SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 2282

SPONSOR: Natural Resources Committee and Senator Laurent

SUBJECT: Implementation of water quality standards

DATE: March 22, 1999 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Branning	Voigt	NR	Favorable/CS
2.			FP	
3.				
4.				
5.				

I. Summary:

This bill provides a process for restoring Florida's waters through the establishment and implementation of total maximum daily loads (TMDLs) for pollutants of impaired water bodies as required by the federal Clean Water Act. Provides legislative findings and intent. Requires the Department of Environmental Protection to periodically submit to the U.S. Environmental Protection Agency a list of surface waters or segments for which TMDL assessments will be conducted. Provides that the list cannot be used in the administration or implementation of any regulatory program. Provides for public comment on the list. Requires the DEP to conduct TMDL assessments on water bodies based on the priority ranking and schedule. Requires the DEP to adopt by rule a methodology for determining those water bodies which are impaired. Provides for the adoption of a second list of water bodies for which TMDLs will be calculated under certain circumstances. Provide for the process for calculating and allocating TMDLs. Requires the DEP to submit a report by February 1, 2000, to the Governor and the Legislature which contains recommendations and draft legislation for allocating TMDLs. Provides that the TMDL calculations must be adopted by rule. Provides for public workshops and public notice. Provides that the DEP shall be the lead agency in coordinating and implementing the TMDL allocation through water quality protection programs. Authorizes the DEP to develop a basin plan. Provides for public workshops and public notice regarding the basin plan. Allows certain pollutant sources to have the opportunity to implement the TMDL through nonregulatory and incentive-based programs. Requires the DEP, water management districts, and others to cooperatively develop suitable interim measures, best management practices, or other measures necessary to achieve the pollution reduction targets for nonagricultural nonpoint pollutant sources. Requires the Department of Agriculture and Consumer Services to develop and may adopt by rule interim measures or best management practices for agricultural pollutants. Authorizes the DEP to adopt certain rules. Prohibits the DEP from implementing, without prior legislative approval, any additional regulatory authority pursuant to the federal Clean Water Act. Requires the DEP , in coordination with the water management district and the Department of Agriculture and Consumer Services to evaluate the effectiveness of the implementation of TMDLs for a period of 5 years and report to the Governor and the Legislature by January 1, 2005.

This bill substantially amends s. 403.031, F.S.; and creates s. 403.067, F.S.

II. Present Situation:

The federal Water Pollution Control Act of 1972 (commonly referred to as the Clean Water Act) provides 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 Clean Water Act sought to restore and protect the health of the nation's water bodies by:

- Strengthening national water quality standards;
- Prohibiting the discharge of pollutants without a permit;
- Encouraging the use of best available technologies for pollution control; and
- Providing moneys for building and improving sewage treatment plants.

Section 305(b) of the Clean Water Act requires states to submit to Congress a biennial report on the water quality of their lakes, streams, and rivers. those waters that quality as "impaired", or don't meet the specific pollutant limits for their designated uses, must be submitted to the U.S. Environmental Protection Agency (EPA) under section 303(d) of the Clean Water Act. 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 have been 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, the Earthjustice Legal Defense Fund 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 Administrator, Carol Browner, have not enforced Florida's adherence to the Clean Water Act. In particular, the lawsuit alleged that EPA had not required Florida to comply with section 303(d) of the Clean Water Act in generating a list of impaired waters and subsequent TMDL development for those waters.

As mentioned above, section 303(d) of the Clean Water Act requires states to submit a list of waters that do not meet relevant water quality standards and that prioritizes TMDL development and implementation for those waters. The 303(d) list is updated every 2 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 2 years.

The DEP submitted its first 303(d) list in 1992 simply using the listed Surface Water Improvement and Management (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" (meeting the designated uses), "fair" (partially meeting the designated uses, and "poor" (not meeting the 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 reevaluated the "fair" waters and resubmitted the list, now with 709 water segments, to the EPA on April 1, 1998, and finally received approval in late November, 1998.

TMDLs are to be developed by the DEP using a basin/watershed management approach. The DEP has drafted a general framework document for 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 Thonatasassa, the Halifax River, and the Manatee River. There is currently no acknowledgment in state statutes of either the TMDL program or the procedure for TMDL development and adoption.

III. Effect of Proposed Changes:

This bill provides 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.

Section 403.031, F.S., is amended to define the term "total maximum daily load."

Section 403.067, F.S., is created to provide for the establishment and implementation of total maximum daily loads. Legislative findings and intent are provided concerning the development of a total maximum daily load (TMDL) program for state waters. The Legislature finds that, while point and nonpoint sources of pollution have been managed through numerous programs, better coordination among these efforts and additional management measures may be needed in order to achieve improvements in water quality and restoration of impaired water bodies. The scientifically based TMDL program is necessary to fairly and equitably allocate pollution loads to both point and nonpoint sources of pollution for a given water body or water body segment. The Department of Environmental Protection (DEP) is to be the lead agency in administering and coordinating the implementation of this program and shall coordinate with local governments, water management districts, the Department of Agriculture and Consumer Services , local soil and water conservation districts, environmental groups, regulated interest, other appropriate state agencies and affected pollution sources in developing and executing the TMDL program.

As required by the Clean Water Act, the DEP must periodically submit to the U.S. Environmental Protection Agency (EPA) a list of surface waters or segments for which TMDL assessments will be conducted. The assessments are required to evaluate the water quality conditions of the listed waters and, if such waters are determined not to meet water quality standards, TMDLs shall be established. The DEP is required to establish a priority ranking and schedule for analyzing such waters.

The list, priority ranking, and schedule cannot be used in the administration or implementation of any regulatory program. The list, priority ranking, and schedule must be made available for public

comment, but they are not subject to challenge under ch. 120, F.S., nor are they to be adopted by rule.

Based on the priority ranking and schedule for a particular listed water body or water segment, the DEP shall conduct a TMDL assessment of the basin in which the water body or segment is located using methodology the DEP is required to adopt by rule. In conducting this assessment, the DEP must coordinate with the local water management district, the Department of Agriculture and Consumer Services, other appropriate state agencies, soil and water conservation districts, environmental groups, regulated interests and other interested parties.

The methodology rule to be adopted by the DEP must provide for consideration as to whether water quality standards codified in ch. 62-302, F.A.C., are being exceeded, based on objective, quantitative and credible data, studies and reports, including surface water improvement and management (SWIM) plans approved by water management districts, and pollutant load reduction goals developed according to DEP rule. The rule must also set forth certain specified additional criteria.

If the DEP determines, based on the TMDL assessment methodology, that water quality standards are not being achieved, and that technology-based effluent limitations and other pollution control programs under local, state or federal authority, including Everglades restoration activities, pursuant to s. 373.4592 designed to restore such waters for the pollutant of concern are not sufficient to result in attainment of applicable surface water quality standards, it shall confirm that determination by adopting a second list of those water bodies or segments for which TMDLs will be calculated. In association with this list, the DEP shall establish priority rankings and schedules by which water bodies or segments will be subjected to TMDL calculations. If a surface water or water segment is to be listed, the DEP must specify the particular pollutants causing the impairment and the concentration of those pollutants causing the impairment relative to the water quality standard. If a numerical criterion for a particular pollutant has been established by DEP rule, a narrative or biological criterion may not be the basis for determining an impairment in connection with that pollutant unless the DEP identifies specific factors as to why the numerical criterion is not adequate to protect water quality. If water quality nonattainment is based on narrative or biological criteria, the factors concerning specific pollutants must be identified prior to a TMDL being developed for those criteria for that surface water or water segment. This second list is to be adopted and amended by DEP order subsequent to the completion of each basin assessment, and submitted to the EPA. These orders are subject to challenge under ch. 120, F.S.

At any time throughout the TMDL process, surface waters or segments must be removed from the lists upon demonstration that water quality criteria are being attained, based on certain data.

Prior to developing a TMDL calculation for each water body or segment on the list, the DEP shall coordinate with applicable local governments, water management districts, the Department of Agriculture and Consumer Services, other appropriate state agencies, local soil and water conservation districts, environmental groups, regulated interests, and affected pollution sources to determine the information required, accepted methods of data collection and analysis, and quality control/quality assurance requirements. The analysis may include mathematical water quality modeling using approved procedures and methods.

The DEP must develop TMDL calculations for each water body or segment on the list according to the priority ranking and schedule unless the impairment of such waters is solely due to activities other than point and nonpoint sources of pollution. For waters determined to be impaired due to factors other than point and nonpoint sources of pollution, no total maximum daily load will be required. The bill specifies what the calculation must establish and account for. The TMDL may be based on a pollutant load reduction goal established by a water management district.

The TMDLs must include establishment of reasonable and equitable allocations of the TMDL among point and nonpoint sources that will alone, or in conjunction with other management and restoration activities, provide for the attainment of water quality standards and the restoration of impaired waters. The allocations shall establish the maximum amount of the water pollutant from a given source or category of sources that may be discharged or released into the water body or segment in combination with other discharges or releases. The allocations shall assure the attainment of water quality and must be based on certain specified factors.

By February 1, 2000, the DEP is required to submit a report to the Governor, president of the Senate, and the Speaker of the House of Representative containing recommendations, including draft legislation, for any modifications to the process for allocating TMDLs. The recommendations must be developed by the DEP in cooperation with a technical advisory committee.

The TMDL calculations and allocations for each water body or segment on the list are to be adopted by rule. As part of the rule development process, the DEP is required to hold at least one public workshop. The bill specifies the notice that is required for the workshop.

The DEP is to be the lead agency in coordinating the implementation of the TMDL allocation through water quality protection programs.

In coordinating and implementing the TMDL allocation, the DEP may develop a basin plan. The basin plan will serve to fully integrate all the management strategies available to the state for the purpose of achieving water quality restoration. The basin planning process is intended to involve the broadest possible range of interested parties, with the objective of encouraging the greatest amount of cooperation and consensus possible. The DEP is required to hold at least one public meeting in the vicinity of the basin. The notice that is required for this meeting is specified.

Pollutant sources which are not subject to permitting under ch. 403, F.S., or ch. 373, F.S., must have the opportunity to implement the TMDL through nonregulatory and incentive-based programs, including best management practices or other preventive measures.

The DEP, in cooperation with the water management district and other interested parties, as appropriate, is to develop suitable interim measures, best management practices, or other measures necessary to achieve the pollution reduction target established by the DEP for nonagricultural nonpoint pollutant sources in allocations developed pursuant to subsection (6)(a). These measures and practices may be adopted by rule. Implementation of these practices in accordance with applicable rules shall provide a presumption of compliance with state water quality standards and release from liability provisions for those pollutants addressed by the practices, and the DEP is not authorized to institute proceedings against the owner of the source

of pollution to recover costs or damages associated with the contamination of surface or ground water. Where water quality problems are detected despite the appropriate implementation of best management practices and other measures according to adopted rules, the DEP or the water management district shall institute a reevaluation of the best management practice or other measures.

For agricultural pollutant sources in allocations developed pursuant to subsection (6)(b), the Department of Agriculture and Consumer Services shall develop and adopt suitable interim measures and best management practices by rule.

The DEP is authorized to adopt rules relating to delisting water bodies or segments from the list; administration of funds to implement the TMDL program; and procedures for pollutant trading among the pollutant sources to a water body or segment.

The DEP may not implement, without prior legislative approval, any additional regulatory authority pursuant to the federal Clean Water Act if such implementation would result in water quality discharge regulation of activities not currently subject to regulation.

The DEP, in coordination with the water management districts, soil and water conservation districts, and the Department of Agriculture and Consumer Services, is required to evaluate the effectiveness or the implementation of TMDLs for a period of 5 years from the effective date of this act. The DEP must report to the Governor, the President of the Senate, and the Speaker of the House of Representatives by January 1, 2005. The bill specifies what the report must contain.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There will likely be significant future construction, operation, and maintenance costs associated with pollution load reductions resulting from implementing TMDLs. Future public benefits from the restoration of impaired water bodies would come in the form of higher property values and greater job and recreational opportunities near those restored water bodies.

C. Government Sector Impact:

While the number of waters listed as impaired on 303(d) list has grown, the schedule for TMDL implementation has been shortened dramatically. In light of this increased workload, staffing is an important issue. Proposed funding from the EPA will cover the costs of six new positions in the Department of Environmental Protection, but these positions must be created by the Legislature. As of March 18, 1999, the Senate appropriations bill does not provide for these six additional positions.

Additional moneys for funding implementation of the TMDL program restoration activities is anticipated to come from the EPA, but this funding is likely to be insufficient to cover even the activities relating to the restoration of the high priority waters.

The DEP likely will encounter numerous challenges to the TMDLs established for water bodies and the allocations of TMDLs among point sources because of the impacts on permitted discharges. These legal costs are likely to be significant in future years.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.