

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Environmental Preservation and Conservation

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BILL: SPB 7126

INTRODUCER: Environmental Preservation and Conservation Committee

SUBJECT: Rules Establishing Minimum Water Flows and Levels for Water Bodies

DATE: April 11, 2014                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hinton	Uchino		<b>EP Submitted as Committee Bill</b>
2.				
3.				
4.				
5.				
6.				

**I. Summary:**

SPB 7126 exempts Department of Environmental Protection (DEP) rules establishing minimum flows and levels (MFLs) for the Lower Santa Fe and Ichetucknee Rivers, and associated priority springs, from legislative ratification. It requires the DEP to publish a notice of enactment in the Florida Administrative Register.

**II. Present Situation:**

*Minimum Flows and Levels*

MFLs are established for water bodies in order to prevent significant harm as a result of permitted water withdrawals. MFLs are typically determined based on evaluations of topography, soils, and vegetation data collected within plant communities, and other pertinent information associated with the water resource. MFLs take into account the ability of wetlands and aquatic communities to adjust to changes in hydrologic conditions and allow for an acceptable level of hydrologic change to occur. When use of water resources shifts the hydrologic conditions below levels defined by MFLs, significant ecological harm can occur.<sup>1</sup>

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<sup>1</sup> St. Johns River Water Management District, *Water Supply: An Overview of Minimum Flows and Levels*, <http://www.sjrwmd.com/minimumflowsandlevels/> (last visited Apr. 10, 2014).

The consumptive use of water can draw down water levels and reduce pressure in the aquifer.<sup>2</sup> By establishing MFLs for non-consumptive uses,<sup>3</sup> the water management districts (WMDs) can determine how much water is available for consumptive uses.

Section 373.042, F.S., requires the DEP or WMDs to establish MFLs for priority water bodies to prevent significant harm from water withdrawals. MFLs are considered rules and are subject to ch. 120, F.S., challenges. MFLs are established by the DEP, in coordination with the applicable WMD, using the best available data and are subject to independent scientific peer review at the request of the WMD, or, if requested, by a third party.<sup>4</sup>

MFLs apply to decisions affecting permit applications, declarations of water shortages, and assessments of water supply sources. Computer water budget models for surface waters and groundwater are used to evaluate the effects of existing and/or proposed consumptive uses and the likelihood they might cause significant harm. The WMD governing boards are required to develop recovery or prevention strategies in those cases where a water body or watercourse is violating an MFL, or is anticipated to not meet an MFL within 20 years. Water uses cannot be permitted that cause an MFL to be violated.<sup>5</sup>

### ***Recovery or Prevention Strategy***

Recovery or prevention strategies are established to recover a water body so that it meets its MFL, or to prevent the existing flow or level from falling below its MFL within 20 years.<sup>6</sup> The recovery or prevention strategies include phasing or a timetable that allows for the development of sufficient water supplies for all existing and projected reasonable-beneficial uses. The strategy also includes development of additional water supplies and implementation of conservation strategies, the use of impact offsets, and other efficiency measures to accommodate withdrawals.<sup>7</sup>

### ***Consumptive Use Permits***

Consumptive use permits (CUPs) establish the duration and type of consumptive water use as well as the maximum amount of water that may be withdrawn daily.<sup>8</sup> Each CUP must be consistent with the objectives of the issuing WMD, or the DEP, and may not be harmful to the water resources of the area.<sup>9</sup> To obtain a CUP, an applicant must establish that the proposed use of water satisfies a statutory test, commonly referred to as “the three-prong test.” Specifically, the proposed water use must:

- Be a “reasonable-beneficial use;”<sup>10</sup>

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<sup>2</sup> Department of Community Affairs, *Protecting Florida’s Springs: An Implementation Guidebook*, 3-5 (Feb. 2008), available at <http://www.dep.state.fl.us/springs/reports/files/springsimplementguide.pdf> (last visited Apr. 10, 2014).

<sup>3</sup> Examples of consumptive uses include agricultural irrigation, public water supply, golf course irrigation, mining, and power generation. Non-consumptive uses of water include recreational, aesthetic, and navigational uses of water resources.

<sup>4</sup> Section 373.042, F.S.

<sup>5</sup> *Supra* note 1.

<sup>6</sup> Section 373.0421, F.S. See also Rule 62-40.473, F.A.C.

<sup>7</sup> Rule 62-40.473(6), F.A.C.

<sup>8</sup> See Rule 40C-2, F.A.C.

<sup>9</sup> Section 373.219, F.S.

<sup>10</sup> Section 373.019(16), F.S. Reasonable-beneficial use is defined as, “the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public

- Not interfere with any presently existing legal use of water; and
- Be consistent with the public interest.<sup>11</sup>

### ***Regional Water Supply Planning***

WMDs are required to conduct water supply needs assessments. If the assessment determines that existing resources will not be sufficient to meet reasonable-beneficial uses for the planning period for a particular water supply planning region, it must prepare a regional water supply plan.<sup>12</sup> Regional water supply plans must be based on at least a 20-year planning period and must include:

- A water supply development component;
- A water resource development component;
- A recovery and prevention strategy;
- A funding strategy;
- Consideration of how water supply development projects serve the public interest or save costs;
- Technical data and information;
- Any MFLs established for the planning region;
- The water resources for which future MFLs must be developed; and
- An analysis of where variances may be used to create water supply development or water resource development projects.<sup>13</sup>

### ***Mobile Irrigation Labs***

Mobile Irrigation Labs (MILs) consist of one or two person teams that provide site-specific evaluation and analysis of irrigation systems. They also provide recommendations on the improvement of existing irrigation systems and equipment, and education on water conservation, irrigation planning, and irrigation management. MILs operate within all five WMDs and are supported by three of the WMDs, the Department of Agriculture and Consumer Services, the Natural Resources Conservation Service, certain counties, and certain utilities in the state.<sup>14</sup>

After evaluating a particular agricultural operation, the MIL provides a report to operation that recommends improvements and irrigation schedules. The schedules offer general guidelines to determine when and how much to irrigate based on system efficiency, crop requirements, and soil characteristics. The program provides for follow-up visits to collect more data and install free soil moisture-sensing devices to help growers adapt the schedule to the site. The program also provides training for farmers to calibrate and maintain the equipment.<sup>15</sup>

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interest.” See also Rule 62-40.410(2), F.A.C., for a list of 18 factors to help determine whether a water use is a reasonable-beneficial use.

<sup>11</sup> Section 373.223(1), F.S.

<sup>12</sup> Section 373.709(1), F.S.

<sup>13</sup> Section 373.709(2), F.S.

<sup>14</sup> Department of Agriculture and Consumer Services, *Evaluate Your Irrigation System*, <http://www.freshfromflorida.com/Divisions-Offices/Agricultural-Water-Policy/Evaluate-Your-Irrigation-System> (last visited Apr. 10, 2014).

<sup>15</sup> DEP, *Statement of Estimated Regulatory Costs*, 24 (Apr. 8, 2015), available at [http://www.dep.state.fl.us/water/waterpolicy/docs/mflrulemaking/serc\\_04\\_08\\_2014.pdf](http://www.dep.state.fl.us/water/waterpolicy/docs/mflrulemaking/serc_04_08_2014.pdf) (last visited Apr. 10, 2014).

### ***The North Florida Southeast Georgia Regional Groundwater Flow Model***

The North Florida Southeast Georgia (NFSEG) Regional Groundwater Flow Model is currently in development. The general goal of the model is to construct a groundwater flow model that will aid in the assessment of climatic and anthropogenic effects on the groundwater resources of north Florida and southeast Georgia.<sup>16</sup> It will also provide a regional framework for the development and application of models for use in assessments of “critical areas of concern.”<sup>17</sup> A “critical area of concern” is an area where there is a particular concern regarding drawdown impacts due to regional and/or local pumping effects. Areas that have been identified as critical areas of concern in the NFSEG Regional Groundwater Flow Model include:

- The Upper Santa Fe Basin;
- The Lower Santa Fe Basin;
- The Upper Suwannee River Basin;
- The Alapaha River Basin; and
- The Upper Etonia Creek Basin.<sup>18</sup>

The flow model must be designed and applied such that it will aid in pinpointing the exact sources of impacts on the basin and determine the relative contributions of the various parties involved. One of the ongoing problems the model will be designed to address more accurately is separating climatic impacts from anthropogenic impacts.<sup>19</sup>

### ***Legislative Ratification of Agency Rules***

Pursuant to s. 120.541, F.S., a rule that meets at least one of three thresholds must be ratified by the Legislature. Those are:

- If the rule is likely to have an adverse impact on economic growth, private sector job creation or employment, or private sector investment in excess of \$1 million in the aggregate within five years after the implementation of the rule;
- If the rule is likely to have an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of \$1 million in the aggregate within five years after the implementation of the rule; or
- If the rule is likely to increase regulatory costs, including any transactional costs, in excess of \$1 million in the aggregate within five years after the implementation of the rule.<sup>20</sup>

If a rule requires ratification by the Legislature, the rule must be submitted to the President of the Senate and Speaker of the House of Representatives no later than 30 days prior to the regular legislative session. The rule may not go into effect until it is ratified by the Legislature.<sup>21</sup>

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<sup>16</sup> North Florida Regional Water Supply Partnership, *North Florida Southeast Georgia (NFSEG) Regional Groundwater Flow Model: Goals and Objectives Technical Memo*, available at [http://northfloridawater.com/pdfs/NFSEG/NFSEG\\_goals\\_objectives\\_final.pdf](http://northfloridawater.com/pdfs/NFSEG/NFSEG_goals_objectives_final.pdf) (last visited Apr. 10, 2014).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Section 120.541(2)(a)1.-3., F.S.

<sup>21</sup> Section 120.541(3), F.S.

### ***Statement of Estimated Regulatory Costs***

According to the DEP's statement of estimated regulatory costs for the proposed MFL rule for the Suwannee River and St. Johns River WMDs, applicants for new CUPs or CUP renewals may be affected by the rule, if the CUP has the potential to impact the MFL.<sup>22</sup> During the next five years, the DEP anticipates approximately 28 agricultural water use permit holders will be required to provide offsets under the proposed rule, requiring a total offset of 2.6 million gallons per day (mgd). The DEP also anticipates that, of new permit requests over the next five years, approximately 40 agricultural users impacted by the rule will have to provide total offsets of 11.2 mgd. The anticipated offset required to accommodate both groups will be 13.8 mgd.<sup>23</sup>

If the entire amount of water is offset by implementing additional agricultural water conservation measures via retrofitting center pivot irrigation systems to make them more efficient, the total cost will approach \$3 million over five years.<sup>24</sup> Because the Suwannee River WMD cost-share program typically covers 80 percent of retrofit costs, the actual regulatory burden will likely be significantly less.<sup>25</sup> Other possible methods, such as changing withdrawal locations, farming practices, or crop rotation, are difficult to project expected costs for. The development of alternative water supplies for agricultural use as an option to provide offsets will likely be significantly limited by cost and feasibility.<sup>26</sup>

### ***Proposed Rule 62-42.300 F.A.C.***

Proposed Rule 62-42.300, Florida Administrative Code (F.A.C.), establishes MFLs for the Lower Santa Fe and Ichetucknee Rivers and associated priority springs.<sup>27</sup> The proposed rule limits the duration of renewed CUPs for existing users that do not request additional allocations to five years if the requested allocation has the potential to affect MFLs in the Ichetucknee or Lower Santa Fe Rivers. CUPs may be issued for longer than five years if the permittee demonstrates that the proposed allocations' impacts on the MFLs will be eliminated or offset.

For a CUP holder that applies for additional allocations in its renewal application that may impact the MFLs in the Ichetucknee or Lower Santa Fe Rivers, the applicant must provide reasonable assurance of elimination or offset of that portion of the requested allocation that exceeds the existing allocation and that results in potential impacts to those water bodies. Such CUPs will be issued for five years unless the potential impacts to the MFLs will be eliminated or offset.

For new CUP applications that impact the MFLs, the entity requesting the permit must provide reasonable assurance that any potential impacts will be eliminated or offset. For existing authorized uses, permits will not be subject to modification unless provided for in future rule revisions.

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<sup>22</sup> *Supra* note 15, at 1-2.

<sup>23</sup> *Supra* note 15, at 15.

<sup>24</sup> *Supra* note 15, at 17.

<sup>25</sup> *Supra* note 15, at 16.

<sup>26</sup> *Supra* note 15, at 23.

<sup>27</sup> Lower Santa Fe priority springs are: Santa Fe Rise, ALA112971, Hornsby, Columbia, Poe, COL 101974, Rum Island, July, Devil's Ear, and GIL.1012973. Ichetucknee River priority springs are: Ichetucknee Head, Blue Hole, Mission, Devil's Eye, Grassy Hole, and Mill Pond.

The rule provides for two special conditions on certain CUPs. For a CUP that is issued for more than five years, it must contain a provision stating that the CUP is subject to modification during the term of the permit, upon reasonable notice by the WMD, to achieve compliance with any approved MFL recovery or prevention strategy. The second provision provides that for new or renewed agricultural CUPs in Columbia, Suwannee, Union, and Gilchrist Counties, and portions of Baker, Bradford, and Alachua Counties, within the boundaries of the SRWMD, the permittee must participate in an MIL program and allow access to the project site for the purpose of conducting an MIL evaluation at least once every five years.

By the publication date of the final peer review report on the NFSEG Regional Groundwater Flow Model, or by December 31, 2019, whichever is earlier, the DEP must:

- Publish a Notice of Proposed Rule to strike Rule 62-42.300(a)-(d), F.A.C., which establishes the MFLs for the Lower Santa Fe and Ichetucknee Rivers and associated priority springs;
- Re-propose MFLs for the Lower Santa Fe and Ichetucknee Rivers and associated priority springs along with any associated recovery or prevention strategies; and
- Adopt the proposed rule in accordance with the timeframes provided in section 120.54(3), F.S.

According to the DEP, the Lower Santa Fe and Ichetucknee Rivers and associated priority springs need increased flows to meet their MFLs.<sup>28</sup> While these rules would normally be ratified by the Legislature, a request for a rule adoption hearing has been received and it may not be possible to obtain legislative ratification during the 2014 Regular Legislative Session. The DEP finds that it is critical that the MFL rules take effect as soon as possible because a delay in ratification could further exacerbate the condition of the Santa Fe and Ichetucknee Rivers and associated priority springs.<sup>29</sup>

### **III. Effect of Proposed Changes:**

The bill exempts Rule 62-42.300, F.A.C., from legislative ratification. The rule establishes MFLs for the Lower Santa Fe and Ichetucknee Rivers and associated priority springs.

The bill specifies that it:

- Serves no other purpose than exempting Rule 62-42.300, F.A.C., from ratification and may not be codified in the Florida Statutes;
- Requires the DEP to publish a notice of the enactment of the exemption in the Florida Administrative Register as soon as the rule is filed for adoption, or as soon thereafter as practicable;
- Does not alter rulemaking authority or constitute a legislative preemption of, or exception to, any other provision of law regarding adoption or enforcement of the rule; and
- Does not cure any rulemaking defect or preempt any challenge based on a lack of authority or a violation of the legal requirements governing the adoption of any rule cited.

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<sup>28</sup> DEP, *General MFL Info on Exemption* (Mar. 18, 2014) (on file with the Senate Committee on Environmental Preservation and Conservation).

<sup>29</sup> *Id.*

The bill will take effect upon becoming a law.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

For CUP renewal applications that affect the MFL for the Ichetucknee and Lower Santa Fe Rivers, if permittees are limited to five year permits, there could be an increase in costs for more frequent permit renewals. The DEP estimates that the total amount of additional application fees will be approximately \$9,000.

According to the DEP, for agricultural users over the next five years who receive new CUPs and those who renew their permits, the estimated cost will approach \$3 million for those allocations that affect the MFL for the Lower Santa Fe and Ichetucknee Rivers and associated priority springs. Cost-sharing programs will likely reduce this cost; however the exact reduction cannot be determined at this time.

CUP restrictions could force agricultural users to diversify their farming practices or implement water conservation measures. The economic impact will be determined by the activities of affected users to accommodate any restrictions placed on operations.

For agricultural operations whose costs increase due to the rule, the increased costs of compliance could result in those costs being passed on to consumers.

C. Government Sector Impact:

Any offsets required under the MFL that are eligible for cost-sharing could result in an increase in costs, depending on the number of projects that qualify for cost-sharing. This effect is indeterminate.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates an undesignated section of Florida law.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.