

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Agriculture Committee

BILL: CS/SB 1514

INTRODUCER: Environmental Preservation and Conservation Committee and Senator Latvala

SUBJECT: Permitting of Consumptive Uses of Water

DATE: April 5, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Uchino	Yeatman	EP	Fav/CS
2.	Akhavein	Spalla	AG	Pre-meeting
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

The Committee Substitute (CS) requires water management districts (WMD) to issue 20-year consumptive use permits (CUP). It eliminates an applicant’s requirement to provide reasonable assurances to a WMD in order to receive 20-year CUP. It also eliminates the requirement that permit holders submit a 10-year compliance report for their CUPs. The CS requires WMD governing boards to modify existing permits, if requested by the permit holder, to comply with the new requirements. The CS specifies how WMDs should evaluate CUP applications in mandatory reuse zones but exempts agricultural uses from this requirement. The CS creates a new type of permit called a “sustainable water use permit” for public water utilities. The CS adds an additional criterion to the list of factors a WMD governing board must consider when funding a water supply development project. Finally, the CS requires the WMDs, in consultation with the Department of Environmental Protection (DEP), to examine options to better coordinate CUPs with water supply planning and report findings and recommendations to the Governor, President of the Senate and Speaker of the House of Representatives.

This CS substantially amends s. 373.236, 373.250, 373.2234, 373.243 and 373.707 and creates s. 373.255, Florida Statutes. It also creates an unnumbered section of law.

II. Present Situation:

Permitting of Consumptive Uses of Water

The Water Resources Act of 1972 (Act) provides for a two-tiered administrative structure governing water quality and consumption.¹ The Department of Natural Resources (now the DEP) was given general supervisory authority to coordinate statewide efforts for water management.² In addition, the Act created six WMDs along hydrological boundaries.³ Each WMD has broad regulatory authority for managing water resources and has ad valorem taxing authority to raise revenue for water management purposes.⁴ One of the most important aspects of the Act was the establishment of minimum flows and levels for the state's surface waters and groundwaters.⁵ The goal of establishing such levels is to ensure there will be enough water to satisfy consumptive use and public purposes, such as swimming, boating and environmental protection. By establishing minimum flows and levels for non-consumptive use, water managers, theoretically, will be able to establish how much water is available for consumptive use.

The WMDs administer the CUP program pursuant to Part II, ch. 373, F.S. The program includes permitting, compliance and enforcement. Any entity or person who wants to use water for certain types of activities, except those exempted by statute or rule, is required to obtain a CUP. These permits are issued for finite durations and, upon expiration, must be renewed. No entity or type of use is given priority over another. However, when two or more applications are pending for a quantity of water that is not available to satisfy both permits, the DEP or governing board grants the permit to the applicant whose activities best serve the public interest. In this instance, preference is also given to applications for renewal over initial applications.⁶

Currently, the DEP and the WMDs may issue a CUP for a period of 20 years if requested, provided there is sufficient data that provides reasonable assurance that the conditions of the permit will be met during the duration of the permit. A CUP may be issued for period of up to 50 years if the related construction bonds for waterworks and waste disposal facilities require a longer period. In addition, the DEP and a WMD may require compliance reporting every 10 years as a condition of the permit.⁷ CUPs for the development of alternative water supplies must be granted for periods of at least 20 years and require compliance reporting. Both the Southwest Florida and South Florida WMDs allocate enough water in their respective CUPs to satisfy the expected usage at the end of the CUP's duration. For example, an applicant requests a 100,000 gallon per day CUP for 20 years. The applicant expects 15 percent usage increase over the duration of the CUP. The Southwest Florida and South Florida WMDs will allocate 115,000 gallons per day on day one of the CUP to account for the increased demand 20 years later.

¹ The act was based on the first four chapters of *A Model Water Code*. Frank E. Maloney, et al., *A Model Water Code with Commentary* (Univ. of Fla. Press 1972).

² Section 373.026(7), F.S.

³ In 1977, the Florida Legislature dissolved the Ridge and Lower Gulf Coast WMD and divided its territory between the South Florida and Southwest Florida WMDs. See ch.77-104, s. 113, Laws of Fla.

⁴ Fla. CONST. art. VII, s. 9.

⁵ Maloney, *supra* note 1. See also s. 373.042(1), F.S.

⁶ See s. 373.223, F.S.

⁷ Chapter 2010-205, s. 55, Laws of Fla.

Section 373.219, F.S., gives the WMDs the authority to define the requirements for issuance of these permits. Such requirements, however, must follow a set of conditions enumerated in s. 373.223(1), F.S. These conditions state a three-prong test applicants must meet for the water use to be accepted:

- Is the use a reasonable-beneficial use as defined in statute;
- Will the use interfere with any presently existing legal use of water; and
- Is the use consistent with the public interest?

Pursuant to their rulemaking authority, each WMD has adopted rules that detail when and what type of permit, individual or general, an applicant may need.⁸

Generally, WMDs require a CUP when:

- The planned withdraw exceeds 100,000 gallons per day, or
- The outside diameter of the groundwater well is six inches or larger, or
- The outside diameter of the withdrawal pipe from a surface water is four inches or larger, or
- The total withdrawal capacity of the system is one million gallons per day or larger.

Some exceptions to these general guidelines exist and are generally based on the individual hydrologic conditions of certain areas within the district. Traditional exemptions for this permitting program include, single family homes or duplexes, fire fighting water wells, salt water use and reclaimed water use.

Reuse of Reclaimed Water

The promotion of reuse of reclaimed water is established in ss. 403.064 and 373.250, F.S., as a formal state objective. The DEP and WMDs maintain the largest and most comprehensive inventory of permitted reuse systems in the country. The inventory allows the state to monitor progress on reclaimed water efforts and further promote and expand its uses in Florida. In addition, the inventory provides municipalities and utilities interested in developing reuse programs access to other communities and utilities that have already implemented reuse programs.⁹ Reuse of reclaimed water is used to supplement use of potable water sources for public use purposes. Those purposes may include:¹⁰

- Public access areas and landscape irrigation,
- Agricultural irrigation,
- Groundwater recharge and indirect potable reuse,
- Industrial,
- Toilet flushing,
- Fire protection, and
- Wetlands.

⁸ See the following Florida Administrative Code rules for each district's criteria: 40A-2 (Northwest Florida); 40B-2 (Suwannee River); 40C-2 (St. Johns River); 40D-2 (Southwest Florida); and 40E-2 (South Florida).

⁹ Florida Dep't of Environmental Protection, *2009 Water Reuse Inventory*, available at http://dep.state.fl.us/water/reuse/docs/inventory/2009_reuse-report.pdf (last visited Mar. 28, 2011).

¹⁰ *Id.* at 5.

Wastewater facilities having permitted capacities of 0.1 million gallons per day (mgd) or greater provide annual reports to the DEP for inclusion in the reuse inventory.¹¹ In 2009, there were a total of 548 wastewater facilities with a combined permitted capacity of 2,497 mgd and a total actual flow of 1,555 mgd. Not all facilities have reuse programs; however, the total permitted capacity of reuse is 1,559 mgd. In 2009, 673 mgd of reclaimed water was reused.¹² The reclaimed water was used to irrigate 276,471 residences, 533 golf course, 873 parks and 306 schools.¹³ As may be expected, reuse in the St. Johns River, Southwest Florida and South Florida WMDs accounted for nearly 90 percent of all reuse in 2009.¹⁴ These three WMDs are the only ones where mandatory reuse zones have been created by local governments.¹⁵

Mandatory Reuse Zones

Mandatory reuse zones are established by local governments and prohibit the use of other water sources when reclaimed water is available. Regulating reuse is not as simple as traditional sources of water. The WMDs contend that reuse falls under the regulatory authority of Part II, ch. 373, F.S., which governs permitting of consumptive uses of water. On the other hand, utilities contend that reuse is a product they created and therefore have sole discretionary control over it.¹⁶ Because of this, potential conflicts of regulatory authority arise in mandatory reuse zones. To address this situation, the St. Johns River WMD and a local government have developed ordinance language that allows for reuse in these zones unless the WMD authorizes another water source.¹⁷ However, better coordination is needed between the WMDs, local governments and public water utilities.

Alternative Water Supply Development

Passed during the 2005 Legislative Session, SB 444 added major revisions to Part I, ch. 373, F.S. It marked the first time in Florida that alternative water resource development, and the money for such, was implemented. The amendments provided numerous changes to Florida water protection and alternative water supply development programs. The primary goal of SB 444 was to create a \$100 million annual funding program entitled the “Water Protection and Sustainability Program” to assist in the implementation of many existing water protection and development programs.¹⁸ In addition, funding was provided for a new alternative water supply development program. Section 373.707(8)(f), F.S., requires the WMD governing boards to prioritize financial assistance for development of alternative water supplies. The governing boards may establish factors to determine funding but must give significant weight to nine criteria contained in this subsection.

¹¹ See rule 62-610, F.A.C.

¹² See *supra* note 9, at 3.

¹³ See *supra* note 9, at 2.

¹⁴ See *supra* note 9, at 7.

¹⁵ Florida Dep’t of Environmental Protection, *Connecting Reuse and Water Use: A Report of the Reuse Stakeholders Meetings*, available at http://www.dep.state.fl.us/water/reuse/docs/reuse-stake-rpt_0209.pdf (last visited Mar. 28, 2011).

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 4.

¹⁸ See ch. 2005-291, s. 3, Laws of Fla. Also, state funding has not been provided for alternative water supply development for the past two fiscal years.

III. Effect of Proposed Changes:

Section 1 amends s. 373.236, F.S., to require the WMDs to issue 20-year CUPs. Reasonable assurance from the applicant that the conditions of the permit will be met over the life of the CUP is no longer required. Applicants may request a shorter duration. It removes the requirement that WMDs inform agriculture of the availability of 20-year CUPs. The changes made to this section of the CS make this requirement obsolete. Additionally, the CS eliminates the requirement that permit holders submit 10-year compliance reports to the DEP or the governing board of a WMD. The CS allows CUP holders to request permit modification to bring them into compliance with these changes.

Section 2 amends s. 373.250, F.S., to add a new section related to mandatory reuse zones. The CS requires the WMDs to recognize mandatory reuse zones established by local governments. When evaluating a CUP application for use in a mandatory reuse zone, a WMD must consider the following:

- If reclaimed water is available and technically and environmentally feasible for the proposed use, a WMD shall presume it is economically feasible as well. The applicant has the burden of proof to show otherwise;
- Applicants in these zones are required to consider the feasibility of reclaimed water for nonpotable uses. This requirement extends to all regulated water uses, except for those that are exempt from permitting; and
- In a mandatory reuse zone, reclaimed water use is given priority over all other water sources for nonpotable use. Using reclaimed water is required if it is technically, environmentally and economically feasible.

The CS does not limit the ability of a reuse utility, local government or special district from prohibiting using potable water for nonpotable uses when reclaimed water can meet the demand. The CS exempts agricultural uses on agricultural lands from the provisions of this section; however, it does not affect the authority of a WMD to consider reuse for agricultural permits.

Section 3 creates s. 373.255, F.S., to create a new type of water use permit called a “sustainable water use permit.” The CS directs the WMDs to implement this permit program for public water utilities. Specifically the program:

- Provides for a single permitting process authorizing water use from multiple sources;
- Emphasizes alternative water sources;
- Encourages storage of excess surface water flows or water from alternative water supplies in reservoirs, aquifer storage and recovery wellfields or other means of storage for recovery;
- Allows recovery of stored water;
- Allows groundwater usage during droughts; and
- Preserves traditional water sources for future generations.

In its application, a public water utility must identify each source it may draw from and demonstrate, for each source, that the withdrawal meets the three-prong test in s. 373.223(1), F.S., and noted previously in this analysis.

The permit must specify all sources a utility may withdraw from and the conditions under which a withdrawal may occur. However, it may be issued without specifying the quantity of water that may be withdrawn from each source. The CS specifies that these permits are issued for 20 years with reasonable assurances for renewal in the absence of quantifiable changed conditions.

Sections 4 and 5 amend ss. 373.2234 and 373.243, respectively, to provide conforming changes for the changes contained in this CS for issuance of 20-year CUPs.

Section 6 amends s. 373.707, F.S., to add an additional criterion to the list of significant factors a WMD governing board must consider when determining alternative water supply development funding. The specific criterion is whether the project provides additional storage capacity of surface water flows to ensure sustainability of the public water supply.

Section 7 creates an unnumbered section of law. The CS requires each WMD, in coordination with the DEP, to examine options to better coordinate CUPs with water supply planning by extending and reconciling CUP durations so they expire and can be renewed simultaneously in a given basin. Each WMD must report its findings and recommendations to the Governor, President of the Senate and Speaker of the House of Representatives by January 1, 2012.

Section 8 provides an effective date of July 1, 2011.

Other Potential Implications:

In creating a new type of water use permit outside of the normal permitting process contained in s. 373.229, F.S., the CS puts public water utilities in a unique position. No other category of user may have access to this new permit type. The effect of this provision will create the beginning of a permitting hierarchy by placing a higher priority on public water supply permitting over all other legal existing users. This will have a negative impact on agriculture and other water users because they will likely have a lower priority when it comes to decisions about allocating water. Additionally, a permit may be issued to a public water utility without specifying the quantity of water allocated from each source it is permitted to draw from. The WMDs have expressed concern that this ties up the entire allocation for each water source. For example, if a public water utility has a 50 mgd permit and is permitted to draw from groundwater, surface water and a reservoir, it may draw 50 mgd from any of the three sources alone or a combination of the three. Under this scenario the permitting WMD would have to reserve a 50 mgd allocation for the public water utility from each source, or 150 mgd. This effectively ties up 100 mgd more than the permitted allocation. Clearly, it is not in the public interest to tie up three times the volume of water needed for one entity, thereby making that water unavailable to any other legal existing user.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

CUPS

Costs for preparing CUP applications will decrease because applicants will no longer have to provide reasonable assurances they can meet the conditions of CUPs for their duration in order to receive 20-year permits. Additionally, compliance reporting costs will be eliminated as the report is no longer required. For applicants in the Southwest or South Florida WMDs, if there is not enough water to adequately satisfy their application requests, they may be required to provide their own water sources, either through development or purchase, or not conduct the activity they requested for the CUP. Developing or buying water allocations is a significant expense but can only be evaluated on a case-by-case basis. Thus, the fiscal impact cannot be determined at this point.

Reuse

Applicants for CUPs in mandatory reuse zones will bear the burden of proving that using reclaimed water is not economically feasible for their purposes. Agricultural operations will not bear this burden as they are exempt.

Sustainable Use Permit

Allowing public water utilities to access their total allocations from any of the sources they are permitted to draw from may have negative impacts on existing and future allocations for current permit holders and future applicants. The costs associated with any potential impacts cannot be determined.

C. Government Sector Impact:

CUPS

Costs for reviewing CUP applications will decrease as reasonable assurance will no longer be included in the application. Additionally, costs for reviewing compliance reports will be eliminated as the report is no longer required.

Reuse

The WMDs expect they can meet the requirements of this section of the CS with existing staff and resources.

Sustainable Use Permit

Although the WMDs currently administer the CUP program for public water utilities, creating a new permit process will require additional expenses and staff time. The WMDs expect they can meet the requirements of this section of the CS with existing staff and resources.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Environmental Preservation and Conservation on March 30, 2011:

Agricultural uses for water are exempt from the mandatory reuse zone requirements contained in this CS. The WMDs still have the authority to consider the feasibility of using reclaimed water in any permit for agricultural use of water. The CS modifies one criterion of the sustainable use permit to allow capture and recovery from alternative water supply sources. Lastly, the CS adds an additional criterion to the list of significant factors a WMD governing board must consider when determining alternative water supply development funding. The specific criterion is whether the project provides additional storage capacity of surface water flows to ensure sustainability of the public water supply.

B. Amendments:

None.