

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/CS/SB 712

SPONSOR: Governmental Oversight & Productivity Committee and Commerce, Economic Opportunities, & Consumer Services Committee

SUBJECT: Review under the Open Government Sunset Review Act

DATE: January 22, 2004 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Maclure</u>	<u>Maclure</u>	<u>CM</u>	<u>Fav/CS</u>
2.	<u>Greenbaum</u>	<u>Lang</u>	<u>JU</u>	<u>Favorable</u>
3.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
4.	_____	_____	<u>RC</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

This committee substitute for the committee substitute saves from repeal and revises a public records exemption for business records submitted to a governmental condemning authority to substantiate a business-damage settlement offer relating to the authority's acquisition of a right-of-way parcel through the power of eminent domain. The committee substitute for the committee substitute:

- Prescribes the information covered by the public records exemption, including certain federal and state tax information; balance sheets, profit-and-loss statements, cash-flow statements, inventory records, and customer data; franchise, distributorship, and lease agreements; information in the nature of trade secrets; and other sensitive or proprietary business information;
- Provides that the information is confidential as well as exempt;
- Provides that a business must request in writing that the information be held exempt;
- Provides that the confidentiality and exemption are lifted if the information is otherwise subject to disclosure;
- Specifies that the information may be shared with an agency, as defined under the public records law, for the transaction of official business and provides that disclosure in violation of the statute is a first-degree misdemeanor;
- Delays the scheduled repeal of the public records exemption from October 2, 2004, until October 2, 2009;
- Provides for future review of the exemption under the Open Government Sunset Review Act; and
- Provides a legislative statement of public necessity for the exemption.

The committee substitute for the committee substitute is based upon the recommendations of Interim Project Report 2004-201 by the Committee on Commerce, Economic Opportunities, and Consumer Services, which is a review of s. 73.0155, F.S., under the Open Government Sunset Review Act.

The committee substitute for the committee substitute substantially amends section 73.0155, Florida Statutes.

## II. Present Situation:

### Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1909.<sup>1</sup> In 1992, Floridians adopted an amendment to the state constitution that raised the statutory right of access to public records to a constitutional level. Article I, s. 24(a), of the State Constitution provides that:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The public records law, ch. 119, F.S., also specifies conditions under which the public must have access to governmental records. Section 119.011(1), F.S., defines the term “public records” to include:

all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition of public records to include all materials made or received by an agency in connection with official business which are used “to perpetuate, communicate, or formalize knowledge.”<sup>2</sup> Unless the Legislature makes these materials exempt, they are open for public inspection, regardless of whether they are in final form.<sup>3</sup>

Under Article I, s. 24(c), of the State Constitution, the Legislature may provide for the exemption of records from the open government requirements provided: (1) the law creating the exemption

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<sup>1</sup> Chapter 5942, L.O.F.

<sup>2</sup> *Shevin v. Byron, Harless, Schaffer, Reid, and Assocs., Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>3</sup> See *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law.

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption. An “exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption” (s. 119.15(3)(b), F.S.).

Under s. 119.15(2), F.S., an exemption may be maintained only if: “(a) The exempted record or meeting is of a sensitive, personal nature concerning individuals; (b) The exemption is necessary for the effective and efficient administration of a governmental program; or (c) The exemption affects confidential information concerning an entity.”

Section 119.15(4)(a), F.S., requires, as part of the review process, the consideration of the following questions:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

An exemption may be maintained only if it serves an identifiable public purpose, and it may be no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one of the following purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong policy of open government and cannot be accomplished without the exemption:

- The exemption allows “the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.”
- The exemption protects “information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals.”
- The exemption protects “information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.”

(Section 119.15(4)(b), F.S.)

## **Eminent Domain Negotiations & Damages**

Eminent domain is the power of the government to take private property for public use. To encourage presuit settlement and reduce litigation costs, the Legislature in 1999 substantially revised the eminent domain law by establishing a presuit negotiation process,<sup>4</sup> under which a governmental condemning authority must attempt to negotiate with the property owner, provide the property owner with a written offer, and attempt to reach an agreement on the amount of compensation to be paid for the property (s. 73.015, F.S.).

### ***Notice to Fee Owners***

The process begins with the governmental condemning authority making an offer of compensation and notifying the property owner of the necessity for the parcel, the nature of the project, the availability of an appraisal report, and the owner's rights and responsibilities under the law. The property owner has 30 days to respond to the offer, during which time the governmental condemning authority may not file a condemnation action in circuit court<sup>5</sup> (s. 73.015(1)(a) and (b), F.S.).

### ***Notice to Business Owners***

The 1999 eminent domain revisions also provided that before the Florida Department of Transportation or a county, municipality, board, district, or other public body may initiate an action to condemn property for a right of way,<sup>6</sup> it must make a good-faith effort to notify businesses that operate on the property, which notice is substantially similar to the notice to the fee owner (s. 73.015(2)(a), F.S.). The governmental condemning authority, however, is not required to negotiate with the business owner prior to initiating an action in circuit court.<sup>7</sup>

### ***Business-Damage Offer***

If a business intends to claim a statutory right to business damages,<sup>8</sup> it must submit to the governmental condemning authority, within 180 days of the notice from the authority, a good-faith written offer to settle any claim of business damages (s. 73.015(2)(c), F.S.). Unless

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<sup>4</sup> See ch. 99-385, L.O.F.; Paul D. Bain, "1999 Amendments to Florida's Eminent Domain Statutes," *The Florida Bar Journal*, Nov. 1999, at 68.

<sup>5</sup> Jurisdiction over eminent domain cases rests with the circuit court, where the cases are tried before a 12-member jury and are given preference over other civil actions (s. 73.071(1), F.S.).

<sup>6</sup> A "right of way" is defined in s. 334.03(22), F.S., as "land in which the state, the department, a county, or a municipality owns the fee or has an easement devoted to or required for use as a transportation facility."

<sup>7</sup> See s. 73.015(2), F.S., which requires solely a good faith effort to notify business owners before an eminent domain proceeding is brought, and Paul D. Bain, *supra* note 4, at 68.

<sup>8</sup> Florida law provides that, under certain circumstances, a business operating on property to be acquired for right-of-way purposes may receive compensation for damages caused by the acquisition. The following conditions must be met: 1) the business must hold a property interest in the portion of the property being acquired; 2) the acquisition must be a partial acquisition of the property; 3) the business must have been in operation for at least four years; and 4) the business must demonstrate that the damages are directly attributable to the loss of property. See s. 73.071(3)(b), F.S.; Florida Department of Transportation, *The Real Estate Acquisition Process*, Jan. 1, 2000, at 12-13, available at <http://www.dot.state.fl.us/rightofway/documents/acqhn.pdf>. However, in contrast to the payment to the fee owner for the property taking, which is constitutionally protected, the payment of compensation for business damages is granted or withheld simply as a matter of

the court finds that a business was justified in failing to submit the offer in a timely manner, the court must strike the owner's claim for business damages if the business fails to do so. The offer to settle business damages "must include an explanation of the nature, extent, and monetary amount of such damage" (s. 73.015(2)(c)1., F.S.).

### ***Business Records***

Accompanying the offer to settle a business-damage claim, the business must submit to the condemning authority copies of "business records" that substantiate the offer. The term includes, but is not limited to:

copies of federal income tax returns, federal income tax withholding statements, federal miscellaneous income tax statements, state sales tax returns, balance sheets, profit and loss statements, and state corporate income tax returns for the 5 years preceding notification which are attributable to the business operation on the property to be acquired, and other records relied upon by the business owner that substantiate the business damage claim

(s. 73.015(2)(c)2., F.S.).

### **Public Records Exemption for Business Records**

Concurrent with the 1999 reforms to the eminent domain law, the Legislature enacted a public records exemption for business records submitted with an offer to settle a business-damage claim.<sup>9</sup> Codified in s. 73.0155, F.S., the provision specifies that business records submitted by a business owner to a governmental condemning authority as part of an offer to settle business damages are exempt from the open government provisions: 1) if disclosure of the records "would be likely to cause substantial harm to the competitive position of the person providing" the records; and 2) if the person providing the records requests that they be held exempt.

In its statement of public necessity for the public records exemption, the Legislature found that the exemption was necessary to encourage presuit settlements and to prevent a business from being placed at a competitive disadvantage through the release of sensitive business records to the public.<sup>10</sup> This exemption expires on October 2, 2004, unless it is reviewed and reenacted by the Legislature. Senate Interim Project Report 2004-201<sup>11</sup> evaluated the public records exemption for eminent domain business records under the Open Government Sunset Review Act.

The public records exemption under review applies to "business records" submitted to a governmental condemning authority as part of a business-damage offer under s. 73.015, F.S. The

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legislative grace. *Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc.*, 444 So.2d 926, 928 (Fla. 1983).

<sup>9</sup> Section 1, ch. 99-224, L.O.F.

<sup>10</sup> Section 2, ch. 99-224, L.O.F.

<sup>11</sup> Committee on Commerce, Economic Opportunities, and Consumer Services, The Florida Senate, Interim Project Report 2004-201, *Open Government Sunset Review of Public Records Exemption for Business Records in Eminent Domain Negotiations (s. 73.0155, F.S.)*, available at [http://www.flsenate.gov/data/Publications/2004/Senate/reports/interim\\_reports/pdf/2004-201cm.pdf](http://www.flsenate.gov/data/Publications/2004/Senate/reports/interim_reports/pdf/2004-201cm.pdf).

term “business records” is not specifically defined with the statutory section creating the public records exemption. The term, however, is defined in s. 73.015, F.S., which is the statutory section that the public records exemption refers to and which is the section that establishes the process for negotiating business-damage claims – suggesting that this definition of business records applies to the public records exemption as well. (See discussion of *Business Records*, above.)

The Florida Department of Transportation and eminent domain attorneys note, however, that businesses submit, and condemning authorities may request, a wide variety of records. In addition to the items specifically identified in s. 73.015(2)(c)2., F.S., businesses may submit, or be asked to submit, items such as: unemployment tax returns, tangible personal property tax returns, sales records, cash-flow statements, customer counts, leases, franchise agreements, appraisal reports or business damage studies, inventories and valuations of fixtures and personal property, and similar types of information.

### **Open Government Sunset Review Report**

The Open Government Sunset Review of s. 73.0155, F.S., by the Committee on Commerce, Economic Opportunities, and Consumer Services<sup>12</sup> found that the exemption protects information of a confidential nature concerning a business that suffers damages when the government, for right-of-way purposes, condemns part of the property on which the business operates. Further, the report found that without the exemption, the business, which must submit a settlement offer or forego the business-damage claim, risks having competitors access sensitive information like tax and sales data. In addition, by promoting the exchange of information between the business and the governmental condemning authority early in the property-acquisition process, the exemption helps governments evaluate business-damage offers and facilitates settlements, thereby allowing for effective and efficient administration of eminent domain programs.

The report also found, however, that the public records exemption does not clearly describe the information exempt from disclosure. Therefore, the report recommended that the Legislature retain but also revise the exemption to more clearly describe the information that is exempt from disclosure within the language of the public records exemption itself. The report also recommended that the Legislature provide that the relevant information is both confidential and exempt from disclosure and provide for interagency exchange of the information in the performance of public duties.<sup>13</sup>

### **Exempt v. Confidential Status of Information**

Public records law recognizes a distinction between records that are made exempt and records that are made confidential. If a record is made exempt only, an agency is not prohibited from disclosing the document in all circumstances.<sup>14</sup> If the Legislature makes certain information confidential and exempt, however, such information may not be released to anyone other than to

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1 and 8.

<sup>14</sup> See *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), *rev. denied*, 589 So.2d 289 (Fla. 1991).

the persons or entities designated in statute.<sup>15</sup> The public records exemption under s. 73.0155, F.S., applies an “exempt” status to business records rather than a “confidential and exempt” status. Currently the exemption provides that it does not preclude access by the Legislature, the Attorney General, and “interested state agencies,” which term is not defined (s. 73.0155, F.S.). In the economic development area, there are examples of public records exemptions relating to sensitive business information in which the information is treated as both confidential and exempt. (See, for example, s. 288.047(7), F.S., providing that materials relating to methods of manufacture, potential trade secrets, and business transactions under the Quick Response Training Program are confidential and exempt; s. 288.1067(1), F.S., providing that certain tax, trade secret, wage, and sales information submitted by a business applying for economic development incentives is confidential and exempt for a period of time; and s. 288.1224(7), F.S., providing that the identity of persons responding to marketing or advertising research projects conducted by the Florida Commission on Tourism, as well as trade secrets obtained through such research, are confidential and exempt.)

### **Related Public Records Exemption**

Florida law provides a public records exemption for records held by a state executive branch agency<sup>16</sup> seeking to acquire real property by purchase or through the exercise of the power of eminent domain (s. 119.07(3)(n), F.S.). The exempt records include “all appraisals, other reports relating to value, offers, and counteroffers.” The exemption is operative until execution of a valid option contract or a written offer to sell that has been conditionally accepted by the agency, at which time the exemption expires. If a valid option contract is not executed, or if a written offer to sell is not conditionally accepted by the agency, the exemption expires at the conclusion of the condemnation litigation of the property. The exemption does not apply to a public record which was made a part of a court file and which is not specifically closed by order of court (s. 119.07(4), F.S.). Research for this staff analysis has not identified any reported case law on the question of whether the term “other reports relating to value” includes business records provided to a condemning authority to establish a value for business damages. This related public records exemption was not reviewed as part of the Open Government Sunset Review of the exemption for eminent domain business records under s. 73.0155, F.S.

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

The committee substitute for the committee substitute saves from repeal and revises an existing public records exemption, codified in s. 73.0155, F.S., for business records that are submitted to a governmental condemning authority as part of an offer to settle a claim of business damages resulting from the acquisition of a parcel for right-of-way purposes under the eminent domain law. The committee substitute for the committee substitute is based upon the findings and recommendations of Interim Project Report 2004-201 of the Committee on Commerce, Economic Opportunities, and Consumer Services, which is an Open Government Sunset Review of the public records exemption.

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<sup>15</sup> See Inf. Op. to Chiaro, January 24, 1997.

<sup>16</sup> Sections 125.355, 166.045, and 1013.14, F.S., provide comparable exemptions for counties, municipalities, and educational boards purchasing property for public purposes.

Rather than apply the exemption to “business records,” as the statute currently does, the committee substitute for committee substitute amends s. 73.0155, F.S., to prescribe the information covered by the public records exemption, which includes:

- Federal and state tax returns and tax information that is provided confidentiality under specific federal or state laws.
- Balance sheets, profit-and-loss statements, cash-flow statements, inventory records, or customer lists and number of customers for the business operating on the parcel to be acquired.
- Franchise, distributorship, or lease agreements relating to the business operating on the parcel to be acquired.
- Information in the nature of trade secrets, using the definition of trade secrets provided under the Uniform Trade Secrets Act (ss. 688.001-688-009, F.S.).
- Other sensitive or proprietary information that the business owner attests in writing is being relied upon to substantiate a business-damage claim, has not otherwise been disclosed, cannot be readily obtained through other means, is used to protect a competitive position in the marketplace, and would injure the business in the marketplace if it were disclosed.

The committee substitute for the committee substitute provides that the information is confidential as well as exempt, and removes a general requirement that disclosure would be likely to cause substantial harm to the competitive position of the person providing the records. A comparable qualifier, however, is specifically incorporated into the final category of information (“other sensitive or proprietary information”) covered by the public records exemption, as revised by this committee substitute for the committee substitute. The committee substitute for the committee substitute also adds a requirement that the business must request *in writing* that the information be held exempt.

In addition to specifying that the confidentiality and exemption are lifted if the covered information is otherwise made available to the public, the committee substitute for the committee substitute provides that the protected information may be shared with an agency, as defined under the public records law, for the transaction of official business. Under s. 119.011(2), F.S., the term “agency” includes a “private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.” The committee substitute for the committee substitute provides, however, that an employee or agent who willfully and knowingly fails to maintain the confidentiality commits a first-degree misdemeanor, punishable by no more than a year in prison or a \$1,000 fine.

The committee substitute for committee substitute extends the scheduled expiration of the public records exemption until October 2, 2009, (from October 2, 2004) and provides for future review of the exemption under the Open Government Sunset Review Act. In addition, the committee substitute for committee substitute includes a legislative statement of public necessity for the public records exemption, which cites the need to prevent potential injury to the competitive position of a business due to the release of sensitive business records and the need for condemning authorities to obtain accurate financial information to use in evaluating business-damage claims in eminent domain actions.

The committee substitute for committee substitute provides for future review of the public records exemption under the Open Government Sunset Review Act and for a statement of public necessity because the committee substitute for committee substitute substantially revises the language of the exemption in a manner that could be considered an expansion of the scope of exemption to include more records. Currently, s. 73.0155, F.S., applies to “business records,” but it does not define the term within the exemption itself, instead relying upon a definition provided in the substantive law applicable to the business-damage negotiation process under s. 73.015(2)(c)2., F.S. That definition is open-ended, because it states that it includes – but is not limited to – a number of specifically delineated items, and because it includes an open-ended category of “other records relied upon by the business owner that substantiate the business damage claim.” The committee substitute for committee substitute, on the other hand, specifically delineates, within the language of the public records exemption itself, the items that are confidential and exempt from disclosure. The listing of items in the committee substitute for committee substitute is similar, but not identical, to the listing of items under the current definition of business records contained in s. 73.015(2)(c)2., F.S. The committee substitute for committee substitute does also contain a general category for “other sensitive or proprietary information.” Because there is the possibility that the public records exemption, as revised by the committee substitute for committee substitute, might cover more information than the current exemption, the committee substitute for committee substitute includes the statement of public necessity and provides for future legislative review in order to comply with constitutional and statutory requirements related to public records exemptions.

The committee substitute for the committee substitute also clarifies that the confidential and exempt status accorded to the information in no way prevents use of that information in a legal proceeding or prevents a court from determining whether to close a portion of a court record from subsequent public disclosure after trial in order to maintain the confidentiality of that information. This language is technically unnecessary as it is the current state of the law for exempt and confidential information, but stating it explicitly provides additional clarity on the matter.

The committee substitute for committee substitute provides an effective date of October 1, 2004.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

This committee substitute for committee substitute retains and revises a public records exemption for certain information that a business submits as part of an offer to settle a claim of business damages stemming from acquisition of property by a government through eminent domain proceedings. The exemption applies to records received by a “governmental condemning authority,” which could include a local government.

Under s. 18(a), Art. VII of the State Constitution, a general law requiring a county or municipality to spend funds or to take action requiring the expenditure of funds requires, under certain circumstances, approval by two-thirds of the membership of each house of the Legislature. By providing that a county or a municipality – acting as a governmental condemning authority – has to maintain the confidentiality of certain information, this

committee substitute for committee substitute has the potential effect of requiring the local government to incur costs and spend funds to maintain that confidentiality. However, because these record-keeping costs are anticipated to be insignificant, the committee substitute for committee substitute is not subject to the two-thirds vote requirement of the constitutional provision.

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

Section 24(c), Art. I of the State Constitution permits the Legislature to create exemptions to public records and meetings requirements by general law. These exemptions must be no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption must contain only exemptions from the public records and meetings requirements and provisions governing enforcement and must relate to one subject. The committee substitute for committee substitute appears to relate to one subject and contain only provisions creating exemptions and providing for enforcement.

In 2002, the voters approved a revision to this section of the constitution to provide that general laws granting exemptions from the constitutional open-government requirements must pass by a two-thirds vote of each house of the Legislature. The public records exemption affected by this committee substitute for committee substitute, s. 73.0155, F.S., was in existence prior to the revision to the constitution. However, to the extent this committee substitute for committee substitute substantially revises (rather than simply re-enacting) the exemption in a manner that may be deemed to broaden the scope to include coverage for more records (see “Effect of Proposed Changes” section of this staff analysis), it would require adoption by a two-thirds vote of each house of the Legislature.

**C. Trust Funds Restrictions:**

None.

**V. Economic Impact and Fiscal Note:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

To the extent that the public records exemption for business information submitted with an eminent domain business-damage offer helps to facilitate negotiations between a business and a governmental condemning authority, the exemption may promote the settlement of and payment for such damages to the business earlier in the property-acquisition process. To the extent that the public records exemption prevents the competitors of a business from gaining access to sensitive financial data, the exemption may help reduce the risk to a business of being injured in the marketplace.

**C. Government Sector Impact:**

To the extent that the public records exemption for business information submitted with an eminent domain business-damage offer promotes the submission of accurate information, it may help a governmental condemning authority correctly value the offer and ultimately pay an amount that matches actual business damages. In addition, to the extent the public records exemption promotes settlements early in the property-acquisition process and before the action proceeds to trial, it may help the authority avoid some costs associated with litigation and thereby reduce the overall costs associated with the acquisition of property for public transportation projects.

The record-keeping costs to governmental condemning authorities, including the Florida Department of Transportation and local governments, associated with maintaining the confidentiality of information covered by this committee substitute for committee substitute are not anticipated to be significant.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.