

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 7115 PCB SAC 13-02 Numeric Nutrient Criteria
SPONSOR(S): State Affairs Committee, Raburn
TIED BILLS: **IDEN./SIM. BILLS:** SB 1808

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: State Affairs Committee	18 Y, 0 N	Blalock	Camechis
1) Rulemaking Oversight & Repeal Subcommittee	11 Y, 0 N, As CS	Rubottom	Rubottom
2) Agriculture & Natural Resources Appropriations Subcommittee			

SUMMARY ANALYSIS

Nutrient pollution (excessive nitrogen and phosphorous) causes harmful algae blooms that produce toxins harmful to humans, deplete oxygen needed for fish and shellfish survival, smother vegetation, and discolor water. The Clean Water Act (CWA) employs a cooperative federalism approach to regulating nutrient pollution. Specifically, the CWA requires states to set water quality standards (WQS) for each waterbody within their jurisdiction. These WQS must include the following three parts:

- Designation of a waterbody's beneficial uses, for example, water supply, recreation, or navigation;
- The numeric or narrative criteria to protect the waterbody from impairment of such uses; and
- The anti-degradation requirements.

Under the CWA, a WQS can include either a narrative or numeric criteria for any pollutant regulated. For any state that refuses to set appropriate WQS, the CWA requires the Environmental Protection Agency (EPA) to set their own federal standards. Thereafter, a state can adopt its own rule, and if approved by EPA, the federal rule is withdrawn.

In August 2009, EPA entered into a consent decree in a federal lawsuit requiring it to adopt federal numeric nutrient criteria for certain Florida waters. Since then, EPA adopted a final numeric nutrient criteria rule for all lakes and springs in the state and flowing waters outside of the southern Florida region, the Florida Department of Environmental Protection (DEP) adopted its own numeric nutrient criteria, and on November 30, 2012, EPA approved DEP's rule. On the same day EPA proposed additional criteria for coastal waters, remaining estuaries, and for certain rivers and streams exempted from Florida's rule. A specific DEP rule provision¹ postpones effectiveness of the state rule until EPA ceases rulemaking.

The bill directs DEP to establish numeric nutrient criteria for waterbodies in the state that were not covered under the rules approved by EPA. The bill also grants DEP authority to implement its own nutrient standards for streams, springs, lakes, and estuaries consistent with a document submitted to EPA in support of the DEP's adopted nutrient standards and filed as a proposed rule under Florida's Administrative Procedure Act². In addition, the bill specifies that once EPA removes federal numeric nutrient criteria and ceases future numeric nutrient criteria rulemaking in Florida, Rule 62-302.531(9), F.A.C.,³ will be removed from the Florida Administrative Code. The bill also exempts from legislative ratification any certain criteria adopted by DEP during 2013. Lastly, the bill directs DEP to establish specific numeric nutrient criteria for unimpaired waters (including DEP's calculation of the current conditions of those waters) and for those estuaries and non-estuarine coastal waters without numeric nutrient criteria established by rule or final order as of the date of the report, and to report to the Legislature and Governor conveying the status of establishing numeric nutrient criteria.

The bill appears to have an insignificant fiscal impact on state government by requiring DEP to submit a report to the Legislature and the Governor conveying the status of establishing numeric nutrient criteria. The bill has an indeterminate fiscal impact on local governments. (See Fiscal Comments.)

¹ Rule 62-302.531(9), F.A.C. See fn. 23 for the effectiveness language in the rule.

² Chapter 120, F.S.

³ See fn. 1.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Nutrient Pollution Generally

Nitrogen and phosphorus (“nutrients”) are natural components of aquatic ecosystems. However, what is considered a healthy and safe level of nutrients varies greatly throughout the state depending on the site-specific characteristics of a given water body. The problems associated with excess nutrients arise when nutrients occur over large areas of a water body for extended periods of time at levels that exceed what is “natural” for the particular system.

Excessive amounts of nitrogen and phosphorus (also known as "nutrient pollution") is a significant contributor to water quality problems. Nutrient pollution originates from stormwater runoff, wastewater treatment, industrial discharges, fertilization of crops, and livestock manure. Nitrogen also forms from the burning of fossil fuels, like gasoline.

Nutrient pollution causes harmful algae blooms that produce toxins harmful to humans, deplete oxygen needed for fish and shellfish survival, smother vegetation, and discolor water.

Federal Law – The Clean Water Act

Under the federal structure established in the U.S. Constitution, states may not be compelled by the Federal Government to enact legislation or take executive action to implement federal regulatory programs.⁴ Thus, where Congress has the authority to regulate private activity under the Commerce Clause, the Federal Government may regulate that activity directly, but it may not require the states to do so. However, Congress can *encourage* a state to regulate in a particular way by offering “incentives” -- often in the form of federal funds. Congress may also create a “potential preemption” structure in which states must regulate the activity under state law according to federally approved standards or have state regulation pre-empted by federal regulation. The federal Clean Water Act (CWA)⁵ utilizes both of these constitutional means.

Water Quality Standards

The CWA was enacted in 1972 in order to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁶ One of the pillars of the CWA is section 303, which requires states 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 defines 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.⁷

Although the CWA gives states the primary authority to set WQS, they are reviewable by the Environmental Protection Agency (EPA).⁸ If at any time EPA determines that a revised or new standard

⁴ *Printz v. United States*, 521 U.S. 898, 925 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).

⁵ Codified at 33 U.S.C. Sec. 1251 et. seq.

⁶ CWA s. 101(a).

⁷ CWA s. 303(c)(2)(A).

⁸ CWA s. 303(a).

is necessary to meet the requirements of the CWA, the EPA Administrator is authorized to adopt revised WQS.⁹ Moreover, the CWA requires EPA to set WQS for any waterbody where a state fails to do so.¹⁰ The CWA also provides that water quality criteria can be established as either narrative or numeric criteria for any pollutant regulated under the act. Currently, Florida employs narrative criteria for nutrient pollution.

Point Source Pollution

The CWA is focused primarily on point sources of water pollution. Point source pollution can be defined generally as any human-controlled “discernible, confined, and discrete” conveyance into jurisdictional waters.¹¹ The CWA directly regulates point source pollution via the National Pollution Discharge Elimination System (NPDES) permitting process.¹² The NPDES process prohibits the discharge of pollutants from a point source into navigable waters except as provided for in an NPDES permit.¹³ 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 effluent¹⁴ limitations. NPDES permits require a point source to meet 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.

However, for some waterbodies, the technology-based effluent limits may not be sufficient to ensure that established water quality standards will be attained in the receiving water. These waterbodies are designated as “impaired.” For a waterbody or segment designated as impaired, the CWA requires that EPA or the state set a total maximum daily load (TMDL),¹⁵ which establishes the maximum amount of a given pollutant the waterbody can accept while still meeting water quality standards associated with its designated use.¹⁶ 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.”¹⁷ A TMDL thus takes into account both point source and nonpoint source pollution. Once a TMDL is established, it can affect the NPDES permit limitations for point sources discharging into the waterbody or segment. In such cases, the CWA requires that more stringent, water quality-based effluent limits be established in an NPDES permit to ensure that water quality standards are met.

Nonpoint 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 limitation 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.

⁹ CWA s. 1313(c)(4)(B).

¹⁰ CWA s. 303(c).

¹¹ CWA s. 502(14). 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). The CWA also established exceptions whereby certain agricultural activities are not considered point source.

¹² CWA s. 402.

¹³ *Id.*

¹⁴ For purposes of this analysis, effluent may be defined as: “Wastewater, treated or untreated, that flows out of a treatment plant, sewer, or industrial point source, such as a pipe. Generally refers to wastes discharged into surface waters.” Glossary of terms from Watershed Analysis and Management Guide for States and Communities (EPA 841-B-03-007)(2003).

¹⁵ CWA s. 402. Section 403.067, F.S., authorizes DEP to establish TMDLs in Florida.

¹⁶ *Id.*

¹⁷ Florida Dept. of Environmental Protection, *Total Maximum Daily Load for Iron for Hatchet Creek, Alachua County, Florida*, Pg. 7.

Status of Nutrient Regulation in Florida

United States Environmental Protection Agency Numeric Nutrient Criteria Rulemaking

In July 2008, the Florida Wildlife Federation and other environmental groups sued EPA in an attempt to compel EPA to adopt numeric nutrient criteria for Florida's waterbodies. In January 2009, EPA determined that numeric nutrient water quality criteria for Florida's waterbodies are necessary to meet the requirements of the CWA. EPA determined that Florida's narrative nutrient criteria alone was insufficient to ensure protection of applicable designated uses, but also recognized the ongoing efforts by DEP in developing a numeric nutrient criteria for Florida's waterbodies. EPA noted that, "in the event that Florida adopts and EPA approves new or revised water quality standards that sufficiently address this determination before EPA promulgates federal water quality standards, EPA would no longer be obligated to promulgate federal water quality standards."

In August 2009, EPA settled the lawsuit and entered into a consent decree that required EPA to adopt numeric nutrient criteria for Florida's lakes, flowing waters, estuaries, and coastal waters. DEP suspended its rulemaking proceedings while EPA developed its rules to impose numeric nutrient criteria in Florida. In December 2010, EPA adopted final numeric nutrient criteria rules for all lakes and springs in the state and flowing waters outside of the southern Florida region in accordance with the consent decree and subsequent revisions.

Also in December 2010, the State of Florida filed a lawsuit in federal district court against EPA over the agency's intrusion into Florida's previously approved clean water program.¹⁸ The lawsuit alleged that EPA's action was inconsistent with the intent of Congress when it based the CWA on the idea of cooperative federalism whereby the states would be responsible for the control of water quality with oversight by EPA. Control of nutrient loading from predominantly nonpoint sources involves traditional states' rights and responsibilities for water and land resource management which Congress expressly intended to preserve in the Clean Water Act. The lawsuit specifically alleged that the EPA rules and EPA's January 2009 necessity determination for promulgating numeric nutrient criteria for Florida's waters are arbitrary, capricious, and an abuse of discretion, and requested the court to enjoin EPA Administrator from implementing its numeric nutrient criteria rules in Florida.

On February 18, 2012, the United States District Court for the Northern District of Florida found against the state, holding that EPA's determination that Florida's narrative nutrient criteria are inadequate and that numeric criteria are necessary was not arbitrary and capricious.¹⁹ The court also held, however, that EPA's rule setting numeric nutrient criteria for Florida was not arbitrary and capricious save for two exceptions: EPA's stream criteria were found to be arbitrary and capricious (at least without further explanation, according to the court), as were the default downstream protection values for unimpaired lakes. In accordance with the court's ruling, the 2009 consent decree was to remain in effect, with the modification that EPA was required to remedy the numeric nutrient criteria for streams and downstream protection values by May 21, 2012.

DEP Numeric Nutrient Criteria Rulemaking

In response to EPA promulgating rules to establish federal numeric nutrient criteria for Florida's waterways, DEP began rulemaking and adopted state numeric nutrient criteria for streams, rivers, lakes, and south Florida estuaries, which it then submitted to EPA for approval pursuant to the CWA.

In December of 2011, several environmental groups filed a petition with the Division of Administrative Hearings challenging DEP's rules. An Administrative Law Judge upheld the rules in June of 2012, finding that DEP acted within its authority in promulgating numeric nutrient criteria for the state. The decision was affirmed by the First District Court of Appeal in February of 2013.²⁰

¹⁸ *State of Florida v. Jackson*, Case 3:10-cv-00503-RV-MD (N.D. Fla. 2010).

¹⁹ *State of Florida v. Jackson*, 853 F.Supp.2d 1138 (N.D. Fla. 2012).

²⁰ *Florida Wildlife Federation, et. al. v. Department of Environmental Protection*, Case No. ID12-320 (Feb. 2013).

The DOAH proceeding was ongoing during the 60-day 2012 legislative session, preventing ratification of the 2011 NNC rule during that session. Consequently, DEP sought and the Legislature enacted a bill exempting the NNC rule from ratification.²¹ That legislation also required that any amendment to rule 62-302.531(9)²² (added to the NNC rule by the Environmental Resources Commission), will not be effective unless the amendment is ratified by the Legislature.²³

On November 30, 2012, EPA approved DEP's numeric nutrient criteria applicable to all of Florida's rivers, streams, and lakes and to estuaries from Tampa Bay to Biscayne Bay, including the Florida Keys.²⁴ Simultaneously, EPA proposed draft federal numeric nutrient criteria for waters not yet covered by state rules which included:

- Remaining estuaries;
- Open ocean waters;
- The location where South Florida canals enter estuaries; and
- Scientifically challenging areas like tidal creeks, headwaters that are dry for portions of the year (excluding drought conditions), and managed water conveyances.

As part of the November 30 action, EPA also amended its previous January 2009 determination and concluded that DEP's rules provided sufficient quantitative procedures upstream to ensure the protection of water quality standards in downstream waters as required by the Clean Water Act. As a result, the DEP rule has not been implemented because a specific provision in DEP's rule (Rule 62-302.531(9), F.A.C.) expressly states that "these rules shall be effective only if EPA approves these rules in their entirety, concludes rulemaking that removes federal numeric nutrient criteria in response to the approval, and determines that these rules sufficiently address EPA's January 14, 2009 determination."²⁵

EPA wishes to assemble a package that can be presented to the federal court in a motion for dismissal from the 2009 consent decree that requires EPA to set additional numeric nutrient criteria in September 2013. In effect, this will begin the process of turning over the task of promulgating numeric nutrient criteria entirely to DEP. EPA desires the package to be completed by August 1, 2013, in order to provide sufficient time to prepare a motion to the court prior to a September deadline.

To accomplish EPA's goals, DEP and EPA officials have entered into an informal agreement²⁶ for DEP to complete adoption of numeric nutrient criteria to EPA's satisfaction in time to enable EPA to resolve its 2009 determination, satisfy the consent decree, obtain dismissal of the federal litigation and withdraw from rulemaking on water quality in Florida. The arrangement is further described in a document entitled "Florida Numeric Nutrient Criteria – a Path Forward"²⁷ (Path Forward), which specifies the DEP's intentions respecting NNC for Marine Waters, including submission of marine NNC to EPA by August 1, 2013, and the implementation of NNC for Fresh Waters including DEP's intent to presumptively apply Florida's stream NNC to ditches, canals and other man-made conveyances

²¹ Chapter 2012-3, L.O.F.

²² Rule 62-302.531(9), F.A.C., provides in part: "these rules shall be effective only if EPA approves these rules in their entirety, concludes rulemaking that removes federal numeric nutrient criteria in response to the approval, and determines that these rules sufficiently address EPA's January 14, 2009 determination."

²³ Section 403.805(3), F.S.

²⁴ EPA Factsheet, *Multiple EPA Actions Related to Nutrient Pollution in Florida Waterways* (Nov. 2012), available at http://water.epa.gov/lawsregs/rulesregs/florida_index.cfm.

²⁵ Section 403.805(3), F.S.

²⁶ A document entitled, "Agreement in Principle", dated March 15, 2013, available at: http://www.dep.state.fl.us/secretary/news/2013/03/NNC_Agreement_in_Principle_Final.pdf (attached hereto), represents the framework of this arrangement. It does not appear to constitute a binding contract but does state its objective to be "...Florida having numeric nutrient criteria for lakes, springs, estuaries and coastal waters, and the vast majority of flowing waters in the State."

²⁷ Florida Numeric Nutrient Criteria – Path Forward, found at

http://www.dep.state.fl.us/secretary/news/2013/03/Florida_Numeric_Nutrient_Criteria_EPA_FDEP_PathForward_31413.pdf (attached hereto).

presently excluded from the definition of "stream".²⁸ To bind itself to its commitments to EPA, the DEP has undertaken the responsibility to secure passage of the legislation encompassed in HB 7115.

The Path Forward document makes the following representation:

Based on this extensive coverage of Florida waters by State numeric nutrient criteria (fresh and marine), EPA is prepared to take actions that would make it unnecessary for EPA to finalize federal criteria for these waters. Upon FDEP's incorporating by reference into rule the Implementation Document as modified on March 11, 2013, and EPA's review of that document under Clean Water Act section 303(c), EPA is prepared to amend the 2009 Determination to clarify that numeric nutrient criteria are unnecessary for flowing waters not covered by the stream definition. EPA would then not finalize its rulemaking for inland waters. Upon enactment of [legislation proposed as HB 7115] and FDEP's submittal to EPA of the numeric values that FDEP is directed to develop in the legislation and those numeric nutrient criteria FDEP adopts by rule, EPA, following review under Clean Water Act section 303(c), is prepared to cease corresponding federal rulemaking for estuaries and coastal waters.

Legislative Rule Ratification Requirement

As part of the administrative rulemaking process, s. 120.541, F.S., requires that the Division of Environmental Assessment and Restoration (DEAR) conduct an assessment of 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 numeric nutrient criteria for Florida waterbodies.²⁹ If a SERC is required, staff within the Bureau of Watershed Restoration then conducts a multi-step economic analysis of the regulatory costs that are anticipated to be incurred were the rule to be adopted.

Section 120.541(1)(b), F.S., requires the preparation of a SERC if the 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.³⁰ 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.³¹ The proposed rule will not become effective until it is ratified by the legislature.³²

Effect of Proposed Changes

HB 7115 amends s. 403.061, F.S., to direct DEP to establish numeric nutrient criteria for remaining waterbodies in the State that were not covered under the rules approved by EPA on November 30, 2012. Specifically, the bill directs DEP to implement permitting and other pollution control measures consistent with the attainment of:

- Narrative criteria for nutrients and in-stream numeric interpretation of the narrative water criteria for nutrients in streams, canals, and other conveyances; and
- Nutrient water quality standards applicable to downstream waters.

The bill also declares that the loading of nutrients to downstream waters from a stream, canal, or other conveyance must be limited to provide for the attainment and maintenance of nutrient water quality standards in downstream waters. In the event that the downstream water does not have a TMDL

²⁸ Rule 62-302.200(36), F.A.C. The ""Path Forward"" document incorrectly cites this definition as rule 62-302.300(36).

²⁹ Section 120.541, F.S.

³⁰ Section 120.541(1)(a), F.S.

³¹ Section 120.541(2)(g)(3), F.S.

³² *Id.*

adopted under s. 403.067, F.S., and has not been verified as impaired by nutrient loadings,³³ DEP must implement its authority in a manner that prevents impairment of the downstream water due to loadings from the upstream water. Where the downstream water does not have a TMDL, but has been verified as impaired by nutrient loadings, DEP must adopt a TMDL for that waterbody under s. 403.067, F.S. If the downstream water does have a TMDL that interprets narrative water quality criteria for nutrients, then allocations must be set for upstream waterbodies.

In addition, the bill states that compliance with an allocation calculated under s. 403.067(6), F.S., (providing for the calculation and allocation of TMDLs) or if applicable, the basin management action plan established under s. 403.067(7), F.S., for the downstream water constitutes reasonable assurance that a discharge does not cause or contribute to the violation of downstream nutrient WQS.

The bill also grants DEP the authority to implement its own nutrient standards for streams, springs, lakes, and estuaries consistent with the document entitled "Implementation of Florida's Numeric Nutrient Standards," which was submitted to EPA in support of the DEP's adopted nutrient standards. The document was also filed as a proposed rule on March 19, 2013.³⁴ EPA relied upon this document when it issued its approval of Florida's numeric nutrient criteria on November 30, 2012. The bill states that the document, which explicitly states how DEP will apply nutrient standards to water management conveyances, is subject to the provisions of R. 62-302.531(9), F.A.C., (providing that the numeric nutrient rules shall be effective only if EPA approves these rules in their entirety, concludes rulemaking that removes federal numeric nutrient criteria in response to the approval, and determines, in accordance with 33 U.S.C. § 1313(c)(3), that these rules sufficiently address EPA's January 14, 2009, determination) and is also exempt from the legislative ratification requirement of s. 120.541(3), F.S. However, the express authority to implement the document appears to narrow the effect of R. 62-302.531(9) which currently postpones effectiveness of the NNC rule being implemented by the document.

Furthermore, the bill provides that once EPA approves DEP's remaining numeric nutrient criteria, subsequently withdraws all of its own numeric nutrient criteria rules from the state, and otherwise ceases all federal nutrient rulemaking in Florida, Rule 62-302.531(9), F.A.C, must be removed from the Florida Administrative Code, thus allowing DEP to fully implement state numeric nutrient criteria. This constitutes an implied limitation or nullification of the 2012 legislation endorsing and protecting the rule by requiring ratification of any changes to the cited rule.³⁵ In effect, this bill intends the repeal the rule as a matter of law, upon the conditions subsequent provided in this bill, which differ from those in the rule. Thereafter, should DEP choose to promulgate a new numeric nutrient WQS – such as for lakes, streams, estuaries, etc. – it must be submitted to EPA in accordance with the CWA.³⁶ As a result of the revised conditions on effectiveness, if EPA invalidates the newly proposed standard, the remainder of DEP's numeric nutrient standards already established for other waterbodies will remain in effect.

The bill additionally provides that any nutrient criteria rules for estuaries adopted by DEP in 2013 are subject to the EPA approval requirements found in Rule 62-302.531(9), F.A.C., which also delays effectiveness until EPA so approves and ceases rulemaking. NNC rules adopted under the bill in 2013 are also exempted from the legislative ratification requirement of s. 120.541(3), F.S.

The bill also directs DEP to adopt numeric nutrient criteria for total nitrogen, total phosphorous, and chlorophyll *a* for any remaining estuaries not already subject to DEP numeric nutrient criteria. DEP is also directed to establish chlorophyll *a* interpretations of the narrative nutrient criteria for non-estuarine, coastal waters by December 1, 2014. In the meantime, the bill establishes that the criteria for those waterbodies are the current unimpaired condition of those waters.³⁷

³³ Rule Ch. 62-303, F.A.C., governs identification of impaired surface waters. Rule 62-303.200(7), F.A.C., defines impairment.

³⁴ Volume 39, No. 54, F.A.R. (The issue may be found at: https://www.flrules.org/BigDoc/View_Faw.asp?IID=1317.)

³⁵ Section 403.805(3), F.S..

³⁶ CWA Sec. 303(2)(A).

³⁷ Respecting the calculation of the "current conditions", the "Path Forward" document provides:

The interim numeric values, reflecting the current unimpaired conditions, will be values that EPA and FDEP mutually determine are based on the best monitoring and modeling data available at the time and protective of the designated uses.

Finally, the bill directs DEP to send a report to the Governor and Legislature by August 1, 2013, conveying the status of the legislatively established numeric nutrient criteria for unimpaired waters (including DEP's calculation of the current conditions of those waters) and for those estuaries and non-estuarine coastal waters without numeric nutrient criteria established by rule or final order³⁸ as of the date of the report.

B. SECTION DIRECTORY:

Section 1. Amends s. 403.061, F.S., related DEP's duty to control and prohibit nutrient pollution.

Section 2. Authorizes DEP to implement its adopted nutrient standards for streams, springs, lakes, and estuaries consistent with the document entitled "Implementation of Florida's Numeric Nutrient Standards."

Section 3. Provides that DEP rule, R. 62-302.531(9), F.A.C., will stand repealed when EPA withdraws all federal numeric nutrient criteria rules in the State of Florida.

Section 4. Provides that any nutrient criteria rules for estuaries adopted by DEP in 2013 are subject to the EPA approval requirements found in R. 62-302.531(9), F.A.C., and also exempt from the legislative ratification requirement.

Section 5. Directs DEP to adopt numeric nutrient criteria for remaining estuaries and coastal waters by December 1, 2014, and directs DEP to submit a report.

Section 6. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill requires DEP to submit a report to the Governor and Legislature containing the current calculations of unimpaired conditions for nutrients for certain estuaries and coastal waters. According to DEP, the department will also incur certain costs associated with rulemaking to implement the provisions in the bill. However, DEP has also stated that they will be able to absorb these costs within existing resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

Any disagreement over the interim numeric interpretation for any estuary or coastal segment will be immediately elevated to the Secretary of FDEP and the Regional Administrator of the EPA Region 4 Office for resolution.

³⁸ DEP represents that the following rules in the F.A.C. authorize some such criteria to be established directly or indirectly by final order: 62-302.531(2), 62-302.532(3), 62-302.800(3), 62-303.600, and 62-650.500(4) and (9).

D. FISCAL COMMENTS:

DEP provided the following fiscal comments:

While there are costs associated with implementing Florida's comprehensive NNC—the need to restore polluted waters inevitably comes at a cost—the Legislature acknowledged in chapter 2012-3, Laws of Florida (House Bill 7051 from the 2012 legislative session) that the costs to implement DEP's adopted and proposed NNC are significantly less than the costs to implement NNC rules adopted by the EPA. This is largely because DEP's NNC account for unique site-specific conditions and the critical underlying biology of these disparate ecosystems. And implementing comprehensive NNC will serve to protect currently unimpaired waters from becoming polluted, saving local governments millions if not billions of dollars in restoration costs in the future.

Furthermore, the NNC for remaining estuaries and coastal waters that are the immediate subject of this legislation are set in the interim at the current conditions of unimpaired waters. Those unimpaired conditions suggest, on the whole, that significant pollution reduction investments will not be necessary for these remaining waters. Conditions are generally similar to those present in the Panhandle estuaries, for which the ERC approved NNC in November 2012 and for which it was determined that implementation costs overall would be less than any of the thresholds established by the Legislature for a Statement of Estimated Regulatory Costs pursuant to chapter 120, F.S.

It is essential to recognize that if DEP does not set comprehensive NNC for Florida, EPA will do so. If that occurs, the significant additional costs the Legislature acknowledged in chapter 2012-3, Laws of Florida, will come to pass.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill exempts certain DEP rules from the legislative ratification requirement in chapter 120, F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

With respect to particular pollutants identified therein, Section 5 establishes, as a matter of law, "the current conditions of those unimpaired waters, accounting for climactic and hydrologic cycles" to constitute the water quality standard pursuant to s. 403.061(11), F.S., until changed through rulemaking. The DEP is impliedly directed to calculate "the numeric values that represent the current conditions..." and to report status, including such calculation, to the Governor, Speaker and Senate President. It might be more practical to make a more reliable record of the DEP calculation, such as by publication online or publishing notice thereof in the Florida Administrative Register.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 1, 2013, the Rulemaking Oversight & Repeal Subcommittee adopted one technical amendment to Section 3. The amendment improved the language intended to effect the repeal of R. 62-302.531(9), F.A.C. when the EPA ceases rulemaking. This analysis explains the bill as amended thereby.