

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 7045 PCB SCWP 12-01 Consumptive Use Permits for Development of Alternative Water Supplies

**SPONSOR(S):** Select Committee on Water Policy, Williams

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1178

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Select Committee on Water Policy	14 Y, 0 N	Camechis	Camechis
1) State Affairs Committee	15 Y, 0 N, As CS	Camechis	Hamby

### SUMMARY ANALYSIS

Under current Florida law, the water management districts (WMD) may require a consumptive use permit (CUP) for the development of alternative water supplies. These permits must be granted for a term of *at least 20 years*. If the permittee issues bonds for the construction of the project and requests an extension prior to the expiration of the permit, that permit *must* be extended for such additional time as is required for the retirement of bonds, not including any refunding or refinancing of such bonds, provided that the WMD determines that the use will continue to meet the conditions for the issuance of the permit. These permits are subject to periodic compliance reports where necessary to maintain reasonable assurance that the conditions for issuance of a 20-year permit can continue to be met.

This bill establishes a new type of CUP for the development of alternative water supplies (Extended Permit). Extended Permits approved by the state after July 1, 2012, for the development of alternative water supplies must have a term of *at least 30 years* if there is sufficient data to provide reasonable assurance that the conditions for permit issuance will be met for the duration of the permit. Any public or private entity that wishes to develop an alternative water supply may be eligible to receive an Extended Permit regardless of the manner in which the water project will be financed.

If, within 7 years after an Extended Permit is granted, the permittee issues bonds to finance the project, completes construction of the project, and requests an extension of the permit duration, the permit must be extended to expire upon the retirement of such bonds or 30 years after the date construction of the project is complete, whichever occurs later. However, a permit's duration may not be extended more than 7 years after the permit's original expiration date regardless of whether any bonds issued to finance the project will be outstanding at the end of the 7 years. The 7-year permit extension is also applicable to any 30-year permit for the development of alternative water supplies granted between June 1, 2011 and July 1, 2012.

Extended Permits will be subject to periodic compliance reviews; however, if the permittee demonstrates that bonds issued to finance the project are outstanding, a WMD may not reduce the quantity of alternative water allocated by an Extended Permit unless a reduction is needed to address unanticipated harm to the water resources or to existing legal uses present when the permit was issued. Thus, during a compliance review, if bonds to finance the project are outstanding, a WMD may not reduce the amount of water allocated by the permit if the permittee does not demonstrate a need for the allocated water due to lower than expected population growth or demand. However, reductions in water allocations required by an applicable water shortage order will apply to Extended Permits.

Extended Permits may not authorize the use of non-brackish groundwater supplies or non-alternative water supplies.

The availability of Extended Permits, if utilized, may result in an indeterminate reduction in permit fees collected by WMDs. Please see Fiscal Comments for the fiscal impact on local government and private sector expenditures.

This bill has an effective date of July 1, 2012.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h7045a.SAC

DATE: 1/26/2012

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

##### *Consumptive Use Permitting*

Section 373.236(5), F.S., authorizes consumptive use permits (CUP) for the development of alternative water supplies. The WMD or DEP may impose such reasonable conditions as are necessary to assure that such use is consistent with the overall objectives of WMD or DEP and is not harmful to the water resources of the area.<sup>1</sup>

A CUP establishes the duration and type of water use as well as the maximum amount that may be used. Pursuant to s. 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 s. 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.

##### 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.<sup>2</sup> 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.”<sup>3</sup> Rather, the reasonable-beneficial use standard requires efficient economic use of water and consideration of the rights of the general public.<sup>4</sup>

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.<sup>5</sup> 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*<sup>6</sup> nonetheless upheld DEP’s use of these criteria for implementing the reasonable-beneficial use standard.

##### 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.<sup>7</sup> Essentially, new users cannot obtain a CUP to use water if the use conflicts with existing

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<sup>1</sup> Section 373.219, F.S. (2011).

<sup>2</sup> Section 373.019(16), F.S. (2011).

<sup>3</sup> 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)).

<sup>4</sup> *Id.*

<sup>5</sup> Chapter 62-40, F.A.C. (2010).

<sup>6</sup> *Florida Water Management District v. Charlotte County*, 774 So. 2d 903, 911 (Fla. 2d DCA 2001).

<sup>7</sup> Section 373.223(1)(b), F.S. (2011).

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*<sup>8</sup> 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.”<sup>9</sup>

### Public Interest

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”,<sup>10</sup> 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*,<sup>11</sup> 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*,<sup>12</sup> 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.”

### **Duration of Permits and Compliance Reviews**

According to s. 373.236(1), F.S., CUPs must be granted *for a period of 20 years* if: (1) requested by the applicant and (2) 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 DEP may determine the duration of permits based upon a reasonable system of classification according to the water source, type of use, or both.

Pursuant to s. 373.326(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 DEP *may* require a permittee to produce a compliance report every 10 years.<sup>13</sup> A compliance report must contain sufficient data to maintain reasonable assurance that the initial permit conditions are met. After reviewing a compliance report, the WMD or DEP may modify the permit, including reductions or changes in the initial allocations of water, to ensure that the water use comports with initial conditions for issuance of the permit. Permit modifications made by a WMD or 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(5), F.S., defines “alternative water supplies” as “salt 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 agricultural uses; the downstream augmentation of water bodies with reclaimed water; stormwater; and any other water supply source that is

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<sup>8</sup> *Harloff v. Sarasota*, 575 So. 2d 1324 (Fla. 2d DCA 1991).

<sup>9</sup> *West Coast Regional Water Supply Authority v. Southwest Florida Water Management District*, 89 ER F.A.L.R. 166 (Final Order, August 30, 1989).

<sup>10</sup> 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).

<sup>11</sup> *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).

<sup>12</sup> *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).

<sup>13</sup> In limited instances, the statute authorizes more frequent “look backs”. For example, the Suwannee River WMD may require a compliance report every 5 years through July 1, 2015; but on that date the “look-back” period returns to 10 years.

designated as nontraditional for a water supply planning region in the applicable regional water supply plan.”

CUPs issued under s. 373.326(5), F.S., for the development of alternative water supplies must be issued for a term of *at least 20 years*.<sup>14</sup> If the permittee issues bonds to finance construction of the alternative water supply project, the permit term *must* be extended to expire upon retirement of the bonds if two conditions are met: 1) the permittee requests an extension during the term of the permit, and 2) the WMD determines that the use will continue to meet the conditions for issuance of the permit. As a matter of general practice in Florida, WMDs have historically issued CUPS with a maximum term of 20 years for the development of alternative water supplies.

During the term of these permits, compliance reports may be required by the WMD or DEP every 10 years (every 5 years if within the Suwannee River WMD). A compliance report must contain sufficient data to maintain reasonable assurance that the initial permit conditions are met. During a compliance review, permits are subject to modification, including reductions or changes in water allocations.

### **Effects of proposed changes**

The current text of s. 373.236(5), F.S., is designated as new subsection (5)(a) and amended to clarify that a CUP issued under that paragraph for the development of alternative water supplies may be approved only “if there is sufficient data to provide for reasonable assurance that the conditions for permit issuance will be met for the duration of the permit.”

Additionally, the bill creates subsection (5)(b) in order to establish a new type of CUP for the development of alternative water supplies (for purposes of this analysis only, these permits will be referred to as “Extended Permits”). Under this new subsection, CUPs approved by the state after July 1, 2012, for the development of alternative water supplies must have a term of *at least 30 years* if there is sufficient data to provide reasonable assurance that the conditions for permit issuance will be met for the duration of the permit. Any public or private entity that wishes to develop an alternative water supply may be eligible to receive an Extended Permit regardless of the manner in which the water project will be financed.

If, within 7 years after an Extended Permit is granted, the permittee issues bonds to finance the project, completes construction of the project, and requests an extension of the permit duration, the permit *must* be extended to expire upon the retirement of such bonds or 30 years after the date construction of the project is complete, whichever occurs later. However, a permit’s duration may not be extended more than 7 years after the permit’s original expiration date regardless of whether any bonds used to finance the project are outstanding at the end of 7 years. The 7-year permit extension is also applicable to any 30-year permit for the development of alternative water supplies granted between June 1, 2011 and July 1, 2012.

Extended Permits are subject to periodic compliance report reviews as described in s. 373.236(4), F.S.; however, during a compliance review, the WMDs may not reduce the quantity of alternative water allocated under an Extended Permit if the permittee demonstrates that bonds issued to finance the project are outstanding unless a reduction is needed to address unanticipated harm to the water resources or to existing legal uses present when the permit was issued. Thus, if bonds are outstanding, a WMD may no longer reduce the amount of water allocated if the permittee does not demonstrate a need for the allocated water due to lower than expected population growth or demand. However, reductions in water allocations required by an applicable water shortage order apply to Extended Permits.

Applicants may choose to apply for a CUP under subsection (5)(a), which is essentially current law authorizing CUPS with a duration of *at least 20 years*, or under new subsection (5)(b), which authorizes Extended Permits with a duration of *at least 30 years*.<sup>15</sup> Because WMDs have historically issued initial CUPs with a maximum term of 20 years, this bill effectively increases the minimum duration of an initial CUP for the development of alternative water supplies from 20 to 30 years. In addition, entities that issue

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<sup>14</sup> Section 373.236(5), F.S., (2011).

<sup>15</sup> One reason an applicant may wish to receive a permit under subsection (5)(a) rather than new (5)(b) is to have the option, *at the end of a permit’s term*, of extending the permit’s duration so the permit expires when the bonds used to finance the project are retired rather than prior to retirement of the bonds.

bonds to finance a project are entitled to a 7-year extension of an Extended Permit if certain conditions are met; however, the duration of an Extended Permit may not be extended more than 7 years after the original expiration date even if bonds remain outstanding.

Extended Permits may not authorize the use of non-brackish groundwater supplies or non-alternative water supplies. Thus, a composite permit that authorizes both the use of traditional and alternative water supplies is not authorized under subsection 5(b).

**B. SECTION DIRECTORY:**

Section 1. Amends § 373.236, F.S., specifying conditions for issuance, extension, and review of consumptive use permits for the development of alternative water supplies.

Section 2. Provides and effective date of July 1, 2012.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues: None.

2. Expenditures: None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues: The availability of Extended Permits, if utilized, may result in an indeterminate reduction in permit fees collected by WMDs.

2. Expenditures: See Fiscal Comments.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: See Fiscal Comments.**

**D. FISCAL COMMENTS:** Current law authorizes WMDs to issue new CUPs with durations of 30 years for the development of alternative water supplies; however, proponents of the bill assert that, in practice, WMDs have authorized CUPs with maximum durations of only 20 years. Proponents of the bill assert that, if a public or private entity initially obtains an Extended Permit with a 30-year duration, and then finances the alternative water supply project by issuing bonds with a 30-year term, the interest rate of the bonds will be reduced because the expiration of the initial Extended Permit more closely aligns with the retirement of the bonds. Thus, proponents assert, the capital costs of developing alternative water supplies will be reduced if Extended Permits are authorized by this bill. In addition, by requiring a 7-year extension of an Extended Permit under certain circumstances, the permittee will avoid the costs and uncertainty associated with reapplying for a new permit at the end of the initial 30-year permit term.

**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 with counties or municipalities.

2. Other: None.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 26, 2012, the State Affairs Committee amended the bill to apply the 7-year permit extension to any 30-year permit for the development of alternative water supplies granted between June 1, 2011 and July 1, 2012.