

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 Environmental Preservation and Conservation Committee

BILL: SB 2060

INTRODUCER: Environmental Preservation and Conservation Committee

SUBJECT: Rules Establishing Numeric Nutrient Criteria

DATE: January 26, 2012

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Uchino	Yeatman	EP	Favorable
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill exempts proposed rule amendments to Rules 62-302 and 62-303 of the Florida Administrative Code (F.A.C.) that were proposed for adoption by the Environmental Regulation Commission (ERC) on December 8, 2012, from legislative ratification under s. 120.541(3), F.S. It clarifies that ERC acted within its legislative authority in proposing for adoption Rule 62-302.531(9), F.A.C. Lastly, the bill directs the Department of Environmental Protection to submit the proposed rules to the U.S. Environmental Protection Agency within 30 days of this bill becoming a law.

II. Present Situation:

Legislative Ratification of Agency Rules

Section 120.541, F.S., requires agencies to prepare a statement of estimated regulatory costs (SERC) for proposed rules. Changes to the law contained in ch. 2010-279, Laws of Florida, require agencies to include an analysis of a rule's fiscal and adverse impacts over the first five years in the SERC. If the proposed rule change is estimated to cost \$1 million in the aggregate within the first five years of implementation, an agency must submit the rule to the Legislature for ratification.

In accordance with s. 120.541(3), F.S., the DEP submitted rule amendments to Rules 62-302 and 62-303, F.A.C., to the Legislature for ratification on December 9, 2011. The rule amendments are estimated to exceed the allowable thresholds for implementation costs for rule adoption without legislative ratification.

Background on Numeric Nutrient Criteria Rule Approval

The rules were proposed for adoption by the ERC on December 8, 2011. Since the ERC proposed additional amendments to the rules for adoption, the DEP submitted a Notice of Change in the Florida Administrative Weekly, published December 22, 2011.

The approved state rules plus amendments set numeric nutrient criteria on the amount of phosphorus and nitrogen allowed in state waters. The DEP based these rules on more than a decade of research and data collection. The numeric nutrient standards were designed to:

- ensure water quality,
- protect public health, and
- preserve well-balanced aquatic ecosystems throughout Florida.

They replace Florida's narrative standard, which was the subject of a lawsuit and subsequent consent decree between the EPA and several environmental groups. This lawsuit led to the development of federal numeric nutrient criteria rules.

The approved state rules are more cost effective than the federal rules, and the DEP asserts they will afford the same level of protection for Florida's water bodies. While the numbers are the same or similar for the state and federal rules, the implementation of state rules is more tailored to Florida's specific needs. The Florida State University Center for Economic Forecasting and Analysis estimated the costs of implementation for the DEP rules. The median cost estimate for the state rules is \$75 million annually.¹ While those costs are significant, they are much less than some of the median cost estimates for the federal rules, which may be as high as \$4 billion annually.²

Legal Challenge to the Proposed DEP Rules

Pursuant to s. 120.56, F.S., a petition has been filed challenging the proposed rules.³ This will prevent or delay the DEP from filing the certification packages for these rules with the Department of State. The rule challenge seeks to invalidate the DEP's proposed numeric nutrient criteria rules because "contrary to FDEP's claims, the rules are not designed to protect state waters from the adverse impacts of nutrient overenrichment. Instead, these rules go so far as to prevent a finding of impairment due to nutrients until the waterbody is covered with nutrient-fueled toxic blue-green algae (cyanobacteria)."⁴ The challenge asserts that certain provisions of the proposed rules are invalid exercises of delegated legislative authority.⁵ The hearing has been scheduled for February 27, 2012, through March 2, 2012.

¹ E-mail from Frank Nearhoof, DEP (January 18, 2012) (on file with the Senate Committee on Environmental Preservation and Conservation).

² Cardno ENTRIX, *Addendum to the Economic Analysis of the Federal Numeric Nutrient Criteria for Florida* (2011) (on file with the Committee on Environmental Preservation and Conservation).

³ *Florida Wildlife Federation, et al. v. Fl. Dept. of Environmental Protection*, DOAH Case No: 11-006137RP.

⁴ *Id.* at 2.

⁵ The petition does not challenge proposed Rule 62-302.531(9), F.A.C., as proposed for approved by the ERC on December 8, 2011, as an invalid exercise of delegated legislative authority.

Until the Administrative Law Judge issues an order in the administrative rule challenge proceeding, the DEP cannot file the proposed rules for adoption as final rules. Consequently, the Legislature will not be able to get a final adopted rule from the DEP for ratification during the 2012 Regular Session. For purposes of compliance with the federal Clean Water Act, the DEP's *adopted* rules must be approved by the EPA in order to replace the EPA's numeric nutrient criteria rules for Florida. In response to the recent state activity to implement state numeric nutrient rules, the EPA has proposed to delay the implementation date of the federal rules from March 6, 2012, until June 4, 2012.

III. **Effect of Proposed Changes:**

Section 1 provides for an exemption from ratification under s. 120.541(3), F.S., of proposed Rules 62-302 and 62-303, F.A.C., as proposed for adoption by the ERC on December 8, 2011. The bill directs the DEP to publish a notice of enactment of the exemption in the Florida Administrative Weekly. It also clarifies that the ERC acted within its delegated legislative authority pursuant to s. 403.804, F.S., when it proposed for adoption Rule 62-302.531(9), F.A.C., which is a nonseverability and effective date provision. If any future rule or amendment alters the effect of the severability and effective date provision, it must be ratified by the Legislature before it becomes effective. Lastly, the bill directs the DEP to submit the current proposed rules to the EPA for review within 30 days of this bill becoming a law.

Section 2 provides the act takes effect upon becoming a law.

Other Potential Implications:

If the proposed rule amendments to Rules 62-302 and 62-303, F.A.C., are not ratified, the federal rules will become effective on March 6, 2012, or, if the proposed extension is approved, on June 4, 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:

The private sector would be responsible for the majority of the increases in regulatory and compliance costs. As stated above, the median fiscal impact from the state rules is estimated at \$75 million annually. To the extent possible, it is expected these costs will be passed on to end users or consumers.

C. Government Sector Impact:

The DEP estimates its costs associated with rule implementation to be between \$645,250 and \$1.95 million.

The water management districts will likely incur costs associated with rule implementation and enforcement; however, the extent of the fiscal impact and whether they can absorb the costs with existing staff and resources are unknown.

The Florida Fish and Wildlife Conservation Commission and the Florida Department of Agriculture and Consumer Services will incur minimal to no additional costs.

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.)

None.

B. Amendments:

None.