HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 639 Reclaimed Water
SPONSOR(S): Young and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1086

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Select Committee on Water Policy	14 Y, 1 N	Smith	Camechis
2) Agriculture & Natural Resources Subcommittee	12 Y, 2 N	Smith	Blalock
3) Rulemaking & Regulation Subcommittee			
4) State Affairs Committee			

SUMMARY ANALYSIS

Under current Florida law, "waters in the state" are considered basic public resources benefiting the entire state. The statutes define "water" or "waters in the state" as "all water on or beneath the surface of the ground or in the atmosphere, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground, as well as coastal waters within the jurisdiction of the state."

In the "Declaration of Policy" for Chapter 373, F.S., the Legislature acknowledges that, in the past, Florida's water resources were not adequately conserved or otherwise realized for their full beneficial use. In response, the Legislature delegated authority to the Department of Environmental Protection (DEP) and the Water Management Districts (WMD) to sustainably manage water resources and allocate these resources throughout the state to meet all reasonable-beneficial uses. Under Florida law, the public has a right to use waters in the state but may not assert a legally protected property interest to "own" the waters. That is, Florida presently recognizes only a right to "beneficial use" of water, but not a title to it. DEP and the WMDs regulate use of these waters through issuance of consumptive use permits (CUP) based upon statutory authority contained in Chapter 373, F.S., commonly known as the Florida Water Resources Act of 1972.

DEP defines reclaimed water by rule as water that has received at least secondary treatment and basic disinfection and is reused after flowing out of a domestic wastewater (i.e., sewage) treatment facility. While the statutory definition of "water" or "waters in the state" broadly encompasses "any and all water on or beneath the surface of the ground," it does not expressly include reclaimed water. Whether reclaimed water is a "water" or "waters in the state," and whether DEP and the WMDs have authority to require a CUP for the use of reclaimed water, are legal questions yet to be resolved by the Florida courts.

This bill resolves the debate over the extent of DEP's and the WMDs' statutory authority to regulate the use of reclaimed water through the CUP process by expressly excluding reclaimed water from the definition of "water" and "waters in the state" until it is discharged into "waters" as defined in § 403.031(13), F.S., and by prohibiting a WMD from requiring a permit for the use of reclaimed water. According to DEP, this definitional change removes the use of reclaimed water from regulation by the WMDs under the CUP permit program. However, DEP and the WMDs may continue to require the use of reclaimed water in lieu of all or a portion of a proposed use of surface water or groundwater when the use of reclaimed water is available; is environmentally, economically, and technically feasible; and is of such quality and reliability as is necessary to the user. The bill also prohibits WMDs from specifying any user to whom a reuse utility must provide reclaimed water or restricting the use of reclaimed water. However, a contract for state or district funding assistance for the development of reclaimed water may specify conditions for the project relating to metering of certain uses of reclaimed water, implementation of reclaimed water rate structures, education programs, and location data.

Additionally, the bill requires DEP to initiate rulemaking to adopt revisions to the Water Resource Implementation Rule to include criteria for the use of "impact offsets" and "substitution credits" related to using reclaimed water to replace the use of surface or groundwater. "Impact offset" is defined as "the use of reclaimed water to reduce or eliminate a harmful impact that has occurred or would otherwise occur as a result of other surface water or groundwater withdrawals." "Substitution credit" is defined as "the use of reclaimed water to replace all or a portion of an existing permitted use of resource-limited surface water or groundwater, allowing a different user or use to initiate a withdrawal or increase its withdrawal from the same resource-limited surface water or groundwater source."

This bill has a minimal negative fiscal impact on the DEP and WMDs due to anticipated costs of rulemaking, and no impact on local governments or the private sector.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

"Water" or "Waters in the State"

Under current Florida law, "waters in the state" are considered basic public resources benefiting the entire state.[1] The statutes define "water" or "waters in the state" as "all water on or beneath the surface of the ground or in the atmosphere, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground, as well as coastal waters within the jurisdiction of the state."[2]

In the "Declaration of Policy" for Chapter 373, F.S., the Legislature acknowledges that, in the past, Florida's water resources were not adequately conserved or otherwise realized for their full beneficial use. In response, the Legislature delegated authority to the Department of Environmental Protection (DEP) and the Water Management Districts (WMD) to sustainably manage water resources[3] and allocate these resources throughout the state to meet all reasonable-beneficial uses.[4] Under Florida law, the public has a right to use waters in the state but may not assert a legally protected property interest to "own" the waters.[5, 6] That is, Florida presently recognizes only a right to "beneficial use" of water, but not a title to it.[7] DEP and the WMDs regulate use of these waters through issuance of consumptive use permits (CUP) based upon statutory authority contained in Chapter 373, F.S., commonly known as the Florida Water Resources Act of 1972.

DEP defines reclaimed water by rule as water that has received at least secondary treatment and basic disinfection and is reused after flowing out of a domestic wastewater (i.e., sewage) treatment facility.[8] While the statutory definition of "water" or "waters in the state" broadly encompasses "any and all water on or beneath the surface of the ground," it does not expressly include reclaimed water. Whether reclaimed water is a "water" or "waters in the state," and whether DEP and the WMDs have authority to require a CUP for the use of reclaimed water, are legal questions yet to be resolved by the Florida courts.

An attempt by St. Johns River WMD (SJRWMD) in 2008 to adopt rules to regulate reclaimed water through the CUP process illustrates the unresolved question regarding the extent of DEP's and the WMDs' regulatory authority over reclaimed water. SJRWMD proposed rulemaking that, if adopted, would have included reclaimed water among water regulated by the WMD by general permit for purposes of landscape and agricultural irrigation, by address, time of day, and day of the week.[9] The Florida League of Cities contested SJRWMD's delegated legislative authority to promulgate these rules, and, two months after proposing the rulemaking, SJRWMD decided not to pursue adoption of the regulations.[10] Nevertheless, DEP asserts that, although they have not historically done so, the WMDs may require a CUP solely for the use of reclaimed water.[11]

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[1] Sections 373.016(1) and (4)(a), F.S. (2011).
[2] Section 373.019(20), F.S. (2011) (emphasis added).
[3] Section 373.016(2), F.S. (2011).
[4] Section 373.016(4)(a), F.S. (2011).
[5] William S. Bilenky, *An Alternative Strategy for Water Supply and Water Resource Development in Florida*, 25 J. Land Use & Envtl. Law 77 (2009).
[6] *See Village of Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663, 667 (Fla. 1979) ("There is a right of use as [the water] passes, but there is no ownership in the absolute sense.").
[7] Section 373.223, F.S. (2011).
[8] Rule 62-610.200(48), F.A.C. (2007).
[9] *See* Letter from Suzanne G. Printy, Chief Staff Attorney, The Florida Legislature Joint Administrative Procedures Committee to Thomas M. Beason, General Counsel, Florida Department of Environmental Protection (Dec. 9, 2008).
[10] Letter from Rebecca A. O'Hara, Legislative Director, Florida League of Cities, Inc. to Suzanne Printy, Chief Staff Attorney, The Florida Legislature Joint Administrative Procedures Committee (Dec. 5, 2009).
[11] DEP Draft Bill Analysis for HB 639 (2012), relating to reclaimed water in the consumptive use permitting (p. 3).

Consumptive Use Permitting

For uses other than private wells for domestic use, DEP or the WMDs may require any person seeking to use "waters in the state" to obtain a CUP. A CUP establishes the duration and type of water use as well as the maximum amount that may be used. Pursuant to § 373.219, F.S., each CUP must be consistent with the objectives of the WMD and not 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: 1) must be a "reasonable-beneficial use" as defined in § 373.019, F.S.; 2) must not interfere with any presently existing legal use of water; and 3) must be consistent with the public interest.

1. Reasonable-Beneficial Use

"Reasonable-beneficial use," as defined in statute, is the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner that is both reasonable and consistent with the public interest.[12] In the words of the drafters of *A Model Water Code*, from which the reasonable-use standard was taken, "[w]asteful use of water will not be permitted under the reasonable-beneficial use standard, regardless of whether or not there is sufficient water to meet the needs of other riparian owners."[13] Rather, the reasonable-beneficial use standard requires efficient economic use of water and consideration of the rights of the general public.[14]

To that end, 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.[15] These criteria include consideration of the quantity of water requested; the need, purpose, and value of the use; and the suitability of the use 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 through such adverse impacts as salt water intrusion. Notwithstanding DEP's rather broad discretion when interpreting these criteria, the district court in *Florida Water Management District v. Charlotte County*[16] nonetheless upheld DEP's use of these criteria for implementing the reasonable-beneficial use standard.

2. Existing Legal Users

The second criterion of the three-prong test protects the rights of existing legal water users for the duration of their permits.[17] Essentially, new users cannot obtain a CUP to use water if the use conflicts with existing permits. But, when the permit is up for renewal, the competing use that the WMD determines best serves the public interest will be permitted, irrespective of which use was previously permitted.

This criterion only protects water users that actually withdraw water. Illustrative of this point, the court in *Harloff v. Sarasota*[18] held that a municipal wellfield was an existing legal use entitled to protection from interference by a new use. In contrast, a farmer who passively depended on the water table to maintain the soil moisture necessary for nonirrigated crops and the standing surface water bodies for watering cattle was denied protection as an "existing user."[19]

3. Public Interest

[12] Section 373.019(16), F.S. (2011).
[13] Richard Hamann, *Consumptive Use Permitting Criteria*, 14.2-1, 14.2-2 (Fla. Env. & Land Use Law, 2001) (citing Frank E. Maloney, et al., *A Model Water Code*, 86-87 (Univ. of Fla. Press, 1972)).
[14] *Id.*
[15] Chapter 62-40,F.A.C. (2010).
[16] *Florida Water Management District v. Charlotte County,* 774 So. 2d 903, 911 (Fla. 2d DCA 2001).
[17] Section 373.223(1)(b), F.S. (2011).
[18] *Harloff v. Sarasota*, 575 So. 2d 1324 (Fla. 2d DCA 1991).
[19] *West Coast Regional Water Supply Authority v. Southwest Florida Water Management District*, 89 ER F.A.L.R. 166 (Final Order, August 30, 1989).

The third 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",[20] determination of public interest is made on a case-by-case basis during the permitting process. For example, in *Friends of Fort George v. Fairfield Communities*,[21] the Division of Administrative Hearings considered the following factors in finding that water use was in the public interest: water conservation and reuse, total amount of water allocated, lack of salt water intrusion, reduction of estuarine pollution, and development of new water source. In a separate case, *Church of Jesus Christ of Latter Day Saints v. St. John's Water Management District*,[22] the St. John's WMD stated that the determination of whether a water use is in the public interest requires a determination of whether the use is "beneficial or detrimental to the overall collective well-being of the people or to the water resource in the area, the [WMD], and the State."

Reclaimed Water

In an effort to conserve the State's potable surface and groundwater resources, the statutes authorize the WMDs to restrict water use to the lowest quality water source appropriate for the specific use and to adopt rules that identify preferred water supply sources for consumptive uses.[23] The WMD may consider all economically and technically feasible alternatives to the proposed water source, including alternative water sources that include desalination, aquifer storage and recovery, and – most notably for the purposes of this proposed legislation – reuse of nonpotable reclaimed water.[24] Of these enumerated alternative water sources, the Legislature expressly encourages the use of reclaimed water as an alternative water source "whenever practicable."[25]

DEP defines reclaimed water as water that has received at least secondary treatment and basic disinfection and is reused after flowing out of a domestic wastewater treatment facility.[26] In essence, water reuse involves taking domestic wastewater (i.e., sewage), giving it a high degree of treatment, and using the resulting high-quality reclaimed water for a new, beneficial purpose. Extensive treatment and disinfection during this process ensure that public health and environmental quality are protected.[27]

Reclaimed water is an important alternative water source in Florida in light of mounting pressures on the State's fresh water resources, principally surface water and groundwater. Among its noteworthy benefits, the use of reclaimed water saves water that would otherwise need to be withdrawn from surface water and groundwater sources to meet non-potable supply needs such as agricultural or residential irrigation,[28] power generation, or recreation (e.g., golf courses or waterparks). Additionally, reclaiming waste water reduces reliance on traditional wastewater disposal methods such as surface water discharges, ocean outfall[29], or deep injection wells.[30] DEP asserts that "Florida is leading the nation – reusing 660 million gallons of reclaimed water each day to conserve freshwater supplies and replenish our rivers, streams, lakes and the aquifer."[31]

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[20] *See, e.g.*, Rule 62-40.422, F.A.C. (2010) (criteria to determine whether transport of water between districts is consistent with the public interest).
[21] *Friends of Fort George v. Fairfield Communities*, 24 Fla. Supp. 2d 192-223, DOAH Case No. 85-3537, 85-3596 (Final Order dated Oct. 6, 1986).
[22] *Church of Jesus Christ of Latter Day Saints v. St. John's Water Management District*, 92 ER. F.A.L.R. 34 (Final Order, Dec. 13, 1990).
[23] Section 373.2234, F.S. (2011).
[24] Section 373.223(3)(c), F.S. (2011).
[25] Section 373.016(4)(a), F.S. (2011).
[26] Florida DEP website http://www.dep.state.fl.us/legal/rules/wastewater/62-610.pdf (p. 12).
[27] Florida DEP website http://www.dep.state.fl.us/water/reuse/index.htm.
[28] In central Florida, for instance, studies have shown that irrigation accounted for 64% of the residential use volume for all monitored homes. (Florida Section of the American Water Works Association, *Florida's Water Survival Handbook for the Future* 60 (2009) (citing Journal of Irrigation and Drainage Engineering, Vol. 133, Issue 5, pp. 427-94 (2007)).)
[29] "Ocean outfall" means the outlet or structure through which effluent is finally discharged to the marine environment which includes the territorial sea, contiguous zone and the ocean. 62–600.200(55), F.A.C. (2010).
[30] "Injection well" means a well into which fluids are being or will be injected, by gravity flow or under pressure. 62-528.200(39), F.A.C. (2010).
[31] Florida DEP website http://www.dep.state.fl.us/water/reuse/index.htm.

Section 373.250(2)(c), F.S., authorizes a WMD to require the use of reclaimed water in lieu of surface water or groundwater when the use of uncommitted reclaimed water is available; is environmentally, economically, and technically feasible; and is of such quality and reliability as is necessary to the user. Reclaimed water is presumed to be available to a CUP applicant when a reclaimed water provider has "uncommitted" reclaimed water capacity, and there are distribution facilities provided by the utility to the site of the proposed use. Uncommitted reclaimed water is defined in statute as the average amount of reclaimed water produced during the lowest-flow months, less the amount of reclaimed water that a reclaimed water provider is contractually obligated to provide a customer or user.[32] However, by its express terms, this provision does not authorize a WMD to require a provider of reclaimed water to redirect reclaimed water from one user to another or to provide uncommitted water to a specific user if such water is anticipated to be used by the provider, or a different user selected by the provider, within a reasonable amount of time.

As required in statute and implemented in DEP's Water Resource Implementation Rule,[33] WMDs must designate water resource caution areas[34] within which CUP permit holders are required to use a "reasonable" amount of reclaimed water, unless using it is not "economically, environmentally or technically feasible." For example, the entire St. Johns River WMD has been designated a water resource conservation area, and WMD rules require reclaimed water to be used throughout the district if it is readily available and feasible.[35] In contrast, the Northwest Florida WMD has designated only two water resource caution areas – the coastal areas of Santa Rosa, Okaloosa, and Walton Counties and the Upper Telogia Creek Drainage Basin of Gadsden County. Applicants in those two areas who propose to withdraw water from the Floridan aquifer are required to use reclaimed water unless its use is not economically, environmentally, or technically feasible as determined by the WMD.[36]

Currently, WMD year-round irrigation restrictions do not apply to irrigation with reclaimed water. In recent years, discussions have been held in some WMDs regarding the possibility of imposing restrictions on the use of reclaimed water for irrigation purposes. However, reclaimed water utilities expressed concerns that such restrictions would create operational problems for the utilities, because wastewater flows do not vary according to weather conditions while the need for irrigation does vary. As a result, irrigation restrictions may cause a reuse utility to increase discharges of reclaimed water to surface waters, possibly in violation of the utility's National Pollutant Discharge Elimination System (NPDES) permit, or require the construction of expensive storage capacity for the utility's reclaimed water supply.[37]

For areas outside of designated water resource caution areas, DEP encourages local governments to implement programs for the use of reclaimed water. Specifically, WMDs are encouraged to establish incentives, such as longer permit duration and cost-sharing, for local governments and other interested parties to implement programs for reclaimed water use.[38] With respect to Florida's "Home Rule Power,"[39] the provisions of the Water Resource Implementation Rule provide that the rule itself may not preempt any local water reuse programs.[40]

Additionally, mandatory reuse zones established by local government ordinance may require person living within the area to connect when available with any alternative water supply system, including reclaimed water.[41] Mandatory reuse zones have been established in three districts – SFWMD, SRWMD, and

[32] Section 373.250(2)(a)-(b), F.S. (2011).
[33] Chapter 62-40, F.A.C. (2010).
[34] Water resource caution areas are designated where water supply problems currently exist or are expected to exist within the next 20 years. Section 373.0363, F.S. (2011); Rule 62-40.416, F.A.C. (2010).
[35] Rule 40C-23.001, F.A.C. (2010).
[36] Rule 40A-2.802, F.A.C. (2010).
[37] DEP Draft Bill Analysis for HB 639 (2012) (p. 2-3).
[38] Rule 62-40.416(2), F.A.C. (2010).
[39] In Florida, "Home Rule Power" language was proposed in the 1968 Constitutional revision and was adopted by the people. After several legal challenges, the Florida Legislature adopted the Home Rule Powers Act in 1973, which ended challenges related to city and county powers. The Florida Constitution states in Art. VIII, § 2(b) for municipalities: "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise power for municipal purposes except as otherwise provided by law."
[40] Rule 62-40.416(2), F.A.C. (2010).
[41] Section 125.01(k)1., F.S. (2011), authorizes counties to: "[p]rovide and regulate waste and sewage collection and disposal, water and alternative water supplies, including, but not limited to, reclaimed water and water from aquifer storage and recovery and desalination

SJRWMD – mostly for irrigation. In SJRWMD, the conflict between the WMD's authority and the "Home Rule Power" of the local government was resolved by including language in local ordinances requiring reclaimed water use, unless the WMD required otherwise. This allowed the utility to use the most logical lowest quality source, which sometimes may be another source, such as stormwater.[42]

Alternative Water Supply Funding

Between fiscal years 2005-2006 and 2007-2008, the Legislature authorized the allocation of over $217 million among the five WMDs to develop alternative water supply projects. Reclaimed water development projects made up the bulk of project types that were funded over these four years, comprising 202 of the 324 funded projects. Over these four years, the funding waned significantly. In fiscal year 2005-2006, $100 million was allocated among the five WMDs, but by fiscal year 2007-2008, that figure dropped to $5.54 million. The Legislature has not provided any alternative water supply funding at the state level since fiscal year 2008-09.[43]

Environmental Considerations

The adverse environmental impacts of consumptive water use are essential considerations in the permitting process. Indeed, the Legislature expressly provided that the policy of the State Water Resource Plan is "to preserve natural resources, fish, and wildlife."[44] This statute is consistent with Article II, Section 7(a), of the Florida Constitution, which states that "[i]t shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and excessive and unnecessary noise and for the conservation and protection of natural resources."

1. Water Needs of Natural Systems

Excessive use of ground or surface waters may trigger a cascade of adverse environmental impacts including: salt water intrusion that can degrade water quality; changes in salinity levels in estuaries that can kill off oyster and grass beds; "drying out" of wetlands and lakes that can lead to habitat loss; and reduced spring and river flows that can diminish recreational values like fishing or ecotourism, which rely on a robust and biologically diverse ecology. To avoid adverse environmental impacts, DEP and WMDs are statutorily mandated to establish minimum flow levels (MFLs) for surface and groundwaters, which set the threshold at which further withdrawals could significantly harm the water resources or ecology of the area.[45] To date, the five WMDs have collectively adopted over 300 MFLs for water bodies across the state.[46]

A WMD may deny a CUP because the desired uses are "undesirable because of the nature of the activity or the amount of water required."[47] For example, in *Osceola County v. St. Johns River Water Management District*,[48] the WMD denied a wellfield permit because of the potential adverse effects of a drawdown of the aquifer on wetlands. The hearing officer found that the predicted drawdown of 0.14 feet could significantly harm herbaceous wetlands, and the applicant was denied a permit because he failed to sufficiently assess those impacts or propose adequate mitigation efforts.[49]

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systems, and conservation programs."; Section 180.02, F.S., provides that cities that may " create a zone or area by ordinance and to prescribe reasonable regulations requiring all persons or corporations living or doing business within said area to connect, when available, with any … alternative water supply system, including, … reclaimed water ...."

[42] "Connecting Reuse and Water Use: A Report of the Reuse Stakeholders Meetings," Florida Department of Environmental Protection (Feb. 23, 2009), pp. D-5,6.

[43] Florida DEP website, http://www.dep.state.fl.us/water/waterprojectfunding/.

[44] Section 373.016(3)(g), F.S. (2011).

[45] Section 373.042(1)(a)-(b), F.S. (2011).

[46] Since 1992, the five WMDs have adopted 322 minimum flow levels or reservations. (SWFWMD: 167 MFLs; SJRWMD: 135 MFLs; SFWMD: 9 MFLs and 2 Reservations; SRWMD: 7 MFLs; and NWFWMD: 2 Reservations.)

[47] Section 373.036(4), F.S. (2011).

[48] *Osceola County v. St. Johns River Water Management District*, 92 ER F.A.L.R. 109 (Final Order, June 10, 1992).

[49] *See* Richard Hamman, *Consumptive Use Permitting Criteria*, Florida Environmental and Land Use Law. 14.2, 14.2-7 (August 2001).

2. Water Quality Standards

Water quality and pollution is primarily regulated through Florida's implementation of the federal Clean Water Act (CWA).[50] The CWA requires states or the U.S. Environmental Protection Agency (EPA) to establish water quality standards for surface waters and prohibits the discharge of any pollutant into navigable waters from a point source, such as a pipe, man-made ditch, or large animal feeding operation, without a National Pollutant Discharge Elimination System (NPDES) permit. Non-point sources, such as fertilizer and pesticide runoff, are not required to obtain an NPDES permit and are not directly regulated under the CWA. DEP sought and accepted authority from the EPA to implement water quality programs in Florida under state laws. As such, DEP adopts water quality standards subject to EPA approval and administers the federal pollutant discharge NPDES permit program.

Specifically, the CWA requires states to establish water quality standards and review those standards every three years. States must also identify impaired waters that are not meeting established water quality standards and establish total maximum daily loads (TMDLs) of pollutants for those waters. A TMDL is a value of the maximum amount of a pollutant that a body of water can receive and still meet water quality standards. To enforce TMDLs, DEP establishes water quality-based effluent limitations (WQBELs) and incorporates these limitations into NPDES permits.

TMDLs and WQBELs can be established for a broad range of pollutants – in Florida particular attention is paid to nutrient levels, principally the levels of nitrogen and phosphorus. While nitrogen and phosphorus are essential for aquatic organisms to live and grow, excessive levels of these nutrients may result in harmful algal blooms, nuisance aquatic weed proliferation, or an imbalance in the natural community of flora and fauna. Unnatural sources of nitrogen and phosphorus include sewage disposal systems (treatment works or septic systems), overflows of storm and sanitary sewers (untreated sewage), agricultural production and irrigation practices, and runoff from urban and agricultural areas.

In 2008, environmental advocacy groups filed suit against the EPA alleging that excessive nutrient levels were impairing Florida's surface waterbodies and that EPA was failing to comply with the CWA by not requiring Florida to adopt more stringent numeric nutrient criteria in lieu of the State's current EPA-approved narrative criteria. Following a determination by the EPA that numeric nutrient criteria were necessary to protect waters in the state and entry of a court-approved settlement agreement, in November, 2010, EPA issued a final rule adopting numeric nutrient criteria for Florida's lakes, springs, and inland flowing waters with the exception of south Florida canals (mostly south of Lake Okeechobee). These rules are scheduled to take effect in March 2012. In response to EPA's final rule, DEP recently proposed a rule containing numeric nutrient criteria and is proceeding through the rule adoption process. If adopted by DEP, ratified by the Legislature, and approved by the EPA, DEP's adopted numeric nutrient criteria will replace the criteria in the EPA's final rule.

Unless reclaimed water is extensively treated, it invariably contains nutrients (i.e., nitrogen and phosphorus). When reclaimed water is used for irrigation or discharged into other surface waters, it may eventually flow or seep into an impaired surface waterbody. Therefore, DEP's authority to regulate the effluent and nutrient levels in reclaimed water is an important component in maintaining chemical, physical, and biological integrity of surface waters. In light of this fact, wastewater treatment facilities that produce reclaimed water for land application must obtain wastewater permits and are subject to treatment standards (e.g., effluent limitations and pH standards), monitoring, and reporting requirements.[51] Specifically, DEP may require additional levels of treatment depending on the ultimate use (beyond the minimum) to protect the potential receiving surface waters from exceeding their established TMDLs.[52]

[50] 33 U.S.C. § 1251 *et seq.*
[51] Rule 62-600.530, F.A.C., Reuse of Reclaimed Water and Land Application.
[52] Rule 62-600.530(3)(b), F.A.C.

Reclaimed Water Working Group

The Reclaimed Water Working Group is a collective of several interested parties[53] that, over the past several years, has convened to discuss the role of reclaimed water in meeting Florida's projected water demands. The working group's express objective was "to optimize the use and continued development of reclaimed water as an alternative water supply to the extent environmentally, technically, and economically feasible in order to meet water supply demands."[54] According to DEP, portions of the bill reflect the recommendations of the working group.[55]

Effects of Proposed Changes

Declaration of Policy

The bill amends § 373.250(1), F.S., to add a legislative declaration that "the interest of the state to sustain water resources for the future through the use of reclaimed water must be balanced with the need for reuse utilities to operate and manage reclaimed water systems in accordance with a variety and range of circumstances, including regulatory and financial considerations, which influence the development and operation of reclaimed water systems across the state."

"Water" or "Waters in the State"

The bill amends the current statutory definition of "water" and "waters in the state" in § 373.019(20), F.S., to exclude reclaimed water until it has been discharged back into "waters," as defined in § 403.031(13), F.S.[56] That is, after wastewater treatment plants convert wastewater into reclaimed water, reclaimed water is not considered "water" or "waters in the state" until it has been reused and discharged into certain "waters" as defined elsewhere in statute. According to DEP, this definitional change removes the use of reclaimed water from regulation by the WMDs under the CUP program.[57]

Consumptive Use Permitting

The bill amends § 373.250(3), F.S., to prohibit WMDs from requiring a CUP for the use of reclaimed water. Provisions defining "uncommitted" reclaimed water capacity have been deleted, and the bill provides that the reuse utility will determine when uncommitted reclaimed water capacity exists.

If a CUP application includes at least some use of surface water or groundwater, the WMDs are authorized to include conditions that govern the use of the permitted sources in relation to the feasibility or use of reclaimed water. Additionally, this bill allows WMDs to continue requiring the use of reclaimed water in lieu of all or a portion of a proposed use of surface water or groundwater, provided that the use of reclaimed water is available; is environmentally, economically, and technically feasible; and is of such quality and reliability as is necessary to the user.

However, the bill stipulates that WMDs may neither specify any user to whom the reuse utility must provide reclaimed water nor restrict -- in a permit, water shortage order, or water shortage emergency order -- the use of reclaimed water provided by a reuse utility to a customer unless requested by the reuse facility. DEP asserts that "[t]hese changes are not expected to result in a significant change over existing practices, and should provide more operational and business flexibility to reuse utilities" and "[i]It is anticipated that this flexibility should promote expansion of reuse systems and increase the use of reclaimed water."[58]

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[53] The Reclaimed Water Working Group consisted of: DEP, the WMDs, Florida Water Environment Association- Utility Council, American Water Works Association, League of Cities, Association of Counties, and individual utilities. (DEP presentation by Dr. Ann Shortelle, Director of Office of Water Policy before Florida House Subcommittee on Agriculture and Natural Resources, Nov. 1, 2011.)
[54] *Id.*
[55] DEP Draft Bill Analysis for HB 639 (2012) (p. 3).
[56] Section 403.031(13), F.S. (2011). "Waters" include, but are not limited to, rivers, lakes, streams, springs, impoundments, wetlands, and all other waters or bodies of water, including fresh, brackish, saline, tidal, surface, or underground waters.
[57] DEP Draft Bill Analysis for HB 639 (2012) (p. 3).
[58] *Id.*

Funding

The bill creates § 373.250(2), F.S., providing that reclaimed water remains a statutorily defined "alternative water supply"[59] eligible for state and district alternative supply funding. This bill provides that a contract for state or WMD funding for the development of reclaimed water as an alternative water supply may include the following conditions:[60]

- Metering of reclaimed water use for irrigation uses (including residential, agricultural, landscape, irrigation as well as irrigation of golf courses and public access areas), industrial uses, commercial and institutional uses (e.g., toilet flushing), and transfers to other reclaimed water utilities;
- Implementation of reclaimed water rate structures based on actual use of reclaimed water for such irrigation uses, industrial uses, commercial and institutional uses, and transfers;
- Implementation of education programs to inform the public about water issues, water conservation, and the importance and proper use of reclaimed water; or
- Development of location data for key reuse facilities.

Impact Offsets and Substitution Credits

This bill creates § 373.250(5), F.S., requiring DEP to initiate rulemaking no later than October 1, 2012 to adopt revisions to the Water Resource Implementation Rule to include criteria for the use of proposed "impact offsets" and "substitution credits." Additionally, the WMDs must initiate rulemaking to incorporate DEP's revisions to the Water Resource Implementation Rule within 60 days of DEP's final adoption of the revisions. Two WMDs (the South Florida and Southwest Florida WMDs) have already adopted rules similar to "impact offsets" and "substitution credits," and other WMDs have separately evolved other permitting practices in their own regions using similar, but less detailed rules.[61]

1. Impact Offsets

First, the bill requires DEP to initiate rulemaking to adopt "[c]riteria for the use of a proposed impact offset derived from the use of reclaimed water when a water management district evaluates an application for a consumptive use permit." The bill defines "impact offset" as:

> The use of reclaimed water to reduce or eliminate a harmful impact *that has occurred or would otherwise occur* as a result of *other* surface water or groundwater withdrawals."
> (emphasis added)

The bill does not provide further legislative guidance regarding DEP's development of these rules. For example, the bill does not specifically address the manner in which impact offsets may be approved or applied by a WMD or the ultimate benefit a CUP applicant may derive from using an impact offset, nor does the bill provide guidelines or standards to address these issues or otherwise direct DEP's establishment of criteria for the use of impact offsets. For instance, the bill does not indicate whose or which harmful impacts may be offset by the applicant's use of reclaimed water other than to specify an impact "that has occurred or would otherwise occur as a result of other surface water or groundwater withdrawals." In addition, the bill does not require a geographical nexus between the use of reclaimed water and the applicant's withdrawal of surface or ground water. Therefore, it is unclear whether an impact offset will be available if reclaimed water will be used by the applicant to offset a harmful impact outside the hydrological area where the applicant proposes to withdraw surface or groundwater.

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[59] Section 373.019(1), F.S. (2011). "Alternative water supplies" mean salt water; brackish surface and groundwater; surface water captured predominately during wet-weather flows; sources mad 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 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.
[60] Section 373.707(9)(a)-(d), F.S. (2011).
[61] "Purple Paper: Reclaimed Water, Credits, and Offsets," Prepared by: DEP, NWFWMD, SJRWMD, SFWMD, SWFWMD, SRWMD, and the Florida Water Environment Association Utility Council. (undated)

Examples of offset projects that may have a beneficial water resource effect include: the use of recharge systems to prevent saltwater intrusion; the use of reclaimed water to reduce or prevent wetland impacts or other surface and groundwater impacts; and the use of reclaimed water to replace surface or groundwater withdrawals, so that those withdrawals may be use to reduce or prevent adverse impacts. [62] According to DEP, the use of reclaimed water to rehydrate wetlands that would otherwise be adversely affected by a water withdrawal has already been allowed in some WMDs.[63]

2. Substitution Credits

Second, DEP must establish criteria for the use of "substitution credits" where a WMD has adopted rules establishing withdrawal limits from a specified water resource within a defined geographic area. The bill defines "substitution credits" as "the use of reclaimed water to replace all or a portion of an existing permitted use of resource-limited surface water or groundwater, allowing a different user or use to initiate a withdrawal or increase its withdrawal from the same resource-limited surface water or groundwater source provided that the withdrawal creates no net adverse impact on the limited water resource or creates a net positive impact if required by water management district rule as part of a strategy to protect or recover a water resource." The bill does not provide other restrictions on the use of credits or further legislative guidance regarding DEP's development of these rules.

Examples of resource-limited areas in which the concept of substitution credits has already been implemented are the Southern Water Use Caution Area in SWFWMD, as well as the Lower East Coast Everglades and Northern Palm Beach/Loxahatchee River Watershed regions, and the Lake Okeechobee Service Area in SFWMD.[64] According to DEP, these WMDs have "formalized mechanisms to allow reclaimed water to be provided as a substitution for groundwater withdrawals, thus allowing another entity to use new or additional groundwater without increasing the overall water withdrawals in a region."[65]

Water Quality Standards

According to DEP, this bill does not affect its existing statutory authority to regulate the water quality of reclaimed water as it leaves the reuse facility. Thus, DEP's continued regulation of wastewater treatment facilities will ensure that reclaimed water is in compliance with treatment requirements (i.e., effluent and nutrient limitations) before it is utilized or applied to the landscape.[66]

B. SECTION DIRECTORY:

Section 1. Amends § 373.019, F.S., to exclude reclaimed water from the definition of "water" or "waters in the state" until it has been discharged into "waters" as otherwise defined by law.

Section 2. Amends § 373.250, F.S., providing legislative intent for the use or reclaimed water; designating reclaimed water as an alternative water supply eligible for state alternative water supply funding; deleting the definition of "uncommitted" reclaimed water and providing that reclaimed water may be presumed available when a reuse utility has determined that is has uncommitted reclaimed water capacity; limiting the water management districts' (WMD) ability to require the use of reclaimed water; providing that the Department of Environmental Protection (DEP) must initiate rulemaking to adopt revisions to the water implementation rule that include criteria for the use of "impact offsets" and "substitution credits"; providing that each WMD must initiate rulemaking to incorporate these revisions; and providing that this section does not impair a WMD's ability to regulate the use of surface or groundwater to supplement a reclaimed water system.

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

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[62] *Id.*at p. 2; "Purple Paper: Reclaimed Water, Credits, and Offsets," Prepared by: DEP, NWFWMD, SJRWMD, SFWMD, SWFWMD, SRWMD, and the Florida Water Environment Association Utility Council (undated).
[63] DEP Draft Bill Analysis for HB 639 (2012) (p. 3).
[64] *Id.*
[65] DEP Draft Bill Analysis for HB 639 (2012) (pp. 2-3).
[66] *See generally*, Chapter 403, F.S. (2011), "Environmental Control"; *see also* § 62-600.530, F.A.C., "Reuse of Reclaimed Water and Land Application".

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The bill will result in a minimal negative fiscal impact on DEP related to the costs associated with promulgating rules.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   A. Delegated Authority to Adopt Rules

   This bill creates s. 373.250(5), F.S., which requires DEP to initiate rulemaking to provide criteria for the use of "impact offsets" and "substitution credits." (Please see pp. 9-10 for additional discussion.)

   With respect to "impact offsets," the bill does not provide specific legislative guidance regarding DEP's development of criteria for receiving or using an impact offset. For example, the bill does not specifically address the manner in which impact offsets may be approved or applied by a WMD or the ultimate benefit a CUP applicant may derive from using an impact offset, nor does the bill provide guidelines or standards to address these issues or otherwise direct DEP's establishment of criteria for the use of impact offsets. For instance, the bill does not indicate whose or which harmful impacts may be offset by the applicant's use of reclaimed water other than to specify an impact "that has occurred or would otherwise occur as a result of other surface water or groundwater withdrawals." In addition the bill does not require a geographical nexus between the use of reclaimed water and the applicant's withdrawal of surface or ground water. Therefore, it is unclear whether an impact offset is

available if reclaimed water will be used by the applicant to offset a harmful impact outside the hydrological area where the applicant proposes to withdraw surface or ground water. By not providing specific standards or guidelines to guide DEP in resolving these questions or otherwise developing criteria for the use of impact offsets, the issue of unlawful delegation of legislative authority or unlawful exercise of delegated legislative authority may arise if the enacted statute is challenged or DEP promulgates a comprehensive rule addressing the approval or use of impact offsets.

With respect to "substitution credits," the definition of "substitution credits" authorizes the use of a substitution credit if the withdrawal creates "no net adverse impact" on the limited water resource or creates a "net positive impact" if required by WMD rule as part of a strategy to protect or recover a water resource. However, the bill imposes no other limitations or conditions on obtaining or using substitution credits. Therefore, while DEP may arguably adopt rules to define "net adverse impact" and "net positive impact", it is unclear what other "criteria for the use of substitution credits" may be adopted by DEP without raising issues of unlawful exercise of delegated legislative authority by an executive branch agency.

A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.[67] Rulemaking authority is delegated by the Legislature[68] through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"[69] a rule. Agencies do not have discretion whether to engage in rulemaking.[70] To adopt a rule, an agency must have a general grant of authority to implement a specific law by rulemaking.[71] The grant of rulemaking authority itself need not be detailed.[72] However, the specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.[73] According to the Florida Supreme Court, "[w]hen the statute is couched in vague and uncertain terms or is so broad in scope that no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law, it must be held unconstitutional as attempting to grant to the administrative body the power to say what the law shall be."[74] Thus, "administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program."[75] In essence, the Legislature may delegate confined rule-making authority to agencies, but the Legislature may not give agencies authority to determine what the law should be.[76]

B. Contract Impairment

DEP asserts that, although they have not historically done so, the WMDs may require a CUP solely for the use of reclaimed water.[77] Whether reclaimed water is a "water" or "waters in the state," and whether DEP and the WMDs have authority to require a CUP for the use of reclaimed water, are legal questions yet to be resolved by the Florida courts.

Today, if a reuse utility enters into a contract to provide reclaimed water to a user, and the Legislature subsequently amends the law in a manner that diminishes the rights of either party to the contract, the law may be subject to challenge as an invalid impairment of contract rights.

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[67] Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region,* 969 So. 2d 527, 530 (Fla. 1st DCA 2007).
[68] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.,* 773 So. 2d 594 (Fla. 1st DCA 2000).
[69] Section 120.52(17), F.S.
[70] Section 120.54(1)(a), F.S.
[71] Sections 120.52(8) and 120.536(1), F.S.
[72] *Save the Manatee Club, Inc.,* supra at 599.
[73] *Sloban v. Florida Board of Pharmacy,*982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.,* 794 So. 2d 696, 704 (Fla. 1st DCA 2001).
[74] *Conner v. Joe Hatton*, Inc., 216 So.2d 209 (Fla.1968).
[75] *Id.* at 925.
[76] *Sarasota Cnty. v. Barg*, 302 So.2d 737 (Fla. 1974).
[77] DEP Draft Bill Analysis for HB 639 (2012) (p. 3).

This bill explicitly excludes reclaimed water from the definition of "water" or "waters in the state" and prohibits WMDs from requiring a permit for the use of reclaimed water except. If the changes in this bill are enacted, and reuse utilities rely on the changed law to enter into financing agreements to fund infrastructure or enter into long-term contracts to provide reclaimed water to water users, it is unclear what effect, if any, these changes will have on the Legislature's ability to amend the law to regulate reclaimed water in the future. The actual effect, if any, will not be known unless addressed by the courts. It should be noted that this bill, alone, does not appear to impair existing contracts.

The Contract Clause in Article I, Section 10, of the U.S. Constitution prohibits states from passing laws which substantially impair contract rights.[78] Courts use a balancing test to determine whether a particular regulation violates the contract clause. The courts measure the severity of contractual impairment against the importance of the interest advanced by the regulation. Also, courts look at whether the regulation is a reasonable and narrowly tailored means of promoting the state's interest.[79] Generally, courts accord considerable deference to legislative determinations relating to the need for laws which impair private obligations.[80] However, courts scrutinize the impairment of public contracts in a stricter fashion, and exhibit less deference to findings of the Legislature because the Legislature may stand to gain from the outcome.[81]

Interpretations of Florida's Contract Clause[82] have generally mirrored the United States Supreme Court's interpretation of the federal Contract Clause. State statutes that impair contractual obligations are measured on a sliding scale of scrutiny. The degree of contractual impairment permitted is delineated by the importance of the governmental interests advanced.[83] In 1980, the Florida Supreme Court enumerated several factors it might weigh when making such determinations:

1. Whether the law was enacted to deal with a broad economic or social problem;
2. Whether the law operates in an area that was already subject to state regulation at the time the contract was entered into; and
3. Whether the effect on the contractual relationship is temporary; not severe, permanent, immediate, and retroactive.[84]

C. Vested Rights

DEP asserts that, although they have not historically done so, the WMDs may require a CUP solely for the use of reclaimed water.[85] Whether reclaimed water is a "water" or "waters in the state," and whether DEP and the WMDs have authority to require a CUP for the use of reclaimed water, are legal questions yet to be resolved by the Florida courts.

In addition to explicitly prohibiting WMDs from requiring a permit for the use of reclaimed water, the bill removes reclaimed water from the definition of "waters in the state," which are those waters considered to be public resources. If these changes are enacted, and reuse utilities rely on the law to make significant investments in infrastructure to develop reclaimed water, it is unclear whether the Legislature will be subject to additional limitations on its ability to enact regulations of reclaimed water in the future due to the potential for infringing upon vested rights other than vested contractual rights.

In addition to federal and state constitutional limitations on laws that impair contracts, government, through rule or legislation, cannot adversely affect substantive rights once such rights have vested.[86]

[78] *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1923).
[79] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).
[80] *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230 (1945).
[81] *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); see generally, Leo Clark, The Contract Clause: A Basis for Limited Judicial Review of State Economic Regulation, 39 U. MIAMI L. REV. 183 (1985).
[82] Art. I, s. 10, Florida Constitution ("No . . . Law impairing the obligation of contracts shall be passed.")
[83] *Yellow Cab Co. of Dade Cnty. v. Dade Cnty*., 412 So.2d 395 (Fla. 3d DCA 1982).
[84] *Pomponio v. Cladridge of Pompano Condo., Inc*., 378 So.2d 774 (Fla. 1980).
[85] DEP Draft Bill Analysis for HB 639 (2012) (p. 3).
[86] *Bitterman v. Bitterman*, 714 So.2d 356 (Fla. 1998).

A "vested right" is "an immediate, fixed right of present or future enjoyment and also as an immediate right of present enjoyment, or a present, fixed right of future enjoyment."[87]

The existence of a "vested right" is determined by applying the principles of equitable estoppel or substantive due process under statutory or common law. The common law doctrine of equitable estoppel may be invoked against the government when a person, relying in good faith upon some act or omission of the government, has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights the person has acquired.[88] The First District Court of Appeals analogized equitable estoppel to the government through an act or omission inviting a citizen "onto a welcome mat" and then "snatch[ing] the mat away to the detriment of the party induced or permitted to stand thereon."[89]

B. RULE-MAKING AUTHORITY:

See Constitutional Issues.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.

[87] *Promontory Enterprises, Inc. v. Southern Engineering & Contracting, Inc*., 864 So.2d 479 (Fla. 5th DCA 2004).
[88] *Verizon Wireless Pers. Commc'ns L.P. v. Sanctuary at Wulfert Point Cmty. Ass'n*, 916 So.2d 850, 856 (Fla. 2nd DCA 2002).
[89] *Equity Res. Inc. v. County of Leon*, 643 So.2d 1112, 1120 (Fla. 1st DCA 1994) (quoting *Town of Largo v. Imperial Homes Corp*., 309 So.2d 571, 573 (Fla. 2d DCA 1975).