

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.)

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

BILL: SPB 7126

INTRODUCER: For consideration by Environmental Preservation and Conservation Committee

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

DATE: April 1, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hinton	Uchino		Pre-meeting
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.¹

¹ St. Johns River Water Management District, *Water Supply: An Overview of Minimum Flows and Levels*, <http://www.sjrwmd.com/minimumflowsandlevels/> (last visited Mar. 28, 2014).

The consumptive use of water can draw down water levels and reduce pressure in the aquifer.² By establishing MFLs for non-consumptive uses,³ 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.⁴

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.⁵

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.⁶ 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.⁷

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.⁸ 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.⁹ 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;”¹⁰

² 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 Mar. 28, 2014).

³ 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.

⁴ Section 373.042, F.S.

⁵ *Supra* note 1.

⁶ Section 373.0421, F.S. See also Rule 62-40.473, F.A.C.

⁷ Rule 62-40.473(6), F.A.C.

⁸ See Rule 40C-2, F.A.C.

⁹ Section 373.219, F.S.

¹⁰ 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.¹¹

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.¹² 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.¹³

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.¹⁴ It will also provide a regional framework for the development and application of models for use in assessments of “critical areas of concern.”¹⁵ 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 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.¹⁶

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.

¹¹ Section 373.223(1), F.S.

¹² Section 373.709(1), F.S.

¹³ Section 373.709(2), F.S.

¹⁴ 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 (last accessed Mar. 28, 2014).

¹⁵ *Id.*

¹⁶ *Id.*

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.¹⁷

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.¹⁸

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.¹⁹

Statement of Estimated Regulatory Costs

According to the DEP's statement of estimated regulatory costs developed for the proposed MFL rule for the Suwanee River and St. Johns River WMDs, the only CUP applicants potentially affected are those requesting new permits and, for existing permit holders, those requesting increases in their allocations when their CUPs are renewed.²⁰ During the next five years, the DEP anticipates approximately 28 agricultural water use permit holders will request additional quantities of water that are likely to affect the MFLs. The DEP also anticipates that, of the new permit requests over the next five years, approximately 40 will impact the MFLs. The anticipated offset required to accommodate both groups will be 13.8 million gallons of water per day.²¹

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. Because the Suwanee River WMD cost-share program typically covers 80 percent of retrofit costs, the actual regulatory burden will likely be significantly less.²² Other possible methods, such as changing withdrawal locations, farming practices, or crop rotation, are difficult to project expected costs for. The development of

¹⁷ *Id.*

¹⁸ Section 120.541(2)(a)1.-3., F.S.

¹⁹ Section 120.541(3), F.S.

²⁰ DEP, *Statement of Estimated Regulatory Costs for Rule 62-42.300, F.A.C., Executive Summary* (Mar. 28, 2014) (on file with the Senate Committee on Environmental Preservation and Conservation).

²¹ *Id.*

²² *Id.*

alternative water supplies for agricultural use as an option to provide offsets will likely be significantly limited by cost and feasibility.²³

According to the DEP, the Lower Santa Fe and Ichetucknee Rivers and associated priority springs need increased flows to meet their MFLs.²⁴ 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.²⁵

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.²⁶ Upon completion of the NFSEG Regional Groundwater Flow Model, the DEP, in coordination with the Suwanee River and St. Johns River WMDs, will re-evaluate the MFLs and status of the Lower Santa Fe and Ichetucknee Rivers and associated priority springs using the best available scientific or technical data, methodologies, and models.

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.

III. Effect of Proposed Changes:

The proposed 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 proposed 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;

²³ *Id.*

²⁴ DEP, *General MFL Info on Exemption* (Mar. 18, 2014) (on file with the Senate Committee on Environmental Preservation and Conservation).

²⁵ *Id.*

²⁶ 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.

- 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.

The proposed 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:

According to the DEP, for agricultural users over the next five years who receive new CUPs and those who request increased allocations as part of their CUP renewals, 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.

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
