

II. Present Situation:

Consumptive Use Permitting

Section 373.236(5), F.S., authorizes CUPs for the development of AWS projects. A WMD or the Department of Environmental Protection (DEP) may impose reasonable conditions as are necessary to assure that such use is consistent with the overall objectives of the issuing WMD or the DEP and is not harmful to the water resources of the area.¹

A CUP establishes the duration and type of water use as well as the maximum amount that may be withdrawn. Pursuant to s. 373.219, F.S., each CUP must be consistent with the objectives of the issuing WMD or the DEP and may not be harmful to the water resources of the area. To obtain a CUP, an applicant must establish that the proposed use of water satisfies the statutory test, commonly referred to as “the three-prong test.” Specifically, the proposed water use must:

- be a “reasonable-beneficial use” as defined in s. 373.019(16), F.S.;
- not interfere with any presently existing legal use of water; and
- be consistent with the public interest.

The Three-Prong Test

“Reasonable-beneficial use” is defined as “the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest.”² The Legislature has declared water a public resource belonging to the public, therefore, wasteful uses of water are not allowed even if there are sufficient resources to meet all other users.

To that end, the DEP has promulgated the Water Resource Implementation Rule that incorporates interpretive criteria for implementing the reasonable-beneficial use standard based on common law and on water management needs.³ These criteria include consideration of the quantity of water requested; the need, purpose, and value of the use; and the suitability of the source. The criteria also consider the extent and amount of harm caused, whether that harm extends to other lands, and the practicality of mitigating that harm by adjusting the quantity or method of use. Particular consideration is given to the use or reuse of lower quality water, and the long-term ability of the source to supply water without sustaining harm to the surrounding environment and natural resources.⁴

The second element of the three-prong test protects the rights of existing legal uses of water for the duration of their permits.⁵ New CUPs cannot be issued if they would conflict with an existing

¹ See s. 373.219, F.S.

² Section 373.019(16), F.S.

³ See generally rule 62-40, F.A.C.

⁴ *Southwest Florida Water Management District v. Charlotte County*, 774 So. 2d 903, 911 (Fla. 2d DCA 2001) (upholding the WMD’s use of criteria for implementing the reasonable-beneficial use standard).

⁵ Section 373.223(1)(b), F.S.

legal use. This criterion is only protective of water users that actually withdraw water, not passive users of water resources.⁶

The final element of the three-prong test requires water use to be consistent with the “public interest.” While the DEP’s Water Resource Implementation Rule provides criteria for determining the “public interest,” determination of a public interest is made on a case-by-case basis during the permitting process.⁷ However, the WMDs and the DEP have broad authority to determine which uses best serve the public interest if there are not sufficient resources to fulfill all applicants’ CUPs. In the event that two or more competing applications are deemed to be equally in the public interest, the WMDs or the DEP gives preference to renewal applications.⁸

Duration of Permits and Compliance Reviews

Pursuant to s. 373.236(1), F.S., CUPs must be granted for 20 years if requested by the applicant and there is sufficient data to provide reasonable assurance that the conditions for permit issuance will be met for the duration of the permit. If either of these requirements is not met, a CUP with a shorter duration may be issued to reflect the period for which reasonable assurances can be provided. The WMDs and the DEP may determine the duration of permits based upon a reasonable system of classification according to the water source, the type of use, or both.

Pursuant to s. 373.236(4), F.S., when necessary to maintain “reasonable assurance” that initial conditions for issuance of a 20-year CUP can continue to be met, a WMD or the DEP may require a permittee to produce a compliance report every 10 years.⁹ A compliance report must contain sufficient data to maintain reasonable assurance that the initial permit conditions are met, including original demand projections. After reviewing a compliance report, a WMD or the DEP may modify the permit, including reductions or changes in the initial allocations of water, to ensure the water use comports with initial conditions for issuance of the CUP. Permit modifications made by a WMD or the DEP during a compliance review cannot be subject to competing applications for water use if the permittee is not seeking additional water allocations or changes in water sources.

Consumptive Use Permits for the Development of Alternative Water Supplies

Section 373.019(1), F.S., defines “alternative water supplies” as:

[S]alt water; brackish surface and groundwater; surface water captured predominately during wet-weather flows; sources made available through the addition of new storage capacity for surface or groundwater, water that has been reclaimed after one or more public supply, municipal, industrial, commercial, or

⁶ See *Harloff v. City of Sarasota*, 575 So. 2d 1324 (Fla. 2d DCA 1991) (holding a municipal wellfield was an existing legal user and should be afforded protection). In contrast, see *West Coast Regional Water Supply Authority v. Southwest Florida Water Management District*, 89 ER F.A.L.R. 166 (Final Order, Aug. 30, 1989) (holding a farmer who passively relied on a higher water table to grow nonirrigated crops and standing surface water bodies to water cattle was not an existing legal user).

⁷ *Supra* note 3.

⁸ See s. 373.233, F.S.

⁹ In limited instances, the statute authorizes more frequent “look backs”. For example, the Suwannee River WMD may require a compliance report every five years through July 1, 2015, after which the “look-back” period returns to 10 years.

agricultural uses; the downstream augmentation of water bodies with reclaimed water; stormwater; and any other water supply source that is designated as nontraditional for a water supply planning region in the applicable regional water supply plan.

CUPs issued pursuant to s. 373.236(5), F.S., for the development of AWS must be issued for at least 20 years. If the permittee issues bonds to finance construction of the AWS project, the permit must be extended to expire upon retirement of the bonds if the permittee requests an extension during the term of the permit and the issuing WMD's governing board determines the use will continue to meet the CUP's conditions. Compliance reports may also be required every 10 years for CUPs issued for AWS projects. WMDs generally issue CUPS with a maximum term of 20 years for the development of AWS, although some 30-year CUPs for AWS projects have been issued.

Investor-Owned Water and Wastewater Utilities

The specific regulatory entities that set rates and service in the state vary. For privately-owned utilities operating within a single county, the county has the option to regulate rates and service or allow the Public Service Commission (PSC) to regulate those utilities.¹⁰ The PSC currently has jurisdiction over privately-owned water and wastewater utilities in 36 of the 67 counties in Florida. Regardless of whether the county has opted to regulate privately-owned utilities, the PSC has jurisdiction over all water or wastewater utility systems whose service transverses county boundaries, except for systems owned and regulated by intergovernmental authorities.¹¹ Systems owned, operated, managed, or controlled by governmental authorities are not subject to PSC regulation.¹²

For regulatory purposes, the PSC classifies utilities into one of three categories based on annual operating revenues:¹³

- Class A – Operating revenues greater than \$1,000,000.
- Class B – Operating revenues greater than \$200,000 but less than \$1,000,000.
- Class C – Operating revenues less than \$200,000.

Currently, there are 15 Class A utilities, 33 Class B utilities, and 96 Class C utilities under the PSC's jurisdiction. These utilities serve approximately 3 to 4 percent of Florida's population. The remaining population is served either by private utilities in non-jurisdictional counties, by statutorily exempt utilities (such as municipal utilities, cooperatives, and non-profits), or by wells and septic tanks. The 15 Class A utilities serve approximately 50 percent of the customers for all classes. In general, filing requirements, fees, penalties, and regulatory treatment are eased for Class B and C utilities.

¹⁰ Section 367.171, F.S. If a county chooses to allow regulation by the PSC, it may rescind this choice only after 10 continuous years of PSC regulation.

¹¹ *Id.*

¹² Section 367.022(2), F.S.

¹³ Rules 25-30.110(4) and 25-30.115, F.A.C. As noted in these rules, this classification system is used by the National Association of Regulatory Utility Commissioners for publishing its system of accounts.

In September 2011, the PSC conducted an informal staff workshop in Orlando to address challenges facing the water and wastewater industry. The PSC invited the industry stakeholders to this workshop and indicated that the workshop would provide an open forum to look at probable solutions to the challenges facing utilities.¹⁴ The PSC invited input and discussion concerning currently available options as well as solutions that may require regulatory or statutory changes.

Following the informal staff workshop, the PSC conducted a formal agency workshop in Tallahassee on November 3, 2011, to discuss solutions to increase efficiencies in the water and wastewater industry to minimize the effects of rates on consumers.¹⁵ The main purpose of the workshop was to hear and address ideas to help alleviate financial strains on small water and wastewater utilities.¹⁶

The PSC heard discussion on several potential mechanisms to address these issues, including the creation of a legislative commission comprised of legislators, regulators, industry representatives, local government representatives, and customer representatives.¹⁷ This proposal, drafted by the PSC's staff, provided that the committee would be staffed by the PSC staff and have use of the PSC's facilities. The proposal required that the committee meet at least four times, with two of those meetings held in areas where utility customers had been impacted by recent rate increases. The proposal required that the committee submit a report, including specific findings and legislative recommendations, to the Governor and the Legislature by December 31, 2012. The committee would terminate on June 30, 2012.

III. Effect of Proposed Changes:

Section 1 amends ss. 373.236(5), F.S., clarifying that AWS permits issued for at least 20 years are subject to the reasonable assurance provisions currently required by the DEP and WMDs. It directs the DEP or the WMDs to issue permits for the development of AWS projects for at least 30 years for permits issued on or after July 1, 2012, if the proper reasonable assurance is provided. If the permittee issues bonds to finance the project, completes the project and requests an extension of the CUP duration, the CUP must be extended for a maximum of seven years. This will allow the entity that develops the AWS project to operate the AWS project for 30 years after construction in order to repay 30-year bonds. The seven-year extension may be retroactively applied to any 30-year AWS permit issued between June 1, 2011, and July 1, 2012.

CUPs issued pursuant to this bill are subject to compliance reports; however, the quantity of alternative water allocated under the permit cannot be reduced during the compliance review if bonds that financed the project are outstanding. This provision does not apply to adopted

¹⁴ PSC, *Re: Staff Workshop on Challenges Facing the Water and Wastewater Industry*, available at http://www.psc.state.fl.us/common/controls/workshop09_29_11.pdf (last visited Feb. 7, 2012).

¹⁵ PSC, *Notice of Commission Workshop*, available at <http://www.psc.state.fl.us/library/filings/11/07437-11/07437-11.pdf> (last visited Feb. 7, 2012).

¹⁶ PSC, *Workshop Transcript (2-3)*, available at <http://www.psc.state.fl.us/library/filings/11/08324-11/08324-11.pdf> (last visited Feb. 7, 2012).

¹⁷ PSC, *Workshop Materials*, available at <http://www.psc.state.fl.us/agendas/workshops/Materials.11.03.2011.pdf> (last visited Feb. 7, 2012).

districtwide water shortage orders or when an AWS permit results in unanticipated harm to water resources or existing legal uses.

The bill clarifies that CUPs cannot be issued for AWS projects for nonbrackish groundwater supplies (i.e., fresh water) or nonalternative water supplies. It also clarifies that entities may apply for an AWS permit under either ss. 373.236(5)(a) or (b), F.S.

Section 2 creates an unnumbered section of law that creates the Study Committee on Investor-Owned Water and Wastewater Utility Systems (committee). The committee will consist of 17 members, 13 of which are voting members. The voting members consist of:

- Two Senators appointed by the President of the Senate, one of whom will be appointed as the chair of the study committee;
- Two Representatives appointed by the Speaker of the House of Representatives;
- A representative of a WMD, appointed by the Governor;
- A representative of a water or wastewater system owned or operated by a municipal government, appointed by the Governor;
- A representative of a water or wastewater system owned or operated by a county government, appointed by the Governor;
- A representative of the Florida Rural Water Association, appointed by the Governor;
- A representative of a small investor-owned water or wastewater utility, appointed by the Governor;
- A representative of a large investor-owned water or wastewater utility, appointed by the Governor;
- The Public Counsel or his or her designee;
- A customer of a Class C water or wastewater utility, appointed by the Governor; and
- A representative of a government authority that was created pursuant to chapter 367, Florida Statutes, appointed by the Governor.

The four nonvoting members are:

- The Secretary of the Department of Environmental Protection, or his or her designee;
- The chair of the PSC, or his or her designee;
- The chair of a county commission that regulates investor-owned water or wastewater utility systems; and
- A representative of a county health department, appointed by the Governor.

The bill requires members to serve until the committee work is complete and the committee is terminated. A member that no longer serves in the representative position required for the appointment will be replaced by the individual who serves in the position. The members will not be compensated but are entitled to reimbursement for reasonable expenses to carry out their duties. Additionally, the appointing authority may remove or suspend a member appointed by it for cause, including failure to attend two or more committee meetings.

The bill directs the PSC to provide staff, information, assistance and facilities for the committee, as necessary. The bill specifies that funding for the committee will come from the Florida Public Service Regulatory Trust Fund.

The bill specifies the committee must identify issues facing investor-owned water and wastewater utility systems, particularly small systems, and their customers, and research possible solutions. In addition, the bill requires the committee to consider:

- The ability of a small investor-owned water and wastewater utility to achieve economies of scale when purchasing equipment, commodities or services.
- The availability of low-interest loans to a small, privately-owned water or wastewater utility.
- Tax incentives or exemptions available to a small water or wastewater utility.
- The impact on customer rates if a utility purchases an existing water or wastewater utility system.
- The impact on customer rates of a utility providing service through a reseller.
- Other issues that the committee identifies during its investigation.

The bill does not specify where meetings must occur but requires the committee meet a minimum of four times; however, at least two meetings must be held in an area “centrally located to utility customers who have recently been affected by a significant increase in water or wastewater utility rates.” The bill directs that the public must be given the opportunity to speak at these meetings.

The bill requires the committee to prepare and submit a report to the Governor and Legislature by December 31, 2012. The report must detail the committee’s findings and make specific legislative recommendations. The bill provides that this unnumbered section of law expires and the committee terminates on June 30, 2013.

Section 3 provides an effective date of July 1, 2012.

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:

Most bonds issued to fund the capital construction costs of an AWS project are 30-year bonds; however, most AWS CUPs are only issued for 20 years. This discrepancy may affect the interest rate the AWS developer has to pay to launch the bonds. The impact of this is indeterminate but may be significant if the uncertainty in renewing a 20-year CUP for a 30-year bond has significant weight in the rating agencies' models. For example, an A-rated \$100 million bond may cost \$7-10 million more over the life of the bond as compared to an AAA-rated bond. Also, by allowing an up to seven-year extension under certain circumstances, AWS developers will be able to operate the AWS project without having to reapply for a CUP at the end of the initial 30-year duration. This will ensure operation of the AWS project for a full 30-year term.

C. Government Sector Impact:

The bill may have a negative but indeterminate effect on permit revenues for the DEP or the WMDs; however, any impacts are expected to be met by existing staff and resources.

The bill requires the PSC to provide staff, information, assistance and facilities to support the committee. In addition, expenses will be incurred by the committee for its operations and reimbursement for members' reasonable expenses. The fiscal for this bill will be addressed in the General Appropriations Act and contingent upon passage of the bill.

VI. Technical Deficiencies:

On lines 104-105, no individual is designated as the appointer of the member representing the chair of a county commission that regulates investor-owned water or wastewater utility systems.

VII. Related Issues:

By the Legislature's amending this section to explicitly require reasonable assurance for a variety of CUPs, a court may find that the Legislature implicitly excluded the necessity to provide reasonable assurance for a 50-year permit for certain public or government works. It would be the only permit category left out of reasonable assurance requirements of s. 373.236, F.S. Currently the WMDs require reasonable assurance for the up to 50-year permit.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Community Affairs on February 6, 2012:

The CS creates the Study Commission on Investor-Owned Water and Wastewater Utility Systems with associated requirements.

CS by Environmental Preservation and Conservation on January 30, 2012:

- Clarifies reasonable assurance must be provided for the at least 20-year permit;
- Deletes the list of entities that may apply for an extended AWS permit;

- Applies the seven-year extension retroactively to AWS permits issued between June 1, 2011, and July 1, 2012; and
- Provides for necessary permit allotment reductions if the permit results in unanticipated harm to the resource or existing legal uses.

B. Amendments:

None.