



State Affairs Committee

MEETING PACKET

Thursday, January 26, 2012

10:30 AM

Morris Hall (17 HOB)

**Dean Cannon
Speaker**

**Seth McKeel
Chair**

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

State Affairs Committee

Start Date and Time: Thursday, January 26, 2012 10:30 am
End Date and Time: Thursday, January 26, 2012 12:30 pm
Location: Morris Hall (17 HOB)
Duration: 2.00 hrs

Consideration of the following bill(s):

CS/HB 1227 Certification of 911 Public Safety Telecommunicators by Judiciary Committee, Drake, Passidomo
HB 4187 Cattle by Albritton
HB 4189 Florida Agricultural Exposition by Albritton
HB 7045 Consumptive Use Permits for Development of Alternative Water Supplies by Select Committee on Water Policy, Williams, T.
HB 7051 Rules Establishing Numeric Nutrient Criteria by Agriculture & Natural Resources Subcommittee, Caldwell

NOTICE FINALIZED on 01/24/2012 16:15 by Love.John

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1227 Certification of 911 Public Safety Telecommunicators

SPONSOR(S): Drake and others

TIED BILLS: IDEN./SIM. **BILLS:** CS/SB 514

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Judiciary Committee	16 Y, 0 N, As CS	Thomas	Havlicak
2) State Affairs Committee		Thompson <i>JHT</i>	Hamby <i>JDC</i>
3) Health & Human Services Committee			

SUMMARY ANALYSIS

The bill provides that the requirement for certification as a 911 public safety telecommunicator is waived for a sworn state-certified law enforcement officer that passes the 911 public safety telecommunicator certification exam, provided that the officer:

- Is selected by the chief executive of her or his agency, and
- Performs as a 911 public safety telecommunicator only on an occasional or limited basis.

The bill waives the \$75.00 fee for law enforcement officers taking the examination. A law enforcement officer who fails the examination must complete the required 911 public safety telecommunication training program before retaking the exam.

The bill will not have a significant fiscal impact on state or local governments.

The bill takes effect July 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Legislative History

In 2008, the Legislature established a voluntary certification program for “911 emergency dispatchers.”¹ In 2010, the Legislature amended this program to change it to a mandatory certification program for “911 public safety telecommunicators.”²

Emergency Telephone Number “911”

Section 365.171, F.S., governs Florida’s public policy on the emergency telephone number “911.” This statute specifies that it is the intent of the Legislature:

[T]o implement and continually update a cohesive statewide emergency communications number “E911” plan for enhanced 911 services which will provide citizens with rapid direct access to public safety agencies by accessing “911” with the objective of reducing the response time to situations requiring law enforcement, fire, medical, rescue, and other emergency services.³

The Department of Management Services (DMS) directs the statewide 911 system and is authorized to coordinate the activities of the system with state, county, local, and private agencies. The Enhanced 911 (E911) Board receives and distributes fee revenues for the system and provides annual reports to the Governor and the Legislature regarding expenditures and the status of E911 service in Florida.⁴

Currently, all 67 Florida counties report operational E911 systems that provide lifesaving features, including call answering, call back and location determination. Automatic location identification including the caller’s telephone number, address or location of the telephone, and supplementary emergency services information are required at all Public Safety Answering Points.⁵ In addition, Florida is continuing Next Generation 911 migration.⁶

The E911 Board’s 2009-2010 fiscal year county funding survey identified 286 Public Safety Answering Points statewide with each county having between one and forty of these facilities.⁷ There is no standard procedure defining which local agency operates these call centers, but many are managed by Sheriff’s offices, police departments, fire rescue, or a variety of local administrative agencies.⁸ The FY 2009-2010 county survey found that 5,213 call takers received over 13.2 million 911 calls statewide.⁹

Public Safety Telecommunicators

¹ Chapter 2008-51, L.O.F.; codified as s. 401.465, F.S.

² Chapter 2010-188, L.O.F.; codified as s. 401.465(2)(a), F.S.

³ Section 365.171(2), F.S.

⁴ Section 365.172 (5)(a), F.S.

⁵ See s. 365.175, F.S.

⁶ State of Florida E911 Board 2010 Annual Report, available at

http://dms.myflorida.com/suncom/public_safety_bureau/florida_e911/e911_board (last visited Jan. 25, 2012), provides that NG-911 involves the transition to a managed IP network for routing and delivery of 911 emergency requests from a variety of devices and services to the appropriate Public Safety Answering Point (PSAP). Congress and Federal agencies are increasing efforts to regulate advanced technologies and NG-911 to ensure access to emergency services.

⁷ *Id.* See appendix 2.

⁸ David Gulliver, Ed., *Florida 911: The State of Emergency*, Gulf Coast Community Foundation of Venice, <http://www.a911.org/sites/default/files/Florida-911-Report.pdf> (last visited Jan. 25, 2012).

⁹ *Supra* note 7.

Public safety telecommunicators (telecommunicators), also known as 911 operators or emergency dispatchers, are often the initial point of contact for the public when emergency assistance is required. Telecommunicators receive emergency calls requesting police, fire, medical, and other urgent situation services. These personnel determine the nature, location, and priority of the situation and communicate this information to emergency units as necessary and in accordance with established procedures. Telecommunicators answer and process 911 calls, maintain contact with all units on assignment, and coordinate status and location of emergency responders as necessary.

Public Safety Telecommunication Curriculum Framework and Standards

The Division of Workforce Education at the Department of Education (DOE) publishes curriculum frameworks and standards for both public safety telecommunication and law enforcement.

The Public Safety Telecommunication framework is designed to prepare students for employment as police, fire, and ambulance dispatchers. The intended outcomes for the 232-hour Public Safety Telecommunication course include the ability of the dispatcher to do all of the following:

- Describe and demonstrate professional ethics and the role of telecommunicator.
- Describe Guidelines and Operational Standards of call classification and prioritization.
- Identify and explain communication equipment and resources.
- Demonstrate communication and interpersonal skills.
- Perform operational skills.
- Demonstrate understanding of fire department role and responses as well as hazardous materials awareness.
- Demonstrate understanding of emergency medical services role and responses.
- Demonstrate understanding of law enforcement role and responses.
- Understand the duties of a public safety telecommunicator.
- Comprehend stress management techniques.
- Demonstrate an understanding of Emergency Management practices.
- Demonstrate CPR proficiency.¹⁰

The Public Safety Telecommunication program curriculum is currently taught at various community colleges and vocational/technical centers across the state. Forty-eight public safety agencies have been certified to teach the curriculum since 2008, including thirty-seven local law enforcement agencies.¹¹

Law Enforcement Officer Curriculum Framework and Standards

The Florida DOE curriculum framework for Law Enforcement Officers includes its own set of intended outcomes in its 770-hour course.¹² Seven of the twelve Public Safety Telecommunication outcomes overlap with Law Enforcement Officer training. The five Public Safety Telecommunication outcomes which are not covered by the Law Enforcement Officer curriculum are the first three, relating to the role of telecommunicator, call classification and prioritization, and E911 equipment; the fifth, relating to operational skills; and the tenth, relating to understanding the duties of a public safety telecommunicator.

Public Safety Telecommunicator Certification

¹⁰ Florida Department of Education, *Curriculum Framework, Public Safety Telecommunication* (July 2010) available at http://www.fldoe.org/workforce/dwdframe/law_cluster_frame10.asp (last visited Jan. 25, 2012).

¹¹ Florida Department of Health, *911 Public Safety Telecommunicator Program: Overview* (Oct. 4, 2011) available at <http://www.doh.state.fl.us/DEMO/EMS/dispatchers.html> (last visited Jan. 25, 2012).

¹² Florida Department of Education, "Curriculum Framework, Law Enforcement," July 2010, http://www.fldoe.org/workforce/dwdframe/law_cluster_frame10.asp, (last visited Jan. 25, 2012),

In 2010, the Florida Legislature made several changes to the public safety telecommunication certification provisions of s. 401.465, F.S.¹³ Among the changes were the replacement of “911 emergency dispatcher” with “public safety telecommunicator”¹⁴ throughout Florida law and the delineation of a public safety telecommunication training program.¹⁵ A training program is certified by the Department of Health (DOH) if it meets the DOE’s curriculum framework and consists of not less than 232 hours of coursework.¹⁶

Another significant change to this section in 2010 was the transition of certification from a voluntary to a mandatory procedure. Effective October 1, 2012, all public safety telecommunicators must be certified by DOH if they are employed at an “answering point,” defined as a “public safety agency that receives incoming 911 calls and dispatches appropriate public safety agencies to respond to the calls.”¹⁷ To achieve certification, a person must complete an appropriate training program and pass an examination administered by DOH which measures the applicant’s competency and proficiency.¹⁸ A certificate is good for two years and expires automatically if not renewed at the end of the two-year period.¹⁹ Twenty hours of training are required for the biennial renewal certification.²⁰ The examination fee for a 911 public safety telecommunicator is set by DOH and may not exceed \$75.²¹

The mandatory public safety telecommunicator certification may be temporarily waived by the DOH in a geographic area of Florida where a state of emergency has been declared by the Governor.²²

Existing Public Safety Telecommunicators, Law Enforcement Officers and Firefighters

The certification of existing public safety telecommunicators, as well as existing state-certified law enforcement officers and firefighters is also provided for in current law. Persons who fit these descriptions prior to April 1, 2012, must still pass the examination for certification; however, upon passage of the examination, completion of the training program is waived. Newly employed telecommunicators, law enforcement officers, and firefighters who begin their employment on or after April 1, 2012, will be required to be certified by taking both a training course and passing the exam.²³

In a 2010 Advisory Legal Opinion, Florida Attorney General Bill McCollum addressed a question posed by the Chief of Police in Springfield, Florida, as to whether the law now required “all law enforcement officers who are likely to work in the city’s dispatch center and serve as a call-taker and dispatcher of 911 calls to be trained and certified?” The Attorney General opined that certification is the only requirement. McCollum stated:

... it is my opinion that pursuant to section 401.465(2)(a), Florida Statutes, any public agency employee whose duties and responsibilities include answering, receiving, transferring, and dispatching functions related to 911 calls or supervising or serving as the command officer to a person or persons having these duties and responsibilities at a public safety answering point is required to be certified by the Department of Health by October 1, 2012. Training requirements are dependent upon personnel’s length of employment as a 911 public safety telecommunicator.²⁴

¹³ Section 3, ch. 2010-188, L.O.F.

¹⁴ Section 401.465(1)(a), F.S.

¹⁵ Section 401.465(1)(c), F.S.

¹⁶ *Id.*

¹⁷ Section 365.172(2)(a), F.S.

¹⁸ *See* s. 401.465(2)(d), F.S.

¹⁹ Section 401.465(2)(f), F.S.

²⁰ Section 401.465(2)(e), F.S.

²¹ Section 401.465(3)(b), F.S.

²² Section 401.465(4), F.S.

²³ Section 401.465(2)(j), F.S.

²⁴ Op. Atty Gen. Fla. 10-27 (2010).

Florida Department of Law Enforcement E911 Training Efforts

The Florida Department of Law Enforcement (FDLE) is working to develop a 40-hour training program in E911 Public Safety communication for sworn law enforcement officers for which approval as a specialized course will be sought from the Criminal Justice Standards and Training Commission.²⁵ The training program will be a combination of hands-on and on-line training. The hands-on training portion could be delivered by public safety agency training departments, and the online segment would be made available by FDLE via its current system for on-line training and delivery at no cost to officers of their agency.²⁶

Effect of the Bill

The bill waives the requirement for certification as a 911 public safety telecommunicator for a person employed as a sworn state-certified law enforcement officer, provided the officer:

1. Is selected by the chief executive of her or his agency;
2. Only performs as a 911 public safety telecommunicator on an occasional and limited basis; and
3. Passes the Department of Health approved examination that measures the competency and proficiency of an applicant in the subject material comprising the public safety telecommunications program.

The bill waives the \$75.00 examination fee for law enforcement officers taking the examination under this new provision. A law enforcement officer who fails the examination must take a Department of Health approved public safety telecommunication training program before retaking the exam.

The bill takes effect on July 1, 2012.

B. SECTION DIRECTORY:

Section 1 amends s. 401.465, F.S., relating to 911 public safety telecommunicator certification.

Section 2 provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill waives examination fees for law enforcement officers, fees that are to be collected by DOH once the certification program becomes effective on October 1, 2012. The fee is set by DOH and is presently set at the statutory cap of \$75. It is unknown at this time how many fees will be waived under this bill.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

²⁵ Florida Criminal Justice Standards and Training Commission, at <http://www.fdle.state.fl.us/Content/getdoc/91a75023-5a74-40ef-814d-8e7e5b622d4d/CJSTC-Home-Page.aspx>, (last visited Jan. 25, 2012).

²⁶ Florida Department of Law Enforcement Analysis of HB 1227 (2012), at page 3, section IV., last visited Jan. 25, 2012, (on file with the House Government Operations Subcommittee).

2. Expenditures:

The bill will likely reduce costs for local governments by allowing them to occasionally utilize law enforcement officers as 911 public safety telecommunicators if the officers have passed the statutorily-mandated certification exam. In addition, the bill waives examination fees for law enforcement officers.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an 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:

None.

B. RULE-MAKING AUTHORITY:

DOH may need to amend its rules relating to the 911 public safety telecommunicator certification program based on the changes made by the bill. Adequate rulemaking authority exists within s. 401.35, F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 19, 2012, the Judiciary Committee approved one amendment and reported the bill favorably. The amendment:

- Removes from the bill the exemption for law enforcement officers from the definition of "911 Public Safety Telecommunicator."
- Provides that law enforcement officers selected by their chief executive who pass the required examination and only perform as a 911 public safety telecommunicator on an occasional and limited basis are exempt from certification as a 911 public safety telecommunicator.

This analysis is drafted to the bill as passed by the Judiciary Committee.

1 A bill to be entitled
 2 An act relating to certification of 911 public safety
 3 telecommunicators; amending s. 401.465, F.S.; revising
 4 requirements for certification of 911 public safety
 5 telecommunicators; providing conditions under which
 6 the requirement for certification as a 911 public
 7 safety telecommunicator may be waived for certain law
 8 enforcement officers; providing for exemption from the
 9 examination fee; providing an effective date.

10
 11 Be It Enacted by the Legislature of the State of Florida:

12
 13 Section 1. Paragraphs (d) and (j) of subsection (2) of
 14 section 401.465, Florida Statutes, are amended, paragraph (k) of
 15 that subsection is redesignated as paragraph (l), and a new
 16 paragraph (k) is added to that subsection, to read:

17 401.465 911 public safety telecommunicator certification.-

18 (2) PERSONNEL; STANDARDS AND CERTIFICATION.-

19 (d) The department shall determine whether the applicant
 20 meets the requirements specified in this section and in rules of
 21 the department and shall issue a certificate to any person who
 22 meets such requirements. Such requirements must include the
 23 following:

24 1. Completion of an appropriate 911 public safety
 25 telecommunication training program;

26 2. Certification under oath that the applicant is not
 27 addicted to alcohol or any controlled substance;

28 3. Certification under oath that the applicant is free

29 from any physical or mental defect or disease that might impair
 30 the applicant's ability to perform his or her duties;

31 4. Submission of the application fee prescribed in
 32 subsection (3);

33 5. Submission of a completed application to the department
 34 which indicates compliance with subparagraphs 1., 2., and 3.;
 35 and

36 6. Effective October 1, 2012, passage of an examination
 37 approved ~~administered~~ by the department which measures the
 38 applicant's competency and proficiency in the subject material
 39 of the public safety telecommunication training program.

40 (j) If a person was employed as a 911 public safety
 41 telecommunicator, ~~a sworn state-certified law enforcement~~
 42 ~~officer~~, or a state-certified firefighter before April 1, 2012,
 43 he or she must pass the examination approved ~~administered~~ by the
 44 department which measures the competency and proficiency in the
 45 subject material of the public safety telecommunication program,
 46 as defined in paragraph (1)(c). Upon passage of the examination,
 47 the completion of the public safety telecommunication training
 48 program is ~~shall be~~ waived.

49 (k)1. The requirement for certification as a 911 public
 50 safety telecommunicator is waived for a person employed as a
 51 sworn state-certified law enforcement officer, provided the
 52 officer:

53 a. Is selected by his or her chief executive to perform as
 54 a 911 public safety telecommunicator;

55 b. Performs as a 911 public safety telecommunicator on an
 56 occasional or limited basis; and

57 c. Passes the department-approved examination that
 58 measures the competency and proficiency of an applicant in the
 59 subject material comprising the public safety telecommunication
 60 program.

61 2. A sworn state-certified law enforcement officer who
 62 fails an examination taken under subparagraph 1. must take a
 63 department-approved public safety telecommunication training
 64 program prior to retaking the examination.

65 3. The testing required under this paragraph is exempt
 66 from the examination fee required under subsection (3).

67 Section 2. This act shall take effect July 1, 2012.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 4187 Cattle
SPONSOR(S): Albritton
TIED BILLS: None IDEN./SIM. BILLS: None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	13 Y, 0 N	Kaiser	Blalock
2) State Affairs Committee		Kaiser	Hamby <i>J2e</i>

SUMMARY ANALYSIS

Current law provides that all female calves born in the state used for dairy breeding purposes must be vaccinated with an approved Brucella abortus vaccine by state or federal regulatory officials or licensed, accredited veterinarians. Once vaccinated, the calves are "tattooed" to indicate certain information regarding when and where the vaccine was administered. This information must be supplied to the Department of Agriculture and Consumer Services (department) to aid in the tracking of reactor or suspect animals in a herd.

The bill repeals s. 585.155, F.S. Florida has been declared brucellosis-free since 2001 and no cases have been revealed since that time. Although calfhood vaccination continues on a voluntary basis, the vaccine is no longer provided at state expense.

The bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Section 585.155, F.S., provides that all female calves born in the state used for dairy breeding purposes must be vaccinated with an approved *Brucella abortus* vaccine by state or federal regulatory officials or licensed, accredited veterinarians. When vaccinated, calves must be tattooed with the official shield tattoo "V", which is registered by the United States Department of Agriculture (USDA), in the right ear, preceded by the numeral of the quarter of the year and followed by the last numeral of the year. Additionally, each calf must be individually identified at the time of vaccination, if not already identified by tattoo or brand, by an official vaccination ear tag in the right ear. The tag must include the designated state prefix, followed by the letter "V," two additional letters, and four numerals. Registration tattoos or individual brand numbers may be substituted for the official ear tags. The identification must be accurately recorded on the official vaccination record. Duplicate records of these vaccinations must be supplied to the department and comprise the official record of vaccination.

Each owner of a herd of cattle in the state must enroll the herd in a program to determine whether the herd is infected with brucellosis. When reactors or suspects are revealed in a herd, the department and the owner must develop a plan to eliminate the infection in accordance with the Uniform Methods and Rules for Brucellosis Eradication and the rules of the state. The plan must include the required testing, removal of reactor animals, calfhood vaccination, and whole-herd vaccination to clear the herd of infection.

The department must establish low brucellosis incidence areas and brucellosis free areas that can be recognized by the USDA as having Class "Free," Class "A," or Class "B" status under the Uniform Methods and Rules for Brucellosis Eradication. The only vaccine that qualifies under chapter, 585, F.S., is an approved vaccine produced under license of the USDA.

Effect of Proposed Changes

The bill repeals s. 585.155, F.S. Florida has been declared brucellosis-free since 2001 and no cases have been revealed since that time. Although calfhood vaccination continues on a voluntary basis, the vaccine is no longer provided at state expense.

B. SECTION DIRECTORY:

Section 1: Repeals s. 585.155, F.S., relating to the inspection and vaccination of cattle for brucellosis.

Section 2: Provides an effective date of July 1, 2012.

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:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

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

HB 4187

2012

1
2
3
4
5
6
7
8
9

A bill to be entitled
An act relating to cattle; repealing s. 585.155, F.S.,
relating to the inspection and vaccination of cattle
for brucellosis; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 585.155, Florida Statutes, is repealed.
Section 2. This act shall take effect July 1, 2012.



HB 4189

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 4189 Florida Agricultural Exposition

SPONSOR(S): Albritton

TIED BILLS: None IDEN./SIM. BILLS: None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	13 Y, 0 N	Kaiser	Blalock
2) State Affairs Committee		Kaiser 	Hamby 

SUMMARY ANALYSIS

In 1969, the Department of Agriculture and Consumer Services (department) received legislative authority to construct and equip, in conjunction with the Department of Corrections, an agricultural exposition center in Palm Beach County to be known as the Florida Agricultural Exposition (exposition). The exposition is administered by the department for the purposes of:

- Demonstrating and selling Florida agricultural products.
- Attracting and informing buyers.
- Conducting agricultural short courses and conferences.
- Organizing tours to aid in the marketing of Florida agricultural products to domestic and foreign markets.
- Training prisoners of the correctional institutions of the state in agricultural labor and management.

The exposition is funded through contributions solicited from growers and dealers of agricultural products, the various groups and associations representing agricultural products and agricultural business products, the federal government and other sources. The department is also authorized to expend up to \$25,000 of its own funds, if available. According to the department, due to a lack of interest, as well as funding, it is no longer feasible to continue the operation of the exposition.

The bill repeals section 570.071, F.S., which creates and provides for the administration of the Florida Agricultural Exposition. The bill also corrects cross-references to s. 57.071, F.S., in other areas of the statutes.

The bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

In 1969, the department received legislative authority to construct and equip, in conjunction with the Department of Corrections, an agricultural exposition center in Palm Beach County to be known as the Florida Agricultural Exposition (exposition). The exposition is administered by the department for the purposes of:

- Demonstrating and selling Florida agricultural products.
- Attracting and informing buyers.
- Conducting agricultural short courses and conferences.
- Organizing tours to aid in the marketing of Florida agricultural products to domestic and foreign markets.
- Training prisoners of the correctional institutions of the state in agricultural labor and management.

The department and the Department of Corrections have statutory authority to receive donations of funds from growers and dealers of agricultural products, the various groups and associations representing agricultural products and agricultural business products, the federal government and other sources. The moneys collected are deposited into the state treasury in a separate trust fund. The department is further authorized to expend up to \$25,000 of its own funds, if available. According to the department, due to a lack of interest, as well as funding, it is no longer feasible to continue the operation of the exposition.

Effect of Proposed Changes

The bill repeals section 570.071, F.S., which creates and provides for the administration of the Florida Agricultural Exposition. The bill also corrects cross-references to s. 57.071, F.S., in other areas of the statutes.

B. SECTION DIRECTORY:

Section 1: Repeals s. 570.071, F.S., relating to the Florida Agricultural Exposition.

Section 2: Amends s. 570.73, F.S., correcting a cross-reference.

Section 3: Amends s. 570.54, F.S., correcting a cross-reference.

Section 4: Provides an effective date of July 1, 2012.

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:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None .

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.

1 A bill to be entitled
 2 An act relating to the Florida Agricultural
 3 Exposition; repealing s. 570.071, F.S., relating to
 4 the Florida Agricultural Exposition and the authority
 5 of the Department of Agriculture and Consumer Services
 6 and the Department of Corrections to receive donations
 7 of funds and expend funds for the exposition; amending
 8 ss. 570.53 and 570.54, F.S.; deleting cross-references
 9 to conform to the repeal by the act of s. 570.071,
 10 F.S.; providing an effective date.

11
 12 Be It Enacted by the Legislature of the State of Florida:

13
 14 Section 1. Section 570.071, Florida Statutes, is repealed.

15 Section 2. Paragraph (e) of subsection (6) of section
 16 570.53, Florida Statutes, is amended to read:

17 570.53 Division of Marketing and Development; powers and
 18 duties.—The powers and duties of the Division of Marketing and
 19 Development include, but are not limited to:

20 (6)

21 (e) Extending in every practicable way the distribution
 22 and sale of Florida agricultural products throughout the markets
 23 of the world as required of the department by s. 570.07(7),
 24 (8), (10), and (11) ~~and 570.071~~ and chapters 571, 573, and 574.

25 Section 3. Subsection (2) of section 570.54, Florida
 26 Statutes, is amended to read:

27 570.54 Director; duties.—

28 (2) It shall be the duty of the director of this division

HB 4189

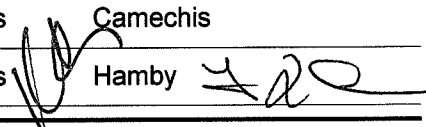
2012

29 | to supervise, direct, and coordinate the activities authorized
30 | by ss. 570.07(4), (7), (8), (10), (11), (12), (17), (18), and
31 | (20), ~~570.071~~, 570.21, 534.47-534.53, and 604.15-604.34 and
32 | chapters 504, 571, 573, and 574 and to exercise other powers and
33 | authority as authorized by the department.

34 | Section 4. This act shall take effect July 1, 2012.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7045 **PCB SCWP 12-01** **Consumptive Use Permits for Development of Alternative Water Supplies**
SPONSOR(S): Select Committee on Water Policy, Williams
TIED BILLS: **IDEN./SIM. BILLS:** SB 1178

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Select Committee on Water Policy	14 Y, 0 N	Camechis	Camechis
1) State Affairs Committee		Camechis	Hamby 

SUMMARY ANALYSIS

Under current Florida law, the water management districts (WMD) may require a consumptive use permit (CUP) for the development of alternative water supplies. These permits must be granted for a term of *at least 20 years*. If the permittee issues bonds for the construction of the project and requests an extension prior to the expiration of the permit, that permit *must* be extended for such additional time as is required for the retirement of bonds, not including any refunding or refinancing of such bonds, provided that the WMD determines that the use will continue to meet the conditions for the issuance of the permit. These permits are subject to periodic compliance reports where necessary to maintain reasonable assurance that the conditions for issuance of a 20-year permit can continue to be met.

This bill establishes a new type of CUP for the development of alternative water supplies (Extended Permit). Extended Permits approved by the state after July 1, 2012, for the development of alternative water supplies must have a term of *at least 30 years* if there is sufficient data to provide reasonable assurance that the conditions for permit issuance will be met for the duration of the permit. Any public or private entity that wishes to develop an alternative water supply may be eligible to receive an Extended Permit regardless of the manner in which the water project will be financed.

If, within 7 years after an Extended Permit is granted, the permittee issues bonds to finance the project, completes construction of the project, and requests an extension of the permit duration, the permit must be extended to expire upon the retirement of such bonds or 30 years after the date construction of the project is complete, whichever occurs later. However, a permit's duration may not be extended more than 7 years after the permit's original expiration date regardless of whether any bonds issued to finance the project will be outstanding at the end of the 7 years.

Extended Permits will be subject to periodic compliance reviews; however, if the permittee demonstrates that bonds issued to finance the project are outstanding, a WMD may not reduce the quantity of alternative water allocated by an Extended Permit unless a reduction is needed to address unanticipated harm to the water resources or to existing legal uses present when the permit was issued. Thus, during a compliance review, if bonds to finance the project are outstanding, a WMD may not reduce the amount of water allocated by the permit if the permittee does not demonstrate a need for the allocated water due to lower than expected population growth or demand. However, reductions in water allocations required by an applicable water shortage order will apply to Extended Permits.

Extended Permits may not authorize the use of non-brackish groundwater supplies or non-alternative water supplies.

The availability of Extended Permits, if utilized, may result in an indeterminate reduction in permit fees collected by WMDs. Please see Fiscal Comments for the fiscal impact on local government and private sector expenditures.

This bill has an effective date of July 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Consumptive Use Permitting

Section 373.236(5), F.S., authorizes consumptive use permits (CUP) for the development of alternative water supplies. The WMD or DEP may impose such reasonable conditions as are necessary to assure that such use is consistent with the overall objectives of WMD or DEP and is not harmful to the water resources of the area.¹

A CUP establishes the duration and type of water use as well as the maximum amount that may be used. Pursuant to s. 373.219, F.S., each CUP must be consistent with the objectives of the WMD and not harmful to the water resources of the area. To obtain a CUP, an applicant must establish that the proposed use of water satisfies the statutory test, commonly referred to as "the three-prong test." Specifically, the proposed water use: 1) must be a "reasonable-beneficial use" as defined in s. 373.019, F.S.; 2) must not interfere with any presently existing legal use of water; and 3) must be consistent with the public interest.

Reasonable-Beneficial Use

"Reasonable-beneficial use," as defined in statute, is the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner that is both reasonable and consistent with the public interest.² In the words of the drafters of *A Model Water Code*, from which the reasonable-use standard was taken, "[w]asteful use of water will not be permitted under the reasonable-beneficial use standard, regardless of whether or not there is sufficient water to meet the needs of other riparian owners."³ Rather, the reasonable-beneficial use standard requires efficient economic use of water and consideration of the rights of the general public.⁴

To that end, DEP has promulgated the Water Resource Implementation Rule that incorporates interpretive criteria for implementing the reasonable-beneficial use standard based on common law and on water management needs.⁵ These criteria include consideration of the quantity of water requested; the need, purpose, and value of the use; and the suitability of the use of the source. The criteria also consider the extent and amount of harm caused, whether that harm extends to other lands, and the practicality of mitigating that harm by adjusting the quantity or method of use. Particular consideration is given to the use or reuse of lower quality water, and the long-term ability of the source to supply water without sustaining harm to the surrounding environment and natural resources through such adverse impacts as salt water intrusion. Notwithstanding DEP's rather broad discretion when interpreting these criteria, the district court in *Florida Water Management District v. Charlotte County*⁶ nonetheless upheld DEP's use of these criteria for implementing the reasonable-beneficial use standard.

Existing Legal Users

The second criterion of the three-prong test protects the rights of existing legal water users for the duration of their permits.⁷ Essentially, new users cannot obtain a CUP to use water if the use conflicts with existing

¹ Section 373.219, F.S. (2011).

² Section 373.019(16), F.S. (2011).

³ Richard Hamann, *Consumptive Use Permitting Criteria*, 14.2-1, 14.2-2 (Fla. Env. & Land Use Law, 2001) (citing Frank E. Maloney, et al., *A Model Water Code*, 86-87 (Univ. of Fla. Press, 1972)).

⁴ *Id.*

⁵ Chapter 62-40, F.A.C. (2010).

⁶ *Florida Water Management District v. Charlotte County*, 774 So. 2d 903, 911 (Fla. 2d DCA 2001).

⁷ Section 373.223(1)(b), F.S. (2011).

permits. But, when the permit is up for renewal, the competing use that the WMD determines best serves the public interest will be permitted, irrespective of which use was previously permitted.

This criterion only protects water users that actually withdraw water. Illustrative of this point, the court in *Harloff v. Sarasota*⁸ held that a municipal wellfield was an existing legal use entitled to protection from interference by a new use. In contrast, a farmer who passively depended on the water table to maintain the soil moisture necessary for nonirrigated crops and the standing surface water bodies for watering cattle was denied protection as an “existing user.”⁹

Public Interest

The third element of the three-prong test requires water use to be consistent with the “public interest.” While the DEP’s Water Resource Implementation Rule provides criteria for determining the “public interest”,¹⁰ determination of public interest is made on a case-by-case basis during the permitting process. For example, in *Friends of Fort George v. Fairfield Communities*,¹¹ the Division of Administrative Hearings considered the following factors in finding that water use was in the public interest: water conservation and reuse, total amount of water allocated, lack of salt water intrusion, reduction of estuarine pollution, and development of new water source. In a separate case, *Church of Jesus Christ of Latter Day Saints v. St. John’s Water Management District*,¹² the St. John’s WMD stated that the determination of whether a water use is in the public interest requires a determination of whether the use is “beneficial or detrimental to the overall collective well-being of the people or to the water resource in the area, the [WMD], and the State.”

Duration of Permits and Compliance Reviews

According to s. 373.236(1), F.S., CUPs must be granted *for a period of 20 years* if: (1) requested by the applicant and (2) there is sufficient data to provide reasonable assurance that the conditions for permit issuance will be met for the duration of the permit. If either of these requirements is not met, a CUP with a shorter duration may be issued to reflect the period for which reasonable assurances can be provided. The WMDs and DEP may determine the duration of permits based upon a reasonable system of classification according to the water source, type of use, or both.

Pursuant to s. 373.326(4), F.S., when necessary to maintain “reasonable assurance” that initial conditions for issuance of a 20-year CUP can continue to be met, a WMD or DEP *may* require a permittee to produce a compliance report every 10 years.¹³ A compliance report must contain sufficient data to maintain reasonable assurance that the initial permit conditions are met. After reviewing a compliance report, the WMD or DEP may modify the permit, including reductions or changes in the initial allocations of water, to ensure that the water use comports with initial conditions for issuance of the permit. Permit modifications made by a WMD or DEP during a compliance review cannot be subject to competing applications for water use if the permittee is not seeking additional water allocations or changes in water sources.

Consumptive Use Permits for the Development of Alternative Water Supplies

Section 373.019(5), F.S., defines “alternative water supplies” as “salt water; brackish surface and groundwater; surface water captured predominately during wet-weather flows; sources made available through the addition of new storage capacity for surface or groundwater, water that has been reclaimed after one or more public supply, municipal, industrial, commercial, or agricultural uses; the downstream augmentation of water bodies with reclaimed water; stormwater; and any other water supply source that is

⁸ *Harloff v. Sarasota*, 575 So. 2d 1324 (Fla. 2d DCA 1991).

⁹ *West Coast Regional Water Supply Authority v. Southwest Florida Water Management District*, 89 ER F.A.L.R. 166 (Final Order, August 30, 1989).

¹⁰ See, e.g., Rule 62-40.422, F.A.C. (2010) (criteria to determine whether transport of water between districts is consistent with the public interest).

¹¹ *Friends of Fort George v. Fairfield Communities*, 24 Fla. Supp. 2d 192-223, DOAH Case No. 85-3537, 85-3596 (Final Order dated Oct. 6, 1986).

¹² *Church of Jesus Christ of Latter Day Saints v. St. John’s Water Management District*, 92 ER. F.A.L.R. 34 (Final Order, Dec. 13, 1990).

¹³ In limited instances, the statute authorizes more frequent “look backs”. For example, the Suwannee River WMD may require a compliance report every 5 years through July 1, 2015; but on that date the “look-back” period returns to 10 years.

designated as nontraditional for a water supply planning region in the applicable regional water supply plan.”

CUPs issued under s. 373.326(5), F.S., for the development of alternative water supplies must be issued for a term of *at least 20 years*.¹⁴ If the permittee issues bonds to finance construction of the alternative water supply project, the permit term *must* be extended to expire upon retirement of the bonds if two conditions are met: 1) the permittee requests an extension during the term of the permit, and 2) the WMD determines that the use will continue to meet the conditions for issuance of the permit. As a matter of general practice in Florida, WMDs have historically issued CUPS with a maximum term of 20 years for the development of alternative water supplies.

During the term of these permits, compliance reports may be required by the WMD or DEP every 10 years (every 5 years if within the Suwannee River WMD). A compliance report must contain sufficient data to maintain reasonable assurance that the initial permit conditions are met. During a compliance review, permits are subject to modification, including reductions or changes in water allocations.

Effects of proposed changes

The current text of s. 373.236(5), F.S., is designated as new subsection (5)(a) and amended to clarify that a CUP issued under that paragraph for the development of alternative water supplies may be approved only “if there is sufficient data to provide for reasonable assurance that the conditions for permit issuance will be met for the duration of the permit.”

Additionally, the bill creates subsection (5)(b) in order to establish a new type of CUP for the development of alternative water supplies (for purposes of this analysis only, these permits will be referred to as “Extended Permits”). Under this new subsection, CUPs approved by the state after July 1, 2012, for the development of alternative water supplies must have a term of *at least 30 years* if there is sufficient data to provide reasonable assurance that the conditions for permit issuance will be met for the duration of the permit. Any public or private entity that wishes to develop an alternative water supply may be eligible to receive an Extended Permit regardless of the manner in which the water project will be financed.

If, within 7 years after an Extended Permit is granted, the permittee issues bonds to finance the project, completes construction of the project, and requests an extension of the permit duration, the permit *must* be extended to expire upon the retirement of such bonds or 30 years after the date construction of the project is complete, whichever occurs later. However, a permit’s duration may not be extended more than 7 years after the permit’s original expiration date regardless of whether any bonds used to finance the project are outstanding at the end of 7 years.

Extended Permits are subject to periodic compliance report reviews as described in s. 373.236(4), F.S.; however, during a compliance review, the WMDs may not reduce the quantity of alternative water allocated under an Extended Permit if the permittee demonstrates that bonds issued to finance the project are outstanding unless a reduction is needed to address unanticipated harm to the water resources or to existing legal uses present when the permit was issued. Thus, if bonds are outstanding, a WMD may no longer reduce the amount of water allocated if the permittee does not demonstrate a need for the allocated water due to lower than expected population growth or demand. However, reductions in water allocations required by an applicable water shortage order apply to Extended Permits.

Applicants may choose to apply for a CUP under subsection (5)(a), which is essentially current law authorizing CUPS with a duration of *at least 20 years*, or under new subsection (5)(b), which authorizes Extended Permits with a duration of *at least 30 years*.¹⁵ Because WMDs have historically issued initial CUPs with a maximum term of 20 years, this bill effectively increases the minimum duration of an initial CUP for the development of alternative water supplies from 20 to 30 years. In addition, entities that issue bonds to finance a project are entitled to a 7-year extension of an Extended Permit if certain conditions are

¹⁴ Section 373.236(5), F.S. (2011).

¹⁵ One reason an applicant may wish to receive a permit under subsection (5)(a) rather than new (5)(b) is to have the option, *at the end of a permit’s term*, of extending the permit’s duration so the permit expires when the bonds used to finance the project are retired rather than prior to retirement of the bonds.

met; however, the duration of an Extended Permit may not be extended more than 7 years after the original expiration date even if bonds remain outstanding.

Extended Permits may not authorize the use of non-brackish groundwater supplies or non-alternative water supplies. Thus, a composite permit that authorizes both the use of traditional and alternative water supplies is not authorized under subsection 5(b).

B. SECTION DIRECTORY:

Section 1. Amends § 373.236, F.S., specifying conditions for issuance, extension, and review of consumptive use permits for the development of alternative water supplies.

Section 2. Provides and effective date of July 1, 2012.

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: The availability of Extended Permits, if utilized, may result in an indeterminate reduction in permit fees collected by WMDs.

2. Expenditures: See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: See Fiscal Comments.

D. FISCAL COMMENTS: Current law authorizes WMDs to issue new CUPs with durations of 30 years for the development of alternative water supplies; however, proponents of the bill assert that, in practice, WMDs have authorized CUPs with maximum durations of only 20 years. Proponents of the bill assert that, if a public or private entity initially obtains an Extended Permit with a 30-year duration, and then finances the alternative water supply project by issuing bonds with a 30-year term, the interest rate of the bonds will be reduced because the expiration of the initial Extended Permit more closely aligns with the retirement of the bonds. Thus, proponents assert, the capital costs of developing alternative water supplies will be reduced if Extended Permits are authorized by this bill. In addition, by requiring a 7-year extension of an Extended Permit under certain circumstances, the permittee will avoid the costs and uncertainty associated with reapplying for a new permit at the end of the initial 30-year permit term.

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 with counties or municipalities.

2. Other: None.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.

HB 7045

2012

1 A bill to be entitled
 2 An act relating to consumptive use permits for
 3 development of alternative water supplies; amending s.
 4 373.236, F.S.; specifying conditions for issuance of
 5 permits; providing for issuance, extension, and review
 6 of permits approved after a certain date; providing
 7 construction; providing an effective date.

8
 9 Be It Enacted by the Legislature of the State of Florida:

10
 11 Section 1. Subsection (5) of section 373.236, Florida
 12 Statutes, is amended to read:

13 373.236 Duration of permits; compliance reports.—

14 (5) (a) Permits approved for the development of alternative
 15 water supplies shall be granted for a term of at least 20 years
 16 if there is sufficient data to provide reasonable assurance that
 17 the conditions for permit issuance will be met for the duration
 18 of the permit. However, if the permittee issues bonds for the
 19 construction of the project, upon request of the permittee prior
 20 to the expiration of the permit, the ~~that~~ permit shall be
 21 extended for such additional time as is required for the
 22 retirement of bonds, not including any refunding or refinancing
 23 of such bonds, if ~~provided that~~ the governing board determines
 24 that the use will continue to meet the conditions for the
 25 issuance of the permit. Such a permit is subject to compliance
 26 reports under subsection (4).

27 (b)1. Permits approved after July 1, 2012, for the
 28 development of alternative water supplies shall be granted for a

29 term of at least 30 years if there is sufficient data to provide
 30 reasonable assurance that the conditions for permit issuance
 31 will be met for the duration of the permit. If, within 7 years
 32 after a permit is granted, the permittee issues bonds to finance
 33 the project, completes construction of the project, and requests
 34 an extension of the permit duration, the permit shall be
 35 extended to expire upon the retirement of such bonds or 30 years
 36 after the date construction of the project is complete,
 37 whichever occurs later. However, a permit's duration may not be
 38 extended by more than 7 years beyond the permit's original
 39 expiration date.

40 2. Permits issued under this paragraph are subject to
 41 compliance reports under subsection (4). However, if the
 42 permittee demonstrates that bonds issued to finance the project
 43 are outstanding, the quantity of alternative water allocated in
 44 the permit may not be reduced during a compliance report review
 45 unless a reduction is needed to address unanticipated harm to
 46 water resources or to existing legal uses present when the
 47 permit was issued. A reduction required by an applicable water
 48 shortage order shall apply to permits issued under this
 49 paragraph.

50 3. Permits issued under this paragraph may not authorize
 51 the use of nonbrackish groundwater supplies or nonalternative
 52 water supplies.

53 (c) Entities that wish to develop alternative water
 54 supplies may apply for a permit under paragraph (a) or paragraph
 55 (b).

56 Section 2. This act shall take effect July 1, 2012.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 7045 (2012)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: State Affairs Committee
2 Representative Williams, T. offered the following:

3
4 **Amendment**

5 Remove line 39 and insert:
6 expiration date. The 7-year permit extension, as described in
7 this paragraph, shall be applicable to any 30-year permit for
8 the development of alternative water supplies granted between
9 June 1, 2011 and July 1, 2012.

**Numeric Nutrient
Criteria**



Florida Department of Environmental Protection

Numeric Nutrient Criteria

*Discussion of Department's Rule Approved by the
Environmental Regulation Commission on
December 8, 2012*

By: Florida Department of Environmental Protection

Drew Bartlett, Director

Division of Environmental Assessment and Restoration

Prepared for: House State Affairs Committee

January 26, 2012

Chair: Representative Seth McKeel



Clean Water Act: Its Role in the Nutrient Issue

- §303 (a-c) – **Water Quality Standards**
 - Requires each state to assign **designated uses** to all waterbodies in the state, as well as the **criteria** that will maintain or be used to attain the designated use.
 - **Designated Uses/Goals**
 - Recreation, Fish and Wildlife, Drinking Water
 - **Criteria**
 - Water quality limits necessary to protect designated use
 - Can be Numeric or Narrative
 - **Impaired Waterbody**
 - One that does not meet water quality standards.





FDEP Filed Petition with EPA (April 22, 2011)

- FDEP Petitioned EPA based on Florida's performance of the eight key elements identified in an EPA Memo.
- Petition included initiation of rule development for state standards, and requested that EPA:



- Rescind the Determination to Promulgate Numeric Nutrient Criteria in Florida
- Rescind Promulgated Criteria

- EPA's initial response (May 22, 2011) did not grant or deny.





Three Key Differences of FDEP's Rule

**Give preference to nutrient
Site Specific Science.**

EPA's do not

**Only create nutrient reduction
expectations where necessary to
protect Florida waterbodies.**

**EPA's do
regardless of
waterbody
health**

**Eliminate unnecessary
procedures that do not add to
waterbody protection
and restoration.**

**EPA's use federal
procedures to
overcome
Illogical
outcomes**





Financial Analyses

- FDEP Rule:
 - FSU estimates a range of costs between \$51 million to \$150 million per year.
- EPA Rule:
 - Cardno ENTRIX estimated \$298 million to \$4.7 billion per year.
 - This wide range is due to the uncertainty over rule implementation.
 - EPA estimated \$135.5 to \$206.1 million per year.*



* Based on Different Assumptions



2012 Events: Numeric Nutrient Criteria



*Proposed delay to June 4th



Questions?



For more information, please contact:

Drew Bartlett

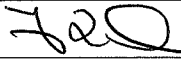
drew.bartlett@dep.state.fl.us

(850) 245-8446



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7051 **PCB ANRS 12-07** **Rules Establishing Numeric Nutrient Criteria**
SPONSOR(S): Agriculture & Natural Resources Subcommittee, Caldwell
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Agriculture & Natural Resources Subcommittee	15 Y, 0 N	Camechis	Blalock
1) State Affairs Committee		Camechis	Hamby 

SUMMARY ANALYSIS

In 2009, the U.S. Environmental Protection Agency (EPA) determined that Florida's regulation of nitrogen and phosphorus ("nutrients") pollution in Florida waters is insufficient to protect water quality as required by the federal Clean Water Act. As a result, in 2010, the EPA finalized rules that impose federal numeric nutrient criteria on lakes and springs throughout the state and flowing waters outside of the southern Florida region. These EPA rules are scheduled to take effect in March 2012 unless the effective date is extended to June 2012, as requested by the EPA. In addition, the EPA plans, consistent with its obligations under a federal consent decree, to adopt within the next year similar numeric nutrient limits for coastal and estuarine waters throughout the state and flowing waters in the southern Florida region. However, the Clean Water Act allows for withdrawal of the EPA rules if Florida adopts its own rules imposing nutrient limits and the EPA finds those rules to be consistent with the Clean Water Act. The Florida Department of Environmental Protection (DEP) has proposed numeric nutrient criteria rules to replace the EPA's rules, but the EPA cannot formally approve DEP's rules until DEP adopts the rules and the rules are ratified by the Legislature or exempt from ratification. Unless DEP's rules are approved by the EPA under the federal Clean Water Act, the EPA's rules will take effect in Florida.

Current law requires an adopted state agency rule to be ratified by the Legislature before taking effect if the economic impact of the rule exceeds specified dollar thresholds; however, an agency rule may not be ratified by the Legislature until adopted by the agency as a final rule. The DEP's proposed numeric nutrient criteria rules exceed the economic impact dollar thresholds, but DEP has been unable to adopt the rules due to an ongoing administrative rule challenge, which is scheduled for hearing from February 27, 2012 through March 2, 2012. DEP is not allowed by law to adopt the proposed rules as final rules until after a decision is issued by the judge in the administrative rule challenge, which is unlikely to occur until after the 2012 Regular Session concludes. Thus, it is unlikely that adopted rules will be available for ratification by the Legislature during the 2012 Regular Session.

In order to facilitate the EPA's review of DEP's numeric nutrient criteria rules, this bill exempts DEP's proposed numeric nutrient criteria rules, as approved by the Florida Environmental Regulation Commission on December 8, 2011, from the legislative ratification requirement in s. 120.541(3), F.S. The bill also requires DEP to publish, when the rules are adopted, notice of the exemption from ratification.

The bill provides that, after adoption of proposed Rule 62-302.531(9), a non-severability and effective date provision approved by the Florida Environmental Regulation Commission on December 8, 2011, in accordance with its legislative authority in s. 403.804, F.S., any subsequent rule or amendment altering the effect of that rule must be submitted to the President of the Senate and Speaker of the House of Representatives for legislative ratification prior to taking effect.

Lastly, the bill requires DEP to submit its proposed numeric nutrient criteria rules to the EPA for review under the Clean Water Act within 30 days after the effective date of this bill.

Although this bill does not have a direct fiscal impact, if DEP's proposed numeric nutrient criteria rules are implemented and applied to all Florida waters, the DEP estimates that implementation will cost affected parties between \$51 and \$150 million annually. These costs are significantly less than the estimated cost to implement the final EPA rules that only apply to lakes and springs in the state and flowing waters outside of the southern region of Florida, which are scheduled to take effect on March 6, 2012, unless the effective date is extended to June 4, 2012, as proposed by the EPA. Please see Attachment 2 for a more detailed discussion of the costs associated with implementing DEP's proposed rules.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Effect of Proposed Changes

In order to facilitate the EPA's review of DEP's numeric nutrient criteria rules, this bill exempts DEP's proposed rules, as approved by the Florida Environmental Regulation Commission on December 8, 2011, from the legislative ratification requirement in s. 120.541(3), F.S. The bill also requires DEP to publish, when the rules are adopted, notice of the exemption from ratification.

The bill provides that, after adoption of proposed Rule 62-302.531(9), a non-severability and effective date provision approved by the Florida Environmental Regulation Commission on December 8, 2011, in accordance with its legislative authority in s. 403.804, F.S., any subsequent rule or amendment altering the effect of that rule must be submitted to the President of the Senate and Speaker of the House of Representatives for legislative ratification prior to taking effect.

Lastly, the bill requires DEP to submit, within 30 days after the effective date of this bill, its proposed numeric nutrient criteria rules to the EPA for review under the Clean Water Act.

Present Situation

Nutrient Pollution Generally

Nitrogen and phosphorus ("nutrients") are natural components of aquatic ecosystems. However, what is considered a healthy and safe level of nutrients varies greatly throughout the state depending on the site specific characteristics of a given waterbody. The problems associated with excess nutrients arise when nutrients occur over large areas of a waterbody for extended periods of time at levels that exceed what is "natural" for the particular system.

Nitrogen and phosphorus pollution (also known as "nutrient pollution") is a significant contributor to water quality problems. Nutrient pollution originates from stormwater runoff, wastewater treatment, industrial discharges, fertilization of crops, and livestock manure. Nitrogen also forms from the burning of fossil fuels, like gasoline.

Nutrient pollution causes harmful algae blooms which produce toxins harmful to humans, deplete oxygen needed for fish and shellfish survival, smother vegetation, and discolor water. It can also result in the formation of byproducts in drinking water from disinfection chemicals, some of which have been linked with serious human illnesses. DEP recently found that 16% of Florida's assessed river and stream miles, 36% of assessed lake acres, and 25% of assessed estuary square miles are impaired by nutrients (2008 Integrated Water Quality Report).¹

Federal Law

General Federal Structure

Under the federal structure established in the U.S. Constitution, states may not be compelled by the Federal Government to enact legislation or take executive action to implement federal regulatory programs.² Thus, where Congress has the authority to regulate private activity under the commerce clause, the Federal Government may regulate that activity directly, but it may not require the states to do so. However, Congress can *encourage* a state to regulate in a particular way by offering "incentives" -- often in the form of federal funds. Congress may also create a "potential preemption" structure in which states must regulate the activity under state law according to federally approved standards or have state regulation pre-empted by federal regulation. The Clean Water Act (CWA) utilizes both of these techniques.

The Clean Water Act

Although the Federal Government probably has plenary power under the commerce clause to regulate any pollution that enters waters that are navigable, and can probably regulate any pollution that, in the aggregate, substantially affects interstate commerce, there is no such broad assertion of jurisdiction currently contained in the CWA. Instead, the CWA essentially grants the Federal Government authority over point sources and leaves the States with authority over nonpoint

¹ *Frequently Asked Questions Related to Development of Numeric Nutrient Criteria*, Fl. Dept. of Environmental Protection, Available at: <http://www.dep.state.fl.us/water/wqssp/nutrients/faq.htm>.

² *Printz v. United States*, 521 U.S. 898, 925 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).

sources. This approach aligns with historic jurisdictions. Point sources, as the name suggests, discharge pollutants from “any discernible, confined and discrete conveyance.” Point source regulation of pollution can best be visualized as “end-of-the-pipe” controls that clean up waste water before it is discharged into a water body. On the other hand, nonpoint source pollution can best be thought of as water runoff that picks up pollutants as it flows over the land itself. As a result, regulation of nonpoint source pollution typically relies on controls -- generally referred to as best management practices -- that directly modify how the land itself is used. Comprehensive federal regulation of nonpoint source pollution would thus probably engage the Federal Government directly in land use regulation--a type of regulation historically viewed as belonging to state and local levels of government.

The first legal regime established under the CWA is the National Pollutant Discharge Elimination System (NPDES), through which the EPA is authorized to directly regulate point source pollution. Under the NPDES program, all facilities which discharge pollutants from any point source into waters of the United States are required to obtain an NPDES permit. The primary focus of the NPDES permitting program is municipal (Publically Owned Treatment Works) and non-municipal (industrial) direct dischargers, and the primary mechanism for controlling discharges of pollutants to receiving waters is establishing effluent limitations. NPDES permits require a point source to meet established effluent limits, which are based on applicable technology-based and water quality-based standards. The intent of technology-based effluent limits in NPDES permits is to require a minimum level of treatment of pollutants for point source discharges based on the best available control technologies, while allowing the discharger to use any available control technique to meet the limits. However, technology-based effluent limits may not be sufficient to ensure that established water quality standards will be attained in the receiving water. In such cases, the CWA requires that more stringent, water quality-based effluent limits be required in order to ensure that water quality standards are attained.

The EPA will refrain from implementing its regulation of point sources under NPDES if it approves a state program which meets these purposes. Although this is commonly referred to as a “delegation” from the Federal Government, it is clear that the legal authority to administer the state program is not technically delegated from the Federal Government, but rather derives solely from state law (a state may submit to the EPA “a full and complete description of the program it proposes to establish and administer under state law” and there must be a statement from the Attorney General “that the laws of such state . . . provide adequate authority to carry out the described program”).³ This is a “potential preemption” structure. The Federal Government reviews the state program, and all actions taken under it, and can withdraw state program approval if a state fails to maintain federal standards or does not properly administer or enforce the state’s program.⁴ If the Federal Government withdraws approval of a state’s program, such action would compel the EPA to directly regulate point sources itself. In this situation, the CWA would preempt Florida’s statutes and rules relating to regulation of point sources.

The EPA and the DEP executed a Memorandum of Understanding (MOU) in 2007 delineating the state and federal agencies’ mutual responsibilities in the DEP’s administration of the federal NPDES program (the approved program). Pursuant to the MOU, the EPA acknowledges that the DEP has no veto authority over an act of the Florida Legislature, and reserves the right to initiate procedures for withdrawal of the state NPDES program approval in the event the Florida Legislature enacts legislation or issues any directive which substantially impairs the DEP’s ability to administer the NPDES program or to otherwise maintain compliance with NPDES program requirements. If the approved program were withdrawn, entities requiring a NPDES permit for activities relating to wastewater, stormwater, construction, industry, pesticide application, power generation, and some agricultural activities would need to acquire both federal and state permits.

The MOU anticipates situations when the EPA resumes authority over an individual permit and instances when DEP-submitted NPDES permits are disapproved by the EPA until the DEP adjusts the permit conditions to include EPA conditions on the permit. If the permit is issued by the DEP with EPA-imposed conditions, the permit holder may seek an administrative challenge to the DEP’s imposition of the conditions in the Florida Division of Administrative Hearings. If the permit is issued by the EPA, the permit holder may seek a federal appeal; however, in the meantime, the permit holder would be required to comply with the federal permit.

The second legal regime established under the CWA relates to water quality standards. In contrast to the NPDES regime’s focus on regulating specifically identified pollution sources, the water quality standards regime focuses on establishing the appropriate uses and condition of waters subject to the CWA. Water quality standards consist of three parts: designated uses of various water bodies, and specific water quality criteria based on these identified uses, and the anti-degradation requirements mentioned above.⁵ The DEP adopted Florida’s nutrient narrative water quality standards in chapter 62-302 of the Florida Administrative Code. While these standards are adopted by the state, if at any time the

³ 33 U.S.C. s. 1342(b).

⁴ 33 U.S.C. s. 1342(c).

⁵ 33 U.S.C. s. 1313(c)(2)(A).

EPA determines that a revised or new standard is necessary to meet the requirements of the CWA, the Administrator is authorized to adopt revised water quality standards.⁶

The CWA next requires Florida to identify waters for which existing pollution controls are not stringent enough to implement the established water quality standards and establish total maximum daily loads (TMDLs) for those waters. A TMDL does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that must be implemented by adjusting pollutant discharge requirements in the individual NPDES permits under federal control and may be implemented with nonpoint source controls under state control.⁷ With respect to point sources, EPA regulations require that effluent limitations in NPDES permits be "consistent with the assumptions and requirements of any available wasteload allocation" in a TMDL. Nonpoint source reductions can be enforced against those responsible for the pollution only to the extent that the state institutes such reductions as regulatory requirements pursuant to state authority.⁸ The CWA merely requires states to undertake an assessment process to identify waters for which further controls on nonpoint sources of pollution may be needed, and provides financial incentives to encourage such further state regulations as may be necessary. The Act makes various federal grants available to the states to aid implementation of the plans and withholds funding for states with inadequate plans.⁹

Current Nutrient Regulation in Florida

Currently, DEP's rules apply a narrative nutrient criterion to waterbodies in Florida. The narrative criterion states, "[i]n no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural population of flora or fauna."¹⁰ DEP implements the narrative criterion through site-specific detailed biological assessment together with site-specific outreach to stakeholders. DEP does this in a variety of ways, including assessing whether specific water bodies are "impaired" under the CWA, developing TMDLs for watersheds, and setting wastewater discharge permit limits.

The derivation of specific numeric nutrient criteria to complement the narrative is very complex. Since nutrients are essential to life, a balance must be achieved to provide adequate nutrients to sustain aquatic life while preventing excessive nutrients that alter the aquatic ecosystem through species shifts. Each waterbody can have very different and unique nutrient requirements. In order to develop the thresholds at which a health aquatic environment can be sustained, it is necessary to develop a reliable measure of the biological condition of the waterbody.¹¹

The EPA has noted that this is a difficult, lengthy, and data-intensive undertaking, and ultimately concluded that the existing process was too time consuming, given the widespread impairment of Florida's water quality due to nutrient over-enrichment.¹² The DEP also recognized this problem, and over the last 10 to 12 years attempted to develop specific numeric nutrient criteria to complement its narrative criterion.

United States Environmental Protection Agency Numeric Nutrient Criteria Rulemaking

In July 2008, the Florida Wildlife Federation and other environmental groups sued EPA in an attempt to compel the EPA to adopt numeric nutrient criteria for Florida's waterbodies. In January 2009, EPA determined that numeric nutrient water quality criteria for Florida's waterbodies are necessary to meet the requirements of the CWA. EPA determined that Florida's narrative nutrient criteria alone was insufficient to ensure protection of applicable designated uses, but also recognized the ongoing efforts by DEP in developing a numeric nutrient criteria for Florida's waterbodies. The EPA noted that, "in the event that Florida adopts and EPA approves new or revised water quality standards that sufficiently address this determination before EPA promulgates federal water quality standards, EPA would no longer be obligated to promulgate federal water quality standards."

In August 2009, EPA settled the lawsuit and entered into a consent decree that required EPA to adopt numeric nutrient criteria for Florida's lakes, flowing waters, estuaries, and coastal waters. DEP suspended its rulemaking proceedings while EPA developed its rules to impose numeric nutrient criteria in Florida.

In December 2010, the EPA adopted final numeric nutrient criteria rules for all lakes and springs in the state and flowing waters outside of the southern Florida region in accordance with the consent decree and subsequent revisions. These rules are scheduled to take effect on March 6, 2012, but the EPA has proposed to extend the effective date to June 4, 2012, to allow EPA to work with DEP on state rules that will replace the EPA's rules if approved by the EPA. In addition, consistent with its obligations under the August 2009 consent decree, the EPA plans to adopt within the next year similar numeric nutrient limits for coastal and estuarine waters throughout the state and flowing waters in the southern region of

⁶ 33 U.S.C. s. 1313(c)(4)(B).

⁷ *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir.2002).

⁸ *Pronsolino v. Nastro*, 291 F.3d 1123 (9th Cir. 2002).

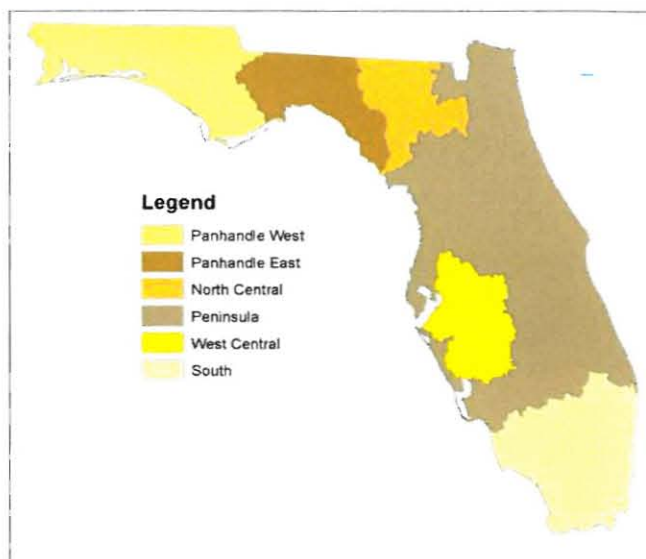
⁹ 33 U.S.C. s. 1329(h).

¹⁰ Section.62-302-530(47)(b), F.A.C.

¹¹ *Id.*

¹² See EPA 303(c)(4) January 2009 Determination Letter.

Florida. The following map indicates nutrient watershed regions of the state, which will be used to implement EPA's numeric nutrient criteria rules:



Also in December 2010, the State of Florida filed a lawsuit in federal district court against the EPA over the agency's intrusion into Florida's previously approved clean water program.¹³ The lawsuit alleges that the EPA's action is inconsistent with the intent of Congress when it based the Clean Water Act on the idea of cooperative federalism whereby the States would be responsible for the control of water quality with oversight by the EPA. Control of nutrient loading from predominately non-point sources involves traditional States' rights and responsibilities for water and land resource management which Congress expressly intended to preserve in the Clean Water Act. The lawsuit specifically alleges that the EPA rules and the EPA's January 2009 necessity determination for promulgating numeric nutrient criteria for Florida's waters are arbitrary, capricious, and an abuse of discretion, and requests the court to enjoin the EPA Administrator from implementing its numeric nutrient criteria rules in Florida. A hearing was recently held in the lawsuit, but the court has not issued a decision to date.

Unless DEP's proposed rules are adopted and approved by the EPA, the EPA's final rules for Florida's lakes and springs and flowing waters outside the southern region of Florida will take effect. In addition, the EPA will propose new numeric nutrient criteria rules for Florida's coastal and estuarine waters and flowing waters in the southern region of Florida by March 15, 2012, and finalize the criteria by November 15, 2012. In a letter to DEP dated June 13, 2011, EPA noted that, if the state adopts and the EPA approves protective nutrient criteria, the EPA will promptly initiate rulemaking to repeal the corresponding federally-promulgated numeric nutrient criteria. In a letter to Senator Marco Rubio dated December 1, 2011, EPA asserted that if the EPA formally approves DEP's final numeric nutrient criteria, the EPA will initiate rulemaking "to withdraw federal numeric nutrient criteria for any waters covered by the new and approved state numeric water-quality standards."

Florida Department of Environmental Protection Numeric Nutrient Criteria Rulemaking
(Please see Attachment 1 for a more detailed description of DEP's proposed rules.)

On November 2, 2011, the EPA affirmed its support of DEP's efforts to address nutrient pollution, noting that EPA *preliminarily* concluded that it would approve the draft rule submitted by DEP on October 24, 2011. However, EPA noted that a final decision to approve or disapprove any numeric nutrient criteria rule submitted by DEP will follow normal review of the rule and record.

On December 8, 2011, the Florida Environmental Regulation Commission modified and approved rule amendments to Chapters 62-302 and 62-303, F.A.C., as proposed by DEP, to address nutrient pollution in Florida waters in "an integrated, comprehensive, and consistent manner."¹⁴

DEP's rules and amendments set limits on the amount of phosphorus and nitrogen allowed in Florida's waters. The rules are designed to ensure water quality, protect public health and preserve well-balanced aquatic ecosystems throughout

¹³ *State of Florida v. Jackson*, Case 3:10-cv-00503-RV-MD (N.D. Fla. 2010).

¹⁴ DEP Proposed Rule 62-302.531(9).

Florida. The rules address the complexity of Florida's various aquatic ecosystems by focusing on site-specific analyses of each water body, allowing for consideration of natural factors that influence the effect nutrients have on aquatic plants and animals and identification of the most appropriate nutrient levels for each individual waterbody.

One of the rule provisions incorporated into DEP's proposed rules following approval by the Environmental Regulation Commission on December 8, 2011, is Rule 62-302.200(36), which expressly excludes the following from the definition of "stream":

(a) non-perennial water segments where fluctuating hydrologic conditions, including periods of desiccation, typically result in the dominance of wetland and/or terrestrial taxa (and corresponding reduction in obligate fluvial or lotic taxa), wetlands, or portions of streams that exhibit lake characteristics (e.g., long water residence time, increased width, or predominance of biological taxa typically found in non-flowing conditions) or tidally influenced segments that fluctuate between predominantly marine and predominantly fresh waters during typical climatic and hydrologic conditions; or

(b) ditches, canals and other conveyances, or segments of conveyances, that are man-made, or predominantly channelized or predominantly physically altered and;

1. are primarily used for water management purposes, such as flood protection, stormwater management, irrigation, or water supply; and

2. have marginal or poor stream habitat or habitat components, such as a lack of habitat or substrate that is biologically limited, because the conveyance has cross sections that are predominantly trapezoidal, has armored banks, or is maintained primarily for water conveyance.

Another rule provision incorporated into DEP's proposed rules following approval by the Environmental Regulation Commission on December 8, 2011, is Rule 62-302.531(9), which affirms the unified and cohesive approach of the proposed rules by stating:

The Commission adopts rules 62-302.200(4), .200(16)-(17), .200(22)-(25), .200(35)-(37), .200(39), 62-302.531, and 62-302.532(3), F.A.C., to ensure, as a matter of policy, that nutrient pollution is addressed in Florida in an integrated, comprehensive and consistent manner. Accordingly, these rules shall be effective only if EPA approves these rules in their entirety, concludes rulemaking that removes federal numeric nutrient criteria in response to the approval, and determines, in accordance with 33 U.S.C. § 1313(c)(3), that these rules sufficiently address EPA's January 14, 2009 determination. If any provision of these rules is determined to be invalid by EPA or in any administrative or judicial proceeding, then the entirety of these rules shall not be implemented.

The EPA has not expressed preliminary approval of the modifications to DEP's initial proposed rule that were approved by the Florida Environmental Regulation Commission on December 8, 2011, and subsequently incorporated into DEP's current proposed rules.

On December 1, 2011, the Florida Wildlife Federation, Inc., the Sierra Club, Inc., the Conservancy of Southwest Florida, Inc., the Environmental Confederation of Southwest Florida, Inc., and St. Johns Riverkeeper, Inc. filed an administrative rule challenge at the Florida Division of Administrative Hearings.¹⁵ The rule challenge seeks to invalidate the DEP's proposed numeric nutrient criteria rules because "contrary to FDEP's claims, the rules are not designed to protect state waters from the adverse impacts of nutrient overenrichment. Instead, these rules go so far as to prevent a finding of impairment due to nutrients until the waterbody is covered with nutrient-fueled toxic blue-green algae (cyanobacteria)."¹⁶ The challenge asserts that certain provisions of the proposed rules are invalid exercises of delegated legislative authority.¹⁷ The hearing in the case has been scheduled for February 27, 2012, through March 2, 2012.

Until the Administrative Law Judge issues an order in the administrative rule challenge proceeding, DEP is prohibited by law from filing the proposed rules for adoption as final rules. For purposes of compliance with the federal Clean Water Act, DEP's *adopted* rules must be approved by the EPA in order to replace the EPA's final numeric nutrient criteria rules for Florida's lakes and springs and flowing waters outside of the southern region, which are scheduled to take effect March 6, 2012, unless extended to June 4, 2012, as proposed by the EPA.

¹⁵ *Florida Wildlife Federation, et al. v. Fl. Dept. of Environmental Protection*, DOAH Case No: 11-006137RP.

¹⁶ *Florida Wildlife Federation, et al. v. Fl. Dept. of Environmental Protection*, DOAH Case No: 11-006137RP, Petition to Invalidate Existing and Proposed Rules of the Florida Department of Environmental Protection, p.2.

¹⁷ The petition does not challenge proposed Rule 62-302.531(9) as approved by the Environmental Regulation Commission on December 8, 2011.

Differences Between DEP's Rules and EPA's Rules

DEP summarizes the differences between the EPA's rules and DEP's rules as follows:

- DEP's rules give preference to nutrient site specific science, EPA's do not;
- DEP's rules only create nutrient reduction expectations where necessary to protect Florida waterbodies, EPA's rules create those expectations regardless of waterbody health; and
- DEP's rules eliminate unnecessary procedures that do not add to waterbody protection and restoration, while the EPA's rules use federal procedures to overcome illogical outcomes.¹⁸

Legislative Ratification

⁶ In 2010, the Legislature enacted new s. 120.541(3), F.S., which requires rules that have certain economic impacts to be ratified by the Legislature before taking effect.¹⁹ The Statement of Estimated Regulatory Costs mandated by s. 120.541(2)(a), F.S., must address a rule's direct or indirect economic impact during the 5 years following agency implementation of the rule, including an analysis of whether the rule is likely to:

1. Have an adverse impact on economic growth, private-sector job creation or employment, or private-sector investment;²⁰
2. Have an adverse impact on business competitiveness,²¹ productivity, or innovation,²² and
3. Increase regulatory costs, including any transactional costs.²³

If the analysis shows the projected impact of the 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."²⁴ A rule must be filed for adoption before it may go into effect²⁵ and cannot be filed for adoption until completion of the rulemaking process.²⁶ A rule projected to have a specific economic impact exceeding \$1 million in the aggregate over 5 years²⁷ must be ratified by the Legislature before going into effect.²⁸ 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.

The economic impact of DEP's proposed numeric nutrient criteria rules is estimated to exceed the economic impact dollar thresholds for ratification. On December 9, 2011, DEP submitted its proposed rule amendments to the Legislature for ratification, but DEP has been unable to adopt the rules due to the ongoing administrative rule challenge. A hearing in the administrative rule challenge is scheduled from February 27, 2012 through March 2, 2012. DEP is not allowed by law to file the proposed rules for final adoption until after a decision is issued by the Administrative Law Judge in the administrative rule challenge, which is unlikely to occur until after the 2012 Regular Session concludes on March 9, 2012. Thus, it is highly unlikely that DEP's adopted rules will be available for ratification by the Legislature during the 2012 Regular Session.

B. SECTION DIRECTORY:

Section 1 exempts DEP's proposed numeric nutrient criteria rules, as approved by the Florida Environmental Regulation Commission on December 8, 2011, from the legislative ratification requirement in s. 120.541(3); requires DEP to publish, when the rules are adopted, notice of the exemption from ratification; requires legislative ratification of any subsequent rule or amendment altering the effect of proposed Rule 62-302.531(9); and requires DEP to submit its proposed numeric nutrient rules to the EPA for review under the Clean Water Act within 30 days after the effective date of this bill.

Section 2 provides that the act is effective upon becoming law.

¹⁸ Drew Bartlett, Director, Div. of Environmental Assessment and Restoration, Fl. Dept. of Environmental Protection, Presentation for Legislative Committee Staff, Dec. 1, 2011.

¹⁹ Ch. 2010-279, Laws of Florida.

²⁰ s. 120.541(2)(a)1., F.S.

²¹ Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

²² s. 120.541(2)(a) 2., F.S.

²³ s. 120.541(2)(a) 3., F.S.

²⁴ s. 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.

²⁵ s. 120.54(3)(e)6, F.S.

²⁶ s. 120.54(3)(e), F.S.

²⁷ s. 120.541(2)(a), F.S.

²⁸ s. 120.541(3), F.S.

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:

DEP Proposed Numeric Nutrient Criteria Rules

Although this bill does not have a direct fiscal impact, if DEP's proposed numeric nutrient criteria rules are implemented and applied to all Florida waters, the DEP estimates that implementation will cost affected parties between \$51 and \$150 million annually. These costs are significantly less than the estimated cost to implement the final EPA rules for Florida's lakes and springs and flowing waters outside of the southern region, which are scheduled to take effect on March 6, 2012, unless the effective date is extended to June 4, 2012, as proposed by the EPA.

Please see Attachment 2 for a more detailed discussion of the costs associated with implementing DEP's proposed rules and the EPA's final rules for Florida's lakes and springs and flowing waters outside of the southern Florida region.

EPA Final Numeric Nutrient Rules for Florida's Lakes and Springs and Flowing Waters Outside the Southern Region of Florida

EPA published a cost estimate with its final numeric nutrient criteria rules for lakes and springs throughout the state and for flowing waters outside of the southern region. The EPA estimated that annual direct compliance costs of \$135.5 to \$206.1 million. Unlike DEP's proposed numeric nutrient criteria rules, the EPA's rules do not include the cost of implementing future EPA rules that will apply to estuarine waters and coastal waters throughout the state as well as to flowing waters in the southern region of Florida. A National Academy of Sciences independent review of EPA's cost analysis is expected to be published in February 2012.

The DEP and other affected parties strongly disagree with the EPA's cost estimates and assert that actual costs of compliance will be significantly higher. Cardno ENTRIX performed an independent cost analysis at the request of affected parties, estimating the cost of implementing EPA's final numeric nutrient criteria rules for lakes and springs throughout the state and flowing waters outside of the southern region waters to be between \$298 million and \$4.7 billion annually, depending on the manner in which the rules are implemented.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: Not applicable.
2. Other: None.

B. **RULE-MAKING AUTHORITY:** The bill does not grant additional rulemaking authority; however, the bill does specify that proposed Rule 62-302.531(9), a non-severability and effective date provision approved by the Florida Environmental Regulation Commission on December 8, 2011, was approved in accordance with the commission's legislative authority granted in s. 403.804, F.S.

C. **DRAFTING ISSUES OR OTHER COMMENTS:** None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

Not applicable.

**ATTACHMENT 1
FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
DESCRIPTION OF PROPOSED STATE NUMERIC NUTRIENT CRITERIA RULES**

The Florida Department of Environmental Protection has crafted water quality standards on the amount of phosphorus and nitrogen, also known as “nutrients,” that would protect Florida’s lakes, rivers, streams, springs, and estuaries. The rules were approved for adoption by the Environmental Regulation Commission (ERC) on December 8, 2011.

This rule sets numeric standards to prevent harm to the natural population of aquatic plants and animals. This numeric expression of the nutrient criteria allows for much more effective and efficient analysis of nutrient conditions. The most accurate criteria are numeric expressions set through site specific analyses of a waterbody. The site specific approach better accounts for many natural factors that influence the actual effect of nutrients on aquatic conditions. Where those site specific analyses do not exist, this rule provides other numeric expectations for nutrients and related biological conditions.

Rule Structure

The *long-standing narrative* nutrient criterion, which was established to address harmful nutrient concentrations, will continue to apply to all waterbodies. This rule adds a *numeric* interpretation of that criteria as well as biological measurements for each waterbody in the following priority manner:

Approach 1

Established waterbody specific nutrient thresholds (like Total Maximum Daily Loads, Site Specific Criteria, and other actions by the Department) constitute the numeric expression.

- This rule also establishes estuary specific criteria for a number of estuaries in southern Florida and sets a schedule for the establishment of numeric values for the remaining estuaries.

Approach 2

If “Approach 1” (above) is not applicable, the numeric interpretation of the narrative criteria for a specific waterbody would be based on established, quantifiable nutrient cause and effect relationships between nutrient concentrations and impacts to the aquatic biology. Such relationships are currently available for lakes and springs.

- Lake criteria are set depending on the expected unimpacted condition of each lake (relative to its color and hardness). The numeric expectation for nutrients can also be adjusted within a defined range of possible nutrient concentrations when indicators show no biological imbalance in the lake’s aquatic plants and animals. The following table contains the lake criteria:

Long Term Lake Color and Hardness	Annual Chlorophyll a (algae)	Minimum calculated numeric interpretation		Maximum calculated numeric interpretation	
		Annual Total Phosphorus	Annual Total Nitrogen	Annual Total Phosphorus	Annual Total Nitrogen
High Color	20 µg/L	0.05 mg/L	1.27 mg/L	0.16 mg/L ¹	2.23 mg/L
Low Color; Hard Water	20 µg/L	0.03 mg/L	1.05 mg/L	0.09 mg/L ¹	1.91 mg/L
Low Color; Soft Water	6 µg/L	0.01 mg/L	0.51 mg/L	0.03 mg/L ¹	0.93 mg/L

1: For lakes with high color in the West Central Nutrient Watershed Region, the maximum TP limit shall be the 0.49 mg/L TP streams threshold for the region.

- Proposed spring criteria are established for nitrate/nitrite (a form of nitrogen). For spring vents, the standard is 0.35 mg/L of nitrate/nitrite as an annual geometric mean, not to be exceeded more than once in any three calendar year period.

Approach 3

If "Approaches 1 and 2" (above) are not applicable for a stream, attainment of nutrient criteria is determined using a combination of reference-based nutrient thresholds and measurements of biological indicators. This approach is currently only available for perennial streams. For a waterbody to be in attainment:

- information on algae, plant growth, and plant community structure must indicate there are no biological impacts; and either
- measures of aquatic animals indicate healthy conditions, or
- nutrient thresholds set forth in the table below are achieved.

Nutrient Watershed Region	Total Phosphorus Nutrient Threshold²	Total Nitrogen Nutrient Threshold²
Panhandle West	0.06 mg/L	0.67 mg/L
Panhandle East	0.18 mg/L	1.03 mg/L
North Central	0.30 mg/L	1.87 mg/L
Peninsular	0.12 mg/L	1.54 mg/L
West Central	0.49 mg/L	1.65 mg/L
South Florida	No numeric nutrient threshold. The narrative criterion continues to apply.	

2: These values are annual geometric mean concentrations not to be exceeded more than once in any three calendar year period.

As a safety measure, the rules contain provisions to monitor for and address increasing trends in nutrient concentrations, as well as a specific provision that prohibits upstream nutrient concentrations at levels that would harm a downstream waterbody. For the remaining waterbodies, including wetlands waterbodies that do not flow year-round and manmade ditches, canals and other artificial waterbodies, including canals generally located south of Lake Okeechobee, the narrative nutrient criteria will continue to apply until numeric expressions can be scientifically derived.

Implementation of Numeric Nutrient Criteria

These standards apply to the ambient water quality condition. As such, they can be used to guide permitting decisions and used to identify waterbodies in need of restoration plans. If a regulated source discharges into a waterbody whose ambient condition does not attain these standards, its permit would need to be issued in a manner that ensures the discharge is not a contributor to the nonattainment condition. As well, nonattainment of these standards can help identify waterbodies for future restoration activities, such as a Total Maximum Daily Load. Since the TMDL is a site specific analysis, it can be used to establish precise site specific criteria for the waterbody under these rules.

ATTACHMENT 2
FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
FISCAL ANALYSIS OF PROPOSED STATE NUMERIC NUTRIENT CRITERIA RULES

The FSU Center for Economic Forecasting and Analysis (CEFA) performed an initial economic analysis of FDEP's Numeric Nutrient Standards approved by the Environmental Regulation Commission on December 8, 2011. Estimates of the costs potentially associated with the FDEP proposed rule were provided to FSU CEFA by FDEP, and cost analysis was performed by FSU CEFA for five industry sectors that may incur costs to reduce nutrients sufficiently for Florida's waters to be in compliance with the proposed rule. It was assumed that such costs would potentially be incurred by entities in waterbodies which do not appear to achieve the standards, based on an assessment by FDEP. Costs for domestic and industrial wastewater facilities were estimated based on the cost associated with upgrading those facilities to advanced wastewater treatment. Costs for agricultural and urban stormwater were based on the acreage and cost associated with BMP implementation for those waterbodies²⁹. Costs for septic tanks were based on the number of affected systems and costs associated with their upgrade. The initial estimate³⁰ was revised to reflect the rule adopted on December 8th, 2011. The revised estimate is:

Sector	Estimated Annual Costs (Million \$)		
	Low Cost	High Cost	Median Cost
Industrial Wastewater	\$3.4	\$35	\$10
Domestic Wastewater	\$1.8	\$4.5	\$2.4
Urban Stormwater	\$16	\$64	\$32
Agricultural Stormwater	\$20	\$20	\$20
Septic Tanks	\$9	\$26	\$11
Total	\$51	\$150	\$75

The Department's rule represents a significant cost saving in comparison to the recently-adopted U.S. EPA rule. Estimates of those costs were performed by Cardno ENTRIX³¹ with two sets of assumptions. The first was that the levels of treatment necessary to achieve the criteria would be similar to those assumed for the Department's rule; the second was that the EPA criteria would have to be met at the point of discharge. The difference between these two scenarios and the large range in costs is due to uncertainty associated with how the EPA criteria implementation. The Cardno ENTRIX estimated costs were:

Sector	Estimated Annual Costs (Million \$)					
	Level of Technology Assumptions			Point of Discharge Assumptions		
	Low Cost	High Cost	Median Cost	Low Cost	High Cost	Median Cost
Industrial Wastewater	\$164	\$372	\$270	\$1,492	\$2,437	\$1,975
Domestic Wastewater	\$17	\$66	\$41	\$314	\$480	\$395
Urban Stormwater	\$25	\$115	\$61	\$312	\$1,075	\$629
Agricultural Stormwater	\$24	\$42	\$33	\$853	\$1,088	\$969
Septic Tanks	\$2	\$18	\$8	\$39	\$347	\$133
Total	\$298	\$533	\$415	\$3,424	\$4,702	\$4,037

²⁹ Based on FDEP delineation of waterbodies by Waterbody Identification (WBID).

³⁰ Based on removal of costs associated with canals from the total cost analyses.

³¹ Addendum to the Economic Analysis of the Federal Numeric Nutrient Criteria for Florida. Prepared for the Florida Water Quality Coalition by Cardno ENTRIX. July 2011.

The U.S. EPA also performed an economic analysis with the promulgation of their criteria for inland lakes and flowing waters in December 2010. That estimate is reflected in the table below.

EPA Estimate of Potential Annual Costs Associated with Numeric Nutrient Criteria		
Source Sector	Type of Expenditure	Annual Costs (millions)
Municipal Wastewater	Biological Nutrient Removal (BNR) to reduce TN and/or TP	\$22.3 - \$38.1
Industrial Dischargers	BNR to reduce TN and TP; chemical precipitation to reduce TP	\$25.40
Urban Stormwater	Stormwater controls	\$60.5 - \$108.0
Agriculture	Owner/typical BMP program	\$19.9 - \$23.0
Septic Systems	Upgrade to advanced nutrient treatment	\$6.6 - \$10.7
Government/Program Implementation	TMDL development	\$0.90
Total	--	\$135.5-\$206.1

The U.S. EPA estimate is based on the Department making future site specific water quality standards changes to provide relief. However, such future standards changes are too uncertain for current cost estimation purposes. Therefore, for comparison with FSU's estimates, the Department recommends relying on the Cardno ENTRIX estimate.

1 A bill to be entitled
 2 An act relating to rules establishing numeric nutrient
 3 criteria; exempting specified rules from legislative
 4 ratification under s. 120.541(3), F.S.; requiring the
 5 Department of Environmental Protection to publish
 6 certain notice; requiring legislative ratification of
 7 certain subsequent rules or amendments; directing the
 8 department to submit specified rules to the United
 9 States Environmental Protection Agency for review
 10 under the federal Clean Water Act; providing an
 11 effective date.

12
 13 WHEREAS, the Department of Environmental Protection
 14 proposed amendments to chapters 62-302 and 62-303, Florida
 15 Administrative Code, addressing nutrient pollution in waters of
 16 the state, and

17 WHEREAS, on December 8, 2011, the Environmental Regulation
 18 Commission approved proposed amendments to chapters 62-302 and
 19 62-303, Florida Administrative Code, addressing nutrient
 20 pollution in waters of the state in an integrated,
 21 comprehensive, and consistent manner, and

22 WHEREAS, estimates of the cost to implement the
 23 department's proposed amendments to chapters 62-302 and 62-303,
 24 Florida Administrative Code, are significantly less than
 25 estimates of the cost to implement the numeric nutrient criteria
 26 rules adopted by the United States Environmental Protection
 27 Agency, and

28 WHEREAS, for purposes of compliance with the federal Clean

HB 7051

2012

29 | Water Act, the department's proposed amendments to chapters 62-
 30 | 302 and 62-303, Florida Administrative Code, must be approved by
 31 | the United States Environmental Protection Agency in order to
 32 | replace the agency's adopted numeric nutrient criteria rules,
 33 | which are scheduled to take effect March 6, 2012, unless
 34 | extended to June 4, 2012, as proposed by the agency, and

35 | WHEREAS, after adoption by the department, the amendments
 36 | to chapters 62-302 and 62-303, Florida Administrative Code,
 37 | require legislative ratification pursuant to s. 120.541(3),
 38 | Florida Statutes, and

39 | WHEREAS, a recently filed rule challenge pending before the
 40 | Division of Administrative Hearings has delayed adoption by the
 41 | department, making the rules unavailable for ratification during
 42 | the 2012 Regular Session, and

43 | WHEREAS, exempting the proposed amendments to chapters 62-
 44 | 302 and 62-303, Florida Administrative Code, from legislative
 45 | ratification and directing the department to expeditiously
 46 | submit the proposed amendments to the United States
 47 | Environmental Protection Agency will facilitate the agency's
 48 | review of the proposed amendments under s. 303(c) of the Clean
 49 | Water Act, Pub. L. No. 92-500, 33 U.S.C. ss. 1251 et seq., NOW,
 50 | THEREFORE,

51 |

52 | Be It Enacted by the Legislature of the State of Florida:

53 |

54 | Section 1. (1) The rules proposed by the Department of
 55 | Environmental Protection as rules 62-302.200, 62-302.530,
 56 | 62.302.531, 62.302.532, 62-302.800, 62-303.150, 62-303.200, 62-

57 303.310, 62-303.330, 62-303.350, 62-303.351, 62-303.352, 62-
 58 303.353, 62-303.354, 62-303.390, 62-303.420, 62-303.430, 62-
 59 303.450, 62-303.710, and 62-303.720, Florida Administrative
 60 Code, notices of which were published on November 10, 2011, in
 61 the Florida Administrative Weekly, Vol. 37, No. 45, pages 3753-
 62 3775, as approved by the Environmental Regulation Commission on
 63 December 8, 2011, and the subsequent changes to proposed rules
 64 62-302.200, 62-302.531, 62-302.532, 62-302.800, 62-303.200, 62-
 65 303.330, 62-303.350, 62-303.351, 62-303.352, 62-303.353, 62-
 66 303.390, and 62-303.430, Florida Administrative Code, which were
 67 published on December 22, 2011, in the Florida Administrative
 68 Weekly, Vol. 37, No. 51, pages 4444-4450, are exempt from
 69 ratification under s. 120.541(3), Florida Statutes. At the time
 70 of filing these rules for adoption, or as soon thereafter as
 71 practicable, the department shall publish a notice of the
 72 enactment of this exemption in the Florida Administrative
 73 Weekly.

74 (2) After adoption of proposed rule 62-302.531(9), Florida
 75 Administrative Code, a nonseverability and effective date
 76 provision approved by the commission on December 8, 2011, in
 77 accordance with the commission's legislative authority under s.
 78 403.804, Florida Statutes, notice of which was published by the
 79 department on December 22, 2011, in the Florida Administrative
 80 Weekly, Vol. 37, No. 51, page 4446, any subsequent rule or
 81 amendment altering the effect of such rule shall be submitted to
 82 the President of the Senate and the Speaker of the House of
 83 Representatives no later than 30 days before the next regular
 84 legislative session, and such amendment may not take effect

HB 7051

2012

85 until it is ratified by the Legislature.

86 (3) Within 30 days after the effective date of this act,
87 the proposed rules specified in subsection (1) shall be
88 submitted by the department to the regional administrator of the
89 United States Environmental Protection Agency for review under
90 s. 303(c) of the Clean Water Act, Pub. L. No. 92-500, 33 U.S.C.
91 ss. 1251 et seq.

92 Section 2. This act shall take effect upon becoming a law.