

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

N/A

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

N/A

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

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

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

No, but implementation of the TMDL could result in higher costs relating to point sources of pollution (e.g. wastewater treatment plants, power plants, etc.) and nonpoint sources of pollution (e.g. urban stormwater management and agricultural runoff) that could in turn be passed on to the consumer.

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:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

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?

No, but the bill could result in more restrictive effluent limitations than those currently allowed.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

The bill does not purport to provide services to families or children.

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

The bill does not create or change a program providing services to families or children.

- (1) parents and guardians?

N/A

- (2) service providers?

N/A

- (3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Creates ss. 403.031(21) and 403.067, F.S., and amends s. 403.805, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Designates this legislation as the "Florida Watershed Restoration Act."

Section 2: Amends s. 403.031, F.S., to define "total maximum daily load."

Section 3: Creates s. 403.067, F.S. Provides legislative findings and intent that are to improve the quality of state waters through the scientifically based total maximum daily load program, accounting

for both point and nonpoint sources of pollution. Designates DEP as the lead agency in administering the TMDL program.

Provides for the development and submittal of the 303(d) list, priority ranking and schedule to the EPA of waters on the list for TMDL development. States that the list may not be used for regulatory purposes, but that the data used to establish the list may.

Requires an additional assessment of waters on the 303(d) list to determine if TMDLs need to be calculated for all waters. The methodology for this assessment would be adopted by rule and would include the use and collection of objective, quantitative, and credible data.

A subsequent list, based on this assessment, would be developed and adopted by order. This list would contain those waters for which TMDLs would be calculated. Waters may be delisted from either this list or the 303(d) list if it is demonstrated that water quality criteria are being attained.

Once calculated, the TMDL would be allocated reasonably and equitably to point and nonpoint pollutant sources. TMDL calculations and allocations would be adopted by the DEP secretary by rule. Provisions are made in the allocation for pollution entering from outside the state and for previous but no longer existing discharges or alterations. Provides for the establishment of a technical advisory committee which will report back to the Legislature by February 1, 2001 with recommendations regarding the TMDL allocation process.

Implementation of TMDLs would be accomplished through permits for point sources and cooperatively developed basin plans or other non-regulatory agreements for nonpoint sources. A range of programs may be used to facilitate implementation of TMDLs including permits, BMPs, cost-sharing, waste minimization, pollution prevention, public education, restoration activities, pollutant trading, and public works. Points of entry to the implementation are available through the permitting process or through the development of other binding agreements.

Gives DEP authority to promulgate rules relating to the "delisting process," administration of funds, and pollutant trading.

Section 4: Amends s. 403.805, F.S. to give the DEP secretary the authority to adopt rules relating to TMDL calculations and allocations.

Section 5: Requires a cooperative report from DEP, DACS and the water management districts on the status and effectiveness of the TMDL implementation by January 1, 2005, along with recommendations for changes to the program and any additional regulatory authority.

Section 6: Provides that the act will take effect upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Indeterminate.

2. Recurring Effects:

Funding for additional positions would be required by DEP to implement the TMDL program over the 13-year implementation. Currently, DEP is requesting six additional positions to be funded through an EPA grant.

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:

None in the next fiscal year. But in subsequent years, there likely will be one-time construction costs associated with pollution load reductions resulting from TMDL implementation.

2. Recurring Effects:

In subsequent fiscal years there are likely to be operation and maintenance costs of structures built to meet pollution load reductions resulting from implementing TMDLs.

3. Long Run Effects Other Than Normal Growth:

Indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

In subsequent years, there are likely to be construction, operation and maintenance costs associated with pollution load reductions resulting from implementing TMDLs.

2. Direct Private Sector Benefits:

Indeterminate dollar amount, but the private sector will benefit from improved water quality in impaired water bodies in terms of higher property values, greater job and recreational opportunities, and a higher quality of life.

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

Competition could be affected if, for example, TMDLs are more restrictive for one water body than another. This could mean more costly alterations for an industry to meet the TMDL if it is located on the more restrictive water body, resulting in a competitive disadvantage.

D. FISCAL COMMENTS:

The overall fiscal impact of implementing the TMDL program is indeterminate. However, while initial data collection and monitoring costs are expected to be minimal, subsequent implementation of an individual TMDL could result in costly alterations to meet the TMDL allocation, particularly for nonpoint sources of pollution.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

CS/HB 2069 does not require counties or municipalities to expend funds or take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

CS/HB 2069 does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

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

CS/HB 2069 does not reduce the percentage of state tax shared with counties and municipalities.

V. COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

At its March 17, 1999 meeting, the Committee on Water and Resource Management unanimously adopted one strike-everything amendment to PCB WRM 99-03. Eight amendments to the amendment were also adopted unanimously.

Changes contained in the strike-everything amendment include:

- Technical and clarifying changes;
- Rewording Legislative intent language regarding nonpoint sources;
- New provisions added to the allocation section describing the factors upon which the allocations must be based;
- A technical advisory committee is to be established and report due by Feb 1, 2000 to the Legislature providing recommendations for modifications to the TMDL allocation process;
- Moderating provisions will now be considered throughout the TMDL process;
- The TMDL calculation methodology is no longer adopted by rule, but determined in cooperation with stakeholders;
- The TMDL calculation and allocation will be adopted by rule, not order. In addition to the noticing requirements of rule making, notice will be made in local newspapers to alert local individuals who do not normally read the Florida Administrative Weekly;
- Notice will also be made in local newspapers regarding the basin planning process;
- Pollutant trading rules are not effective until the Legislature has reviewed and approved those rules; and
- Sections (d) and (e) of s. 403.067, F.S., regarding BMP development for non-agricultural and agricultural nonpoint sources were reworked to provide for rulemaking by the Department of Environmental Protection, water management districts, and the Department of Agriculture and Consumer Services. These sections also contain a presumption of compliance with state water quality standards and a release from liability for those who implement the BMPs adopted by rule.

The first amendment to the amendment amended s. 403.031, F.S., to define "total maximum daily load" per the Code of Federal Regulations and added additional language to specify that the assimilative capacity of a water body must be determined before wasteload and load allocations can be calculated.

The second amendment to the amendment listed what parameters the TMDL calculation should address. Specifically, the TMDL calculation should establish the amount of a pollutant that a water body can assimilate and account for seasonal variations with a margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

The third amendment to the amendment added "other appropriate state agencies" to the list of groups the Department of Environmental Protection must coordinate with throughout the TMDL process.

The remaining five amendments to the amendment were either technical or clarified language in the amendment. All amendments were incorporated into HB 2069 as it was reported out of committee.

At its April 14, 1999 meeting, the Committee on Governmental Rules and Regulations adopted one strike-everything amendment to HB 2069.

STORAGE NAME: h2069s1.grr

DATE: April 14, 1999

PAGE 9

Changes contained in the strike-everything amendment include:

- Technical or clarifying changes;
- Incorporating USEPA comments;
- Providing for TMDLs that were calculated prior to the effective date of this act;
- Providing for secretarial rule adoption for TMDL calculations and allocations; and
- Allowing the DEP to go forward with the TMDL process prior to resolution of an administrative challenge, short of implementing a TMDL.

The amendment was incorporated into the committee substitute for HB 2069.

VII. SIGNATURES:

COMMITTEE ON WATER AND RESOURCE MANAGEMENT:

Prepared by:

Kellie R. Ralston

Staff Director:

Joyce Pugh

AS REVISED BY THE COMMITTEE ON GOVERNMENTAL RULES AND REGULATIONS:

Prepared by:

David M. Greenbaum

Staff Director:

David M. Greenbaum