

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7035 PCB NRPL 18-01 Ratification of St. Johns River Water Management District Rules

SPONSOR(S): Natural Resources & Public Lands Subcommittee, McClain

TIED BILLS: **IDEN./SIM. BILLS:** SB 670

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Natural Resources & Public Lands Subcommittee	12 Y, 0 N	Moore	Shugar
1) Government Accountability Committee	20 Y, 0 N	Moore	Williamson

SUMMARY ANALYSIS

Silver Springs is an Outstanding Florida Spring (OFS). OFSs are required to have a minimum flow and water level (MFL) adopted by rule. If the OFS is below or projected to fall below the MFL within 20 years, then a recovery or prevention strategy must be adopted concurrently with the MFL.

In June 2017, the St. Johns River Water Management District (SJRWMD) adopted by rule the MFL for Silver Springs. Currently, the MFL is being met; however, by 2025, the projected water use demands of the area cannot be met under the established frequent low flow for the OFS. Accordingly, the SJRWMD concurrently moved to adopt proposed rule 40C-2.101, F.A.C, establishing a prevention strategy for the OFS, which includes the development of additional water supplies and other regulatory action to prevent the existing flow or water level from falling below the established MFL. The prevention strategy includes two water supply development projects, the Lower Floridan Aquifer (LFA) Conversion Project and the Wetland Recharge Park Project. The SJRWMD estimates the LFA Conversion Project will cost between \$23.82 million and \$44.97 million. The SJRWMD is required to pay at least 25 percent of the total project cost of the project. Water users will incur the remaining costs.

A statement of estimated regulatory costs (SERC) must be prepared if a proposed rule will have an adverse impact on small business or is likely to directly or indirectly increase regulatory costs in excess of \$200,000 aggregated within one year after implementation. If the SERC shows that the adverse impact or regulatory costs of the proposed rule exceeds \$1 million in the aggregate within five years after implementation, then the proposed rule must be submitted to the Legislature for ratification.

Due to the estimated regulatory costs, the SJRWMD was required to prepare a SERC for proposed rule 40C-2.101, F.A.C. The SJRWMD's SERC indicates that the proposed rule will exceed \$1 million aggregated within five years after implementation. Accordingly, proposed rule 40C-2.101, F.A.C., was submitted to the Legislature for ratification.

The bill ratifies the SJRWMD's proposed consumptive use rule, proposed rule 40C-2.101, F.A.C., which will be incorporated into the SJRWMD's "Applicant's Handbook, Consumptive Uses of Water." The bill states it serves no other purpose and will not be codified in the Florida Statutes. The bill specifies that after becoming law, its enactment and effective dates will be noted in the Florida Administrative Code, the Florida Administrative Register, or both, as appropriate.

The proposed rule being ratified by the bill will have a negative fiscal impact on the SJRWMD, and on local governments and the private sector who provide water supply from the Silver Springs area and who are required to implement the prevention strategy.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Consumptive Use Permits

Before using water of the state,¹ a person must apply for and obtain a consumptive use permit (CUP) from the applicable water management district (WMD) or the Department of Environmental Protection (DEP). The WMD or DEP may impose reasonable conditions necessary to assure that such use is consistent with the overall objectives of the WMD or DEP and is not harmful to the water resources of the area.² To obtain a CUP, an applicant must establish that the proposed use of water is a reasonable-beneficial use,³ will not interfere with any presently existing legal use of water, and is consistent with the public interest.⁴

Silver Springs

Silver Springs is an Outstanding Florida Spring⁵ (OFS) located in Marion County, Florida. OFSs were required to have a minimum flow⁶ and water level⁷ (MFL) adopted by rule by July 1, 2017.⁸ A recovery or prevention strategy must be adopted concurrently with the MFL if the OFS is below, or is projected to fall below, the MFL within 20 years.⁹

In June 2017, the St. Johns River Water Management District (SJRWMD) adopted rule 40C-8.031(7), F.A.C., which provided the MFL for Silver Springs.¹⁰ Currently, the MFL is being met; however, by 2025 the projected water use demands of the area cannot be met under the established frequent low flow for the OFS.¹¹ Accordingly, the SJRWMD concurrently moved to adopt proposed rule 40C-2.101, F.A.C., which provides a prevention strategy for the OFS. The proposed rule includes the development of additional water supplies and other regulatory action to prevent the existing flow or water level from falling below the established MFL.¹²

Prevention Strategy

A prevention strategy must include the development of additional water supplies and regulatory actions to prevent the existing flow or water level from falling below the established MFL. A prevention strategy

¹ Section 373.019(22), F.S., defines “water” or “waters of the state” to mean any and all water on or beneath the surface of the ground or in the atmosphere, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground, as well as all coastal waters within the jurisdiction of the state.

² Section 373.219(1), F.S.; An individual solely using water for domestic consumption is exempt from CUP requirements.

³ Section 373.019(16), F.S., defines “reasonable-beneficial use” to mean 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 interest.

⁴ Section 373.223(1), F.S.

⁵ Section 373.802(4), F.S., provides that an “Outstanding Florida Spring” includes all historic first magnitude springs, including their associated spring runs, as determined by DEP using the most recent Florida Geological Survey springs bulletin, and the following additional springs, including their associated spring runs: De Leon Springs; Peacock Springs; Poe Springs; Rock Springs; Wekiwa Springs; and Gemini Springs. It does not include submarine springs or river rises.

⁶ The minimum flow is the limit at which further water withdrawals would be significantly harmful to the water resources or ecology of the area; s. 373.042(1)(a), F.S.

⁷ The minimum level is the level of groundwater in an aquifer or the level of a surface waterbody at which further withdrawals will significantly harm the water resources of the area; s. 373.042(1)(b), F.S.

⁸ Section 373.042(2)(a), F.S.

⁹ Section 373.805(1), F.S.

¹⁰ The rule has since been amended and the current reference to the Silver Springs MFL is found in subsection (10).

¹¹ SJRWMD. *SERC*, https://www.sjrwmd.com/static/permitting/ruledevelopment/SERC_for_40C-2.101_Silver_Springs_Strategy_Rules.pdf (last visited Jan. 16, 2018).

¹² Section 373.0421(2), F.S.; SJRWMD, *Prevention Strategy for the Implementation of Silver Springs Minimum Flows and Levels* (April 2017), https://www.sjrwmd.com/static/mfls/ssmfl/Silver_Prevention_Strategy_Draft.pdf (last visited Jan. 8, 2018).

must include a phased-in approach or a timetable, which allows for the provision of sufficient water supplies for all existing and projected reasonable-beneficial uses, including implementation of conservation and other efficiency measures to offset reductions in permitted water withdrawals.¹³

For an OFS, a prevention strategy must also include:

- A list of all specific projects identified for implementation;
- A priority listing of each project;
- The estimated cost and completion date of each project;
- The source and amount of financial assistance to be made available by the WMD¹⁴ for each project, which may not be less than 25 percent of the total project cost unless a specific funding source(s) is identified which will provide more than 75 percent of the total project cost;
- An estimate of each project's benefit to the OFS; and
- An implementation plan designed with a target to achieve the adopted MFL no more than 20 years after the adoption of a prevention strategy.¹⁵

The SJRWMD's prevention strategy includes two water supply development projects, the Lower Floridan Aquifer (LFA) Conversion Project and the Wetland Recharge Park Project, which will reduce potential impacts to Silver Springs. The LFA Conversion Project will convert existing Upper Floridan Aquifer (UFA) wells, which extend a few hundred feet below ground, to LFA wells, which extend more than 1,000 feet below ground. The SJRWMD estimates the LFA Conversion Project will cost between \$23.82 million and \$44.97 million. The SJRWMD estimates that its 25 percent portion of the project will be approximately \$1.8 million to \$9.06 million. Water users would incur the remaining costs, which are approximately \$5.42 million to \$27.17 million. The SJRWMD estimates that its 25 percent portion of the total cost for all prevention strategy projects will be approximately \$14 million.¹⁶ Due to the estimated regulatory costs, the SJRWMD was required to prepare a statement of estimated regulatory costs (SERC) for proposed rule 40C-2.101, F.A.C.

Agency Rulemaking and Legislative Ratification

A rule is an agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency.¹⁷ The Legislature grants an agency rulemaking authority through statute and authorizes an agency to adopt, develop, establish, or otherwise create a rule.¹⁸ To adopt a rule, an agency must have a general grant of authority to implement a specific law through rulemaking.¹⁹ 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.²⁰

The formal rulemaking process begins by an agency giving notice of the proposed rule.²¹ The notice is published by the Department of State in the Florida Administrative Register²² and must include an explanation of the purpose and effect of the rule, the specific legal authority for the rule, the full text of the rule, a summary of the agency's SERC, if one is prepared, whether legislative ratification is required, and how a party may request a public hearing on the proposed rule.²³

¹³ Section 373.0421(2), F.S.

¹⁴ The Northwest Florida WMD and the Suwannee River WMD are not required to meet this financial assistance requirement; s. 373.805(4)(d), F.S.

¹⁵ Section 373.805(4)(a)-(f), F.S.

¹⁶ SJRWMD. *SERC*, https://www.sjrwmd.com/static/permitting/ruledevelopment/SERC_for_40C-2.101_Silver_Springs_Strategy_Rules.pdf (last visited Jan. 16, 2018).

¹⁷ Section 120.52(16), F.S.

¹⁸ Sections 120.52(17) and 120.536(1), F.S.

¹⁹ Section 120.536(1), F.S.

²⁰ *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

²¹ Section 120.54(3)(a), F.S.

²² Section 120.55, F.S.

²³ Section 120.54(3)(a), F.S.

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.²⁴ If the proposed rule will have an adverse impact on small business²⁵ or is likely to increase directly or indirectly regulatory costs in excess of \$200,000 aggregated within one year after implementation, an agency must prepare a SERC.²⁶ If the SERC shows that the adverse impact or regulatory costs of the proposed rule exceeds \$1 million in the aggregate within five years after implementation, then the proposed rule must be submitted to the Legislature for ratification and may not take effect until it is ratified by the Legislature.²⁷

The SJRWMD's SERC for proposed rule 40C-2.101, F.A.C, indicates the rule will exceed \$1 million aggregated within five years after implementation. Accordingly, the proposed rule was submitted to the Legislature for ratification.

Effect of Proposed Changes

The bill ratifies the SJRWMD's proposed consumptive use rule, proposed rule 40C-2.101, F.A.C, which provides its prevention strategy for Silver Springs. The proposed rule will be incorporated into the SJRWMD's "Applicant's Handbook, Consumptive Uses of Water" (Handbook). The Handbook is a publication adopted by rule pursuant to rule 40C-2.101, F.A.C.

The bill states it serves no other purpose and will not be codified in the Florida Statutes. The bill specifies that after becoming law, its enactment and effective dates will be noted in the Florida Administrative Code, the Florida Administrative Register, or both, as appropriate. The bill specifies that it does not alter rulemaking authority delegated by prior law, constitute legislative preemption or exception to any provision of law governing adoption or enforcement of the rule cited, and is intended to preserve the status of any cited rule as a rule under ch. 120, F.S. The bill also specifies that it 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.

B. SECTION DIRECTORY:

Section 1. Ratifies a rule of the St. Johns River Water Management District.

Section 2. Provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

According to the SERC, implementation of the rule being ratified will have a negative fiscal impact on the SJRWMD. The SJRWMD's 25 percent share of the estimated cost of the LFA Conversion Project is approximately \$1.8 million to \$9.06 million. The SJRWMD estimates that its 25 percent portion of the total cost for all prevention strategy projects will be approximately \$14 million.²⁸

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

²⁴ Section 120.541(2), F.S.

²⁵ Section 288.703(6), F.S., defines "small business" to mean an independently owned and operated business that employs 200 or fewer permanent full-time employees and that, together with its affiliates, has a net worth of not more than \$5 million or any firm based in this state that has a Small Business Administration 8(a) certification. As applicable to sole proprietorships, the \$5 million net worth requirement includes both personal and business investments.

²⁶ Sections 120.54(3)(b) and 120.541(1)(b), F.S.

²⁷ Sections 120.541(2)(a) and (3), F.S.

²⁸ SJRWMD. *SERC*, https://www.sjrwmd.com/static/permitting/ruledevelopment/SERC_for_40C-2.101_Silver_Springs_Strategy_Rules.pdf (last visited Jan. 16, 2018).

1. Revenues:

None.

2. Expenditures:

According to the SERC, implementation of the rule being ratified by the bill will have a negative fiscal impact on local governments who provide water supply from the Silver Springs area and who are required to implement the prevention strategy. Additionally, the SJRWMD determined that it was not suitable to exempt small counties²⁹ or cities³⁰ from the rule.³¹

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill itself does not have a direct fiscal impact on the private sector; however, the substantive policy of the rule being ratified is expected to have an economic impact on the private sector. According to the SERC, the rule being ratified by the bill will have a negative fiscal impact on the private sector due to implementation of the prevention strategy. The SJRWMD determined that it was not suitable to exempt small businesses, which comprise approximately 84 percent of the permitted water users in the Silver Springs area, from the rule.³²

Applicants who request an increase in permitted water use from the UFA beyond their 2024 water demand will incur new costs when applying for a new CUP, CUP modification, or CUP renewal. For instance, 75 percent of the estimated cost of the LFA Conversion Project, approximately \$5.42 million to \$27.17 million, will result in a cost on water users. Water users who pump groundwater from the LFA will pay 100 percent of the increased operating costs. The increased operating costs represent the difference to pump water from the UFA (approximately \$19,100 per year) versus the slightly greater cost to pump water from the LFA (approximately \$22,900 per year), and the difference to treat fresh water from the UFA (approximately \$560,000 per year) versus the greater costs to treat brackish water from the LFA (approximately \$4,117,000 per year).³³

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds; reduce the authority that counties or municipalities have to raise revenue in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

²⁹ Section 120.52(19), F.S., defines a “small county” to mean any county that has an unincarcerated population of 75,000 or less according to the most recent decennial census.

³⁰ Section 120.52(18), F.S., defines a “small city” to mean any municipality that has an unincarcerated population of 10,000 or less according to the most recent decennial census.

³¹ SJRWMD. *SERC*, https://www.sjrwmd.com/static/permitting/ruledevelopment/SERC_for_40C-2.101_Silver_Springs_Strategy_Rules.pdf (last visited Jan. 16, 2018).

³² *Id.*

³³ *Id.*

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.