HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1309 Ratification of Department of Environmental Protection Rules
SPONSOR(S): Payne
TIED BILLS: **IDEN./SIM. BILLS:** SB 7060

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Environment, Agriculture & Flooding Subcommittee	17 Y, 0 N	Melkun	Moore
2) State Affairs Committee	22 Y, 0 N	Melkun	Williamson

SUMMARY ANALYSIS

When domestic wastewater is treated, a solid byproduct accumulates in the wastewater treatment plant and must be removed periodically to keep the plant operating properly. The collected material, called biosolids or "sewage sludge," is high in organic content and contains moderate amounts of nutrients. Wastewater facilities can dispose of biosolids by transferring them to another facility, placing them in a landfill, incinerating them, distributing them as fertilizer, or land applying them to permitted sites. The option selected for use or disposal is typically stated in the permit issued to the wastewater treatment facility by the Department of Environmental Protection (DEP). Florida produces a total of 340,000 dry tons of biosolids annually, of which approximately two-thirds are beneficially used and one-third is landfilled.

The Environmental Regulation Commission (ERC) is a board created within DEP that sets standards and rules based on sound scientific and technical validity, economic impacts, and risks and benefits to the public and Florida's natural resources.

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 cost 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.

On December 3, 2020, DEP published a notice of proposed rule for new biosolids rules. Due to the estimated regulatory costs of the rules, DEP was required to prepare a SERC, which indicated that the proposed rules will exceed $1 million aggregated within five years after implementation. Accordingly, the proposed rules were submitted to the Legislature for ratification on January 29, 2021.

The bill ratifies DEP's proposed biosolids rules, which are proposed rules 62-640.100, 62-640.200, 62-640.210, 62-640.300, 62-20 640.400, 62-640.500, 62-640.600, 62-640.650, 62-640.700, 62-21 640.800, 62-640.850, and 62-640.880, 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 exempts the biosolids rules from review and approval by the ERC.

The proposed rule being ratified by the bill will have a negative fiscal impact on local governments and the private sector who provide wastewater and biosolids treatment as well as locally and privately owned utilities.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Agency Rulemaking

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.[1] The Legislature grants an agency rulemaking authority through statute and authorizes an agency to adopt, develop, establish, or otherwise create a rule.[2] To adopt a rule, an agency must have a general grant of authority to implement a specific law through rulemaking.[3] 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.[4]

The formal rulemaking process begins by an agency giving notice of the proposed rule.[5] The notice is published by the Department of State in the Florida Administrative Register[6] 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 statement of estimated regulatory cost (SERC), if one is prepared, whether legislative ratification is required, and how a party may request a public hearing on the proposed rule.[7]

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.[8] If the proposed rule will have an adverse impact on small business[9] 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.[10] 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.[11]

Biosolids

When domestic wastewater is treated, a solid byproduct accumulates in the wastewater treatment plant and must be removed periodically to keep the plant operating properly. The collected material, called biosolids or "sewage sludge," is high in organic content and contains moderate amounts of nutrients.[12] Wastewater facilities can dispose of biosolids by transferring them to another facility, placing them in a

[1] Section 120.52(16), F.S.
[2] Sections 120.52(17) and 120.536(1), F.S.
[3] Section 120.536(1), F.S.
[4] *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).
[5] Section 120.54(3)(a), F.S.
[6] Section 120.55, F.S.
[7] Section 120.54(3)(a), F.S.
[8] Section 120.541(2), F.S.
[9] 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.
[10] Sections 120.54(3)(b) and 120.541(1)(b), F.S.
[11] Sections 120.541(2)(a) and (3), F.S.
[12] DEP, *Domestic Wastewater Biosolids*, available at https://floridadep.gov/water/domestic-wastewater/content/domestic-wastewater-biosolids (last visited Mar. 9, 2021); r. 62-640.200(6), F.A.C., defines the term "biosolids" to mean the solid, semisolid, or liquid residue generated during the treatment of domestic wastewater in a domestic wastewater treatment facility, formerly known as "domestic wastewater residuals" or "residuals." The treated effluent or reclaimed water from a domestic wastewater treatment plant is not included. Also, solids removed from pump stations and lift stations, screenings and grit removed from the preliminary treatment components of domestic wastewater treatment facilities, other solids as defined in subsection 62-640.200(31), F.A.C., and ash generated during the incineration of biosolids are not included.

landfill, incinerating them, distributing them as fertilizer, or land applying them to permitted sites.[13] The option selected for use or disposal is typically stated in the permit issued to the wastewater treatment facility by the Department of Environmental Protection (DEP).[14] Florida produces a total of 340,000 dry tons of biosolids annually, of which approximately two-thirds are beneficially used and one-third is landfilled.[15]

Three classes of biosolids are regulated for beneficial use and are categorized based on treatment and quality: Class B, Class A, and Class AA.[16] Treatment is required to either reduce or completely eliminate pathogens. Class B treatment significantly reduces pathogens, but does not completely eliminate them. Class AA treatment essentially eliminates pathogens and meets strict concentration limits for heavy metals. The Class A treatment level is between Class B and Class AA. While Class A and Class AA can be used for a variety of beneficial purposes, Class B, the lowest quality of biosolids, is typically only used for land application.[17]

Land application is the use of biosolids at a permitted site, such as agricultural land or a golf course, forest, park, or reclamation site, to provide nutrients or organic matter to the soil. The biosolids are applied in accordance with restrictions based on crop nutrient needs, phosphorus limits in the area, and soil fertility.[18] Biosolids contain macronutrients (such as nitrogen and phosphorus) and micronutrients (such as copper, iron, and manganese) that are utilized by crops. The application of these nutrient-rich biosolids increases the organic content of the soil, fostering more productive plant growth.[19] To prevent odor or the contamination of soils, crops, and livestock, land application sites must meet site management requirements such as the construction of site slopes and establishment of setback distances.[20] There are approximately 140 permitted land application sites in Florida.[21]

Class AA biosolids can be land applied or can be distributed and marketed as a commercial fertilizer.[22] Class AA biosolids products are also not subject to site management requirements if distributed and marketed as a fertilizer or distributed and marketed to a person or entity that will sell or give away the biosolids products as a fertilizer or component of a fertilizer.[23] There are approximately 39 facilities in Florida that produce Class AA biosolids.[24] In 2016, 197,115 dry tons of Class AA biosolids product was distributed and marketed in Florida.[25]

The beneficial use of biosolids is regulated by DEP under ch. 62-640, F.A.C., and by the U.S. Environmental Protection Agency (EPA) under Title 40 Code of Federal Regulations Part 503 (Part 503).[26] Adopted in 1993, Part 503 created standards for the final use or disposal of biosolids generated during domestic wastewater treatment. The standards included general requirements, pollutant limits, management practices, and operational standards for biosolids. Standards were also included for

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[13] DEP, *Biosolids Use and Regulations in Florida* (Sept. 2018), slide 3, available at https://floridadep.gov/sites/default/files/Biosolids101-TAC-090518.pdf (last visited Mar. 9, 2021).
[14] *Id*. at slide 4.
[15] *Id*. at slide 5.
[16] *Id*. at slide 6.
[17] *Id*. at slide 7.
[18] DEP, *Biosolids Use and Regulations in Florida* (Sept. 2018), slide 23, available at https://floridadep.gov/sites/default/files/Biosolids101-TAC-090518.pdf (last visited Mar. 9, 2021); *see also,* EPA, *A Plain English Guide to the EPA Part 503 Biosolids Rule* (Sept. 1994), 26, available at https://www.epa.gov/sites/production/files/2018-12/documents/plain-english-guide-part503-biosolids-rule.pdf (last visited Mar. 9, 2021).
[19] DEP, *Biosolids Use and Regulations in Florida* (Sept. 2018), slide 20, available at https://floridadep.gov/sites/default/files/Biosolids101-TAC-090518.pdf (last visited Mar. 9, 2021).
[20] *Id*. at slides 8-9.
[21] *Id*. at slide 20.
[22] *Id*. at slide 6.
[23] DEP, *Biosolids in Florida: 2013 Summary* (Dec. 2014), 4, available at https://floridadep.gov/sites/default/files/BiosolidsFlorida-2013-Summary_2.pdf (last visited Mar. 9, 2021).
[24] DEP, *Biosolids Use and Regulations in Florida* (Sept. 2018), slide 13, available at https://floridadep.gov/sites/default/files/Biosolids101-TAC-090518.pdf (last visited Mar. 9, 2021).
[25] *Id*. at slide 19.
[26] EPA, *Biosolids Laws and Regulations*, available at https://www.epa.gov/biosolids/biosolids-laws-and-regulations (last visited Mar. 9, 2021).

biosolids applied to the land, placed on a surface disposal site, or fired in a sewage sludge incinerator.[27]

In 1990, DEP adopted rules governing biosolids based on the draft of Part 503 and previously adopted solid waste rules.[28] DEP's rules were revised in 1998 to be consistent with the final version of Part 503. Part 503, a self-implementing program, did not address phosphorus, a major pollutant in Florida.[29] As a result, DEP amended its rules in 2010 to improve site accountability and nutrient management by requiring site permits for the land application of biosolids, requiring nutrient management plans (NMPs), establishing phosphorus limitations, and specifying site management requirements.[30] Additionally, the rules clarified that the disposal and incineration of biosolids must be in accordance with DEP's solid waste[31] and air[32] rules to protect water quality and human health.

NMPs are site-specific plans that specify the rate at which biosolids can be applied in the area, the method of application allowed (i.e., surface application, injection, incorporation, etc.), the zone in which biosolids can be applied, pollutant concentration targets, and cumulative pollutant loading limits from all sources at the application site.[33] NMPs are submitted to DEP along with the permit application for each agricultural site.

Agricultural sites that are required to have a NMP for the application of biosolids are also often required to participate in DACS's agricultural BMP program if the site is located in an impaired watershed because of the potential impact biosolids may have on water quality.[34] Typical BMP practices include nutrient management, irrigation and water table management, and water resource protection. Nutrient management practices for biosolids land application address appropriate source, rate, timing, and placement of nutrients to minimize impacts to water resources. Irrigation and water table management practices address methods for irrigating to reduce water and nutrient losses to the environment and to maximize the efficient use and distribution of water. Finally, water resource protection practices, such as the site management requirements for biosolids, help to reduce or prevent the transport of nutrients and sediments from production areas to water resources. The BMPs for the site are typically included in facility permits.[35]

Biosolids Technical Advisory Committee

In 2018, DEP created a Biosolids Technical Advisory Committee (Biosolids TAC) to evaluate current management practices and explore opportunities to better protect Florida's water resources.[36] The Biosolids TAC was composed of various stakeholders, including environmental and agricultural industry experts, representatives of large and small utilities, waste haulers, consultants, and academics.[37] The meetings included presentations and public comments as well as discussions among the Biosolids TAC members, the audience, and DEP.

Based on the deliberations of the Biosolids TAC and feedback from public participants, the Biosolids TAC recommended that DEP take the following actions:

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[27] 40 C.F.R. Part 503.

[28] Chapters 62-701 and 62-709, F.A.C.

[29] DEP, *Biosolids Rule/Permitting* (Nov. 2018), slide 2, available at https://floridadep.gov/water/domestic-wastewater/documents/tac-3-biosolids-rulepermitting (last visited Mar. 9, 2021); *see also*, DEP, *Biosolids Use and Regulations in Florida* (Sept. 2018), slide 11, available at https://floridadep.gov/sites/default/files/Biosolids101-TAC-090518.pdf (last visited Mar. 9, 2021).

[30] DEP, *Biosolids Rule/Permitting* (Nov. 2018), slide 2, available at https://floridadep.gov/water/domestic-wastewater/documents/tac-3-biosolids-rulepermitting (last visited Mar. 9, 2021); *see* ch. 62-640, F.A.C.

[31] Chapter 62-701, F.A.C.

[32] *See* Chapters 62-204, 62-210, 62-212, 62-213, 62-296, and 62-297, F.A.C.

[33] DEP, *NMPs*, available at https://floridadep.gov/water/domestic-wastewater/documents/nutrient-management-plans-biosolids (last visited Mar. 9, 2021); *see also*, r. 62-640.500, F.A.C.

[34] Rule 62-303.200(7), F.A.C., defines "impaired water" to mean a waterbody or waterbody segment that does not meet its applicable water quality standards […] due in whole or in part to discharges of pollutants from point or nonpoint sources.

[35] Section 403.067(7)(c), F.S.; *see* ch. 2016-1, Laws of Fla.

[36] DEP, *DEP Biosolids Technical Advisory Committee*, available at https://floridadep.gov/water/domestic-wastewater/content/dep-biosolids-technical-advisory-committee (last visited Mar. 9, 2021).

[37] *Id*.

- Permit biosolids in a manner that minimizes migration of nutrients to prevent impairment to waterbodies and amend current permitting rules to:
    - Establish the rate of biosolids application based on site specifics, such as soil characteristics/adsorption capacity, water table, hydrogeology, site use, and distance to surface water;
    - Evaluate the percentage of water extractable phosphorus in all biosolids to inform the appropriate application rate; and
    - Establish criteria for low, medium, and high-risk sites that guide application practices and required water quality monitoring.
- Increase the inspection rate of land application.
- Develop site-specific groundwater and surface water monitoring protocols to detect nutrient migration.
- Develop and conduct biosolids and nutrient management research on nutrient run-off through surface and groundwater flow using various application rates, types of biosolids application, and different geologic conditions.
- Promote innovative technology pilot projects for biosolids processing that could provide a wider range of beneficial end products.[38]

Biosolids Rulemaking

DEP published an initial notice of rule development to amend its biosolids rules[39] on March 22, 2019, and held rulemaking workshops on June 25, 26, and 27, 2019, in various locations across the state. After a notice of proposed rule was published on October 29, 2019, DEP withdrew the rule and started over again. DEP published a new Notice of Rule Development on April 14, 2020, and held a workshop for the new draft rules on September 18, 2020.[40] DEP published a notice of proposed rule on December 3, 2020.[41]

The SERC for the new proposed rule includes the following statewide cost estimates:

- $10 million in capital costs for permitting new land application sites;
- At least $42 million in recurring costs for additional sites and transportation of wet biosolids; and
- $1 million in additional monitoring costs.[42]

DEP expects more biosolids to be converted to Class AA biosolids/fertilizer as a result of the proposed rule and estimates the capital cost for additional Class AA biosolids projects to be between $300 and $400 million.[43]

Because the SERC showed that the adverse impact or regulatory cost of the proposed rule exceeded $1 million in the aggregate within five years after implementation, the proposed rule must be submitted to the Legislature for ratification and may not take effect until it is ratified by the Legislature.[44]

<u>Environmental Regulation Commission</u>

The Environmental Regulation Commission (ERC) is a non-salaried, seven-member board created within DEP and selected by the Governor and approved by the Senate that represents agriculture, the development industry, local government, the environmental community, residents, and members of the scientific and technical community.[45] The ERC sets standards and rules based on sound scientific and

[38] DEP, *Biosolids Technical Advisory Committee Recommendations* (January 2019), available at https://floridadep.gov/water/domestic-wastewater/documents/tac-4-biosolids-tac-considerations (last visited Mar. 9, 2021).
[39] Chapter 62-640, F.A.C.
[40] Florida Administrative Register, *Notice List: 62-640*, available at https://www.flrules.org/gateway/result.asp (last visited Mar. 9, 2021).
[41] DEP, *DEP Chapter 62-640, F.A.C., Rulemaking*, available at https://floridadep.gov/water/domestic-wastewater/content/dep-chapter-62-640-fac-rulemaking (last visited Mar. 9, 2021).
[42] DEP, *Statement of Estimated Regulatory Cost (SERC)*, available at https://floridadep.gov/sites/default/files/SERC%2062-640_120320_Final.pdf (last visited Mar. 9, 2021).
[43] *Id*.
[44] Section 120.541, F.S.
[45] DEP, *Environmental Regulation Commission*, available at https://floridadep.gov/ogc/ogc/content/environmental-regulation-commission (last visited Mar. 9, 2021); ss. 20.255(6) and 403.804(1), F.S.

technical validity, economic impacts, and risks and benefits to the public and Florida's natural resources.[46] The ERC may not establish DEP policies, priorities, plans, or directives.[47]

Effect of the Bill

The bill ratifies DEP's proposed biosolids rules, which are proposed rules 62-640.100, 62-640.200, 62-640.210, 62-640.300, 62-640.400, 62-640.500, 62-640.600, 62-640.650, 62-640.700, 62-640.800, 62-640.850, and 62-640.880, F.A.C.

The bill exempts the biosolids rules from review and approval by the ERC.

The bill states that 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 further specifies that it does not alter rulemaking authority delegated by prior law, does not constitute legislative preemption of 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 the Administrative Procedure Act. The bill 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. Provides an unnumbered section of law to ratify DEP's biosolids rules.

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:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

D. FISCAL COMMENTS:

The bill itself does not have a direct fiscal impact; however, the substantive policy of the rule being ratified is expected to have a significant economic impact on local governments and the private sector. According to the SERC, implementation of the rule being ratified by the bill will have a significant

[46] Section 403.804(1), F.S.
[47] *Id*.

negative fiscal impact on the utilities that treat and land apply biosolids, send biosolids to larger treatment facilities, and biosolids treatment facilities that treat and land apply biosolids.

It is estimated that due to the new restrictions for the land application of biosolids, the number of sites eligible for land application will significantly decrease, resulting in approximately $10 million in capital costs for permitting new land application sites and at least $42 million in recurring costs for additional sites and the transportation of wet biosolids for those utilities that must send biosolids to larger treatment facilities. Additionally, it is estimated that permitted land application sites will need to expend an additional $1 million in monitoring costs to comply with the new rule.[48]

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or 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.

[48] DEP, *Statement of Estimated Regulatory Cost (SERC)*, available at https://floridadep.gov/sites/default/files/SERC%2062-640_120320_Final.pdf (last visited Mar. 11, 2021).