

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7027      PCB WST 23-01      Ratification of Rules of the Department of Environmental Protection

**SPONSOR(S):** Water Quality, Supply & Treatment Subcommittee, Overdorf

**TIED BILLS:**                      **IDEN./SIM. BILLS:** CS/SB 7002

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Water Quality, Supply & Treatment Subcommittee	15 Y, 0 N	Curtin	Curtin
1) Constitutional Rights, Rule of Law & Government Operations Subcommittee	14 Y, 0 N	Wagoner	Miller
2) Infrastructure Strategies Committee	18 Y, 0 N	Curtin	Harrington

### SUMMARY ANALYSIS

In 2020, the Legislature passed the Clean Waterways Act (Act) to address a number of environmental issues relating to water quality improvement. In pertinent part, the Act expanded requirements for onsite sewage treatment and disposal systems (OSTDSs) by requiring a remediation plan to be included in the development of a basin management action plan for nutrient-impaired water bodies if:

- OSTDSs contribute at least 20 percent of the nutrient pollution; or
- The Department of Environmental Protection (DEP) determines that remediation is necessary to achieve the total maximum daily load.

The Act also created new regulations for wastewater treatment facilities related to the prevention of sanitary sewer overflows and underground pipe leaks.

The Act required DEP to promulgate rules to administer the requirements of the OSTDS remediation plan (rule 62-6.001, F.A.C.) and to implement requirements of the Act related to reducing domestic wastewater treatment facility overflows and pipe leakages through pipe repair action plans, power outage contingency plans, and reports relating to expenditures on pollution mitigation and prevention (rules 62-600.405, 62-600.705, and 62-600.720, F.A.C.).

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 in the aggregate 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. The SERCs developed by DEP indicate that the estimated costs of the rules will exceed \$1 million within five years after implementation. Accordingly, the rules must be ratified by the Legislature to be effective. As such, rules 62-6.001, 62-600.405, 62-600.705, and 62-600.720, F.A.C., were timely submitted to the Legislature for ratification.

The bill ratifies the DEP rules, rules 62-6.001, 62-600.405, 62-600.705, and 62-600.720, F.A.C. The bill 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 has a significant fiscal impact on the state. See Fiscal Comments in Section II.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### The Clean Waterways Act

The Legislature passed the Clean Waterways Act (Act) in 2020 to address a number of environmental issues relating to water quality improvement, including onsite sewage treatment and disposal systems (OSTDSs), wastewater, stormwater, agriculture, and biosolids, and it directed the Department of Environmental Protection (DEP) to promulgate rules to implement these policies.<sup>1</sup>

In pertinent part, the Act expanded requirements for OSTDS (septic system) remediation plans by requiring a remediation plan to be included in the development of a basin management action plan (BMAP) for nutrient-impaired water bodies if:

- OSTDSs contribute at least 20 percent of the nutrient pollution; or
- DEP determines that remediation is necessary to achieve the total maximum daily load (TMDL).<sup>2</sup>

The Act authorized DEP to adopt rules to administer the requirements of an OSTDS remediation plan.<sup>3</sup>

The Act also addressed prevention of sanitary sewer overflows, underground pipe leaks, and inflow and infiltration.<sup>4</sup> DEP's rules must reasonably limit, reduce, and eliminate domestic wastewater collection and transmission system pipe leakages and inflow and infiltration.<sup>5</sup> The Act authorized DEP to adopt rules relating to pipe assessment, repair, and replacement action plans, power outage contingency plans, and reports relating to expenditures on pollution mitigation and prevention.<sup>6</sup>

##### Water Quality and Nutrients

Phosphorus and nitrogen are naturally present in water and are essential nutrients for the healthy growth of plant and animal life.<sup>7</sup> The correct balance of both nutrients is necessary for a healthy ecosystem; however, excessive nitrogen and phosphorus can cause significant water quality problems.<sup>8</sup> Phosphorus and nitrogen are derived from natural and human-made sources.<sup>9</sup> Human-made sources include sewage disposal systems (wastewater treatment facilities and OSTDSs), overflows of storm and sanitary sewers (untreated sewage), agricultural production and irrigation practices, and stormwater runoff.<sup>10</sup>

Excessive nutrient loads may result in harmful algal blooms, nuisance aquatic weeds, and the alteration of the natural community of plants and animals.<sup>11</sup> Dense, harmful algal blooms can also cause human health problems, fish kills, problems for water treatment plants, and impairment of the aesthetics and taste of water. Growth of nuisance aquatic weeds tends to increase in nutrient-enriched waters, which may also impact recreational activities.<sup>12</sup>

---

<sup>1</sup> Ch. 2020-150, Laws of Fla.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> U.S. Environmental Protection Agency (EPA), *The Issue*, <https://www.epa.gov/nutrientpollution/issue> (last visited Mar. 1, 2023).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> EPA, *Sources and Solutions*, <https://www.epa.gov/nutrientpollution/sources-and-solutions> (last visited Mar. 1, 2023).

<sup>11</sup> EPA, *supra* note 7.

<sup>12</sup> *Id.*; see also National Institute of Environmental Health Sciences, *Algal Blooms*, <https://www.niehs.nih.gov/health/topics/agents/algal-blooms/index.cfm> (last visited Mar. 4, 2023).

### Total Maximum Daily Loads

A TMDL, which must be adopted by rule, is a scientific determination of the maximum amount of a given pollutant that can be absorbed by a waterbody and still meet water quality standards.<sup>13</sup> Waterbodies or sections of waterbodies that do not meet the established water quality standards are deemed impaired.<sup>14</sup> Pursuant to the federal Clean Water Act, DEP must establish a TMDL for impaired waterbodies.<sup>15</sup>

### Basin Management Action Plans (BMAPs)

DEP is the lead agency in coordinating the development and implementation of TMDLs.<sup>16</sup> BMAPs are one of the primary mechanisms DEP utilizes to achieve TMDLs. BMAPs are plans that address the entire pollution load, including point and nonpoint discharges,<sup>17</sup> for a watershed. BMAPs generally include:

- Permitting and other existing regulatory programs, including water quality-based effluent limitations;
- Best management practices and non-regulatory and incentive-based programs, including cost-sharing, waste minimization, pollution prevention, agreements, and public education;
- Public works projects, including capital facilities; and
- Land acquisition.<sup>18</sup>

DEP may establish a BMAP as part of the development and implementation of a TMDL for a specific waterbody. First, the BMAP equitably allocates pollutant reductions to individual basins, to all basins as a whole, “or to each identified point source or category of nonpoint sources.”<sup>19</sup> Then, the BMAP establishes the schedule for implementing projects and activities to meet the pollution reduction allocations. The BMAP development process provides an opportunity for local stakeholders, local government, community leaders, and the public to collectively determine and share water quality cleanup responsibilities.<sup>20</sup> BMAPs are adopted by secretarial order.<sup>21</sup>

“BMAPs must include milestones for implementation and water quality improvement,” as well as a water quality monitoring component to evaluate whether reasonable progress is being achieved over time.<sup>22</sup> An assessment of progress must be conducted every five years, and revisions to the BMAP must be made as appropriate.<sup>23</sup>

The Act required BMAPs for nutrient TMDLs to include an OSTDS remediation plan if DEP identifies OSTDSs as contributors of at least 20 percent of nutrient pollution or if DEP determines that remediation is necessary to achieve the TMDLs.<sup>24</sup> This was an expansion of the statutory requirement that an OSTDS remediation plan must be developed if DEP determines that OSTDSs within a sensitive

---

<sup>13</sup> Department of Environmental Protection (DEP), *Total Maximum Daily Loads Program*, <https://floridadep.gov/dear/water-quality-evaluation-tmdl/content/total-maximum-daily-loads-tmdl-program> (last visited Mar. 1, 2023).

<sup>14</sup> R. 62-300.200(7), F.A.C. (“Impaired water” shall mean a waterbody or waterbody segment that does not meet its applicable water quality standards as set forth in Chapters 62-302 and 62-4, F.A.C. . . . due in whole or in part to discharges of pollutants from point or nonpoint sources).

<sup>15</sup> S. 403.067(1), F.S.

<sup>16</sup> S. 403.061, F.S. DEP has the power and the duty to control and prohibit pollution of air and water in accordance with the law and rules adopted and promulgated by it. Furthermore, s. 403.061(21), F.S., allows DEP to advise, consult, cooperate, and enter into agreements with other state agencies, the federal government, other states, interstate agencies, etc.

<sup>17</sup> The term “point source” means “any discernible, confined, and discrete conveyance, including any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged.” Nonpoint sources of pollution are sources of pollution that are not point sources. Rule 62-620.200(37), F.A.C.

<sup>18</sup> S. 403.067(7), F.S.

<sup>19</sup> S. 403.067(7)(a)2., F.S.

<sup>20</sup> DEP, *Basin Management Action Plans (BMAPs)*, <https://floridadep.gov/dear/water-quality-restoration/content/basin-management-action-plans-bmaps> (last visited Mar. 1, 2023).

<sup>21</sup> S. 403.067(7)(a)5., F.S.

<sup>22</sup> S. 403.067(7)(a)6., F.S.

<sup>23</sup> *Id.*

<sup>24</sup> Ch. 2020-150, Laws of Fla.

spring area contribute at least 20 percent of nonpoint source nitrogen pollution or that remediation is necessary to achieve the TMDL.<sup>25</sup>

### Onsite Sewage Treatment and Disposal Systems

OSTDSs, commonly referred to as “septic systems,” generally consist of two basic parts: the septic tank and the drainfield.<sup>26</sup> Waste from toilets, sinks, washing machines, and showers flows through a pipe into the septic tank, where anaerobic bacteria break the solids into a liquid form. The liquid portion of the wastewater flows into the drainfield, which is generally a series of perforated pipes or panels surrounded by lightweight materials such as gravel or Styrofoam. The drainfield provides a secondary treatment where aerobic bacteria continue deactivating the germs. The drainfield also provides filtration of the wastewater, as gravity draws the water down through the soil layers.<sup>27</sup>



There are an estimated 2.6 million OSTDSs in Florida, providing wastewater disposal for 30 percent of the state’s population.<sup>28</sup> In Florida, development in some areas is dependent on OSTDSs due to the cost and time it takes to install central sewer systems.<sup>29</sup> For example, central sewer is not cost-effective in rural areas or low-density developments.<sup>30</sup> Less than one percent of OSTDSs in Florida are actively managed and the remainder are generally only serviced when they fail.<sup>31</sup>

<sup>25</sup> S. 373.807, F.S.

<sup>26</sup> Department of Health (DOH), *Septic System Information and Care*, <http://columbia.floridahealth.gov/programs-and-services/environmental-health/onsite-sewage-disposal/septic-information-and-care.html> (last visited Mar. 1, 2023); EPA, *Types of Septic Systems*, <https://www.epa.gov/septic/types-septic-systems> (last visited Mar. 1, 2023) (showing the graphic provided in the analysis).

<sup>27</sup> *Id.*

<sup>28</sup> DEP, *Onsite Sewage Program*, <https://floridadep.gov/water/onsite-sewage#:~:text=Onsite%20sewage%20treatment%20and%20disposal%20systems%20%28OSTDS%29%2C%20commonly,represent%2012%25%20of%20the%20United%20States%E2%80%99%20septic%20systems> (last visited Mar. 1, 2023).

<sup>29</sup> DOH, *Report on Range of Costs to Implement a Mandatory Statewide 5-Year Septic Tank Inspection Program*, Executive Summary (Oct. 1, 2008), available at <http://www.floridahealth.gov/environmental-health/onsite-sewage/documents/costs-implement-mandatory-statewide-inspection.pdf> (last visited Mar. 4, 2023).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

In a conventional OSTDS, a septic tank does not reduce nitrogen from the raw sewage. In Florida, approximately 30-40 percent of the nitrogen levels are reduced in the drainfield of a system that is installed 24 inches or more from groundwater.<sup>32</sup> This leaves a significant amount of nitrogen to percolate into the groundwater, which makes nitrogen from OSTDSs a potential contaminant in groundwater.<sup>33</sup> Different types of advanced OSTDSs exist that can remove greater amounts of nitrogen than a typical septic system (often referred to as “advanced” or “nutrient-reducing” septic systems).<sup>34</sup> Determining which advanced system is the best option depends on site-specific conditions.

The owner of a properly functioning OSTDS must connect to a sewer system within one year of receiving notification that a sewer system is available for connection.<sup>35</sup> Owners of an OSTDS in need of repair or modification must connect within 90 days of notification from DEP.<sup>36</sup>

The Act required the transfer of the Onsite Sewage Program from the Department of Health (DOH) to DEP.<sup>37</sup> The Onsite Sewage Program is being transferred over a period of five years, and guidelines for the transfer are provided by an interagency agreement.<sup>38</sup> Per the agreement, DEP has the primary powers and duties of the Onsite Sewage Program, meaning that the county departments of health will implement the OSTDS program under the direction of DEP instead of DOH.<sup>39</sup> The county departments of health still handle permitting and inspection of OSTDSs.<sup>40</sup> In the event of an alleged violation of OSTDS laws, county departments of health will be responsible for conducting an inspection to gather information regarding the allegations.<sup>41</sup>

### Wastewater Treatment Facilities

The proper treatment and disposal or reuse of domestic wastewater is an important part of protecting Florida’s water resources. Inadequate treatment of wastewater can become a leading cause of water pollution.<sup>42</sup> The majority of Florida’s domestic wastewater is controlled and treated by centralized treatment facilities regulated by DEP. Florida has approximately 2,000 permitted domestic wastewater treatment facilities.<sup>43</sup>

Facilities or activities which discharge waste into waters of the state or which will reasonably be expected to be a source of water pollution must obtain a permit from DEP, unless specifically exempted from applying for a permit.<sup>44</sup> A wastewater permit is required for:

<sup>32</sup> DOH, *Florida Onsite Sewage Nitrogen Reduction Strategies Study, Final Report 2008-2015*, 21 (Dec. 2015), <http://www.floridahealth.gov/environmental-health/onsite-sewage/research/draftlegreportsm.pdf>; see rule 64E-6.006(2), F.A.C.

<sup>33</sup> University of Florida Institute of Food and Agricultural Sciences (IFAS), *Onsite Sewage Treatment and Disposal Systems: Nitrogen*, 3 (Oct. 2020), available at <http://edis.ifas.ufl.edu/pdf/SS/SS55000.pdf> (last visited Mar. 1, 2023).

<sup>34</sup> DOH, *Nitrogen-Reducing Systems for Areas Affected by the Florida Springs and Aquifer Protection Act* (updated May 2021), <http://www.floridahealth.gov/environmental-health/onsite-sewage/products/documents/bmap-n-reducing-tech-18-10-29.pdf>.

<sup>35</sup> S. 381.00655, F.S.

<sup>36</sup> *Id.*

<sup>37</sup> DEP, *Program Transfer*, <https://floridadep.gov/water/onsite-sewage/content/program-transfer> (last visited Mar. 1, 2023).

<sup>38</sup> DOH, DEP, *Interagency Agreement between DEP and DOH in Compliance with Florida’s Clean Waterways Act for Transfer of the Onsite Sewage Program*, 5 (June 30, 2021), <http://www.floridahealth.gov/environmental-health/onsite-sewage/documents/interagency-agreement-between-fdoh-fdep-onsite-signed-06302021.pdf> (last visited Mar. 1, 2023).

<sup>39</sup> *Id.* at 14.

<sup>40</sup> *Id.* at 11; and DEP, *Onsite Sewage Program*, <https://floridadep.gov/water/onsite-sewage> (last visited Mar. 1, 2023).

<sup>41</sup> DOH, DEP, *Interagency Agreement between DEP and DOH in Compliance with Florida’s Clean Waterways Act for Transfer of the Onsite Sewage Program* at 11.

<sup>42</sup> Water Online, *Growing Popularity Of Ultrafiltration Technology To Boost Hollow Fiber Membrane Market* (Mar. 21, 2023), [https://www.wateronline.com/doc/growing-popularity-of-ultrafiltration-technology-to-boost-hollow-fiber-membrane-market-0001?vm\\_tId=2512446&vm\\_nId=79823&user=76a60344-8e8a-43bc-87c8-a8d7d5883228&gdpr=0&vm\\_alias=Growing%20Popularity%20Of%20Ultrafiltration%20Technology%20To%20Boost%20Hollow%20Fiber%20Membrane%20Market&utm\\_source=mkt\\_WOL&utm\\_medium=email&utm\\_campaign=WOL\\_03-30-2023&utm\\_term=76a60344-8e8a-43bc-87c8-a8d7d5883228&utm\\_content=Growing%20Popularity%20Of%20Ultrafiltration%20Technology%20To%20Boost%20Hollow%20Fiber%20Membrane%20Market&mkt\\_tok=MDc1LU5WQy0wODYAAAGK0P4H3CM1M46SZoUb7uyDk9IsA mu4e BraaPGWTz-jlCDZLyarleHleHdWfg9pa2tCQtFKLU5Uu1AwDtCIk5EaCmJp5T4d mvqOpEp1dahKTRuqq](https://www.wateronline.com/doc/growing-popularity-of-ultrafiltration-technology-to-boost-hollow-fiber-membrane-market-0001?vm_tId=2512446&vm_nId=79823&user=76a60344-8e8a-43bc-87c8-a8d7d5883228&gdpr=0&vm_alias=Growing%20Popularity%20Of%20Ultrafiltration%20Technology%20To%20Boost%20Hollow%20Fiber%20Membrane%20Market&utm_source=mkt_WOL&utm_medium=email&utm_campaign=WOL_03-30-2023&utm_term=76a60344-8e8a-43bc-87c8-a8d7d5883228&utm_content=Growing%20Popularity%20Of%20Ultrafiltration%20Technology%20To%20Boost%20Hollow%20Fiber%20Membrane%20Market&mkt_tok=MDc1LU5WQy0wODYAAAGK0P4H3CM1M46SZoUb7uyDk9IsA mu4e BraaPGWTz-jlCDZLyarleHleHdWfg9pa2tCQtFKLU5Uu1AwDtCIk5EaCmJp5T4d mvqOpEp1dahKTRuqq), (last visited Apr. 7, 2023).

<sup>43</sup> DEP, *General Facts and Statistics about Wastewater in Florida*, <https://floridadep.gov/water/domestic-wastewater/content/general-facts-and-statistics-about-wastewater-florida> (last visited Apr. 7, 2023).

<sup>44</sup> S. 403.087, F.S.



- The collection, transmission, treatment, disposal, and/or reuse of wastewater.
- The operation of, and certain construction activities associated with, domestic or industrial wastewater facilities or activities.
- The construction of a domestic wastewater collection and transmission system.<sup>45</sup>

Under section 402 of the federal Clean Water Act, any discharge of a pollutant from a point source to surface waters (i.e., the navigable waters of the United States or beyond) must obtain a National Pollution Discharge Elimination System (NPDES) permit.<sup>46</sup> NPDES permit requirements for most wastewater facilities or activities (domestic or industrial) that discharge to surface waters are incorporated into a state-issued permit, which gives the permittee a single set of permitting requirements rather than one state and one federal permit.<sup>47</sup> DEP issues operation permits for a period of five years for facilities regulated under the NPDES program and up to 10 years for other domestic wastewater treatment facilities meeting certain statutory requirements.<sup>48</sup>

### Cybersecurity

Cyber-attacks on water and wastewater systems are increasingly common.<sup>49</sup> Attacks that target water or wastewater systems may result in:

- Malfunctioning treatment and conveyance processes;
- Compromise of a utility's website or email system;
- Stolen personal data or credit card information from a utility's billing system; and
- Installation of malicious programs like ransomware, which can disable operations.<sup>50</sup>

### Sanitary Sewer Overflows, Leakages, and Inflow and Infiltration

Although domestic wastewater treatment facilities are permitted and designed to safely and properly collect and manage a specified wastewater capacity, obstructions or extreme conditions can cause a sanitary sewer overflow (SSO). “[A]ny overflow, spill, release, discharge, or diversion of untreated or partially treated wastewater from a sanitary sewer system” is an SSO.<sup>51</sup> An SSO may subject the owner or operator of a facility to civil penalties, criminal conviction or fines, and/or administrative penalties.<sup>52</sup>

SSOs may be reduced by:

- Cleaning and maintaining the sewer system;
- Repairing broken or leaking lines;
- Enlarging or upgrading system capacity and/or reliability; and
- Constructing “wet weather storage and treatment facilities to treat excess flows.”<sup>53</sup>

<sup>45</sup> DEP, *Wastewater Permitting*, <https://floridadep.gov/water/domestic-wastewater/content/wastewater-permitting> (last visited Mar. 1, 2023).

<sup>46</sup> 33 U.S.C. § 1342.

<sup>47</sup> Ss. 403.061(32) and 403.087, F.S.

<sup>48</sup> S. 403.087(3), F.S.

<sup>49</sup> EPA, *Water Sector Cybersecurity Brief for States*, 1 (2018), [https://www.epa.gov/sites/default/files/2018-06/documents/cybersecurity\\_guide\\_for\\_states\\_final\\_0.pdf](https://www.epa.gov/sites/default/files/2018-06/documents/cybersecurity_guide_for_states_final_0.pdf) (last visited Mar. 1, 2023); *see also* Cybersecurity & Infrastructure Security Agency, *Ongoing Cyber Threats to U.S. Water and Wastewater Systems Sector Facilities* (last updated Oct. 14, 2021), <https://www.cisa.gov/news-events/alerts/2021/10/14/ongoing-cyber-threats-us-water-and-wastewater-systems-sector> (last visited Mar. 4, 2023).

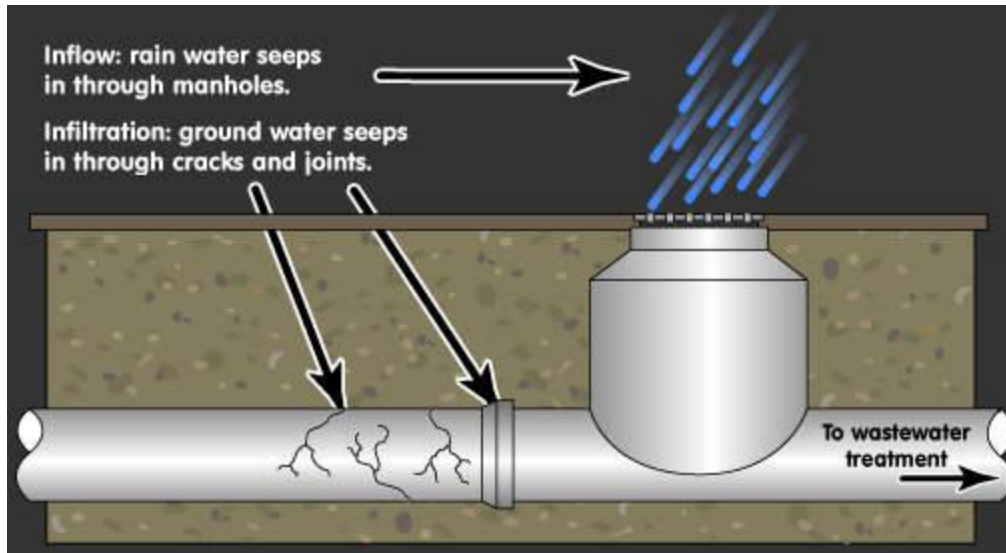
<sup>50</sup> *Id.*

<sup>51</sup> DEP, *Sanitary Sewer Overflows* (Feb. 2019), <https://floridadep.gov/sites/default/files/Sanitary%20Sewer%20Overflows.pdf> (last visited Apr. 6, 2023).

<sup>52</sup> Ss. 403.121, 403.141, and 403.161 (2) – (4), F.S.

<sup>53</sup> DEP, *supra* note 51.

Inflow and infiltration (I&I) is a major cause of SSOs in Florida.<sup>54</sup> I&I is excess water that flows into sewer pipes from stormwater and/or groundwater and ends up at the wastewater treatment facility, requiring it to be treated as though it were wastewater.<sup>55</sup>



When domestic wastewater facilities are evaluated for permit renewal, collection systems are not evaluated for issues such as excessive I&I unless problems result at the treatment plant.<sup>56</sup>

Another major cause of SSOs is the loss of power to the infrastructure for the collection and transmission of wastewater, such as pump stations, particularly during storms.<sup>57</sup> Currently, all pump stations are required to have emergency pumping capability, but what is required ranges from providing portable pumping equipment to having an in-place emergency generator, depending on the type of pump station.<sup>58</sup>

The Act required:

- DEP to adopt rules to reasonably limit, reduce, and eliminate leaks, seepages, or inputs into the underground pipes of wastewater collection systems;
- Sanitary sewage disposal facilities to have a power outage contingency plan to mitigate the impacts of power outages on the utility's collection system and pump stations; and
- Facilities to use I&I studies and leakage surveys to develop pipe assessment, repair, and replacement action plans with at least a five-year planning horizon.<sup>59</sup>

#### Rulemaking Authority 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 . . . .”<sup>60</sup> Rulemaking authority is delegated by the Legislature through statute and authorizes an agency to “adopt, develop, establish, or otherwise create” a rule.<sup>61</sup> The effect of an agency statement determines whether it meets the

<sup>54</sup> See generally RS&H, Inc., *Evaluation of Sanitary Sewer Overflows and Unpermitted Discharges Associated with Hurricanes Hermine and Matthew* (Jan. 2017),

[https://floridadep.gov/sites/default/files/Final%20Report%20Evaluation%20of%20SSO%20and%20Unpermitted%20Discharges%2001\\_06\\_17.pdf](https://floridadep.gov/sites/default/files/Final%20Report%20Evaluation%20of%20SSO%20and%20Unpermitted%20Discharges%2001_06_17.pdf) (last visited Mar. 1, 2023).

<sup>55</sup> City of St. Augustine, *Inflow & Infiltration Elimination Program*, <https://www.citystaug.com/549/Inflow-Infiltration-Elimination-Program> (last visited Apr. 6, 2023).

<sup>56</sup> Rule 62-600.735(5), F.A.C.; see Fla. Admin. Code R. 62-604.200. “Collection/transmission systems” are defined as “sewers, pipelines, conduits, pumping stations, force mains, and all other facilities used for collection and transmission of wastewater from individual service connections to facilities intended for the purpose of providing treatment prior to release to the environment.”

<sup>57</sup> RS&H, Inc., *supra* note 54.

<sup>58</sup> R. 62-604.400(2)(a), F.A.C.

<sup>59</sup> Ch. 2020-150, Laws of Fla.

<sup>60</sup> S. 120.52(16), F.S.; see also *Fla. Dep’t of Fin. Servs. v. Capital Collateral Reg’l Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

<sup>61</sup> S. 120.52(17), F.S.

statutory definition of a rule, regardless of how the agency characterizes the statement.<sup>62</sup> If an agency statement generally requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law, it is a rule.<sup>63</sup>

The Administrative Procedure Act sets forth a uniform set of procedures agencies must follow when exercising delegated rulemaking authority.<sup>64</sup> Rulemaking authority is delegated by the Legislature<sup>65</sup> by law authorizing an agency to “adopt, develop, establish, or otherwise create”<sup>66</sup> a rule. Agencies do not have discretion whether to engage in rulemaking.<sup>67</sup> To adopt a rule, an agency must have an express grant of authority to implement a specific law by rulemaking.<sup>68</sup> The specific statute being interpreted or implemented through rulemaking must provide standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.<sup>69</sup>

An agency begins the formal rulemaking process by filing a notice of rule development in the Florida Administrative Register (FAR) and the notice must “indicate the subject area to be addressed by rule development, provide a short, plain explanation of the purpose and effect of the proposed rule, cite the specific legal authority for the proposed rule, and include the preliminary text of the proposed rules, if available, or a statement of how a person may promptly obtain, without cost, a copy of any preliminary draft, if available.”<sup>70</sup> Next, an agency must file, upon approval of the agency head, a notice of proposed rule.<sup>71</sup> The notice is published by the Department of State in the FAR<sup>72</sup> and must provide certain information, including the text of the proposed rule, a summary of the agency’s statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule.<sup>73</sup>

An agency must prepare a SERC “if a 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 in the aggregate within 1 year after the implementation of the rule . . . .”<sup>74</sup> The economic analysis mandated for each SERC must analyze a rule’s potential impact over the 5 year period from when the rule goes into effect, including the rule’s likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment;<sup>75</sup> the likely adverse impact on business competitiveness, productivity, or innovation;<sup>76</sup> and whether the rule is likely to increase regulatory costs, including any transactional costs.<sup>77</sup>

If the SERC analysis demonstrates that the projected impact of the proposed rule in any one of these areas will exceed \$1 million in the aggregate for the 5-year period after implementation, the rule must be ratified by the Legislature in order to become effective.<sup>78</sup> If a rule requires ratification, the rule must

---

<sup>62</sup> *Dep’t of Admin. v. Harvey*, 356 So. 2d 323, 325 (Fla. 1st DCA 1977).

<sup>63</sup> *McDonald v. Dep’t of Banking & Fin.*, 346 So. 2d 569, 581 (Fla. 1st DCA 1977); see also *Balsam v. Dep’t of Health & Rehab. Servs.*, 452 So. 2d 976, 977–78 (Fla. 1st DCA 1984); *Dep’t of Transp. v. Blackhawk Quarry Co.*, 528 So. 2d 447, 450 (Fla. 5th DCA 1988), rev. den. 536 So. 2d 243 (Fla. 1988); *Dep’t of Natural Res. v. Wingfield*, 581 So. 2d 193, 196 (Fla. 1st DCA 1991); *Dep’t of Revenue v. Vanjaria Enters., Inc.*, 675 So. 2d 252, 255 (Fla. 5th DCA 1996); *Volusia Cnty. Sch. Bd. v. Volusia Homes Builders Ass’n*, 946 So. 2d 1084, 1089 (Fla. 5th DCA 2007); *Fla. Dep’t of Fin. Servs. v. Capital Collateral Reg’l Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007); *Coventry First, LLC v. Fla. Office of Ins. Reg.*, 38 So. 3d 200, 203-04 (Fla. 1st DCA 2010).

<sup>64</sup> Ch. 120, F.S.

<sup>65</sup> *Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

<sup>66</sup> S. 120.52(17), F.S.

<sup>67</sup> S. 120.54(1)(a), F.S.

<sup>68</sup> Ss. 120.52(8) and 120.536(1), F.S.

<sup>69</sup> *Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008).

<sup>70</sup> S. 120.54(2)(a), F.S.

<sup>71</sup> S. 120.54(3)(a)1., F.S.

<sup>72</sup> S. 120.55(1)(b)1., F.S.

<sup>73</sup> S. 120.54(3)(a)1., F.S.

<sup>74</sup> S. 120.541(1)(b), F.S.

<sup>75</sup> S. 120.541(2)(a)1., F.S.

<sup>76</sup> S. 120.541(2)(a)2., F.S. (The analysis of the likelihood of adverse impact on business competitiveness includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.)

<sup>77</sup> S. 120.541(2)(a)3., F.S.

<sup>78</sup> S. 120.541(3), F.S.



be submitted to the President of the Senate and the Speaker of the House of Representatives no later than 30 days prior to the regular legislative session in order to be considered for ratification.<sup>79</sup>

#### Statement of Estimated Regulatory Costs for Rule 62-6.001, F.A.C.

DEP determined that a SERC was required for rule 62-6.001, F.A.C.<sup>80</sup> DEP found that the rule will increase regulatory costs for OSTDS upgrades in excess of existing required costs.<sup>81</sup> DEP estimates that the total cost impact over five years will be approximately \$57 million.<sup>82</sup> Over a five-year period:

- The cost to upgrade 8,940 residential properties to nutrient-reducing OSTDSs will be approximately \$51 million;
- The cost to upgrade 470 OSTDSs for commercial properties will be approximately \$2.7 million; and
- The state government cost impacts for staffing to manage the increased workload will be approximately \$3.5 million.<sup>83</sup>

#### Statement of Estimated Regulatory Costs for Chapter 62-600, F.A.C.

DEP determined that a SERC was required for chapter 62-600, F.A.C.<sup>84</sup> DEP found that the rules will increase regulatory costs for 1,647 wastewater facilities, including the largest municipal wastewater treatment facilities, facilities in small rural towns, and even small privately-owned wastewater treatment facilities that serve a mobile home park or similar business.<sup>85</sup> The key costs related to the primary rule revisions include the cost to:

- Prepare and submit an annual report for pollution mitigation;
- Prepare a power outage contingency plan;
- Develop and implement the initial collection system action plan;
- Prepare and submit annual report(s) for the collection system action plan; and
- For large facilities, update the facility emergency response plan to address cybersecurity.<sup>86</sup>

DEP estimates that the total increase in cost within five years of the implementation of the rules will be \$328 million.<sup>87</sup> The cost to each wastewater treatment facility will vary according to the size of the facility.<sup>88</sup> DEP provided the following estimates:

- A one-time cost to develop an initial collection system action plan with an asset management plan between \$4.5 million and \$74 million;
- Annual costs to implement and manage a collection system action plan between \$5.9 million and \$17 million;
- Annual costs to prepare a report for the collection system action plan between \$1.8 million and \$17 million; and
- A one-time cost for large Type I domestic wastewater facilities to address cybersecurity concerns of \$11.4 million.<sup>89</sup>

### **Effect of the Bill**

The bill ratifies rule 62-6.001, F.A.C., which is amended to incorporate more stringent permitting requirements for onsite sewage treatment and disposal systems (OSTDSs) in areas where the Department of Environmental Protection (DEP) has adopted an OSTDS remediation plan as part of a basin management action plan. The permitting requirements are projected to assure DEP that the

---

<sup>79</sup> S. 120.541(3), F.S.

<sup>80</sup> DEP, *SERC, Rule 62-6.001, F.A.C.* (on file with the House Water Quality, Supply & Treatment Subcommittee).

<sup>81</sup> *Id.* at 4.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 5.

<sup>84</sup> DEP, *SERC, Chapter 62-600, F.A.C.* (on file with the House Water Quality, Supply & Treatment Subcommittee).

<sup>85</sup> *Id.* at 3.

<sup>86</sup> *Id.* at 5.

<sup>87</sup> *Id.* at 6-7.

<sup>88</sup> *Id.* at 7.

<sup>89</sup> *Id.* at 6-7.

installed system will not cause or contribute to the exceedance of a nutrient total maximum daily load established as of the date of the permit application.

The bill ratifies rules 62-600.405, 62-600.705, and 62-600.720, F.A.C., to:

- Require a pipe assessment, repair, and replacement plan and an annual report on the plan;
- Specify the scope and content of the plan and the content of the annual report;
- Specify the content of and submission requirements for a power outage contingency plan;
- Prescribe requirements for an annual report on utilities' expenditures on pollution mitigation activities;
- Prescribe requirements for an annual report on utilities' revenues and expenditures associated with complying with certain provisions of the Act; and
- Require certain domestic wastewater facilities to address cybersecurity in their emergency response plan.

The bill ratifies the DEP rules solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S., and expressly limits ratification to the effectiveness of the rules. The bill directs that the act must not be codified in the Florida Statutes, but only noted in the historical comments to the rule by the Department of State.

**B. SECTION DIRECTORY:**

Section 1. Ratifies rules 62-6.001, 62-600.405, 62-600.705, and 62-600.720, F.A.C.

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:

See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

Rules 62-600.405, 62-600.705, and 62-600.720, F.A.C., will increase costs for small businesses that have their own wastewater treatment facility. DEP estimates that the cost for these small facilities will be approximately \$4,000 for the preparation of the plan and \$1,600 for preparation of the annual report. The few larger facilities that are privately owned will likely see costs similar to small municipality or small county facilities.

**D. FISCAL COMMENTS:**

Rule 62-6.001, F.A.C., will increase regulatory costs for OSTDS upgrades for properties in certain areas. DEP estimates that in year one residential property owners will collectively pay a one-time amount of approximately \$9,386,600 and a recurring amount of approximately \$250,250 collectively. After five years, the total cost to upgrade 8,940 residential properties to nutrient-reducing OSTDSs is approximately \$50,686,750.

Rule 62-6.001, F.A.C., will increase costs for DEP and DOH due to increased staffing. In year one, DEP will pay a one-time amount of approximately \$4,474 and a recurring amount of approximately \$132,684. In year one, DOH will pay a one-time amount of approximately \$22,370 and a recurring amount of approximately \$349,758. After five years, DEP will have paid approximately \$667,894 and DOH will have paid approximately \$2,805,774. The cost to state and local government over five years adds up to approximately \$3,473,668.<sup>90</sup>

Rules 62-600.405, 62-600.705, and 62-600.720, F.A.C., will increase regulatory costs for local government entities that own and operate large domestic wastewater treatment facilities. DEP estimates that these local government entities will be required to pay approximately \$120 million for one-time capital costs and recurring costs.<sup>91</sup> A small county or city that owns a small wastewater treatment facility may pay \$50,000-\$100,000 to prepare an initial collection system action plan, \$10,000-\$20,000 to implement the plan, and \$5,000-\$20,000 to prepare the annual report.<sup>92</sup> DEP indicated that these estimates may vary widely by facility, especially for extremely large facilities.<sup>93</sup>

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

Not applicable. Because this bill only authorizes specific administrative rules to go into effect, this bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures 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 provided by the bill.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

None.

---

<sup>90</sup> DEP, *SERC, Rule 62-6.001, F.A.C.* at 5.

<sup>91</sup> DEP, *SERC, Chapter 62-600, F.A.C.*, 4, 6-7 (on file with the House Water Quality, Supply & Treatment Subcommittee).

<sup>92</sup> *Id.* at 8.

<sup>93</sup> *Id.* at 6.