

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7113 PCB ANRS 13-03 Total Maximum Daily Loads

**SPONSOR(S):** Agriculture & Natural Resources Subcommittee, Caldwell

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1806

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Agriculture & Natural Resources Subcommittee	11 Y, 0 N	Rosenthal	Blalock
1) Rulemaking Oversight & Repeal Subcommittee	11 Y, 0 N	Miller	Rubottom
2) State Affairs Committee	16 Y, 0 N	Rosenthal	Camechis

### SUMMARY ANALYSIS

Under the federal Clean Water Act (CWA), states are required to adopt water quality standards (WQS) for their navigable waters, and to review and update those standards at least every three years. These standards must include:

- Designation of a waterbody's beneficial uses, such as water supply, recreation, fish propagation, or navigation;
- Water quality criteria that define the amounts of pollutants, in either numeric or narrative form, that the waterbody can contain without impairment of the designated beneficial uses; and
- Anti-degradation requirements.

When a waterbody is unable to maintain its WQS, it is designated as impaired. In such a situation, the Environmental Protection Agency (EPA) or the state must set a total maximum daily load (TMDL) establishing the maximum amount of a given pollutant the waterbody can accept while still meeting WQS associated with its designated use. In Florida, the Department of Environmental Protection (DEP) is granted the authority to establish TMDLs via the Watershed Restoration Act of 1999.

The Florida Administrative Procedure Act (APA) requires state agencies to assess whether a Statement of Estimated Regulatory Cost (SERC) must be prepared in conjunction with the promulgation of an administrative rule, such as the establishment of a TMDL for an impaired waterbody. The preparation of a SERC is required if a proposed rule will have an adverse impact on small business, or if it is likely to directly or indirectly increase regulatory costs by more than \$200,000 within one year of implementation. If the SERC analysis indicates the rule is likely to have a specific economic impact exceeding \$1 million aggregated in the first five years from implementation, then the rule must be ratified by the Legislature before going into effect. The APA requires that the rule be submitted to the President of the Senate and the Speaker of the House of Representatives no later than 30 days prior to the next regular legislative session, and the rule may not take effect until it is ratified by the Legislature.

The bill amends current law to exempt rules establishing TMDLs from the legislative ratification requirement in the APA.

The bill does not appear to have a fiscal impact on state or local governments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Present Situation

##### **The Federal Clean Water Act (CWA)**

The federal Clean Water Act (CWA)<sup>1</sup> was enacted in 1972 in order to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>2</sup> Under the CWA states are required to adopt water quality standards (WQS) for waterbodies within their respective jurisdictions and to review and update those standards at least every three years. These standards must include:

- Designation of a waterbody’s beneficial uses, such as water supply, recreation, fish propagation, or navigation;
- Water quality criteria that define the amounts of pollutants, in either numeric or narrative form, that the waterbody can contain without impairment of the designated beneficial uses; and
- Anti-degradation requirements.<sup>3</sup>

Under the CWA states have primary authority to set WQS for waterbodies in their respective jurisdictions that are reviewable by the Environmental Protection Agency (EPA).<sup>4</sup> If at any time EPA determines a revised or new standard is necessary to meet the requirements of the CWA, the EPA Administrator is authorized to adopt a revised WQS.<sup>5</sup> Moreover, the CWA requires EPA to set WQS for any waterbody where a state fails to do so.<sup>6</sup>

The CWA focuses primarily on point sources of water pollution.<sup>7</sup> Point source pollution can be defined generally as any human-controlled “discernible, confined, and discrete” conveyance of a pollutant into waters subject to the CWA.<sup>8</sup> The CWA directly regulates point source pollution via the National Pollution Discharge Elimination System (NPDES) permitting process.<sup>9</sup> The NPDES program prohibits the discharge of pollutants from a point source into navigable waters<sup>10</sup> except as provided for in an NPDES permit.<sup>11</sup> In practice, the NPDES method of regulation can be best visualized as “end-of-the-pipe” controls that clean up waste water before it is discharged into a waterbody. The primary focus of the NPDES permitting program is municipal (Publicly Owned Treatment Works) and non-municipal (industrial) direct dischargers, and the primary mechanism for controlling discharges of pollutants to receiving waters is establishing effluent limitations.<sup>12</sup> NPDES permits require a point source to meet

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<sup>1</sup> 33 U.S.C. s. 1251, et seq.

<sup>2</sup> 33 U.S.C. s. 1251.

<sup>3</sup> 33 U.S.C. ss. 1251(b), 1313(c)(2)(A).

<sup>4</sup> 33 U.S.C. s. 1313(a).

<sup>5</sup> 33 U.S.C. s. 1313(c)(4)(B).

<sup>6</sup> 33 U.S.C. s. 1313(b)(1)(A).

<sup>7</sup> The CWA defines “pollution” as “the manmade or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.” 33 U.S.C. ss. 1362(19).

<sup>8</sup> 33 U.S.C. s. 1362(14). “The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.” Courts have held that human beings themselves are not point sources under the CWA. *See U.S. v. Plaza Health Labs*, 3 F.3d 643 (2d. Cir. 1993). As shown, the CWA also established exceptions whereby certain agricultural activities are not considered point sources.

<sup>9</sup> 33 U.S.C. s. 1342.

<sup>10</sup> For purposes of the CWA, “The term ‘navigable waters’ means the waters of the United States, including the territorial seas.” 33 U.S.C. s. 1362(7). See also *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2008, 165 L. Ed. 2d 159 (2006); 40 C.F.R. s. 230.3(s).

<sup>11</sup> 33 U.S.C. s. 1342.

<sup>12</sup> “‘(E)ffluent limitation’ means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.” 33 U.S.C. s. 1362(11).

established effluent limits, which are based on applicable technology-based and water quality-based standards. The intent of technology-based effluent limits in NPDES permits is to require a minimum level of treatment of pollutants for point source discharges based on the best available control technologies, while allowing the discharger to use any available control technique to meet the limits.

On the other hand, non-point source pollution encompasses all forms of water pollution not classified as point source, such as stormwater runoff. Regulation of nonpoint source pollution typically relies on controls -- such as best management practices -- that directly impact how the land itself is used. Except in limited situations, nonpoint sources are not regulated by the CWA, but states do require nonpoint sources to reduce their pollution, especially when a waterbody is impaired. For example, Florida requires nonpoint sources to implement best management practices in order for an impaired waterbody to achieve the requisite WQS pursuant to a Basin Management Action Plan.<sup>13</sup>

When the NPDES system is inadequate for a waterbody to maintain its WQS, the waterbody is designated as "impaired."<sup>14</sup> A particular segment of a waterbody may be designated as impaired as well. For a waterbody or segment designated as impaired, the CWA requires that EPA or the state set a total maximum daily load (TMDL), which establishes the maximum amount of a given pollutant the waterbody can accept while still meeting water quality standards associated with its designated use.<sup>15</sup> The purpose of a TMDL "is to provide a basis for allocating acceptable loads among all of the known pollutant sources in a watershed so that appropriate control measures can be implemented and water quality standards achieved."<sup>16</sup> A TMDL thus takes into account both point source and non-point source pollution. Once established, a TMDL can affect the NPDES permit limitations for point sources discharging into the waterbody or segment. Moreover, a TMDL must account for "seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality."<sup>17</sup>

## TMDL RULEMAKING IN FLORIDA

The Florida Watershed Restoration Act<sup>18</sup> created the process for establishing TMDLs in Florida.<sup>19</sup> The Florida Department of Environmental Protection (DEP) periodically must submit to EPA a list of waterbodies or segments for which TMDL assessments will be conducted.<sup>20</sup> Pursuant to a methodology adopted by rule, DEP conducts separate TMDL assessments on each listed waterbody.<sup>21</sup> If the assessments show that a particular waterbody is not meeting its WQS, DEP must then add that waterbody to an updated list of those waterbodies requiring calculation of a TMDL.<sup>22</sup>

Each TMDL is calculated through a process detailed in statute. Before it calculates a TMDL, DEP must confer with all entities that will be affected by the proposed TMDL, including local governments, to determine all information, data collection methodologies, and quality controls necessary for proper calculation.<sup>23</sup> Separate TMDL calculations are developed for each waterbody on the updated list and must set the amount of a pollutant that a waterbody "may receive from all sources without exceeding water quality standards."<sup>24</sup> The TMDL calculation must also establish "reasonable and equitable

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<sup>13</sup> Section 403.067(7), F.S.

<sup>14</sup> 33 U.S.C. s. 1313(d)(1)(A). Rule 62-303.200(7), F.A.R., states: "'Impaired water' shall mean a waterbody or waterbody segment that does not meet its applicable water quality standards as set forth in Chapters 62-302 and 62-4, F.A.C., as determined by the methodology in Part IV of this chapter, due in whole or in part to discharges of pollutants from point or nonpoint sources."

<sup>15</sup> 33 U.S.C. s. 1313(d)(1)(C).

<sup>16</sup> Florida Dept. of Environmental Protection, "Total Maximum Daily Load for Iron for Hatchet Creek, Alachua County, Florida," Pg. 7, under "Final TMDL Documents/Group 1 Basins/Oklawaha River Basin" at [http://www.dep.state.fl.us/water/tmdl/final\\_tmdl.htm](http://www.dep.state.fl.us/water/tmdl/final_tmdl.htm), accessed 3/28/2013.

<sup>17</sup> 33 U.S.C. s. 1313(d)(1)(C).

<sup>18</sup> Ch. 99-223, Laws of Florida.

<sup>19</sup> Section 403.067, F.S.

<sup>20</sup> Section 403.067(2), F.S.

<sup>21</sup> Section 403.067(3), F.S.

<sup>22</sup> Section 403.067(4), F.S.

<sup>23</sup> Section 403.067(6)(a)1., F.S.

<sup>24</sup> Section 403.067(a)2., F.S. No TMDL is required if the waterbody is determined to be impaired solely from factors other than point or nonpoint sources.

allocations of the (TMDL)” among all point and nonpoint sources in order to attain reductions in the pollutant necessary to meet the WQS for that particular pollutant.<sup>25</sup> The resulting TMDL calculations and allocations (together with supporting information) are published as a report accessible on the DEP website,<sup>26</sup> are adopted through the rulemaking process of the APA,<sup>27</sup> and are promulgated under one chapter of DEP’s rules.<sup>28</sup>

### ***Florida Wildlife Federation, Inc. v. Browner***

In 1998 several environmental groups sued to compel EPA to establish TMDLs for Florida’s impaired waterbodies, alleging Florida had made inadequate progress in implementing TMDLs and the EPA was compelled to act.<sup>29</sup> As discussed above, although states have the primary responsibility for implementing the CWA, the Act requires EPA to take action where states do not. The litigation culminated in a consent decree requiring EPA to establish TMDLs for 710 waterbody segments identified as impaired if Florida did not.<sup>30</sup> The consent decree also established a timetable for EPA’s compliance. The EPA was to propose TMDLs proposed according to an annual reporting schedule over the course of a 13 year period. As a result, the EPA separately required Florida to establish TMDLs by September 30<sup>th</sup> of each year for specifically identified waterbodies. If the state failed to do so, the EPA was required to set any remaining TMDLs within a “reasonable time.” 2013 is the last year for which the timing requirements described above remain in effect under the consent decree.<sup>31</sup>

### **Legislative Rule Ratification Requirement**

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency, as well as certain types of forms.<sup>32</sup> Rulemaking authority is delegated by the Legislature<sup>33</sup> through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”<sup>34</sup> a rule. Agencies do not have discretion whether to engage in rulemaking.<sup>35</sup> To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.<sup>36</sup> The grant of rulemaking authority itself need not be detailed.<sup>37</sup> 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.<sup>38</sup>

An agency begins the formal rulemaking process by filing a notice of the proposed rule.<sup>39</sup> The notice is published by the Department of State in the Florida Administrative Register<sup>40</sup> and must provide certain information, including the text of the proposed rule, a summary of the agency’s statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule’s adverse effect on specified aspects of the state’s economy or increase in regulatory costs.<sup>41</sup>

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<sup>25</sup> Section 403.067(6)(b), F.S., which provides a detailed direction of the factors to be considered in this allocation.

<sup>26</sup> <http://www.dep.state.fl.us/water/tmdl/index.htm>, accessed 3/28/2013.

<sup>27</sup> Section 403.067(6)(c), F.S. The APA is codified as Ch. 120, F.S.

<sup>28</sup> Chapter 62-304, F.A.C.

<sup>29</sup> *Florida Wildlife Federation, Inc. v. Browner*, Case No. 98-356 (N.D. Fla.). Similar suits were brought in 38 other states.

<sup>30</sup> Consent Decree, *Florida Wildlife Federation, Inc. v. Browner*, Case No. 98-356 (N.D. Fla. July 1999).

<sup>31</sup> *Id.* at Exhibit A.

<sup>32</sup> Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1<sup>st</sup> DCA 2007).

<sup>33</sup> *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1<sup>st</sup> DCA 2000).

<sup>34</sup> Section 120.52(17), F.S.

<sup>35</sup> Section 120.54(1)(a), F.S.

<sup>36</sup> Sections 120.52(8) & 120.536(1), F.S.

<sup>37</sup> *Save the Manatee Club, Inc.*, supra at 599.

<sup>38</sup> *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

<sup>39</sup> Section 120.54(3)(a)1, F.S..

<sup>40</sup> Section 120.55(1)(b)2, F.S.

<sup>41</sup> Section 120.541(2)(a), F.S.

Section 120.541(1)(b), F.S., requires the preparation of a SERC if a proposed rule will have an adverse impact on small business or if the proposed rule is likely to directly or indirectly increase regulatory costs in excess of \$200,000 within one year of implementation of the rule. Alternatively, preparation of a SERC is triggered when a substantially affected person submits a good faith written proposal for a lower cost regulatory alternative which substantially accomplishes the objectives of the law being implemented.<sup>42</sup>

The analysis for each SERC is designed to gauge a rule's potential economic impact over a 5 year period following its implementation. First, the analysis considers the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.<sup>43</sup> The analysis next determines the likely adverse impact on business competitiveness,<sup>44</sup> productivity, or innovation.<sup>45</sup> Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.<sup>46</sup> If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed \$1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature.<sup>47</sup>

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."<sup>48</sup> A rule must be filed for adoption before it may go into effect<sup>49</sup> and cannot be filed for adoption until completion of the rulemaking process.<sup>50</sup> As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption with the Department of State before being submitted for legislative ratification.

As part of the administrative rulemaking process, DEP's Division of Environmental Assessment and Restoration (DEAR) conducts an assessment of whether a SERC must be prepared in conjunction with the promulgation of an administrative rule, such as establishing a TMDL for an impaired waterbody. If a SERC is required, the Bureau of Watershed Restoration then conducts a multi-step economic analysis of the regulatory costs anticipated to be incurred were the rule to be adopted, as described above.<sup>51</sup> As in all cases where a SERC is required, the economic analysis is designed to determine whether the impact of the rule will result in regulatory costs exceeding one million dollars over the first five years of implementation.<sup>52</sup>

If there are no NPDES municipal separate storm sewer system permit holders and no NPDES industrial or domestic wastewater facilities within the area affected by the rule, there is no expectation that small businesses will be adversely affected or that regulatory costs will be increased by \$200,000 in the first year of TMDL implementation and a SERC is not prepared (absent the submission of a lower cost regulatory alternative by a substantially affected person). However, the SERC development checklist provided by the Governor's Office of Fiscal Accountability and Regulatory Reform (OFARR) still will be completed and must be approved (signed/dated) by the Secretary of DEP, indicating that no SERC was necessary for that rule. If a SERC is prepared, the SERC checklist will acknowledge that a SERC is needed and the Secretary of DEP will approve (sign/date) the checklist to indicate such.

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<sup>42</sup> Sec. 120.541(1)(a), F.S.

<sup>43</sup> Section 120.541(2)(a)1., F.S.

<sup>44</sup> Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

<sup>45</sup> Section 120.541(2)(a) 2., F.S.

<sup>46</sup> Section 120.541(2)(a) 3., F.S.

<sup>47</sup> Section 120.541(3), F.S.

<sup>48</sup> Section 120.54(3)(e)6. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.

<sup>49</sup> Section 120.54(3)(e)6, F.S.

<sup>50</sup> Section 120.54(3)(e), F.S.

<sup>51</sup> If there are no NPDES municipal separate storm sewer system permit holders and no NPDES industrial or domestic wastewater facilities within the area affected by the rule, there is no expectation that small businesses will be adversely affected or that regulatory costs will be increased by \$200,000 in the first year of TMDL implementation and a SERC is not prepared (absent the submission of a lower cost regulatory alternative by a substantially affected person). However, the SERC development checklist provided by the Governor's Office of Fiscal Accountability and Regulatory Reform (OFARR) still will be completed and must be approved (signed/dated) by the Secretary of DEP, indicating that no SERC was necessary for that rule. If a SERC is prepared, the SERC checklist will acknowledge that a SERC is needed and the Secretary of DEP will approve (sign/date) the checklist to indicate such.

<sup>52</sup> Section 120.541(2), F.S.

In the event that the estimated regulatory cost exceeds the one million dollar threshold, s. 120.541(3), F.S., requires that the rule be ratified by the Florida Legislature before taking effect. The rule must be submitted to the President of the Senate and the Speaker of the House of Representatives no less than 30 days prior to the beginning of the next regular legislative session.<sup>53</sup> The proposed rule will not become effective until it is ratified by the legislature.<sup>54</sup>

In summary, before a proposed TMDL goes into effect, DEP follows a detailed process:

- Identify specific Florida waterbodies for water quality assessment in a list provided to EPA;
- Following the methodology adopted by rule, assess the water quality of each separate water body on the list;
- Determine whether the WQS for a specific water body is being attained and, if not, whether a TMDL is necessary to reduce the identified pollutant and restore the water quality of the waterbody;
- Update the list of waterbodies for which TMDLs will be calculated;
- Prior to developing the TMDL calculation for a specific water body, confer with all affected stakeholders to determine the best methodologies for obtaining data and developing the TMDL calculation;
- Develop the calculation and establish the TMDL for the particular pollutant;
- Allocate the TMDLs for a waterbody between and among all point and nonpoint sources, accounting for other factors such as restoration activities, applying detailed criteria specified in statute;
- Preparing and making publicly available a report detailing the research, contributing factors, methodology, calculations, and allocations for each TMDL;
- Adopting each TMDL through the rulemaking process of the APA, which provides for public notice of rule development, the proposed rule, preparation of a SERC, hearing rights, and judicial review;<sup>55</sup>
- Ratification of those TMDLs meeting the economic impacts of one million dollars in the first five years of implementation.

Finally, the resulting TMDLs are subject to review and approval by the EPA under the extensive requirements of the CWA.

### **Effect of Proposed Changes**

The bill amends s. 403.067(6)(c), F.S., to include a provision exempting DEP's promulgation of rules establishing TMDLs from the legislative ratification requirement of s. 120.541(3), F.S. As a result, TMDLs promulgated by DEP in the future would not require legislative ratification before taking effect, even if the associated regulatory costs exceed the one million dollar threshold.

#### **B. SECTION DIRECTORY:**

Section 1: Amending s. 403.067, F.S., providing that administrative rules adopted by the Department of Environmental Protection to establish total maximum daily loads calculations and allocations are not subject to the legislative ratification requirement.

Section 2: Provides an effective date of July 1, 2013.

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

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

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<sup>53</sup> Sec. 120.541(2)(g)(3), Fla. Stat.

<sup>54</sup> *Id.*

<sup>55</sup> Sections 120.54, 120.541, 120.56, 120.569, 120.57, 120.68, F.S.

1. Revenues:

None.

2. Expenditures:

None.

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:

The bill does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.