

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB RORS 13-02 Ratification of Rules
SPONSOR(S): Rulemaking Oversight & Repeal Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rulemaking Oversight & Repeal Subcommittee		Miller	Rubottom

SUMMARY ANALYSIS

Exercising its authority under the Watershed Restoration Act of 1999, the Department of Environmental Protection (DEP) adopted a series of rules setting total maximum daily loads (TMDLs) for specific waterbodies and waterbody segments designated as impaired, together with a statewide TMDL for mercury. A TMDL is the maximum amount of a specified pollutant that may enter a particular waterbody without impairing the water quality standard adopted for that waterbody under the federal Clean Water Act (CWA). For many waterbodies, DEP adopts separate rule subsections to establish TMDLs for different pollutants. Other rule subsections may include TMDLs for multiple pollutants and/or some combination waterbody segments.

Except for the statewide TMDL, each rule identified in PCB RORS 13-02 was adopted as a subsection added to or amended in a broader Florida Administrative Code section for the water basin encompassing the water segment covered by the TMDL. TMDLs ratified by the bill were adopted together in six separate rulemaking proceedings. For each proceeding DEP prepared a Statement of Estimated Regulatory Costs (SERC) showing the rules implementing the specific TMDLs would have a specific, adverse economic effect, or would increase regulatory costs, exceeding \$1 million over the first 5 years the rule was in effect. Accordingly, each rule must be ratified by the Legislature before it may go into effect.

The rules were adopted on various dates and some were still in the rulemaking process as of 30 days prior to the start of the 2013 Session of the Legislature. By letter to the Speaker and the President of the Senate received on December 21, 2012, DEP advised of the TMDL rules the Department expected to be submitted for ratification during the 2013 Session once rulemaking was complete.

The proposed bill authorizes the rules to go into effect. The scope of the bill is limited to this rulemaking condition and does not adopt the substance of any rule into the statutes.

The bill is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Establishment of TMDLs by DEP¹

Under the federal CWA² states are required to adopt water quality standards (WQS) for their navigable waters and to review and update those standards at least every three years. These standards must include:

- Designation of a waterbody's beneficial uses, such as water supply, recreation, fish propagation, or navigation;
- Water quality criteria that define the amounts of pollutants, in either numeric or narrative form, that the waterbody can contain without impairment of the designated beneficial uses; and
- Anti-degradation requirements.

When a waterbody is unable to maintain its WQS, it is designated as impaired. In such a situation, the Environmental Protection Agency (EPA) or the state must set a TMDL establishing the maximum amount of a given pollutant the waterbody can accept while still meeting WQS associated with its designated use. In Florida, DEP is granted the authority to establish TMDLs by the Watershed Restoration Act of 1999.³ DEP periodically submits to EPA a list of waterbodies or segments for which TMDL assessments will be conducted. If the assessments show that a particular waterbody is not meeting its WQS, DEP is then required to set a TMDL, which is done through rulemaking.⁴

Adoption of TMDL Rules Submitted for Ratification

DEP develops a TMDL by assessing the quality of a particular waterbody, determining if that waterbody falls short of the applicable water quality standard (and is thus "impaired"), discerning which pollutant(s) may cause the impairment, establish the TMDL necessary to resolve that impairment, and adopts that TMDL by rule.⁵ DEP also prepares and makes available online a complete report supporting the determination of one or more TMDLs, depending on the affected waterbodies included in the report.⁶

DEP organizes all TMDLs under a single chapter of rules.⁷ The chapter is divided into sections representing the different water basins identified in the state, with one exception: Rule section 62-304.900 is a new TMDL for mercury that applies statewide to all waterbodies. A TMDL for a particular waterbody is adopted as a subsection of the rule section representing the water basin encompassing the particular water segment to which the TMDL applies. For each of the six rule section titles below DEP used a single rulemaking proceeding to adopt the listed subsections. As part of each proceeding DEP prepared a single SERC showing the specified subsections would require legislative ratification:

- Rule 62-304.300, "St. Marks River Basin TMDLs:" subsections (3), (4), (5), (6), and (7) were adopted on March 2, 2012.⁸

¹ This summary is drawn from the analysis prepared by staff of the Agriculture & Natural Resources Subcommittee for PCB ANR 13-03. Please consult that analysis for a detailed description of DEP's role in controlling water pollution by setting TMDLs.

² 33 U.S.C. s. 1251, et seq.

³ Section 403.067, F.S.

⁴ Section 403.067(2), F.S.

⁵ General description of process at <http://www.dep.state.fl.us/water/tmdl/index.htm>, accessed 3/28/2013.

⁶ Reports for TMDLs are found under either "Final TMDL Documents" at http://www.dep.state.fl.us/water/tmdl/final_tmdl.htm, or "Draft TMDLs" at http://www.dep.state.fl.us/water/tmdl/draft_tmdl.htm, both accessed 3/28/2013.

⁷ Chapter 62-304, F.A.C., "Total Maximum Daily Loads."

⁸ The TMDL report for these rules is under "Reposted TMDL Documents for Group 1 Basins: St. Marks/Wakulla River Basin" at http://www.dep.state.fl.us/water/tmdl/repost_tmdl.htm, accessed on 3/28/2013.

- Rule 62-304.330, “Pensacola Bay Basin TMDLs:” subsections (10) and (11) were adopted on February 7, 2013.⁹
- Rule 62-304.520, “Indian River Lagoon Basin TMDLs:” subsections (14),¹⁰ (15), (16), (17), (18), (19), and (20) were adopted on March 20, 2013.¹¹
- Rule 62-304.610, “Hillsborough River Basin TMDLs:” subsection (12), “Channelized Stream,” adopted on August 20, 2012.¹²
- Rule 62-304.645, “Springs Coast Basin TMDLs:” subsections (13) and (14), adopted on March 8, 2013.¹³
- Rule 62-304.900, “Statewide TMDLs:” the mercury TMDL was adopted on November 21, 2012.¹⁴

Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.¹⁵ Rulemaking authority is delegated by the Legislature¹⁶ through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”¹⁷ a rule. Agencies do not have discretion whether to engage in rulemaking.¹⁸ To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.¹⁹ The grant of rulemaking authority itself need not be detailed.²⁰ 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.²¹

An agency begins the formal rulemaking process by filing a notice of the proposed rule.²² The notice is published by the Department of State in the Florida Administrative Register²³ and must provide certain information, including the text of the proposed rule, a summary of the agency’s statement of estimated

⁹ The TMDL report for these rules is under “Reposted TMDL Documents for Group 4 Basins: Pensacola Bay Basin” at http://www.dep.state.fl.us/water/tmdl/repost_tmdl.htm, accessed on 3/28/2013.

¹⁰ In the certification submitted to the Department of State when these rules were filed for adoption DEP stated (14) would no longer require ratification. As the filings throughout this particular rulemaking were supported apparently by a single SERC showing all the subsections would require ratification, and because (14) continued to be included with the remaining subsections being adopted, the better practice appears to be to include (14) in this ratification.

¹¹ The TMDL report for these rules is under “Draft TMDL Documents for Group 5 Basins: Indian River Lagoon Basin (Oxygen and Dissolved Nutrient TMDLs for Eleven Tributary Segments of the Indian River Lagoon – Report & Appendices)” at http://www.dep.state.fl.us/water/tmdl/draft_tmdl.htm, accessed 3/28/2013.

¹² The subsection was filed for adoption on August 20, 2012 but mislabeled as subsection (10). In a letter to the Department of State dated February 13, 2013, DEP clarified the mistake and that the adopted rule properly should be labeled as subsection (12). The TMDL report for this rule is under “Reposted TMDL Documents for Group 2 Basins: Hillsborough River Basin” at http://www.dep.state.fl.us/water/tmdl/repost_tmdl.htm, accessed on 3/28/2013.

¹³ The TMDL report for these rules is under “Draft TMDL Documents for Group 5 Basins: Springs Coast Basin” at http://www.dep.state.fl.us/water/tmdl/draft_tmdl.htm, accessed 3/28/2013.

¹⁴ The TMDL report for this rule is under “Draft Statewide TMDL Documents: Revised Draft Mercury TMDL for the State of Florida” at http://www.dep.state.fl.us/water/tmdl/draft_tmdl.htm, accessed 3/28/2013.

¹⁵ Section 120.52(16); *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

¹⁶ *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

¹⁷ Section 120.52(17).

¹⁸ Section 120.54(1)(a), F.S.

¹⁹ Section 120.52(8) & s. 120.536(1), F.S.

²⁰ *Save the Manatee Club, Inc.*, supra at 599.

²¹ *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).

²² Section 120.54(3)(a)1, F.S..

²³ Section 120.55(1)(b)2, F.S.

regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. 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

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. First is the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.²⁵ Next is the likely adverse impact on business competitiveness,²⁶ productivity, or innovation.²⁷ Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.²⁸ If the analysis shows 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, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."²⁹ A rule must be filed for adoption before it may go into effect³⁰ and cannot be filed for adoption until completion of the rulemaking process.³¹ A rule projected to have a specific economic impact exceeding \$1 million in the aggregate over 5 years³² must be ratified by the Legislature before going into effect.³³ As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

Impact of Rules

With one exception, each rule creates the TMDL for one or more specific pollutants for a particular waterbody. Rule 62-304.900, F.A.C., creates a specific TMDL for mercury in all Florida waters. While the implementation of each of these separate TMDLs is projected to increase regulatory costs by over \$1 million in the first five years of operation, the adoption of TMDLs by DEP using a thorough scientific process maintains Florida's overall compliance with the Clean Water Act and precludes the federal EPA from setting these necessary levels.

Effect of Proposed Change

The bill ratifies Rules 62-304.300(3), (4), (5), (6), and (7); 62-304.330(10) and (11); 62-304.520(14), (15), (16), (17), (18), (19), and (20); 62-304.610(12); 62-304.645(13) and (14); and 62-304.900, F.A.C., allowing each rule to go into effect.

B. SECTION DIRECTORY:

Section 1: Ratifies the following rules solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S.:

- Rule 62-304.300, subsections (3), (4), (5), (6), and (7), F.A.C.
- Rule 62-304.330, subsections (10) and (11), F.A.C.
- Rule 62-304.520, subsections (14), (15), (16), (17), (18), (19), and (20), F.A.C.

²⁴ Section 120.541(2)(a), F.S.

²⁵ Section 120.541(2)(a)1., F.S.

²⁶ Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

²⁷ Section 120.541(2)(a) 2., F.S.

²⁸ Section 120.541(2)(a) 3., F.S.

²⁹ Section 120.54(3)(e)6. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State .

³⁰ Section 120.54(3)(e)6, F.S.

³¹ Section 120.54(3)(e), F.S.

³² Section 120.541(2)(a), F.S.

³³ Section 120.541(3), F.S.

- Rule 62-304.610, subsection (12), F.A.C.
- Rule 62-304.645, subsections (13) and (14), F.A.C.
- Rule 62-304.900, F.A.C. (the statewide mercury TMDL)

The bill expressly limits ratification to the effectiveness of the rules. The bill directs the act shall not be codified in the Florida Statutes but only noted in the historical comments to each rule by the Department of State.

Section 2: Provides the act goes into effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The bill creates no additional source of state revenues.
2. Expenditures: The bill itself requires no state expenditures. Any resulting expenditures are due to the substantive policy of the rule as addressed in the SERC for that rule.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill itself has no impact on local government revenues.
2. Expenditures: The bill itself does not impose additional expenditures on local governments. Any resulting expenditures are due to the substantive policy of the rule as addressed in the SERC for that rule.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill itself does not directly impact the private sector. Any resulting economic impacts are due to the substantive policy of the rule as addressed in the SERC for that rule.

D. FISCAL COMMENTS:

The economic impacts projected in the statements of estimated regulatory costs would result from the application and enforcement of the specific TMDL in the specified water body.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The legislation does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

No other constitutional issues are presented by the bill.

B. RULE-MAKING AUTHORITY:

The bill meets the final statutory requirement for DEP to exercise its rulemaking authority in setting TMDLs for the specified water bodies consistent with its duties under the CWA and the Watershed Restoration Act of 1999. No additional rulemaking authority is required.

C. DRAFTING ISSUES OR OTHER COMMENTS: None

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES